

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	
ex rel Davida Perry and James	:	
Perry, III	:	
	:	
v.	:	No. 1738 C.D. 2012
	:	
Attorney General of Pennsylvania	:	Submitted: February 1, 2013
	:	
Commonwealth of Pennsylvania	:	
	:	
v.	:	
	:	
Four Thousand Six Hundred Four	:	
Dollars (\$4,604.00) in U.S. Currency;	:	
One (1) 1999 Ford F-250 Pickup	:	
Truck, Vin: 1FTPG28L9XC11170;	:	
One (1) Sentry Safe; One (1) Digital	:	
Scale; Two (2) Motorola Cellular	:	
Phones; One (1) Verizon Cellular	:	
Phone; One (1) LG Cricket Cellular	:	
Phone; One (1) Gold Ring and One	:	
(1) Gold Men's Bracelet	:	
	:	
Appeal of: James Perry, III	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: April 25, 2013

James Perry, III (Perry) appeals from the Order of the Court of Common Pleas of Westmoreland County (trial court) that granted the Petition for Forfeiture

and Condemnation (Forfeiture Petition) of the Commonwealth of Pennsylvania (Commonwealth) with respect to certain items of personal property and denied Perry's Petition for Return of Property (Return Petition) with respect to those same items. On appeal, Perry argues that the trial court erred in granting the Commonwealth's Forfeiture Petition with respect to \$13,960.00 in United States Currency (the Currency) for a number of reasons, including that the methodology showing drug residue on the cash was flawed and Perry's wife, co-defendant Davida Perry, showed that she was an innocent owner of most of the Currency. For the following reasons, we affirm.

Perry filed his Return Petition¹ with the trial court on March 8, 2011. The Commonwealth filed an answer to the Return Petition on March 30, 2011. At that time, the Commonwealth also filed new matter in the nature of a Forfeiture Petition of the subject property pursuant to the Act commonly known as the Controlled Substances Forfeiture Act (Forfeiture Act), 42 Pa. C.S §§ 6801 – 6802. On August 5, 2011, the Commonwealth filed an additional Forfeiture Petition against additional property, including \$4,604.00 in U.S. Currency and a 1999 Ford F-250 pickup truck. Upon the Commonwealth's motion, the matters were consolidated. The Commonwealth alleged that all of the property at issue "was/were furnished or intended to be furnished by any person in exchange for a controlled substance . . . or, is/are proceeds traceable to such an exchange, or were used or intended to be used to facilitate any violation of The Controlled Substance,

¹ Perry sought the return of the following property: \$14,000.00 in U.S. Currency; one black safe; one 9mm Taurus PT Pro; two magazines of ammunition; one box of ammunition; one Olympus camera; one Honda Rancher ATV; one White Chrysler 300; one Blue Chevy Cobalt; assorted jewelry; and various documents. (Return Petition ¶ 1, Attachment A to Return Petition.)

Drug, Device and Cosmetic Act,^[2] [(Drug Act)].” (Forfeiture Petition ¶ 30, August 5, 2011.) The trial court held hearings on April 25, 2012 and May 25, 2012. In support of the Forfeiture Petition, the Commonwealth presented the testimony of the Commonwealth’s Office of Attorney General, Bureau of Narcotics Investigation and Drug Control (BNIDC) agent Richard S. Miller (Agent Miller) and the Pennsylvania National Guard County Drug Program’s Sergeant Paul Hunter (Sergeant Hunter), along with documentary evidence. More specifically, the Commonwealth elicited the following facts at the two hearings:

The seizure of the Currency and other property resulted from an investigation that was begun in March 2010 by the BNIDC, which had received information from a confidential informant that Perry was distributing heroin in Westmoreland and Washington Counties and the surrounding area. On March 24, 2010, Agent Miller set up a controlled purchase through a confidential informant of 3.2 grams of heroin from Perry using \$700.00 in pre-recorded bills. On June 18, 2010, Agent Miller arranged a second controlled purchase through a different confidential informant and an unwitting intermediary. This controlled purchase resulted in the sale of 0.17 grams of heroin for pre-recorded bills. A third controlled buy through the same confidential informant and unwitting intermediary yielded 0.48 grams of heroin. (Hr’g Tr. at 11-13, 16-18, R.R. at 11-13, 16-18.)

Between May, 2010 and June, 2010, Agent Miller observed Perry entering and exiting a property on Park Avenue in Rostraver Township, Pennsylvania (the Park Avenue Property) approximately five times per day, staying only for short

² Act of April 14, 1972, P.L. 233, as amended, 35 P.S. §§ 780-101 – 780-144.

periods. Agents of the BNIDC determined that the Park Avenue Property was owned by Kimberly Kibelbek (Kibelbek), who was eventually a criminal co-defendant with Perry. Following his visits to the Park Avenue Property, Agent Miller observed Perry engaging in suspicious transactions. In June 2010, Kibelbek moved to a new address on Third Street in Monessen, Pennsylvania (Third Street Property). Agent Miller observed Perry visiting the Third Street Property frequently for short periods of time in September and October, 2010. On January 28, 2011, Agent Miller arranged with a third confidential informant to conduct a controlled purchase through an unwitting individual with pre-recorded bills. After the unwitting individual contacted Perry, Perry stopped at the Third Street Property for about five minutes, and then met the unwitting individual. Perry delivered .13 grams of heroin to the unwitting individual who delivered it, in turn, to Agent Miller's third confidential informant. Agent Miller conducted similar controlled purchases on February 2, 2011 and February 23, 2011, resulting in .19 grams of heroin and .17 grams of heroin, respectively. (Hr'g Tr. at 13-14, 16, 19-26, R.R. at 13-14, 16, 19-26.)

On February 25, 2011, agents of the BNIDC executed search warrants on the Third Street Property and on the home Perry shared with his wife, Davida Perry, on Bonnie Drive in Belle Vernon, Pennsylvania. That day, just prior to the warrants' execution, Perry was stopped immediately after leaving the Third Street Property. On Perry's person, the BNIDC agents found heroin, approximately \$978.00 in U.S. currency and a key to a safe in the Third Street Property. The safe contained 37.4 grams of heroin, 29.8 grams cocaine, and a cutting agent. The

BNIDC agents found no drugs at Perry's home but did find the Currency.³ A scan of the Currency revealed that it included the pre-recorded buy money that had been used in the February 23, 2011, controlled purchase. Agent Miller testified that the majority of the bills making up the Currency were in \$20 denominations. The BNIDC agents arrested Perry and read him his Miranda warnings on February 25, 2011. Perry told the BNIDC agents that he bought heroin in New York, transported it back to Pennsylvania for sale, and that his last trip to New York to buy heroin had been in January, 2011. (Hr'g Tr. at 26-34, R.R. at 26-34.)

Sergeant Hunter testified regarding the ion scan testing of the Currency. Sergeant Hunter submitted the Currency to ion scan testing in two batches of approximately \$7,000.00 each. The first sample tested positive for 1031 digital units of cocaine and 355 digital units of procaine. The second sample tested positive for 986 digital units of cocaine and 182 digital units of procaine. By taking readings of samples of circulated currency from Pennsylvania banks, Sergeant Hunter determined Pennsylvania's casual contact levels of cocaine to be 269 digital units. (Hr'g Tr. at 136-37, 141-42, R.R. at 136-37, 141-42.)

Perry adduced the testimony of an employee of Penn National Insurance, Harry Ernest Platt, III (Platt). Platt testified that he handled property claims resulting from fire damage for Penn National Insurance and that he investigated such a claim resulting from a 2010 fire at an automotive repair facility operated by

³ Agent Miller did not specify in his testimony where in Perry's house the Currency was found; however, in her testimony, Davida Perry testified that she and Perry kept the Currency in a "hamper, like a little couch at the end of your bed." (Hr'g Tr. at 229, R.R. at 229.)

Perry. Platt testified that, as a result of the claim, Penn National Insurance issued payments to Perry totaling approximately \$52,000.00 on November 19, 2010. (Hr'g Tr. at 182-85, R.R. at 182-85.)

Perry⁴ also adduced the testimony of his wife, Davida Perry. Davida Perry testified that she worked as a nurse and earned approximately \$21.00 per hour. Davida Perry testified that, in addition to her earnings, she had other legitimate sources of income, including a workers' compensation settlement totaling approximately \$87,000.00. Davida Perry testified that it was not unusual for her to keep large sums of cash in her home and that she had done so most of her adult life. She testified that she and Perry both kept cash in the hamper in their bedroom from which the Currency was seized and that she usually bundled the cash in packets of one thousand dollars. She estimated that she put approximately three-quarters of the Currency in the hamper. (Hr'g Tr. at 206, 223, 228-30, R.R. at 206, 223, 228-30.)

The trial court issued its Decision and Order on August 6, 2012, holding that the Commonwealth failed to establish a nexus between some of the property and Perry's drug trafficking activities and, therefore, ordered the return of this property to Davida Perry. The trial court held that the Commonwealth established a sufficient nexus with respect to the remaining property, including the Currency, and ordered the remaining property forfeited. The trial court held that the

⁴ Perry also adduced the testimony of Davida Perry's daughter, who testified regarding use and control of one of the seized vehicles. This testimony is not relevant to the forfeiture of the Currency.

Commonwealth showed a nexus between the Currency and Perry's drug activity through: (1) the levels of cocaine, heroin, and procaine revealed by the ion scan; (2) the pre-recorded bills from the February 23, 2011 controlled purchase comingled with the rest of the Currency; and (3) the predominance of \$20 bills in the Currency coupled with Agent Miller's testimony that this denomination is common in the level of drug sales in which Perry was involved. (Trial Ct. Op. at 4.) Perry appealed the trial court's Order to this Court only with regard to the Currency.⁵

Before this Court, Perry argues that the ion scan evidence and the manner of the Currency's bundling was not competent as a matter of law and that the Commonwealth failed to show that Davida Perry, whom Perry argues was the owner of the Currency, knew of Perry's drug activities.

Section 6801(a)(6)(i)(A) of the Forfeiture Act provides that "[m]oney, negotiable instruments, securities or other things of value furnished . . . by any person in exchange for a controlled substance in violation of [the Drug Act], and all proceeds traceable to such an exchange" are "subject to forfeiture to the Commonwealth." 42 Pa. C.S. § 6801(a)(6)(i)(A). "In a forfeiture proceeding, the Commonwealth bears the initial burden of proving, by a preponderance of the evidence, a nexus between the property sought to be forfeited and a violation of the

⁵ This Court's "review of a forfeiture appeal is limited to determining whether the trial court's findings of fact are supported by substantial evidence and whether it abused its discretion or committed an error of law." Commonwealth v. The Real Property and Improvements Commonly Known as 5444 Spruce Street, Philadelphia, 890 A.2d 35, 38 (Pa. Cmwlth. 2006).

[Drug Act].” Commonwealth v. \$4,000.00 in United States Currency, 49 A.3d 21, 23 (Pa. Cmwlth. 2012) (footnote omitted). “Preponderance of the evidence is tantamount to a ‘more likely than not’ standard.” Commonwealth v. \$15,000.00 U.S. Currency, 31 A.3d 768, 773 (Pa. Cmwlth. 2011) (quoting Commonwealth v. \$11,600.00 Cash, U.S. Currency, 858 A.2d 160, 164 (Pa. Cmwlth. 2004)). There is no requirement that drugs be found in proximity to the property sought to be forfeited, or that a criminal conviction or prosecution result from the investigation that resulted in the seizure of property. \$15,000.00 U.S. Currency, 31 A.3d at 773. Forfeiture proceedings are very fact-sensitive and circumstantial evidence may be sufficient to establish a nexus. Id.

In this case, the Commonwealth established that Perry had been engaged in the trafficking of heroin through controlled purchases of heroin from Perry, the seizure of heroin from Perry’s person and from a safe to which Perry had the key, and Perry’s statements to Agent Miller that he purchased heroin in New York to sell in Pennsylvania. The Commonwealth connected the Currency to this activity by showing that the Currency: contained marked bills that had been used in the controlled purchases; tested positive for heroin and high amounts of cocaine; and comprised largely \$20 bills, which is consistent with drug dealings. Viewing these facts together, it is more likely than not that the Currency represents proceeds from Perry’s illegal drug trafficking.

Perry argues that the trial court erred in considering the denominations that made up the Currency. In this case, Agent Miller testified that the Currency comprised mostly \$20 bills and that this is the most common denomination used in

the type of drug sales in which Perry engaged. (Hr’g Tr. at 52-56.) In Commonwealth v. Marshall, 548 Pa. 495, 498, 698 A.2d 576, 578 (1997), the Supreme Court considered a forfeiture case in which police found \$3,400.00 bundled in \$100.00 packets. The Supreme Court held that “although the \$3,400.00 was bundled in a way drug dealers have been known to arrange their money, such an arrangement is equally consistent with an innocent person’s attempt to simplify and promote precision in the counting of lawfully obtained funds.” Id. at 500, 698 A.2d at 579. While Marshall dealt with the bundling of money, rather than the denominations composing a sum of currency, Perry believes the argument is analogous. Even assuming that these factors may be analogized, this Court has, even after Marshall, considered the manner of bundling cash to be a factor, if not a strongly probative one, in considering whether a nexus between cash and illegal drug activity is present. See, e.g., Commonwealth v. Burke, 49 A.3d 542, 549-50 (Pa. Cmwlth. 2012) (holding that the bundling of cash, along with other factors, created “the suspicion of a nexus,” which would have been insufficient to support a forfeiture if it had not been for other factors, including the proximity of drug paraphernalia). Thus, while the denominations composing the Currency might, alone, be insufficient to meet the Commonwealth’s burden, this evidence is still probative and the trial court did not err in considering it.

Next, Perry argues that, pursuant to this Court’s holding in Commonwealth v. \$9,000.00 U.S. Currency, 8 A.3d 379 (Pa. Cmwlth. 2010), the ion scan evidence was not competent. In \$9,000.00 U.S. Currency, this Court held that the presence of an illicit substance, such as cocaine, on cash is, by itself, insufficient to show a nexus and that “[a]n ion scan must show the amount of controlled substance found

on the money, and it must be done in a way that eliminates the possibility that only a small number of bills are responsible for the ion scan reading.” Id. at 387. Otherwise, “the ion scan is no more probative than a drug dog alert.” Id. We determined in \$9,000.00 U.S. Currency that the ion scan evidence was not probative because the testimony of the police officer who performed the ion scan test on the cash did not show that the test results could not have been the result of the residue on a single bill. Id. at 388. Here, Sergeant Hunter testified that he swept the ion scan’s intake only over the tops of bills and, importantly, that it was his procedure to remove any bill that had visibly apparent residue on it, but that he noticed no such bills (or bills that had been rolled) in the Currency. (Hr’g Tr. at 123-24, 142-43, R.R. at 123-24, 142-43.) Thus, unlike in \$9,000.00 U.S. Currency, the testimony indicates that steps were taken to ensure that a single contaminated bill would not distort the ion scan readings.

The testimony in this case is similar to that in Commonwealth v. \$11,600.00 Cash, 858 A.2d 160, 163 (Pa. Cmwlth. 2004). In \$11,600.00 Cash, the individual performing the ion scan “testified that there was no indication that any of the bills was used for snorting cocaine, because none of the bills was rolled in a tube or creased . . . and that he tests the money from only the edges of all the bills to obtain a collective sample.” Id. \$9,000.00 U.S. Currency pointed to \$11,600.00 Cash as a case in which proper precautions were taken to ensure that ion scan readings were not contaminated by a single bill. \$9,000.00 U.S. Currency, 8 A.3d at 387. Because this case is similar to \$11,600.00 Cash and not \$9,000.00 U.S. Currency, we are not persuaded by Perry’s argument that the ion scan evidence in this case was incompetent due to a lack of proper testing procedures.

Next, Perry argues that Sergeant Hunter's testimony was flawed because he compared the levels of cocaine on the Currency to the casual contact levels for Pennsylvania, rather than New York, where Perry told Agent Miller he purchased heroin.⁶ In \$9,000.00 U.S. Currency, this Court held that casual contact levels for New York and West Virginia should have been used where the individual from whom the cash at issue was seized was from New York and claimed that the cash was given to him by an individual living in West Virginia. \$9,000.00 U.S. Currency, 8 A.3d at 387. However in this case, there is no indication that the Currency was circulated or received from individuals other than in Pennsylvania. While Perry told Agent Miller he *purchased* heroin in New York, this would involve the flow of money from Pennsylvania to New York, not vice versa. Perry lives in Pennsylvania, the money was seized in Pennsylvania, he sold heroin in Pennsylvania, and he does not allege any sources of income from outside Pennsylvania. Therefore, it was not necessary for the Commonwealth to present evidence regarding casual contact levels from other states.

Finally, Perry argues that the Commonwealth "failed to overcome the presumption that the [Currency] was Davida Perry's." (Perry's Br. at 10.) Once the Commonwealth establishes a nexus between property and violations of the Drug Act, "the burden shifts to the person opposing the forfeiture to prove he owns the money, acquired it lawfully, and did not use or possess the money for an illegal purpose." Burke, 49 A.3d at 546. In a forfeiture proceeding, "[t]he trial court is

⁶ Perry's argument regarding this issue in his brief states, "Moreover, Agent Miller testified that Perry gave a statement that *cocaine* was purchased in New York." (Perry's Br. at 13 (emphasis added).) However, Agent Miller testified that Perry told him that he purchased *heroin* in New York. (Hr'g Tr. at 33, R.R. at 33.)

the fact finder and, as such, is empowered to make credibility determinations and to draw any reasonable inferences from all of the evidence.” \$9,000.00 U.S. Currency, 8 A.3d at 383 n.6. While Davida Perry’s testimony estimating that she contributed approximately 75% of the Currency from her legitimate sources of income would, if credited, help her sustain her burden as an innocent owner of part of the Currency, the trial court was not required to accept her estimate as credible and there is no indication that it did so. Davida Perry’s uncredited assertion of ownership and estimate of her contribution created no presumption for the Commonwealth to rebut and the trial court did not err or abuse its discretion by not crediting this testimony.

For the foregoing reasons, we affirm the Order of the trial court.

RENÉE COHN JUBELIRER, Judge

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(1) Gold Men's Bracelet	:	
	:	
Appeal of: James Perry, III	:	

ORDER

NOW, April 25, 2013, the Order of the Court of Common Pleas of Westmoreland County in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge