

RENDERED: July 8, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000794-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT  
HONORABLE DOUGHLAS M. GEORGE, JUDGE  
ACTION NO. 03-CR-00005 & 03-CR-00006

KENNETH D. GOFF

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \* \*

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: The Commonwealth appeals the denial in the Washington Circuit Court of its motion requesting forfeiture following a drug trafficking prosecution. The Commonwealth sought forfeiture of \$4,000 held by Kenneth D. Goff at the time of his arrest for two counts of trafficking in a controlled substance in the first degree and one count of being a persistent felony offender in the second degree. This arrest

took place two months after the alleged date of commission of the offense, following indictment by the grand jury.

Goff pled guilty to two counts of trafficking in a controlled substance in the first degree, and trafficking in marijuana second offense, in return for dismissal of the persistent felony offender charge and a total sentence of ten years. After the Judgment on Guilty Plea was entered, but prior to sentencing, Goff and his former employer, Michael Murphy, filed affidavits with the Washington Circuit Court claiming that the \$4,000 was money that had been loaned by Murphy to Goff the day before his arrest for the purchase of a pickup truck. Subsequent to entry of the judgment, the Commonwealth moved to forfeit the \$4,000 Goff possessed at the time of arrest.

The court held a hearing on the motion to forfeit. The court entered an order denying the Commonwealth's request for forfeiture. The Commonwealth filed a motion to alter, amend or vacate the court's order and the court held a second hearing on the motion. The court entered an order denying the motion to vacate in which it made findings of fact. The court noted that it was undisputed that the money seized from Goff was not used in the drug transaction for which he was charged in the indictment. The court found that Goff rebutted the presumption that the money was forfeitable by clear and convincing evidence.

On appeal, the Commonwealth argues that the trial court held the Commonwealth to too high a burden of proof to establish the nexus for forfeiture. In addition, the Commonwealth asserts Goff's proof was not credible and not substantiated.

First, we believe that the trial court employed the correct standard of review. Money may be forfeited under KRS 218A.410(j), which makes the following subject to forfeiture:

Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this chapter, all proceeds, including real and personal property, traceable to the exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this chapter; . . .

In a forfeiture proceeding, the Commonwealth must prove a nexus between the property sought to be forfeited and its use to facilitate a violation of KRS 218A. Osborne v. Commonwealth, 839 S.W.2d 281, 284 (Ky. 1992). After the prosecution produces evidence to show that the property was traceable to the exchange or used to facilitate a violation of chapter 218A, the claimant of personal property has the burden to convince the trier of fact that the property was not being used in the drug trade. Osborne, 839 S.W.2d at 284; Hinkle v. Commonwealth, 104 S.W.3d 778, 781 (Ky.App. 2002).

In this case, the Commonwealth met its initial burden of proof to show by a preponderance of the evidence that forfeiture was proper given appellant's statements on the night of his arrest that the money came from drug activity. However, Goff was then entitled to introduce evidence to rebut the Commonwealth's evidence of a nexus to drug activity. Osborne, 839 S.W.2d at 284. Among its findings, the trial court determined that clear and convincing evidence existed to show that the money was not obtained by selling drugs but came from another source. We conclude that the trial court applied the correct standard, but we do not agree that the Commonwealth's proof was rebutted by clear and convincing evidence. Instead, we conclude that the findings of the trial court were clearly erroneous.

Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. Under this rule, an appellate court should not substitute its own judgment for that of the trial court unless it was clearly erroneous. Taylor v. Taylor, 591 S.W.2d 369, 370 (Ky. 1979). The reviewing court's basic concern is whether there is sufficient evidence, as detailed in the record, to support the decision of the trial court. If so, the decision cannot be said to be clearly erroneous. Id.

The Commonwealth asserts that Goff stated at the time of arrest that some of the money came from drugs; at that time, he never said anything about borrowing any portion of it. In addition, the Commonwealth argues that Goff's information regarding the source of the \$4,000 did not emerge until after he entered the guilty plea, a gap of over a year's time.

The trial court's denial of the motion to forfeit was based on its assessment of the credibility of the witnesses, including Goff and Murphy. The court relied on the fact that Goff had hearing problems to explain that his admissions on the night of the arrest resulted from inability to hear the questions. The court found specifically:

3. The admission consisted of the Defendant answering "yes" to a questions [sic] asked by the Detective at the time the money was confiscated.

4. The Defendant testified that he did not hear the question posed by the detective due to being hard of hearing. This court has had numerous occasions in the past to observe that the Defendant is indeed hard of hearing.

The evidence adduced at the hearing, however, did not support this version of events. In fact, none of the witnesses testified that Goff ever was answering yes or no to questions posed by the officers.

Detective Corbett testified that Goff asked if he could keep the money taken from his pockets. The detective pointed out to Goff that the \$4,000 had rubber bands around it, and commented to Goff that they knew he did that with his money when he was selling drugs. Goff denied that any of the money retrieved from his pockets was drug money. Detective Corbett said Goff next told him that he had worked for some of the money. Detective Corbett testified that he pushed the money in front of Goff and asked which was drug money and which was the money he worked for. He said Goff replied he had worked for the \$300 bundle, and the \$4,000 was drug money. When asked by the Commonwealth Attorney if Goff said that specifically, the detective testified that was specifically what Goff had said.

Next, Trooper Smith testified that he was present when Detective Corbett questioned Goff about which was "good money" and which was "bad money." He said that Goff responded that the \$300-something portion of the money came from contract work, and the \$4,000 was "bad money." He said Goff took the \$4,000 and pushed it aside.

Goff testified that it was the detective who asserted that \$4,000 of the money was drug money and they would give him the \$300 back. He testified that he had had a hard time hearing Detective Corbett that day. Goff added that while he was in the car with Trooper Smith he was asked what he was doing with "that

kind of money." He testified that he told Trooper Smith that the \$300 was from doing drywall and the \$4,000 was borrowed for the purchase of a truck.

This testimony fails to support the trial court's finding that Goff was tripped up by answering questions he did not understand. There certainly is no testimony that he was being asked yes or no questions. Goff did not testify about being questioned. In contrast, Trooper Smith corroborated Detective Corbett's testimony that Goff was asked to identify the sources of the money and Goff voiced his response that the \$4,000 was from selling drugs. Thus, we find that the evidence does not support the findings of the court.

Viewing the whole of the evidence and the findings of the court, we conclude that the court's findings were clearly erroneous. Therefore, we reverse the court's order denying forfeiture in this instance.

All CONCUR.

BRIEF FOR APPELLANT:

Gregory D. Stumbo  
Attorney General of Kentucky

George G. Seelig  
Assistant Attorney General  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Samuel Todd Spalding  
Lebanon, Kentucky