

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000438-MR
AND
NO. 2005-CA-000439-MR

VERTREES BROWN

APPELLANT

APPEALS FROM PULASKI CIRCUIT COURT
v. HONORABLE JEFFREY T. BURDETTE, JUDGE
INDICTMENT NOS. 04-CR-00130 AND 04-CR-00161

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; HUDDLESTON, SENIOR JUDGE.¹

MINTON, JUDGE: Vertrees Brown appeals an order forfeiting several firearms and ammunition seized by sheriff's deputies in a search of his residence. The search occurred several months after Vertrees committed drug trafficking offenses. Because the

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Commonwealth failed to show the nexus between the seized property and Vertrees's drug trafficking offenses, we reverse.

On March 10, 2004, Bill Brown sold narcotics to an informant at a residence on Dry Branch Road that he shared with his father, Vertrees. The sheriff's deputy involved in the investigation then sought and obtained a warrant to search the residence. The affidavit for the search warrant stated that the deputy's information was based specifically on the information received and observed at the Dry Branch Road residence on March 10, 2004. The affidavit also contained a statement that various local law enforcement agencies "have all in the past received numerous drug related tips/information in reference to the sale of controlled substances from this residence involving Bill Brown[] and Vertrees Brown."

Law enforcement officers executed the warrant by searching the residence. The search yielded a number of items, including numerous firearms, ammunition, and cash. All the firearms and ammunition found were in Vertrees's bedroom. Vertrees was arrested the next day on the charge of being a convicted felon in possession of a firearm. Bill was arrested on the charge of trafficking in a controlled substance.

On June 23, 2004, the Pulaski County Grand Jury returned a sealed indictment, which charged Vertrees with

trafficking in a controlled substance in the second degree.² According to the indictment, Vertrees had sold hydrocodone³ to a confidential informant on July 18, 2003. Then, on July 21, 2004, the grand jury returned a second sealed indictment against Vertrees for trafficking in a controlled substance in the second degree.⁴ That second indictment alleged that Vertrees had sold hydrocodone to a confidential informant on July 16, 2003.

On August 12, 2004, the district court granted the Commonwealth's motion to dismiss the firearm charge against Vertrees that followed the March 10, 2004, search. The district judge's notation at that time indicated that the Commonwealth intended to proceed against Vertrees by indictment on this charge. But the record does not indicate that Vertrees was ever indicted on the convicted felon in possession of a firearm charge.

On August 19, 2004, Vertrees was arrested on the warrants stemming from the two sealed indictments. And on November 18, 2004, Vertrees pleaded guilty in Pulaski Circuit Court to the two trafficking in a controlled substance charges. In a judgment entered December 23, 2004, the circuit court

² Pulaski Circuit Court, Indictment No. 04-CR-130.

³ Hydrocodone is "a semisynthetic product of codeine, . . . having narcotic analgesic effects similar to but more active than those of codeine; used as an antitussive." DORLAND'S POCKET MEDICAL DICTIONARY 332 (23rd ed. 1982).

⁴ Pulaski Circuit Court, Indictment No. 04-CR-161.

sentenced Vertrees to four years' imprisonment on each charge, probated for two years.

After sentencing, the Commonwealth moved for forfeiture of all items seized in the March 10, 2004, raid of the Dry Branch Road residence. Vertrees filed no written response. But at the brief hearing held on the motion, Vertrees's counsel made the unavailing argument that the circuit court lacked jurisdiction to rule on this forfeiture motion because the case against Vertrees was completed. In addition, Vertrees's counsel mentioned that Vertrees did not own the weapons seized on March 10, 2004, when he committed his trafficking offenses on July 16 and 18, 2003. No witnesses appeared for either side during the six-minute hearing. At the close of the hearing, the circuit court orally granted the Commonwealth's forfeiture motion. In the written order that followed, the trial court found that it was "apparent that the seized items were present were [sic] Defendant Vertress [sic] Brown[] committed his criminal acts."⁵ Vertrees then filed two appeals, one from each of his underlying indictments. Because these appeals involve common facts and legal issues, we will resolve them in one opinion.

Vertrees contends that the forfeiture was improper because there was no evidence adduced to show that the items

⁵ 04-CR-130 original record, p. 32; 04-CR-161 original record, p. 36.

seized from his bedroom in the Dry Branch Road residence in March 2004 had any connection to the July 2003 drug trafficking charges of which he was convicted. The Commonwealth responds that we should not reach these arguments because Vertrees failed to preserve them for appeal.

Admittedly, Vertrees's brief is vague. In fact, Vertrees's brief does not state where or how he preserved his issue for appeal, as is required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v), made applicable to criminal cases by Kentucky Rules of Criminal Procedure (RCr) 12.02. But our close review of the videotape of the forfeiture hearing shows that Vertrees's counsel stated that Vertrees did not possess the firearms seized in March 2004 when he committed his trafficking offenses in July 2003. Since that argument is similar to the argument Vertrees advances on appeal, we will not penalize Vertrees for his attorney's failure to fully comply with the rules governing appellate briefs.

This forfeiture action is governed by KRS 218A.410 and 218A.460. The former statute generally provides that anything of value traceable to an illegal controlled substances transaction is subject to forfeiture. KRS 218A.410(1)(j) provides that a rebuttable presumption exists that all money found in close proximity to controlled substances is presumed to be forfeitable, and the person opposing forfeiture has the

burden to rebut that presumption by clear and convincing evidence. Similarly, KRS 218A.460(4) provides that in the absence of authority to the contrary, a person opposing forfeiture has the burden to show by a preponderance of the evidence that forfeiture is improper. The Commonwealth contends that Vertrees has not met his burden to contest the forfeiture of the seized funds under KRS 218A.410(1)(j) and had not met his burden to contest the forfeiture of the other items, such as the firearms, under KRS 218A.460(4).

We do not reach the issue of whether Vertrees successfully rebutted the presumption in favor of forfeitability because the Commonwealth failed at the outset to meet its burden by showing that the seized property bore any relation to Vertrees's drug trafficking activity.

It is a fundamental proposition that in proceedings under KRS Chapter 218A, the Commonwealth must trace to a controlled-substances violation any property it desires to be forfeited, irrespective of the statutory presumptions in favor of forfeitability.⁶ The burden to rebut the presumption in favor of forfeiture shifts to the party opposing forfeiture only after the Commonwealth satisfies its initial tracing burden.⁷

⁶ Osborne v. Commonwealth, 839 S.W.2d 281, 284 (Ky. 1992); Harbin v. Commonwealth, 121 S.W.3d 191, 196-197 (Ky. 2003).

⁷ Harbin, 121 S.W.3d at 196-197.

In the case at hand, all parties agree that the seized property belonged to Vertrees. But the Commonwealth offered no evidence that Vertrees owned the property seized in March 2004 at the time he committed his July 2003 offenses. Moreover, the Commonwealth presented no proof that the property seized bore any nexus to Vertrees's prior trafficking offenses. Indeed, Vertrees had not been indicted when the raid occurred. Thus, the Commonwealth failed to meet its initial tracing burden, meaning that the burden never shifted to Vertrees to rebut the statutory presumptions in favor of forfeiture. Therefore, the trial court erred when it found that the seized items were present when Vertrees committed his offenses and, accordingly, erred by granting the Commonwealth's forfeiture motion.

For the foregoing reasons, the Pulaski Circuit Court's orders granting the Commonwealth's motion for forfeiture are reversed.

ALL CONCUR.

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