



University of Tennessee, Knoxville
**Trace: Tennessee Research and Creative
Exchange**

Tennessee Department of State, Opinions from the
Administrative Procedures Division

Law

July 2015

Nicholas D. Ellis vs. Safety

Follow this and additional works at: http://trace.tennessee.edu/utk_lawopinions

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact administrative.procedures@tn.gov



State of Tennessee
Department of State
Administrative Procedures Division
312 Rosa L. Parks Avenue
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
Phone: (615) 741-7008/Fax: (615) 741-4472

July 13, 2015

Commissioner Bill Gibbons
Tennessee Department of Safety
23rd Floor, William R. Snodgrass Tower
312 Rosa L. Parks Avenue
Nashville, Tennessee 37243-1102

Erik Regis Herbert, Esq.
The Southern Turf Building
222 – 4th Avenue North, Suite #100
Nashville, TN 37219-2121

Karen Litwin, Esq.
Staff Attorney
Tennessee Department of Safety
and Homeland Security
Division of Legal Services
1150 Foster Avenue
McCord Building, Room #107
Nashville, TN 37249-1000

RE: In the Matter of: Nicholas D. Ellis (P7931)

Docket No. 19.01-130884J

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:

NICHOLAS D. ELLIS

DOCKET NO. 19.01-130884J

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 **July 28, 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:

**1992 Nissan Maxima
VIN#: JN1HJ0P5NT613932
\$2,214.00 in U.S. Currency
Samsung camera
Seized From: Nicholas Ellis
Seizure Date: April 14, 2014
Claimant: Nicholas Ellis**

**DOCKET NO: 19.01-130884J
D.O.S. No. P7931**

INITIAL ORDER

This matter was heard on April 23 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). Attorney Karen Litwin represented the Department. The Claimant, Nicholas Ellis, was present and was represented by attorney Erik Herbert.

The subject of this hearing was the proposed forfeiture of the above-described seized property 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.*

PENDING MOTION

As a preliminary matter, the Department moved to dismiss the Claimant's claim to the currency and the Samsung camera due to a lack of standing. The issue to be determined on the motion is whether the Claimant showed, by a preponderance of the evidence, that he has an interest, acquired in good faith, in both the currency and the camera seized by law enforcement,

entitling him to a hearing on the merits. Tennessee Department of Safety Rule 1340-2-2-.15(3), TENN. COMP. R. & REGS.; *see also* TENN. CODE ANN. §53-11-201(f)(A).

Pursuant to Departmental Regulations, once it is properly raised, the issue of standing must be determined prior to a ruling on the merits of a contested case. If standing is not proven, the claim may be dismissed, and, when no other valid claims have been filed, the property may be forfeited to the seizing agency. Rule 1340-2-2-.16(1)(g)(3), TENN. COMP. R. & REGS.; *See also, Jones v. Greene*, 946 S.W.2d 817 (Tenn. App. 1996).

To prove legal standing, the Claimant must establish an ownership interest in the seized property that was acquired in good faith. TENN. CODE ANN. § 53-11-201(f)(1) & *Urquhart v. Department of Safety*, 2008 WL 2019458 (Tenn. Ct. App.). Without such an ownership interest, a party lacks standing to challenge the forfeiture. *See Jones v. Greene, supra; U.S. v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Circuit 1998).

The Claimant failed to present any proof of an ownership interest, pursuant to the legal standard to bring a claim, in the currency and the camera that would entitle him to a hearing on the merits. Other than the facts that the currency was on the Claimant's person and the camera was in his vehicle, no proof was offered in support of ownership. From the state of the record, it cannot be concluded that the Claimant is the owner of the seized currency and camera. Upon full consideration of the entire record, it is **DETERMINED** that the Claimant failed to establish his legal standing to pursue the seized currency and camera. The Department's motion to dismiss is **GRANTED** relating to the currency and the camera. The Claimant's claims to the currency and the camera are **dismissed**. Accordingly, the currency and the camera are forfeited to the seizing agency.

FORFEITURE OF THE SEIZED VEHICLE

The issue to be determined on the merits of the forfeiture of the seized vehicle is whether it was used to facilitate the sale of illicit drugs rendering it subject to forfeiture. After consideration of the entire record in this matter, it is **DETERMINED** that the seized vehicle is the sole property of the Claimant who used it to facilitate the sale of illegal drugs. Therefore, the vehicle is properly subject to forfeiture to the seizing agency. This decision is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The seized vehicle is owned solely by the Claimant and has no reported liens.
2. On April 14, 2014, law enforcement was dispatched to a specific address regarding a suspicious subject in the parking lot at approximately 1:00 a.m. The Claimant was observed and identified at the location.
3. The Claimant was observed getting into the driver's side of the vehicle, which was subsequently seized. A bag with the Claimant was identified by law enforcement as containing a large amount of marijuana. Law enforcement also observed marijuana and marijuana residue in plain sight in the vehicle. The Claimant was placed under arrest for a narcotics violation. The Claimant was also charged with being a felon in possession of a firearm.
4. Thereafter, the Claimant informed law enforcement that there was more marijuana in the vehicle's trunk. In total, the Claimant was in possession of approximately 1.5 pounds of marijuana, mostly packaged in unopened air sealed bags. The amount involved was estimated based on a field test. On the Claimant's person was a loaded handgun, a \$10 bill with approximately one gram of cocaine in it and \$2,214 in denominations of \$100's, \$50's, \$20s, \$10's, \$5's and \$1's. The camera was inside the vehicle.

5. The Claimant stated to law enforcement that he was not employed and had previously been arrested on drug charges. The officer verified the Claimant's prior criminal history through a search on his computer and by talking with dispatch personnel. This proof was un rebutted.

6. A law enforcement officer testified that the packaging of the marijuana and the large amount involved indicated that it was for re-sale instead of for personal use, based on his training and experience relating to narcotics trafficking. The amount of currency involved and the mixed denominations also indicated to law enforcement that the currency was used in and proceeds of illegal narcotics dealing.

7. The property was seized upon law enforcement's belief that the currency was used in and was proceeds from the sale of illegal narcotics, that the camera was purchased with said illegal proceeds and that the vehicle was used to transport the narcotics and facilitate the sale of narcotics.

8. The Claimant was not known to area law enforcement relating to any illegal activity.

9. The Claimant did not live at the location where he was arrested during the incident in question.

CONCLUSIONS OF LAW

1. On behalf of the seizing agency, the Department 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. Although the admissibility of evidence is normally controlled by the Tennessee Rules of Evidence, the Administrative Procedures Act provides "when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." T.C.A. §4-5-313(1); *Lettner vs. Plummer*, 559 S.W.2d 785 (1977).

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.*

7. Aggregation of facts, each one insufficient standing alone, may suffice to meet the government's burden in a forfeiture proceeding involving money allegedly involved in illegal drug transaction. *U.S. v. \$67,220.00 in United States Currency*, 957 F.2d 280 (6th Cir. 1992).

8. Carrying large sums of cash is strong evidence of some relationship with illegal drugs for purposes of forfeiture. *U.S. v. \$67,220.00 in United States Currency*, 957 F.2d 280 (6th Cir. 1992).

9. It is probative that property is being used in illegal drug activities when the property is found in close proximity to illicit drugs and drug paraphernalia. *Richardson v. One 1972 GMC Pickup*, 826 P.2d 1311 (Idaho 1992). *See also*, 167 A.L.R. Fed. 365, J.B. Benimow.

10. The presence of drugs, scales, drug manufacturing materials, residue, etc. with the seized property is probative of its connection to illicit drug trade. *U. S. v. U. S. Currency Amounting to Sum of \$20,294.00 More or Less*, 495 F. Supp. 147 (E.D.N.Y. 1980).

ANALYSIS

The Department has the burden to prove, by a preponderance of the evidence, that the seized vehicle was used or intended to be used to transport or in any manner to facilitate the transportation, sale or receipt of drugs.

In light of the entire record, there is both substantial and material evidence that the Claimant was engaged in illegal drug trafficking. Based on the entire record, the Department

proved by a preponderance of the evidence the necessary nexus between the seized vehicle and illegal drug trafficking. There is sufficient proof in the record that the seized vehicle was used or was intended to be used in connection with illegal drug activity, pursuant to the legal standard set forth above. The Department's proof is un rebutted.

Accordingly, the Department having met its burden of proof, by a preponderance of the evidence, for forfeiting the vehicle, the vehicle shall be **FORFEITED** to the seizing agency.

It is **CONCLUDED** that the Department has carried its burden of proof and established by a preponderance of the evidence that the seized vehicle was used or intended to be used in violation of the law.

As stated above, upon full consideration of the entire record, it is **DETERMINED** that the Claimant failed to establish his legal standing to pursue the seized currency and camera. The Department's motion to dismiss is **GRANTED** relating to the currency and the camera. The Claimant's claims to the currency and the camera are **dismissed**. Accordingly, the currency and the camera are forfeited to the seizing agency.

IT IS THEREFORE ORDERED that all of the above-described seized property be forfeited to the seizing agency.

This Order entered and effective this 13TH day of JULY, 2015.

Rachel L. Waterhouse

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

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the
13th day of JULY 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.