

RENDERED: JULY 31, 2020; 10:00 A.M.  
TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2020-CA-000019-MR

VERNON LEE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE  
ACTION NO. 12-CR-003288-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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

BEFORE: COMBS, GOODWINE, AND LAMBERT, JUDGES.

GOODWINE, JUDGE: Vernon Lee (“Lee”) appeals from a Jefferson Circuit Court order denying his motion to return money seized during a search of his business. After careful review, we reverse and remand.

On August 23, 2011, officers of the Louisville Metro Police Department executed a search warrant of Lee’s residence and seized \$3,500 in

cash, pills, and marijuana. That same day, police also searched Lee’s business and seized \$2,210 in cash, pills, empty prescription bottles, and a scale. Lee was later indicted by a Jefferson County grand jury on one count of tampering with physical evidence;<sup>1</sup> one count of second-degree trafficking in a controlled substance, Schedule III, hydrocodone;<sup>2</sup> and one count of possession of an illegal substance, Schedule I, marijuana.<sup>3</sup>

On February 10, 2014, Lee moved to enter a guilty plea upon agreement of the Commonwealth. In exchange for his guilty plea, the Commonwealth offered a recommended sentence of two years for tampering with physical evidence, two years for trafficking in a controlled substance, and 45 days for possession of marijuana, with all sentences to run concurrently for a total of two years of imprisonment. The stipulated facts of the case are as follows: “[Lee] with Co-Defendant attempted to destroy narcotics upon police arrival at the *residence*. [Lee] also possessed with the intent to sell more than 20 hydrocodone and had an amount of marijuana.” Record (“R.”) at 16 (emphasis added). As a condition of the plea agreement, Lee agreed to forfeit various items seized by the police as follows:

---

<sup>1</sup> Kentucky Revised Statutes (KRS) 524.100 (Class D felony).

<sup>2</sup> KRS 218A.1413 (Class D felony).

<sup>3</sup> KRS 218A.1422 (Class B misdemeanor).

[Lee] agrees to forfeit any and all items seized in this action including, unless otherwise agreed, any cash, monies and/or vehicles. [Lee] stipulates that he is the sole owner of the property, and/or funds seized and no other person or entity has any right or interest therein (legal, equitable, or otherwise).

*Id.*

The circuit court accepted Lee's guilty plea by order entered February 11, 2014. The court postponed sentencing pending the completion and review of a presentence investigation report. The same day, the circuit court entered a separate order of forfeiture in the amount of \$3,500. On June 10, 2014, the court entered a judgment of conviction and sentenced Lee to a total of two years of imprisonment in accordance with the plea agreement.

On September 16, 2019, Lee filed a motion for the return of money seized from his business. In his motion, Lee asserted that although the \$3,500 seized from his home was forfeited as part of his guilty plea, he never forfeited the money seized from his business. In response, the Commonwealth admitted it was unaware money was seized from Lee's business, and he provided no proof of the seizure. The Commonwealth further acknowledged that the forfeiture order did not reference the additional money seized from Lee's business. The Commonwealth argued that, under the language of the plea agreement, Lee forfeited the money even though it was not included in the forfeiture order. The

circuit court denied Lee's motion by order entered September 27, 2019, finding the money at issue was not mentioned in the court record.

Subsequently, the Commonwealth provided Lee with supplemental discovery, including a police voucher, which stated police seized \$2,210, pills, an empty prescription bottle, and a scale from Lee's business. Lee then filed another motion for return of the \$2,210 seized from his business. He argued he was never charged with any crime stemming from the search of his business, and the Commonwealth's plea recommendation only referenced the crimes committed at his residence. The circuit court denied his motion by order entered December 5, 2019. This appeal followed.

On appeal, Lee argues he was entitled to the return of the \$2,210 seized from his business because it was not included in the plea agreement, and the Commonwealth did not move for forfeiture of it. The Commonwealth argues the plea agreement covers "all items seized in this action," so Lee waived his right to a separate forfeiture hearing. R. at 16. Alternatively, the Commonwealth argues the case should be remanded to the circuit court for further proceedings. Because the record makes no mention of the money seized from Lee's business until Lee moved for its return, we agree with Lee that it was not covered by the plea agreement.

The record, specifically the plea agreement and forfeiture order, were silent as to the money seized from Lee's business at the time he entered his guilty plea. In *Commonwealth v. Shirley*, 140 S.W.3d 593 (Ky. App. 2004), the defendant pled guilty to charges stemming from a drug transaction. "The plea agreement reached between Shirley and the Commonwealth provided for the forfeiture of various items of personal property seized at the time of Shirley's arrest; however, it was silent regarding forfeiture of the vehicle." *Id.* at 593-94. The circuit court held a forfeiture hearing regarding the vehicle and determined it would not forfeit the defendant's vehicle. *Id.* at 594. On appeal, this Court determined that the circuit court did not abuse its discretion in refusing to forfeit the defendant's vehicle. Although not directly on point, *Shirley* stands for the proposition that a defendant may voluntarily agree to forfeit personal property without a hearing, but a hearing is required when there is no such agreement. *See Dailey v. Commonwealth*, No. 2004-CA-002507-MR, 2005 WL 3249917, at \*1 (Ky. App. Dec. 2, 2005).

Here, the record makes clear Lee was charged with crimes in connection with property seized from his residence, and police seized \$3,500 from his residence. The forfeiture order states Lee forfeited \$3,500. The record did not include any information regarding the search of Lee's business when Lee entered his plea, and the record indicates the Commonwealth was unaware of this search

until Lee filed his motion for the return of money seized from his business.

Therefore, the plea agreement was silent as to the money seized from Lee's business, so he is entitled to a forfeiture hearing.

KRS 218A.410 and KRS 218A.460 define property subject to forfeiture, burdens of proof, and forfeiture procedures. Under KRS 218A.410(1)(j) money is subject to forfeiture under the following conditions:

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 or her to have been committed or omitted without his or her knowledge or consent.

The statute also provides applicable burdens of proof:

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[.]

*Id.*

Additionally, KRS 218A.460 sets forth procedural requirements in

pertinent part:

(2) Following conviction of a defendant for any violation of this chapter, the court shall conduct an ancillary hearing to forfeit property if requested by any party other than the defendant or Commonwealth. The Commonwealth's attorney, or county attorney if the proceeding is in District Court, shall initiate the hearing by filing a motion requesting entry of a final order of forfeiture upon proof that the property was being used in violation of the provisions of this chapter. The final order of forfeiture by the court shall perfect in the Commonwealth or appropriate law enforcement agency, as provided in KRS 218A.420, right, title, and interest in and to the property. The Commonwealth may transfer any real property so forfeited by deed of general warranty.

...

(4) Unless otherwise expressly provided in KRS 218A.410, the burden shall be upon claimant to property to prove by preponderance of the evidence that it is not subject to forfeiture.

Although the record indicates Lee was not charged and convicted of a crime in connection with the property seized from his business, the property may still be subject to forfeiture. “[N]othing in the forfeiture statute requires criminal conviction of the person whose property is sought to be forfeited. It is sufficient under KRS 218A.410(h) and (j) to show a nexus between the property sought to be forfeited and its use to facilitate violation of the Controlled Substances Act, KRS

218A.” *Osborne v. Commonwealth*, 839 S.W.2d 281, 283 (Ky. 1992) (citation omitted).

On remand, the Commonwealth bears the initial burden of proof and must make a *prima facie* case by showing “slight evidence of traceability.” *Gritton v. Commonwealth*, 477 S.W.3d 603, 605 (Ky. App. 2015) (quoting *Smith v. Commonwealth*, 339 S.W.3d 485, 487 (Ky. App. 2010)). This means that the Commonwealth must “produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction.” *Id.* It is sufficient for the Commonwealth to prove “the currency sought to be forfeited was found in close proximity . . . . If the Commonwealth establishes its *prima facie* case, the burden is then on the defendant to rebut this presumption by clear and convincing evidence.” *Id.*

Because the plea agreement was silent as to the \$2210 seized from Lee’s business, he is entitled to a forfeiture hearing. For the foregoing reasons, we reverse the December 5, 2019 order of the Jefferson Circuit Court and remand for a forfeiture hearing as described in this opinion.

ALL CONCUR.



BRIEFS FOR APPELLANT:

Stephen P. Ryan  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron  
Attorney General of Kentucky

Aspen Roberts  
Assistant Attorney General  
Frankfort, Kentucky