



5-6-2009

DEPARTMENT OF SAFETY FORFEITURE
PROCEEDING, vs. One 2006 Nissan Altima,
VIN: 1N4AL11D96N419369, Seized From: Serge
Djomkam & H5729, Seizure Date: 8/1/08,
Claimant: Pamela Djomkam, Seizing Agency:
Memphis P.D., Lienholder: Capital 1 Auto Fin.

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**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF SAFETY**

IN THE MATTER OF:]	
DEPARTMENT OF SAFETY]	FORFEITURE PROCEEDING
]	
vs.]	
]	
One 2006 Nissan Altima]	
VIN: 1N4AL11D96N419369]	DOCKET # 19.05-102834J
Seized From: Serge Djomkam]	(D.O.S. # H5728 & H5729)
Seizure Date: 8/1/08]	
Claimant: Pamela Djomkam]	
Seizing Agency: Memphis P.D.]	
Lienholder: Capital 1 Auto Fin.]	

INITIAL ORDER

This contested administrative case was heard in Memphis, Tennessee, on May 6, 2009, before J. Randall LaFevor, Administrative Judge, assigned by the Secretary of State and sitting for the Commissioner of the Tennessee Department of Safety. Mr. Andre Thomas, Staff Attorney for the Tennessee Department of Safety, represented the State. The Claimant was represented by her legal counsel, Mr. Kenneth W. Brashier.

The hearing was convened to consider the proposed forfeiture of the seized vehicle for (1) its use in the commission of a second or subsequent violation of the state law prohibiting driving a motor vehicle under the influence of an intoxicant (“DUI”); and/or for (2) its alleged operation by an individual whose driving privileges were revoked or suspended for a previous conviction of driving a motor vehicle while under the influence of an intoxicant (“DUI”). Upon consideration of the pleadings, the sworn testimony and other evidence introduced during the hearing, arguments of counsel, and the entire record, it was determined that the vehicle should be returned to the Claimant, as supported by the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The State seeks the forfeiture of the subject 2006 Nissan Altima, seized from Serge Djomkam (“Djomkam”) by the Memphis Police Department on July 27, 2008.¹
2. On that evening, around 9:30 p.m., Djomkam told his wife,² Pamela Djomkam (the “Claimant”) that he was going out with some friends. When he has done this in the past, his general practice has been to ride to his destination with a neighbor who drives a red sports car. The Claimant assumed that he was going to do the same that evening, and promptly fell asleep on the couch.³
3. She was later awakened by a call from the police informing her that her husband had been in an accident. She was also informed that he was driving the Claimant’s car at the time of the accident, and that he was intoxicated. He was arrested for driving under the influence of an intoxicant (“DUI”), and the Claimant’s car was towed to the impound lot.
4. Upon determining that this was Djomkam’s second DUI, and that his license was still revoked due to his prior DUI, the arresting officers sought and obtained a Forfeiture Warrant for the vehicle. The Claimant filed a claim for the return of her car, and the instant hearing was scheduled to consider that claim.
5. Department of Safety records⁴ established that Djomkam’s Tennessee motor vehicle operator’s license was revoked in April 2008 due to a DUI conviction in Shelby County. His license had not been restored by the date of the vehicle seizure on July 27, 2008.

¹ The truck was physically seized on July 27, 2008. The Notice of Seizure and Vehicle Seizure Warrant were not issued until August 1, 2008.

² The Claimant and Djomkam were married in 2005.

³ The Claimant takes medications for diabetes and hypertension. At that time, she was trying to adjust to new medications, and believes that contributed to her drowsiness that evening.

⁴ See Hearing Exhibit # 2: Department of Safety Driving Record.

6. The Claimant, Pamela Djomkam, is the registered owner of the seized vehicle.⁵ She has made all the payments on it, has kept it insured, and maintained since it was purchased in July 2006. (In fact, the Claimant has continued to make monthly payments to the lien holder since the car was seized.) Djomkam did not have his own key to her car. The Claimant testified that she has never allowed her husband to drive her car, because she knew that he did not have a valid license. They had frequently argued about that; He is from Africa, and his cultural heritage leads him to believe that a woman cannot tell him what he can and cannot do. Nevertheless, he had never driven her car from the date she bought it in 2006, until the date of its seizure.

7. The Claimant insisted that she did not consent to the use of her car by her husband. Following her testimony that the car was taken without authorization, the State's counsel asked her whether she would be willing to sign a criminal complaint against her husband, and have him arrested. She said that she had assumed that the police had filed all appropriate charges against him on the night of the arrest, but then said that she was, in fact, willing to have him arrested, because he had taken her car without her consent.

CONCLUSIONS OF LAW & ANALYSIS

1. The state has the burden of proving, by a preponderance of the evidence, that the seized property fits within the statute defining its illegal use, thereby rendering it subject to forfeiture. Rule 1340-2-2-.15(4), TENN. COMP. R. & REGS. (*Rules of the Tennessee Department of Safety*). The burden of proof is the duty imposed upon a party to establish, by a preponderance of the evidence, that an allegation is true, or that an issue should be resolved in favor of that party. A "preponderance of the evidence" means the "greater weight of the evidence," or "the more probable conclusion, based on the evidence presented." Rule 1360-4-1-.02(7), TENN. COMP. R. & REGS. Clearly, this is a significantly lower standard of proof than the "beyond a reasonable doubt" standard required for a criminal DUI conviction. In order to prevail in the instant matter, the State

⁵ The State stipulated that the Claimant is the sole owner of the vehicle, and that her husband owns no legal or equitable interest in the car.

must prove **either** (1) that the driver of the vehicle committed his second or subsequent DUI offense, or (2) that he was driving at a time when his operator's license had been revoked due to a DUI conviction.

2. **Re: Second Offense DUI:** The law provides that it is illegal for a person to operate a motor vehicle under the influence of an intoxicant. TCA 55-10-401, *et. seq.* It further provides that any vehicle used in the commission of a person's second or subsequent violation of the DUI law is subject to seizure and forfeiture by the State. TCA 55-10-403(k)(1). To sustain a forfeiture of the seized property under this theory, the State must prove [1] that the driver was operating the subject vehicle, [2] that he was doing so under the influence of an intoxicant, and [3] that he had been convicted of a DUI within the previous five (5) years. TCA 55-10-403(k)(1)&(2).

3. **Re: Driving on a Revoked License:** The law also provides that it is illegal for a person to operate a motor vehicle at a time when his license to drive has been revoked. It further provides that, if the revocation was ordered due to a DUI conviction, any vehicle driven by the offender during the period of revocation is subject to seizure and forfeiture. TCA § 55-50-504(a)(1) and (h)(1). In order to prevail under this theory, the State must prove [1] that the driver was operating the subject vehicle, and [2] that he was doing so at a time when his license to drive had been revoked or suspended for a DUI conviction.

4. In this case, the State contends that the seized vehicle is subject to forfeiture under both theories. The Claimant did not challenge the arresting officers' determination that Djomkam had been driving the car prior to the accident, and that he was intoxicated at the time, leading to his arrest. The Department of Safety Official Driver Record established that Djomkam's operator's license was revoked in April 2008, following a Shelby County conviction for DUI, and that his license was still revoked on the date of the seizure. There was tacit agreement then, that *if Djomkam had been driving his own car*, it would have been subject to forfeiture under either or both of the theories outlined above.

5. Although she did not challenge the facts surrounding Djomkam's arrest, the Claimant did contest the proposed forfeiture of her car, arguing that she is the sole owner of the car, and, since her husband was driving it without her knowledge or consent, she is therefore entitled to have it returned to her. The law provides that, when the owner of the vehicle is not present at the time of the seizure, his/her legal interest is not subject to forfeiture without proof that the owner knew that the vehicle "was being used in a manner making it subject to forfeiture and consented to its use." TCA § 40-33-210(c). The State has the burden of proving that the owner gave her consent. TCA § 40-33-210(a).

6. The State argues that, because she knew that her husband had lost his license due to a prior DUI conviction, it was insufficient for her to simply forbid him to drive her car. Even though the Claimant has not allowed Djomkam to have his own keys to the car, the State argues that she was under a further duty to hide her car keys from him, or to take other steps to physically prevent the possibility that he might ever take her car without her permission. If there was a history of Djomkam taking the Claimant's car without permission, she may have been on notice that he was likely to do so again, possibly spawning such a duty. In this case, however, he had never driven her car before that night. Even though they had argued about her refusal to allow him to drive her car, until that night he had acceded to her wishes. She had no reason to believe that he would choose that opportunity to defy her wishes, and take her car without her permission.

7. In the absence of some evidence in the record that Djomkam was driving the Claimant's car with her knowledge or consent, or proof of facts from which such a reasonable inference can be drawn, it is concluded that the State failed to prove that the Claimant knew that the vehicle "was being used in a manner making it subject to forfeiture and consented to its use," as required by TCA § 40-33-210(c).

Accordingly, it is hereby concluded that the State has failed to meet its burden of proof. It is therefore ORDERED that the Vehicle Forfeiture Warrant is DISMISSED, and the subject 2006 Nissan Altima shall be returned to the Claimant, Pamela Djomkam.⁶

Entered and effective this 15th day of May, 2009.

J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 15th day of May, 2009.



Thomas G. Stovall, Director
Administrative Procedures Division

⁶ Although it was concluded that the Claimant had no reason to believe that her husband would take her car without her permission before this incident, his actions on July 27, 2008 changed that. She is now on notice that he is capable of such conduct, and, should her vehicle be seized under similar circumstances in the future, forfeiture of the vehicle may be appropriate. She should take reasonable steps to prevent such an occurrence.