

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002540-MR

EDWARD DEROSA

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 01-CR-00084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING

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BEFORE: BARBER, KNOFF, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Edward Derosa (Derosa), appeals an order permitting forfeiture of currency confiscated when he was arrested on charges of possession of an illegal drug. We reverse the forfeiture order.

Derosa was found in a vehicle with prescription medications on his person. He did not have a prescription for the medications. A substantial amount of cash was found on his person at the time of the arrest. Derosa was charged with possession of the medications. The Commonwealth did not charge

Derosa with transactions in the medication or attempted sale of the medications. Derosa was not charged with facilitation of such illegal transactions. Derosa pleaded guilty to a charge of possession of a controlled substance.

Following the entry of the guilty plea the Boyd circuit court ordered forfeiture of currency confiscated when Derosa was arrested. Derosa objected to the forfeiture, and a hearing was present. Counsel had a conflict, and Derosa appeared at the hearing without counsel. Derosa asserted that the currency, \$7,863.00, constituted his entire life savings. At the forfeiture hearing Derosa provided evidence that he had not had a bank account in 15 years, but commonly stored his money in his residence or at his place of employment. Derosa testified that the residence had recently been robbed, and that for that reason he was afraid to leave the money in the mobile home when he left the premises. Tax records of Derosa's employers confirm that the currency found in Derosa's pocket was equivalent to the money he had earned from them as commissions on mobile home sales in the prior two months, less a minimal sum for food and lodging. The Commonwealth failed to provide any evidence linking the currency to the commission of a crime other than the fact that the currency was found in Derosa's pocket.

Following the hearing, the court entered a forfeiture order. In the order the court noted that it gave no credibility

to Derosa's explanation for his actions. Derosa filed a motion to set that order aside. The motion was denied by the circuit court, and the seized currency was retained by the state.

KRS 218A.410(j) permits a trial court to order forfeiture of "everything of value furnished, or intended to be furnished, in exchange for a controlled substance . . . ." where such items of value are "traceable to the exchange" or "used to facilitate any violation of this chapter. . . ." The intent of forfeiture is seizure of property used in the commission of a crime. The forfeiture is an additional penalty for the offense. Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). KRS 218A.410(j) provides that "it shall be a rebuttable presumption that all moneys, coin and currency found in close proximity to controlled substances" may be forfeited. In order to prevent forfeiture, the defendant must rebut the presumption that the currency was related to the criminal actions. KRS 218A.410(j). Derosa asserts that there was no nexus between the controlled substance and the money, which he contends was legitimately earned. Derosa argues that the currency was improperly ordered forfeited.

In order to prevail on the request for forfeiture, the Commonwealth must rebut the defendant's claim that the currency was legitimately earned. Osborne v. Commonwealth, Ky., 839 S.W.2d 281, 285 (1982). Once the defendant has provided

evidence showing that the money comes from a legitimate source, the Commonwealth must show that the moneys are traceable to the bad acts. In the absence of such a showing, there may not be a forfeiture. Harbin v. Commonwealth, Ky., 121 S.W.3d 191, 196 (2003). There was no evidence at the hearing that the money was traceable to the bad act charged. A legitimate source for the funds was shown by Derosa. The Commonwealth failed to provide evidence rebutting the testimony provided by Derosa. Under such circumstances, entry of the order permitting forfeiture was in error.

KRS 218A.410(j) indicates that forfeiture of property used in commission of an exchange of a controlled substance or to facilitate the exchange of a controlled substance is an appropriate penalty. The statute does not reference possession of a controlled substance as grounds for forfeiture. Derosa was not charged with an exchange of a controlled substance, or facilitation of an exchange of a controlled substance, but solely with the offense of possession. He claims error on the part of the court, contending that possession of the controlled substance is not an offense permitting forfeiture of the currency.

The Commonwealth provides authority supporting its position that the currency may properly be forfeited where a defendant is charged with possession, rather than with selling,

the illegal substance. There must be a showing that the defendant was transacting in the drugs, or facilitating such transactions, in order for forfeiture to be found appropriate. Hinkle v. Commonwealth, Ky. App., 104 S.W.3d 778 (2002). Derosa was not charged with an offense permitting forfeiture of the cash on his person absent a traceable link between the cash and the offense. For this reason, the order of forfeiture is reversed.

SCHRODER, JUDGE: CONCURS.

KNOPF, JUDGE, CONCURS WITH SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I fully concur with the reasoning and the result of the majority opinion, but I write separately to add a few points. The trial court specifically found that Derosa's explanation of the source of the money was not credible. At first blush, it might appear that the majority opinion encroaches on the exclusive province of the trial court to judge the credibility of witnesses. Upon further examination, it is clear that the Commonwealth failed to prove any nexus between the money found on Derosa and any drug-related activity. Therefore, the presumption established by KRS 218A.410(j) was never implicated, and the money was not subject to forfeiture as a matter of law.

In Osborne v. Commonwealth, Ky., 839 S.W.2d 281

(1992), the Kentucky Supreme Court noted that property subject to forfeiture under KRS 218A.410(j)

must be traceable to the exchange or intended violation. This requirement exists without regard to the presumption which appears later in the statute. Without such a requirement, the statute would mandate forfeiture of property which was without any relationship to the criminal act and would be of dubious constitutional validity....

Recognizing the difficulty of proof with respect to showing a connection between currency and drug transactions, the General Assembly created a presumption whereby currency found in close proximity to controlled substances was presumed to be forfeitable subject to the right of the owner to rebut the presumption. While the presumption would, at first blush, appear to dispense with the requirement of traceability, we believe the two must be construed harmoniously so as to give effect to the intention of the General Assembly.

The Commonwealth may meet its initial burden by producing slight evidence of traceability. Production of such evidence plus proof of close proximity, the weight of which is enhanced by virtue of the presumption, is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary. In practical application, the Commonwealth must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a prima facie case. Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade.

Id. at 284.

In the present case, the Commonwealth introduced evidence only that the money was found in DeRosa's pocket and in close proximity to the illegally-possessed prescription narcotics. But unlike in Hinkle v. Commonwealth, Ky. App., 104 S.W.2d 781 (2002), there was no evidence that the money was being used to further any drug activity. Indeed, there was no evidence that any drug trafficking activity was occurring at the time, or that any money have even exchanged hands. See Harbin v. Commonwealth, Ky., 121 S.W.3d 191, 196-97 (2003). Thus, even though the trial court found Derosa's explanation of the source of the money to be not credible, it was not subject to forfeiture without some minimal proof that the money was traceable to the exchange or violation in question. Absent such proof, the trial court erred by ordering the money forfeited to the Commonwealth.

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