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April 2016

## Kevin Nicholson vs. Safety

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

April 26, 2016

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

Kevin Nicholson  
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Memphis, TN 38134-7502

RE: In the Matter of: Kevin Nicholson (R0988)

Docket No. 19.01-136029J

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:**

**KEVIN NICHOLSON**

**DOCKET NO. 19.01-136029J**

**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 **May 11, 2016**.

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, 8<sup>th</sup> 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.**

**One 2005 Cadillac STS  
VIN: 1G6DW677250146951  
\$734.00 in U.S. Currency  
Seized From: Jeffrey Whelan  
Seizure Date: 7/31/15  
Claimant: Kevin Nicholson**

**DOCKET # 19.01-136029J  
D.O.S. # R0988**

**INITIAL ORDER**

This contested administrative case was heard in Memphis, Tennessee on February 3, 2016, before Rob Wilson, Administrative Judge, assigned by the Secretary of State, sitting for the Commissioner of the Tennessee Department of Safety. Mr. Andre Thomas, Esq., Staff Attorney for the Tennessee Department of Safety, represented the State. The Claimant proceeded on his own behalf.

The subject of this hearing was the proposed forfeiture of a 2005 Cadillac STS, based on the Seizing Agency's assertion that it was used to facilitate a violation of the Tennessee Drug Control Act. Upon full consideration of the record in this case, it is determined that the proposed forfeiture should be denied, and the vehicle should be returned to the Claimant. This decision is based on the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. On July 31, 2015, Officers received a phone call from Agent Newberry of the United States Post Office that s suspicious package was in route to 6605 Gazebo Cove in

Memphis. The package was addressed to a Kellie Walton, a past tenant at 6605 Gazebo Cove.

2. Detectives conducted surveillance at 6605 Gazebo Cove. At 8:50 a.m. the Cadillac in question arrived at 6605 Gazebo Cove. The Cadillac was being driven by Jeffrey Whelan. Jeffrey Whelan is Claimant Kevin Nicholson's brother. The Cadillac had an Illinois license plate.

3. The Cadillac remained parked in front of 6605 Gazebo Cove for approximately 10 minutes and then drove off. About an hour later the Cadillac returned to Gazebo Cove and parked again. A Black Chevy Trailblazer then arrived at Gazebo Cove and parked next to the Cadillac. Both drivers rolled down their windows and began talking to each other. Both cars drove away after about ten minutes.

4. When the mail truck containing the suspicious package arrived at 6605 Gazebo Cove Terrence Lampkin, a passenger in the Cadillac, approached the mail carrier. Whelan and Lampkin were detained, and Whelan was eventually arrested.

5. Reasoning that the Cadillac had been used to facilitate a drug transaction, the officers seized the car. They later sought and obtained a Forfeiture Warrant for the vehicle.

6. Kevin Nicholson ("the Claimant"), the registered owner of the car, filed a petition for its return, and this hearing was scheduled to consider his claim.

7. Mr. Nicholson lives in Illinois and had loaned the Cadillac to his brother, Jeffrey Whelan. Mr. Nicholson stated that he was not aware that his brother was using his car for illegal purposes.

8. There was no evidence that the Claimant Kevin Nicholson was ever involved in any illegal drug activity. Additionally, Mr. Nicholson stated that he did authorize the use of his car for any illegal purposes, either on July 31, 2015, or on any other date. The

Claimant appeared to be an honest man, who did not appear to be involved in any illegal behavior or intent. His testimony was highly credible and was accepted at full face-value.

### CONCLUSIONS OF LAW and ANALYSIS

1. “All conveyances, including . . . vehicles . . . which are used or are intended for use, to transport, or in any manner facilitate the transportation, sale or receipt of” controlled substances in violation of the Tennessee Drug Control Act are subject to forfeiture. TENN. CODE ANN. § 53-11-451(a)(4).

2. 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. TENN. CODE ANN. 53-11-201(d)(2); *Rule 1340-2-2-.15*, TENN. COMP. R. & REGS., *Rules of the Tennessee Department of Safety*.

3. The State’s proof established, by a preponderance of the evidence, that Jeffrey Whelan drove his brother’s car to 6605 Gazebo Cove. The evidence failed to prove that the Cadillac in question was involved in a violation of the Tennessee Drug Control Act. More importantly, the State failed to prove that Jeffrey Whelan owned any interest in the car that would be subject to forfeiture. The Claimant, Kevin Nicholson, proved conclusively that he is the sole legal *and actual* owner of the vehicle, and that he is therefore entitled to its return. 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) [Emphasis added]. In order to sustain the forfeiture of the Claimant’s car, the State has the burden of proving

that Mr. Nicholson knew that it would be used to transport illegal drugs for resale, and gave his consent for that use. TCA § 40-33-210(a). The State failed to meet that burden.

4. In the absence of any evidence in the record that the Claimant's car was being used to transport illegal drugs with his knowledge and consent, or proof of facts from which such a reasonable inference can be drawn, it must be 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). The Claimant therefore retains his status as an innocent owner who is entitled to the return of his property.

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Accordingly, it is hereby concluded that the State has failed to meet its burden of proof. Forfeiture of the vehicle is barred, as a matter of law. It is therefore ORDERED that the *Vehicle Forfeiture Warrant* is DISMISSED, and the subject 2005 Cadillac STS shall be returned to the Claimant, Kevin Nicholson. The \$734.00 in U.S. Currency is forfeited to the seizing agency due to the fact that no one filed a claim for its return.

Entered and effective this 26<sup>TH</sup> day of APRIL, 2016.

  
\_\_\_\_\_  
Rob Wilson, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,  
this 26<sup>th</sup> day of APRIL 2016.

*J. Richard Collier*

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, 8<sup>th</sup> 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.