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June 2015

Barry L. Ferguson vs. Safety

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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

June 8, 2015

Commissioner Bill Gibbons
Tennessee Department of Safety
23rd Floor, William R. Snodgrass Tower
312 Rosa L. Parks Avenue
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Barry L. Ferguson
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Dyersburg, TN 38024

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Memphis, TN 38134-7502

RE: In the Matter of: Barry L. Ferguson (Q4051, Q4940 and Q4942)
Docket No. 19.01-131384J

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:

BARRY L. FERGUSON

DOCKET NO. 19.01-131384J

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 **June 23, 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**

IN THE MATTER OF:]	
DEPARTMENT OF SAFETY,]	
vs.]	Docket # 19.01-131384J
\$678.50 in U.S. Currency, and]	DOS # Q4051
Misc Personal Property, and]	
One 1984 Chevrolet C-10]	Q4940
VIN: 1GCDC14H0EF371873, and]	
One 1998 Pontiac]	Q4942
VIN: 1G2WP1211WF252836]	
Seized From: Barry L. Ferguson]	
Seizure Date: 12/13/10]	
Claimant: Barry L. Ferguson]	
Seizing Agency: Dyer Co. S.D.]	

INITIAL ORDER

This contested administrative case was heard in Dyersburg, Tennessee on May 26, 2015, 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 Seizing Agency. The Claimant appeared *pro se*. At the conclusion of the hearing, the record was held open until June 1, 2015, to allow both parties to submit late-filed exhibits.¹

The subject of this hearing was the seizure and proposed forfeiture of U.S. Currency, miscellaneous personal property, and two vehicles, based on allegations that the Claimant received or possessed those items in violation of the Tennessee Drug Control Act. Upon full consideration of the entire record in this case, it is determined that the proposed forfeiture is supported by the evidence, and that the seized property should therefore be forfeited to the Seizing Agency. This decision is based on the following Findings of Fact and Conclusions of Law:

¹ On May 27, 2015, the State filed its Official Forensic Chemistry Report, an analysis of the illegal drugs found at the Claimant's residence. [Entered as Exhibit #1] On May 29, the Claimant filed several documents [Entered as Collective Exhibit #2], none of which directly countered the evidence or arguments advanced by the State.

FINDINGS OF FACT

1. On November 3, 2014, as part of an ongoing investigation into illegal drug trafficking in Dyersburg, officers with the Dyersburg Police Department executed a search warrant at 743 Newbern Roellen Road in Dyersburg, Tennessee. That home was the residence of Barry Ferguson, the Claimant in this case. In the kitchen at that residence, the officers found various illegal drugs, including, among others: two rocks of cocaine base on the cabinet and two smaller rocks in a plastic bag (total weight: 1.68 grams); 17 individual bags of marijuana (total weight: 56.30 grams); methamphetamine (total weight: 1.62 grams); and pill bottles containing 20 oxycodone pills (for which no prescription was located). Other drug-related items found in the kitchen area included: two sets of digital scales, a marijuana grinder, marijuana and cocaine pipes, three boxes of sandwich bags (similar to the ones in which drugs were packaged) and three boxes of aluminum foil. Although the Claimant was not present when the search began, he returned before the search concluded. He was arrested and charged with possession of drugs for resale.

2. When questioned at his residence, the Claimant responded that he had “not worked in months.” Found in his possession was \$678.50 in cash; that money was seized by the officers on their belief that it was the proceeds of drug sales. They also seized two vehicles and a variety of personal property,² also on the belief that those items were received in exchange for drugs. Based on the evidence found in his home, the officers sought and received a Forfeiture Warrant for the seized items. The Claimant filed a Petition seeking the return of the property seized from his home, and this hearing was scheduled to consider his claim.

3. The seizing officer testified that the property seizure was based on the fact that a large quantity of illegal drugs and drug-related paraphernalia was found in the Claimant’s home, and other evidence of drug trafficking involving the Claimant.³ Additionally,

² The full list (2 pages) of seized personal property is attached to the Seizing Officer’s Affidavit in Support of Forfeiture Warrant.

³ The Search Warrant executed at the Claimant’s home was premised on a controlled buy of drugs from the Claimant.

before this seizure, the Claimant had been convicted twice for selling cocaine, and had served federal prison sentences of five and six years. When asked during the hearing if the drugs found in the home were his, the Claimant refused to respond, asserting his Fifth Amendment privilege. Departmental Rules mandate that, in such an instance, the hearing judge is required to understand such a response to indicate that, if the Claimant had responded to the question, he would have acknowledged that the drugs were his.⁴

4. During the hearing, the Claimant testified that he had not worked for several months before his arrest, but that, in the past, he had worked off-and-on doing odd jobs, as well as home and electronics repair. He testified that he has earned less than \$10,000.00 per year for the last five years. He further testified that, with additional time, he could produce bank and tax records to support his claim that his past income would have allowed him to legitimately accumulate the seized items. For that reason, he was granted permission to late-file those records. He also testified that the electronics seized from his home were not his, but were items that he was repairing for other people. He did not identify those people, and no others appeared as witnesses on his behalf to support that claim. On May 29, 2015, the Claimant filed several documents as late filed Collective Exhibit #2. Those documents did not provide support for his assertion that he earned sufficient recent legitimate income to allow him to legally purchase the seized items. In light of the totality of the evidence produced at his hearing, and the Claimant's observed demeanor throughout the hearing, his testimony was found to be less than credible.

CONCLUSIONS OF LAW and ANALYSIS

1. "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 such an exchange, and all moneys . . . used, or intended to be used, to facilitate any violation of the Tennessee Drug Control Act . . ." are subject to forfeiture under the law. TENN. CODE ANN. 53-11-451(a)(6)(A).

⁴ Parties in an administrative hearing are permitted to assert such a privilege. However, unlike in a criminal proceeding, refusal to answer in an administrative hearing results in an inference adverse to that party's interests. See, Rule 1340-02-02-.18(1)(a)2, TENN. COMP. R. & REGS.

2. The State bears the burden of proof in this case, and must therefore prove, by a preponderance of the evidence, that the seized currency is subject to forfeiture, pursuant to law. Failure to carry the burden of proof operates as a bar to the proposed forfeiture. TENN. CODE ANN. 53-11-201(d)(2); *Rule 1340-2-2-.15*, TENN. COMP. R. & REGS. (*Rules of the Tennessee Department of Safety*). Specifically, in this case, the State must prove that the money and property found at the Claimant's home was derived from the illegal sale of drugs, or was intended to be used to purchase drugs, or otherwise facilitate the illegal sale or purchase of drugs.

3. In support of its argument, the State offered evidence that a large quantity of drugs [two rocks of cocaine base on the cabinet and two smaller rocks in a plastic bag (total weight: 1.68 grams); 17 individual bags of marijuana (total weight: 56.30 grams); methamphetamine (total weight: 1.62 grams); and pill bottles containing 20 oxycodone pills (for which no prescription was located)] was found in the Claimant's kitchen, along with other evidence that drugs were being weighed and packaged for distribution. This evidence, coupled with the Claimant's two prior federal felony drug sale convictions, supports a conclusion that the Claimant was involved in drug trafficking. Many of the items seized by the officers are the type of property that is frequently traded for drugs when purchasers do not have sufficient cash. Although the State offered no direct proof of specific drug sales by the Claimant to support its theory that the money and property were derived from such activity, the State may be entitled to benefit from circumstantial evidence, reasonable inferences that may be drawn from facts proven during the hearing, and certain presumptions and inferences that have been established by prior judicial decisions. *See, Lettner v. Plummer*, 559 S.W.2d 785. (Tenn. 1977).

4. For example, in a forfeiture proceeding such as this one, proof that a Claimant is involved in drug trafficking and possesses large sums of cash may legitimately raise an issue concerning the source of the Claimant's money. *See, Lettner v. Plummer, supra*. In *United States v. Edwards*, 885 F.2d 377, 390 (7th Cir. 1989) the court held that,

Where a defendant's verifiable income cannot possibly account for the level of wealth displayed and where there is strong evidence that the defendant is a drug trafficker, then there is probable cause to believe that

the wealth is either a direct result of the illicit activity or that it is traceable to the activity as proceeds.

5. In this case, the Claimant was unemployed, and proved no recent source of legitimate income. The facts that: (1) A large quantity of drugs, digital scales, and other items used for packaging drugs were all found in the Claimant's kitchen; and, (2) The Claimant has a history of involvement in drug trafficking, including two federal felony convictions; and (3) The Claimant could not provide evidence establishing recent earned income that would allow him to purchase all of the seized items found in his home, is all evidence from which it may be concluded that he derived at least some of his income from the drug trade. Also, it is not necessary that the Seizing Agency be able to trace the seized currency to a specific drug transaction [*Lettner v. Plummer, supra*, at 787].

6. Once the State proves that the Claimant is likely involved in drug trafficking, many cases⁵ stand for the proposition that, under limited circumstances, it may be concluded that currency and other property found in the possession of that person was derived from illegal drug transactions, if those assets are valued "far in excess of his legitimate income." In the present case, the seized property falls into that category. As such, it is hereby concluded that the seized property was derived from or intended to be used, to facilitate a violation of the Tennessee Drug Control Act, and is therefore subject to forfeiture under the law. TENN. CODE ANN. 53-11-451(a)(6)(A).

⁵ See generally: *United States v. All Assets and Equipment*, 58 F.3d 1181, 1189 (7th Cir. 1995); cert. Den. 516 U.S. 1042 (evidence of couple's past known drug activity and convictions, great discrepancy between couple's legitimate income and value of assets acquired prove sufficient nexus between seized property and narcotics activity to justify forfeiture); *United States v. One Mercedes 560 SEL*, 919 F.2d 327, 331-332 (5th Cir. 1990) (government met burden for forfeiture from Defendants with significant drug involvement, by showing deposit of substantial funds into checking account, purchase of luxury automobile, expenditure of large sums of money, and when compared with tax return, income was substantially less); *United States v. Thomas*, 913 F.2d 1111, 1114-1115 (4th Cir. 1990) (reversing dismissal of forfeiture complaint where cash expenditures of Claimant far exceeded his legitimate source of income coupled with evidence of Claimant's narcotics criminal record).

Accordingly, IT IS HEREBY ORDERED that the subject U.S. currency in the amount of \$678.50, the seized vehicles and miscellaneous personal property described in the Narrative and List of Seized Property attached to the Affidavit in Support of Forfeiture Warrant shall be forfeited to the Seizing Agency, the Dyer County Sheriff's Department, for disposition as provided by law.

Entered and effective this 8th day of JUNE, 2015.



J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 8th day of JUNE 2015.



J. Richard Collier, Director
Administrative Procedures Division

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.