

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001684-MR

TONY HARDIN

APPELLANT

APPEAL FROM SPENCER CIRCUIT COURT
v. HONORABLE REBECCA M. OVERSTREET, SPECIAL JUDGE
ACTION NO. 04-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Tony Hardin brings this appeal from a July 19, 2006, order of the Spencer Circuit Court ordering forfeiture of \$2,406.00 seized from his person incident to his arrest for first-degree trafficking in a controlled substance. We affirm.

On January 24, 2004, police executed a search warrant for Hardin's residence. The search produced a white powdery substance believed to be methamphetamine, items consistent with manufacturing methamphetamine, and a gun. Hardin was placed under arrest and a search of his person revealed cash totalling

\$2,406.00 in Hardin's pocket. When the officer removed the cash, a white powdery substance fell from the cash.

Hardin was indicted upon the offenses of first-degree trafficking in a controlled substance (Kentucky Revised Statutes (KRS) 218A.1412), manufacturing methamphetamine (KRS 218A.1432), and possession of a firearm by a convicted felon (KRS 527.040(2)). Pursuant to a plea agreement, Hardin pleaded guilty to the amended charges of first-degree possession of a controlled substance and possession of methamphetamine precursors. The possession of a firearm by a convicted felon charge was dismissed. Hardin was sentenced to five (5) years probation with six (6) months to serve in the county jail.

On June 29, 2006, Hardin filed a “Motion To Release Personal Property.” Therein, Hardin sought return of the \$2,406.00 seized from his person at the time of his arrest. By order entered July 19, 2006, the court denied the motion and ordered forfeiture of the cash pursuant to KRS 218A.410. This appeal follows.

Hardin contends that the circuit court erred by denying his “Motion To Release Personal Property” and ordering forfeiture of the \$2,406.00. Specifically, Hardin asserts that the circuit court erred in its determination that the Commonwealth established a *prima facie* case for forfeiture pursuant to KRS 218A.410.

KRS 218A.410(1)(j) subjects the following property 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; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him to have been committed or omitted without his knowledge or consent. It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence. The burden of proof shall be upon the law enforcement agency to prove by clear and convincing evidence that real property is forfeitable under this paragraph.

It is well-established that the Commonwealth bears the burden of proof in forfeiture actions. *Osborne v. Commonwealth*, 839 S.W.2d 281 (Ky. 1992). To meet its burden of proof and make a *prima facie* case, the Commonwealth must produce “slight evidence of traceability.” *Id.* at 284. This means the Commonwealth must produce some evidence that the property sought to be forfeited is somehow traceable to the illegal drug activity. Additionally, the statute creates a rebuttable presumption that the property seized is subject to forfeiture if the property is found in “close proximity” to the illegal drugs. *Id.* at 284. However, as cautioned by the Court in *Osborne*, the Commonwealth must initially present proof of traceability before the presumption is effective:

On examination of the foregoing statute, it is apparent that any property subject to forfeiture under (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 under Sections 2, 11, 13, 26 and possibly

Osborne, 839 S.W.2d at 284. If the Commonwealth establishes its *prima facie* case, the burden is then on defendant to rebut this presumption by clear and convincing evidence. *Id.*

In the case *sub judice*, the Commonwealth produced slight evidence of traceability plus proof of close proximity with illegal drug activity. The cash was recovered from Hardin's pocket and a white powdery substance was found on the money. Equipment and materials used to produce methamphetamine and methamphetamine were also recovered from Hardin's residence where he was arrested. Hardin's only employment was from a lawn mowing business, and the cash was recovered during his arrest in the month of January. As the Commonwealth met its burden of production and established a *prima facie* case, the burden was shifted on Hardin to rebut the presumption by clear and convincing evidence. *See id.* Hardin merely testified that the cash came from his lawn mowing business and that he was carrying the cash to pay his child support arrearage. Hardin failed to produce any documentation to substantiate his claim that the cash was produced from his lawn mowing business and failed to offer any other explanation for the source of said income. Issues of weight and credibility of a witness's testimony are plainly within the province of the finder of fact. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). The circuit court obviously did not find Hardin's testimony to be credible. As such, we cannot say the circuit court erred in its determination that the Commonwealth established a *prima facie* case for forfeiture pursuant to KRS 218A.410.

Hardin next contends that the circuit court improperly shifted the burden of proof upon him to demonstrate that the cash was not derived from or intended for a drug transaction. Specifically, Hardin asserts that the court erroneously stated in its order that Hardin's "testimony did not prove by clear and convincing evidence that the \$(money) was not from trafficking." We disagree.

In *Osborne*, the Court held:

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.

Osborne, 839 S.W.2d at 284. As noted, we believe the Commonwealth presented sufficient evidence to establish the rebuttable presumption provided for in KRS 218A.410. In *Osborne*, the Court held that to rebut the presumption a defendant must prove by clear and convincing evidence that the property was not involved in illegal drug activity. Hardin failed to rebut the presumption. Hence, we believe the circuit court's ruling was consistent with *Osborne* and otherwise proper.

Hardin's final contention is that imposition of the \$1,000.00 fine and forfeiture of the cash (\$2,406.00) were unduly excessive and violated the Eighteenth Amendment of the United States Constitution and Section 17 of the Kentucky Constitution.

In Hardin's memorandum in support of the "Motion To Release Personal Property" filed in the circuit court, Hardin asserted that the fine and forfeiture were violative of the Eighteenth Amendment and the Kentucky Constitution. However, when

the trial court made its oral findings of fact and conclusions of law at the forfeiture hearing, it did not address the issue of excessiveness, and Hardin did not request such a ruling. When the court's order was subsequently reduced to writing, the issue was also not addressed by the court. And, Hardin did not request a ruling on the issue by post-judgment motion pursuant to Ky. R. Civ. P. 59.

It is well-established that the Court of Appeals is without authority to review an issue not decided by the circuit court. *Regional Jail Authority v. Tackett*, 770 S.W.2d 225 (Ky. 1989). Furthermore, “[i]t is the duty of one who moves the trial court for relief to insist upon a ruling, and a failure to do is regarded as a waiver.” *Dillard v. Commonwealth*, 995 S.W.2d 366, 371 (Ky. 1999)(citing *Brown v. Commonwealth*, 890 S.W.2d 286 (Ky. 1994)). By failing to seek a ruling on this issue by the circuit court, Hardin failed to preserve this issue for our review.¹

For the foregoing reasons, the order of the Spencer Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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¹ Tony Hardin does not request a review under Ky. R. Crim. P. 10.26.