April 2015

Amber A Adkerson vs. Safety

State of Tennessee
Department of State
Administrative Procedures Division
312 Rosa L. Parks Avenue
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Nashville, Tennessee 37243-1102
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April 9, 2015

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RE: In the Matter of: Amber A. Adkerson (P5578) Docket No. 19.01-129618J

Enclosed is an Initial Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/aem
Enclosure

BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT OF SAFETY

IN THE MATTER OF:

AMBER A. ADKERSON **DOCKET NO. 19.01-129618J**

NOTICE

ATTACHED IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. THE ENROLLEE FILES A WRITTEN APPEAL, OR EITHER PARTY FILES A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **April 24, 2015.**

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
WILLIAM R. SNODGRASS TOWER
312 ROSA PARKS AVENUE, 8th FLOOR
NASHVILLE, TENNESSEE 37243-1102

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008 OR 741-5042, FAX 615/741-4472.** PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT OF SAFETY AND HOMELAND SECURITY

IN THE MATTER OF: **TENNESSEE DEPARTMENT OF SAFETY AND HOMELAND SECURITY** **v.** **One 2007 Jeep Wrangler** **VIN:1J4GB59107L200249** **Seized from: Fred Clark Jr.** **Date of Seizure: Jan. 29, 2014** **Claimant: Amber A. Adkerson** **Lienholder: Wells Fargo Dealer Services**	**DOCKET NO: 19.01-129618J** **D.O.S. Case No. P5578**

INITIAL ORDER

This matter was heard on January 13, 2015, in Nashville, Tennessee, before Rachel L. Waterhouse, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Department of Safety and Homeland Security (Department). Cynthia E. Gross, attorney with the Metropolitan Government of Nashville and Davidson County, and Department attorney Karen Litwin represented the State. The Claimant, Amber A. Adkerson, was present and was represented by attorney Larry B. Hoover.

The subject of this hearing was the proposed forfeiture of the above-described seized vehicle for its alleged use in violation of the Tennessee Drug Control Act, T.C.A. §53-11-451(a) and T.C.A. §40-33-101 *et seq*. After consideration of the entire record in this matter, it is

DETERMINED that the vehicle should be returned to the Claimant immediately. This decision is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Fred Clark Jr. and the Claimant have a romantic relationship and share a residence.

2. The seized vehicle is titled and registered solely in the Claimant's name.

3. Clark is known to area law enforcement for his involvement in drug dealing. Clark has narcotics arrests and is a convicted felon.

4. On October 30, 2013, Clark was driving the seized vehicle and was stopped for a window tint violation. A search of Clark found marijuana and MDMA (a Schedule 1 narcotic also known as "ecstasy") and $1,293 of cash on his person. Clark was arrested for possession of MDMA and marijuana. This is the only proof in the record of a time when Clark was in possession of the vehicle.

5. The vehicle and cash were seized. Thereafter, the vehicle was returned to the Claimant.

6. Then, on January 29, 2014, law enforcement secured and executed a narcotics search warrant on Clark's and the Claimant's shared residence. During the execution of the search warrant, Clark admitted that he had been dealing Dilaudid pills his entire life, buying up to a 1,000 pills at a time. Clark provided law enforcement with information about his supply sources and operation.

7. Based on that information, Clark was arrested and the vehicle was seized (second seizure) as proceeds of drug trafficking or as being used in drug trafficking. Law enforcement also seized $43,000 in U.S. Currency when executing a search warrant on Clark's storage unit.[1]

[1] Clark did not claim the seized vehicle or the U.S. Currency. The Claimant did not claim the U.S. Currency.

8. As part of an ongoing Dilaudid pill investigation, law enforcement observed Clark in possession of several other vehicles, but never saw Clark in possession of the seized vehicle other than the time described in paragraph 4 above (i.e., the first seizure).

9. There is no proof that the Claimant has been involved in drug trafficking.

10. The Claimant was credible in her testimony. The Claimant's testimony was unrebutted by admissible or relevant testimony.

11. The Claimant has owned a licensed children's day care business for about four years, and works in real estate. The Claimant earns around $60,000-$70,000 net annually.

12. The Claimant purchased the seized vehicle herself in January 2013.

13. The Certificate of Title and the registration of the seized vehicle lists the Claimant as the sole owner.

14. The Retail Installment Sale Contract shows the Claimant as the sole purchaser of the seized vehicle. The Claimant put a little more than $9,000 down on the vehicle and owes around $6,000. Wells Fargo Dealer Services has a lien on the vehicle.

15. The seized vehicle has after-market upgrades consisting of a custom paint job, custom rims, sound system and window tinting. The Claimant paid for all of the upgrades to the vehicle, except the window tinting, which was paid for by Clark.

16. The Claimant did not let Clark use the seized vehicle after it was returned to her from the first seizure.

17. Prior to the first seizure, the Claimant allowed Clark to borrow the vehicle occasionally. Occasionally, the Claimant and Clark drive each other's vehicles with permission.

18. The State has failed to prove by a preponderance of the evidence that Clark had any ownership interest in the vehicle.

19. The Claimant is the 100% owner of the seized vehicle by a preponderance of evidence in the record.

20. Besides Clark's October 2013 drug arrest when the vehicle was seized the first time, the Claimant was unaware of Clark's criminal history or his alleged drug trafficking thereafter.

21. There is no proof in the record that the seized vehicle was purchased with illegal proceeds or that it was used in connection with illegal drug activity after its return to the Claimant from the first seizure.

CONCLUSIONS OF LAW

1. On behalf of the seizing agency, the State of Tennessee Department of Safety bears the burden of proof in forfeiture proceedings, and must therefore prove, by a preponderance of the evidence, that the seized property is subject to forfeiture, pursuant to law. Failure to carry the burden of proof operates as a bar to the proposed forfeiture. T.C.A. §53-11-201(d)(2); Department of Safety Rule 1340-2-2-.15; Administrative Procedures Division Rule 1360-04-01-.02.

2. T.C.A §53-11-451(a)(4) authorizes the forfeiture of: "...vehicles...that are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale or receipt of [drugs]."

3. T.C.A §53-11-451(a)(6)(A) authorizes the forfeiture of:

> Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of the Tennessee Drug Control Act of 1989. . ., all proceeds traceable to the exchange, and all moneys. . . used, or intended to be used, to facilitate any violation of the Tennessee Drug Control Act.

4. T.C.A. §40-33-210 states, in pertinent part, as follows:

> (a) In order to forfeit any property or any person's interest in such property pursuant to §53-11-451, the State will have the burden to prove by a preponderance of evidence that:
>
> (1) The seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture ... **and**
>
> (2) The owner or co-owner of the property knew that the property was of a nature making its possession illegal or was being used in a manner making it subject to forfeiture....
>
> (b) (1) Failure to carry the burden of proof shall operate as a bar to any forfeiture and the property shall be immediately returned to the claimant.
>
> (c) (1) The interest of a co-owner or co-owners who were not in possession of the property at the time it was seized may be forfeited if the co-owners:
>
> (B) Knew that the property was of a nature making its possession illegal; or
>
> (C) Knew that it was being used in a manner making it subject to forfeiture and consented to the use.
>
> (2) If the state meets its burden of proof as to one (1) co-owner of the seized property but fails to do so as to one (1) or more other co-owners, the property shall be forfeited subject to the interest of the innocent co-owners.

5. Department of Safety Rule 1340-2-2-.05 states:

> (4) If the person in possession of the property is not the registered owner as determined from public records of titles, registrations, or other recorded documents, the officer may submit certain indicia of ownership to the judge which proves that the possessor is nonetheless an owner of the property. Such indicia of ownership shall include, but is not limited to the following:
>
> (a) How the parties involved regarded ownership of the property in question;
>
> (b) The intentions of the parties relative to ownership of the property;
>
> (c) Who was responsible for originally purchasing the property;
>
> (d) Who pays any insurance, license or fees required to possess or operate the property;
>
> (e) Who maintains and repairs the property;
>
> (f) Who uses or operates the property;
>
> (g) Who has access to use the property;

(h) Who acts as if they have a proprietary interest in the property.

6. The forfeiture statute does not require the Department to trace the seized property to a specific transaction. Lettner vs. Plummer, 559 S.W.2d 785 (Tenn. 1977). But the Department must show some nexus between the seized property and the illegal drug trade. Goldsmith v. Dept. of Safety, 622 S.W.2d 438 (Tenn. Ct. App. 1981). Circumstantial evidence can be used to make this connection. Id.

ANALYSIS

The State has the burden to prove, by a preponderance of the evidence, that the Claimant knew the seized vehicle was purchased with proceeds of drug trafficking or that Clark used the seized vehicle to traffic drugs. This requires a showing of actual knowledge by the Claimant.

The chief issues in this case are (1) the Claimant's ownership interest in the seized vehicle and (2) whether the Claimant knew the seized vehicle was purchased with proceeds of drug trafficking or was being used by Clark to traffic drugs.

The State argues that Clark is the true owner of the seized vehicle because he said he owned it. However, a statement by law enforcement of Clark saying that Clark owned the seized vehicle is not admissible because it is hearsay. Clark is not a party to this matter and provided no testimony under oath upon which he could be cross-examined. Only admissible and relevant facts are to be considered and Clark's statement is given no weight.

Besides the hearsay issue, the State also argues that Clark is the true owner of the seized vehicle via indicia of ownership. The State contends that Clark acted as the owner, said he was the owner and was making enough money from drug dealing to pay for the vehicle. However, despite Clark telling law enforcement that the seized vehicle was his, the majority of the factors relative to indicia of ownership weigh in favor of the Claimant being the owner. The seized

vehicle is titled and registered in the Claimant's name only; the sales contract is in the Claimant's name only; the Claimant paid for maintenance of the seized vehicle; the Claimant uses the seized vehicle the majority of the time; and the Claimant had earnings enough to buy it herself.

Regarding the Claimant's knowledge of the seized vehicle's use, Clark did not possess the seized vehicle after it was returned to the Claimant from the first seizure. The fact that the Claimant knew Clark had been arrested in October 2013 for drug possession when the vehicle was seized the first time does not rebut the Claimant's denial of knowledge of any illegal activity thereafter.

The State has failed to show any nexus between the seized vehicle and illegal drug trafficking. There is no proof in the record that Clark possessed the seized vehicle after it was returned to the Claimant from the first seizure. The State relies on Clark's admission to law enforcement that he trafficked in Dilaudid and Clark's statement to law enforcement that he owns the seized vehicle. However, Clark's ownership statement is inadmissible as hearsay, and is also discredited because of the fact that law enforcement never observed Clark with the vehicle after its return to the Claimant from the first seizure.[2]

There is no proof in the record that the seized vehicle was purchased with illegal proceeds or that it was used in connection with illegal drug activity after its return to the Claimant from the first seizure. There is no proof in the record that the Claimant was involved in or had knowledge of Clark's alleged drug activities, except for Clark's October 2013 drug arrest. The State bears the burden of proof and has failed to show that the Claimant's interest in the vehicle is subject to forfeiture pursuant to T.C.A §53-11-451(a).

[2] It was only a matter of days between when the vehicle was returned to the Claimant from the first forfeiture proceeding and when law enforcement seized it again.

It is **CONCLUDED** that, considering the totality of the evidence, the State has failed to show by a preponderance of the evidence that the seized vehicle was of a nature making its possession illegal (i.e., purchased with drug proceeds) or was used in a manner making it subject to forfeiture (i.e., used in drug trafficking).

It is **CONCLUDED** that, considering the totality of the evidence, the State has failed to show by a preponderance of the evidence that the seized vehicle was of a nature making its possession illegal (i.e., purchased with drug proceeds) or that the Claimant as the owner of the seized vehicle had knowledge that it was used by Clark to traffic drugs.

It is **DETERMINED** that the Claimant is an innocent owner of the vehicle and is entitled to its immediate return.

IT IS THEREFORE ORDERED that the seized vehicle be returned to the Claimant immediately.

This Initial Order entered and effective this 9TH **day of** APRIL **2015.**

Rachel L. Waterhouse

RACHEL L. WATERHOUSE
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

9TH Filed in the Administrative Procedures Division, Office of the Secretary of State, this the ____ day of APRIL 2015.

J. Richard Collier

J. RICHARD COLLIER, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

APPENDIX A TO INITIAL ORDER
NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee, 37243. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.