

RENDERED: MAY 28, 2004; 10:00 a.m.

ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT:
 AUGUST 17, 2005 (2004-SC-0500-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000392-MR

COMMONWEALTH OF KENTUCKY;
COMMONWEALTH ATTORNEY'S
OFFICE, FOR THE SIXTEENTH
JUDICIAL CIRCUIT; AND
KENTON COUNTY POLICE DEPARTMENT

APPELLANTS

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 02-CR-00505

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF PUBLIC ADVOCACY;
COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION
CABINET; AND EARNIE VIRES

APPELLEES

OPINION
REVERSING AND REMANDING

*** * * * * *

BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Following the conviction of Earnie L. Vires (hereinafter "Vires") for trafficking in a controlled substance, first degree (KRS 218A.1412), the Kenton Circuit Court ordered money seized at the time of Vires's arrest to be forfeited. The

trial court ordered the money (approximately \$17,937) forfeited and further ordered Vires "to contribute the sum of \$2,500.00 as partial compensation for defendant's legal representation by the Office of Public Advocacy" and to pay statutory court costs from the forfeited funds. The Commonwealth of Kentucky (hereinafter "the Commonwealth") has appealed that order arguing that the circuit court had no statutory authority to pay such expenses and costs from the forfeited money. We agree, thus we reverse and remand.¹

Vires was indicted by the Kenton County Grand Jury on August 2, 2002, on the charges of trafficking in a controlled substance in the first degree (KRS 218A.1412) and possession of a firearm by a convicted felon (KRS 527.040). The indictment was a result of a consensual search of Vires's home on February 18, 2002. Following a jury trial, Vires was convicted of the trafficking charge and entered a guilty plea to the handgun offense. He was sentenced to eight (8) years and five (5) years respectfully, with the time running concurrently for a total of eight years' imprisonment.

On November 19, 2002, the Commonwealth filed a motion for forfeiture of the \$17,937 in United States currency seized in conjunction with the controlled substance trafficking

¹ Vires also appealed his conviction for trafficking in a controlled substance. That appeal numbered 2003-CA-000116-MR was affirmed in a separate opinion rendered by this Court on the same day as this appeal.

offense, for which Vires had been convicted. Following briefing by the parties and a hearing before the circuit court, the trial judge entered the following order which forms the basis of this appeal:

This matter is before the court pursuant to the Commonwealth's motion for forfeiture of \$17,937.00 in U.S. currency seized from defendant's home. The Commonwealth argues that the jury's verdict of guilty compels a conclusion that the jury believed the money was the defendant's and was obtained from the unlawful sale of drugs. The court accepts the Commonwealth's argument, and finds that the \$17,937.00 in U.S. currency was defendant's property and the product of illegal activity.

In view of the defendant's resources (\$17,937.00) and ability to contribute to his own defense, defendant shall be ordered to contribute the sum of \$2,500.00 as partial compensation for defendant's legal representation by the Office of Public Advocacy. Also, defendant shall pay the statutorily imposed court costs. The remainder of defendant's funds, seized at the time of his arrest, shall be forfeited pursuant to KRS 218A.410.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

1. The statutory court costs shall be paid from defendant's seized funds;
2. Thereafter, there shall be paid as reimbursement to the Office of Public Advocate the sum of \$2,500.00; and,
3. The remainder of the funds seized from the defendant shall be forfeited pursuant to KRS 218A.410.

IT IS FURTHER ORDERED AND ADJUDGED that the Kenton County Police Department, the custodian of defendant's seized funds, shall retain said funds until further orders of the court and subject to the terms set about above.

SO ORDERED this the 23rd day of January, 2003.

On appeal, the Commonwealth contends that KRS 218A.405 et. seq., relating to forfeited property sets forth the statutory scheme which the circuit court must follow once property is determined to be subject to forfeiture. The Department of Public Advocacy, (hereinafter "the Department"), on the other side, argues that KRS 31.211 relating to a defendant's ability to pay the costs of the proceedings controls. Having reviewed the statutes in question and the applicable law, we believe the Commonwealth's position is correct in that KRS 218A.405 et. seq. is determinative in resolving this controversy.

KRS 31.211(1) and (5) relied upon by the Department states:

- (1) At arraignment, the court shall conduct a nonadversarial hearing to determine whether a person who has requested a public defender is able to pay a partial fee for legal representation, the other necessary services and facilities of representation, and court costs. The court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment

payments to recover money for representation provided under this chapter. This partial fee determination shall be made at each stage of the proceedings.

. . .

(5) If a person receives legal assistance or other benefit under this chapter to which he or she is not entitled or if a person receives legal assistance under this chapter and is financially able to pay for representation on the date the suit is brought, the public advocate, on behalf of the Commonwealth, shall recover, where practical, payment or reimbursement, as the case may be, from the person who received the legal assistance or his or her estate. Suit shall be brought within five (5) years after the date on which the aid was received.

In contrast, the Commonwealth relies upon KRS 218A.410(2) and KRS 218A.435(12). KRS 218A.410(2), in relevant part, states:

Title to all property, including all interests in the property, forfeit under this section vests in the Commonwealth on the commission of the act or omission giving rise to forfeiture under this section together with the proceeds of the property after the time.

KRS 218A.435(12), states:

Other provisions of law notwithstanding, the first fifty thousand dollars (\$50,000) of forfeited coin or currency or of the proceeds from sale of any property forfeited pursuant to this chapter which was seized or forfeited by a single order of forfeiture, shall not be paid into the fund but ninety percent (90%) shall be paid to the law enforcement agency or agencies which seized

the property to be used for direct law enforcement purposes and ten percent (10%) to the office of the Commonwealth's attorney or county attorney who has participated in the forfeiture proceeding. The moneys are intended to supplement any funds appropriated to the recipient and shall not supplant other funding of any recipient. In addition, forty-five percent (45%) of all proceeds above fifty thousand dollars (\$50,000) shall not be paid into the fund but shall be retained by the law enforcement agency or agencies which seized the property to be used for direct law enforcement purposes.

Having reviewed the two statutes in issue, the Department argues that the trial court exercised proper judicial discretion in harmonizing two conflicting statutes. Since KRS 31.211 was enacted more recently, the Department contends it should be given greater weight. The Department cites Newport Benevolent Burial Ass'n v. Clay, 170 Ky. 633, 186 S.W. 658 (1916), for the proposition that "where the provisions of two (2) statutes are not repugnant to each other, although dealing to some extent with the same subject matter, and can be enforced consistently with the provisions of each, the court may enforce the provisions of each." Thus, the Department contends the trial court properly acted within its discretion and gave statutory and equitable meaning to both statutes. The Department argues that the court followed KRS 31.211 and ordered that because Vires had received legal assistance under this chapter [KRS 31] that he must pay a sum to the public advocate

for those services received. The trial court then enforced the forfeiture statute (KRS 218A.435) and gave the Commonwealth the balance of the funds confiscated. As such, the Department argues both entities benefited from the ruling and each governmental agency should be satisfied with the result. The Department insists the trial court wisely harmonized the two statutes to the good of all involved. However, as wise and equitable as the trial court's decision appears, we cannot agree that it fully complied with sound statutory construction.

Under KRS 218A.410(2) it states, in relevant part, "that title to all property . . . forfeit[ed] under this section vests in the Commonwealth on the commission of the act or omission giving rise to [the] forfeiture" (Emphasis added). The statute is clear and unambiguous that all property vests in the Commonwealth as of the date of the offense. Vires had no interest in any of the property at the time of the hearing on the forfeiture. The indictment alleged he trafficked in a controlled substance on February 18, 2002. Once the jury convicted him of said offense all property forfeited became property of the Commonwealth as of that date (February 18, 2002). While the Department argues that the trial court first ordered Vires to contribute to his defense based upon his resources (the \$17,937) pursuant to KRS 31.311 and then invoked the forfeiture statute dispensing the remaining funds pursuant

to KRS 218A.410, that is not factually accurate. Nowhere in the record do we find a statement from the Commonwealth that the \$17,937 was Vires's property at the time the forfeiture motion was filed.² In fact, whether the money was Vires's, his wife's, or both of theirs is not relevant. The trial court properly found that the money was the result of illegal activity thus invoking KRS 218A.410(2) which mandates that all property subject to forfeiture vests in the Commonwealth on the commission of the act (February 18, 2002). In that the funds in question belonged to the Commonwealth and not Vires, he did not have resources and/or ability to contribute to his defense and KRS 218A.435(12) sets forth the mandatory statutory process as to what agencies are to receive the seized property (90% to law enforcement agency, 10% to the Office of the Commonwealth's Attorney).

For the foregoing reasons, the order of the Kenton Circuit Court providing that the forfeited funds shall be paid to the Department of Public Advocacy and towards costs is reversed and the matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

² Apparently Mrs. Vires was also charged with some criminal offense as a result of the search of the Vires's residence. It appears Mrs. Vires was seriously ill and reached a plea agreement in which the charges were dismissed and she signed a waiver relinquishing any interest to the seized funds. According to the Commonwealth, Mrs. Vires has since passed away.

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