

RENDERED: DECEMBER 2, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002507-MR

RONALD DAILEY

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
v. ACTION NOS. 02-CR-001383 & 04-CR-000636

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Ronald Dailey appeals from an order of the Jefferson Circuit Court denying his motion to return \$1,220 forfeited under the terms of a plea agreement. For the reasons stated below, we affirm the order on appeal.

On June 20, 2002, Dailey was indicted on charges of first-degree trafficking in a controlled substance, possession of drug paraphernalia, and for being a persistent felony

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

offender in the second degree. A subsequent indictment amended the latter charge to persistent felony offender in the first degree.

Trial on the charges was conducted in Jefferson Circuit Court in March, 2004. After the jury returned a guilty verdict on the trafficking and possession of paraphernalia charges, Dailey agreed to waive jury sentencing and plead guilty to the PFO I charge. Under the terms of the plea, Dailey received a sentence of 10 years in prison, agreed to forfeit property and cash seized during the arrest, and waived his right to appeal. The agreement was memorialized on videotape, and Dailey and his counsel signed a waiver form.

On March 25, 2004, a judgment was rendered which reflected the verdict and plea. It did not address the forfeiture. On December 14, 2004, the court entered a forfeiture order. This appeal followed.

Dailey argues that cash in the amount of \$1,220 was unlawfully confiscated by the Commonwealth and that the Jefferson Circuit Court committed reversible error in failing to so rule. He maintains that he was denied due process and equal protection under the Constitutions of the United States and of Kentucky when the trial court and the Commonwealth failed to conduct a separate hearing to determine whether the cash was subject to forfeiture. He cites case law which he maintains

supports his assertion that he was entitled to a hearing on the issue, and he seeks a reversal of the December 14, 2004, forfeiture order. Conversely, the Commonwealth argues that no hearing on the issue is required where, as in the matter at bar, a defendant enters into a plea agreement which provides for the forfeiture.

The Commonwealth relies on Commonwealth v. Shirley,² for the proposition that no forfeiture hearing is required when a defendant enters into a plea agreement, the terms of which provide for the forfeiture of seized property. We find this argument persuasive. In Shirley, the primary issue was whether the court erred in refusing to order the forfeiture of a vehicle used in a drug transaction. The order was rendered without the benefit of a hearing. The case also included the voluntary forfeiture of personal property – again, without a hearing. In affirming, a panel of this Court concluded that no hearing was required, and alternatively if such a hearing was required, any error was harmless.

While not directly on point, Shirley supports the conclusion that as part of a plea agreement a defendant may choose to voluntarily forfeit personal property; and, that no hearing is required to sustain such a decision. The trial court's examination of the defendant's voluntary, knowing and

² 140 S.W.3d 593 (Ky.App. 2004).

intelligent acceptance of the plea is sufficient to determine whether the defendant's voluntary forfeiture should be accepted. No additional hearing is required.

In the matter at bar, Dailey stated on the record in open court that he agreed to the forfeiture of cash seized during his arrest. The trial court conducted the standard plea colloquy and found that the plea was entered into knowingly, voluntarily and intelligently. The plea was not imposed on Dailey, and a reasonable presumption exists that Dailey, through counsel, concluded that he benefited from the plea. Since the trial court is in the best position to determine if the plea passes constitutional muster, and as there is no basis for concluding that an additional hearing on the forfeiture issue was required, we find no basis for reversing the December 14, 2004, order on this issue.

Lastly, it is worth noting that the order on appeal was rendered after Dailey filed his notice of appeal.³ RCr 10.10 allows for clerical mistakes to be remedied at any time before an appeal is perfected.⁴ Since the forfeiture should have been

³ On November 19, 2004, the court entered an order denying Dailey's pro se motion to modify the March 25, 2004, judgment and return the \$1,220 to him. Dailey filed a notice of appeal from that order. The court then entered the December 14, 2004, order forfeiting the money and distributing it to the Louisville Metro Police Department and Jefferson County Commonwealth's Attorney Special Operations Fund.

⁴ RCr 10.10 states that "[C]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion

addressed in the March 25, 2004, judgment that reflected the verdict and plea, the December 14, 2004, order may properly be regarded as simply correcting the judgment, and as such, it falls under RCr 10.10.

For the foregoing reasons, we affirm the December 14, 2004 order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald Dailey, Pro Se
West Liberty, KY

BRIEF FOR APPELLEE:

Hon. Gregory D. Stumbo
Attorney General

James C. Shackelford
Assistant Attorney General
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of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is perfected in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."