

LETTER OPINION
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COMMITTEE ON OPINIONS

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Re: State v. 2005 Audi, Vin. WAUDT74F15N054334
Docket No. UNN-DC-3119-13

Dear Counsel,

The question presented by this civil forfeiture case is whether the State has proven at trial that the 2005 Audi, seized on December 9, 2012, following the arrest of its owner, is substantially and directly related to an indictable offense, either present or to be committed at some unidentified date in the future. Specifically, it appears from the trial and arguments advanced by the State that the present crime alleged was the possession of a

controlled dangerous substance and that the future crimes to be committed would be possession with the intent to distribute a controlled dangerous substance and armed robbery. After considering all of the credible evidence adduced during the trial, the Court concludes that the State has failed to prove that it is more probable than not that a substantial and direct nexus existed between the 2005 Audi and either a present or future crime. Accordingly, the Court must enter judgment in favor of the Defendant and order that the seized 2005 Audi be returned to its owner, Marcer Mangual.

Facts

This matter was tried without a jury on June 24, 2013. Just prior to closing arguments, the Court advised counsel in detail of its understanding of the facts and asked counsel to advise the Court of any misstatements or misunderstandings. Counsel for the State and defense counsel both agreed that the Court had captured the facts accurately. As such, the facts underlying the Court's decision are not controverted. Those facts are set forth below.

According to the State's first witness, Officer Matthew Hopkins, he was on duty as a member of the Roselle Park Police Department on December 9, 2012 when shortly before 10:00 a.m. he stopped a black Audi being driven by defendant Mangual because the automobile had illegally

tinted windows. The stop occurred in Roselle Park, New Jersey on the north-bound entrance ramp to the Garden State Parkway. Officer Hopkins parked his vehicle directly behind the Audi on the entrance ramp. At the time of the stop, Officer Hopkins had been a member of the Roselle Park Police Department for several months. He had been previously employed by the Union County Sherriff's Office for about three years.

Officer Hopkins approached the Audi and asked Mangual to produce his license, registration and insurance documentation. While speaking with Mangual, Officer Hopkins noticed that Mangual's hands were shaking and his voice was cracking. Mangual told Officer Hopkins that he had just left his girlfriend's apartment in Roselle Park and was heading to work in Newark. According to a computer search of the Division of Motor Vehicle records, Mangual's license was suspended and his insurance was no longer in force. Officer Hopkins called for backup and Officer Kevin Florczak, also of the Roselle Police Department, responded and parked his vehicle behind Officer Hopkins' vehicle which, in turn, caused a traffic obstruction on the ramp to the Parkway.

Both officers then approached the vehicle, with Officer Hopkins going to the driver-side window and Officer Florczak to the passenger-side window. Both officers smelled the odor of burnt marijuana coming from

inside the passenger compartment and both saw, in plain view on the front seat, a Dutch Master cigar, which they knew was commonly used to smoke marijuana. As a result, Mangual was asked to exit the vehicle and cooperated. While standing outside, Mangual appeared nervous and could not remain still. Because he kept putting his hand in his pocket, Officer Hopkins patted Mangual down to make sure that he was not armed with a weapon. He was not. Both officers testified that Mangual was wearing "bulky" layered clothing, even though it was a "warm day" for December.

Officer Hopkins asked Mangual if he had any illegal items in the Audi. According to Officer Hopkins, Mangual said, "No. You can search it." Mangual was then advised of his right to refuse a search. Mangual said that he understood and provided verbal consent to search the Audi. Officer Hopkins testified that he did not have any "consent to search" forms in his police vehicle. There were some discrepancies in the testimony about whether Officer Florczak assisted in the search in any way. He said he did not recall. He did remember standing at the rear of the Audi with Mangual while Officer Hopkins searched the trunk of the vehicle.

On or around the front seat of the 2005 Audi, Officer Hopkins located a couple of cell phones and two packages of suboxone film (identified as a prescription drug used to wean addicts off opiod drugs). Mangual testified

that he did not have a prescription for the suboxone film. Officer Hopkins located an "authentic looking" plastic automatic hand gun under the driver's side floor mat. The "orange safety tip" identifying the gun as a toy had been broken off. As he continued his search of the passenger compartment, Officer Hopkins found three more packets of suboxone film, two folding knives and another cell phone in the center console. He also found another "authentic looking" toy gun under the driver's seat (the "orange safety tip" was also broken off from this toy gun). Two other cell phones and \$28.00 in cash ("small bills") were located on or around the front passenger seat. Finally, some small bags containing crack cocaine were found under the loose gearshift cover, as well as 13 empty bags that were found in the passenger compartment.

During a search of the trunk, Officer Hopkins found what he described as a "ski mask" and a NJ license plate that was not for the Audi. He did not recall seeing anything else in the trunk.

Following the search, Officer Hopkins spoke by phone with an on-call Assistant Prosecutor and Mangual was placed under arrest for possession of crack cocaine, possession with intent to distribute, and possession of illegal knives and handguns. He also received four traffic tickets, but did not receive one for possession of illegal/fictitious license plates, as the plate

located in the trunk of the 2005 Audi was related to another vehicle owned by Mangual.

On cross examination, Officer Hopkins testified that he had been on the police force for approximately only six months when he made the stop/arrest and had no previous experience with drug investigations. He admitted that he had never been qualified as a drug or weapons expert. He conceded that none of the cell phones found in the car were tested for operability. Officer Hopkins did not deny that other toys were found inside the Audi, but candidly admitted that he simply did not recall. He also candidly admitted that his memory of the stop was poor and that he could not recall any details related to the events surrounding the stop/search without referring to his report of the episode.

Officer Florczak testified that a State Trooper also arrived at the scene for "safety reasons" only in light of the fact that the stop was on a Parkway entrance ramp. Officer Florczak could not recall the Trooper's name and the name was not included in any police report. He testified that he did not recall participating in the search of the Audi, but could not specifically rule out that possibility. Officer Florczak identified the "ski mask" in the trunk as a plastic hockey mask. He also testified that he did not recall seeing any toys in the Audi passenger compartment or trunk, but could not say for certain

that other toys were not in the vehicle. Officer Florczak also candidly admitted that he did not have a vivid recollection of the stop/search and asked frequently to review his report of the incident during his testimony.

A photograph showing the "mask", the toy guns and the Audi was admitted into evidence. Also admitted into evidence were the toy handguns and the "masks" themselves, as well as the folding knives, the license plate found in the trunk, and the five cell phones that were found during the search. Finally, the traffic citations and lab report identifying the substance found in the 13 small bags to be crack cocaine were both admitted into evidence.

Mangual testified that on the morning of his arrest, he was leaving his girlfriend's residence in Roselle Park and headed to Newark, where he worked as an unlicensed tattoo artist. Although he had previously worked at a business called "Who's Next?", he testified that since December 2012, he had been working in patron's residences, as the store had closed down. Mangual testified that he lived with his girlfriend for about three years and that she had a 10 year old child that he considered to be his "stepson". He added that he also had a five year old son in Newark.

According to Mangual, the boys played with the toy handguns and they had knocked the orange safety tips off the guns. As to the cell phones

recovered from the 2005 Audi, Mangual advised that four of them did not work and his sons used them to play "pretend" games. The single cell phone in the Audi that was found to be operational was owned by Mangual. It was a Samsung with T-Mobile service. Mangual testified that there were actually two masks in the Audi trunk, which he called "Jason, Friday the 13th" Halloween masks that he purchased for and were used by his "sons". According to Mangual, the car was full of other "Spiderman toys and bats and little gloves". With regard to the folding knives, Mangual testified that he used them to open boxes at work. Finally, he testified that the license plate found in the trunk was registered to him and noted that he was not charged with possession of fictitious plates.

In terms of the crack cocaine located inside the Audi passenger compartment, Mangual testified that all 13 bags were for personal use, as he had been an addict for five years and could easily smoke that much in a day. He explained that the crack cocaine would be mixed with marijuana and smoked in the Dutch Boy cigar by carving out a section and inserting the mixture. According to Mangual, at that point in his life he would spend whatever money he earned on crack cocaine and would "use \$50.00 worth a day or \$200.00 worth a day, depending on how much money he earned". He said that although he helped with his "sons" financially, he was essentially

living off of the earnings of his girlfriend, who had a good job that paid “very well”.

On cross-examination, Mangual testified that he had pled guilty to “robbery of the 3rd degree” in New York in 2006, but had no other criminal convictions. When asked where he got the money to purchase the used Mercedes Benz that he was now driving, Mangual testified that his father had loaned him the money to purchase the automobile.

It is from within the context these uncontroverted predicate facts that the Court must determine whether the State has met its burden of proving, by a preponderance of the evidence, that the 2005 Audi was substantially and directly related to an indictable offense, either present or to be committed at some unidentified date in the future. Unless the State satisfies that burden of proof, the forfeiture application must fail.

Discussion

Under forfeiture law, it is the property itself that is considered the offender and, therefore, a civil forfeiture proceeding is brought not against the owner or possessor of the property, but as an *in rem* action against the property. It is well settled that the theory of civil forfeiture is “based on the misuse of the property rather than resulting from the commission of an

offense by its owner or user.” *State v. One 1986 Subaru*, 230 N.J. Super. 451, 455 (App. Div. 1989), *aff'd in part, rev'd in part*, 120 N.J. 310 (1990).

The Code of Criminal Justice authorizes forfeiture of property to the State under certain defined circumstances. *See N.J.S.A. 2C:64-1-9*. The Code recognizes a distinction between *prima facie* contraband, which includes controlled dangerous substances and firearms unlawfully possessed, carried, acquired or used (*N.J.S.A. 2C:64-1a(1)*), and non-*prima facie* contraband, also known as derivative contraband, which is itself innocent in nature, but has been used or is intended to be used in furtherance of an unlawful activity. *N.J.S.A. 2C:64-1a(2)-(4)*. The crack cocaine recovered for the automobile falls into the *prima facie* contraband category. The 2005 Audi that the State seized from Mangual is unquestionably derivative contraband.

To accomplish forfeiture of derivative contraband, the State must bring a civil action against the property sought to be forfeited. *N.J.S.A. 2C:64-3a*. In that action, the State must prove, by a preponderance of the evidence, that the property to be forfeited was directly and substantially connected to unlawful activity. *See Ben Ali v. Towe*, 30 N.J. Super. 19, 24 (App. Div. 1954). The “unlawful activity” must be an indictable crime. *State v. One (1) 1979 Chevrolet Camaro Z-28*, 202 N.J. Super. 222, 229

(App. Div. 1985). However, the statute does not require that anyone be convicted of that crime. *N.J.S.A. 2C:64-4*; see *State v. One 1988 Honda Prelude*, 252 *N.J. Super.* 312, 315 (App. Div. 1991). Significantly, the Legislature has specified that property is only subject to forfeiture if it is proven that it has been or is intended to be used in furtherance of unlawful activity or as an integral part of unlawful activity. *N.J.S.A. 2C:64-1a(2)-(3)*. As such, the unlawful activity can be a past crime or an intended, but *in futuro* offense.

Although the burden of proof is at the bottom rung of the proof scale, it is beyond cavil that forfeiture statutes are generally disfavored in the law. *State v. Seven Thousand Dollars*, 136 *N.J.* 223, 238 (1994) (citing *State v. 1979 Pontiac Trans Am*, 98 *N.J.* 474, 481 (1985)); *One (1) 1979 Chevrolet Camaro Z-28*, *supra*, 202 *N.J. Super.* at 229; *State v. One (1) Ford Van Econoline*, 154 *N.J. Super.* 326, 331 (App. Div. 1977), *certif. denied*, 77 *N.J.* 474, (1978)). As such, the Supreme Court of New Jersey has required that, despite the lowered burden of proof, “courts strictly construe forfeiture statutes against the State and ““in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation.””” *Seven Thousand Dollars*, *supra* 136 *N.J.* at 238 (quoting *1979 Pontiac Trans Am*, *supra*, 98 *N.J.* at 481) (quoting in turn *One (1) Ford*

Van Econoline, supra, 154 N.J. Super. at 332 (quoting in turn 37 C.J.S. *Forfeitures* § 4b (1943)).

To be subject to forfeiture, the seized property must be used “in furtherance of,” “to facilitate the perpetration of,” or as “an integral part of” the illegal act. N.J.S.A. 2C:64-1a. The Supreme Court has determined that the words of the statute require a direct causal nexus between the use of the property and the crime. *One 1986 Subaru, supra*, 120 N.J. at 320. The nexus condition requires proof of a sense of dependency and, as such, merely a casual relationship is not sufficient for the State to meet its burden. The State is required to prove that the connection is both “proximate and substantial”. *Seven Thousand Dollars*, 136 N.J. at 235. The reviewing court is required “focus on the depth of the connection between the crime and the property rather than on the value of the penalty in relation to the offense.” *Id.* at 236 (citing *Austin v. United States*, 509 U.S. 602, 621 (1993) (Scalia, Justice, concurring in part and concurring in the judgment.)).

Finding a direct causal relationship between the property sought to be forfeited and a crime is necessarily a fact-sensitive determination which requires a court to review the totality of the circumstances surrounding the seizure of the property in question. Although previous decisions provide guidance, in light of the myriad of potential factual scenarios surrounding

each forfeiture, a trial court must determine on a “case-by-case basis whether the State has established, by a preponderance of the evidence, that the seized property is directly connected to unlawful activity.” *Seven Thousand Dollars, supra* 136 N.J. at 238. Once the State demonstrates that the derivative contraband has a direct causal connection to unlawful activity, the burden shifts to the person challenging the forfeiture, the “owner”, to show that the seized property was not used for unlawful activity. *Id.* If the owner presents sufficient credible evidence to make that showing, the forfeiture must be denied. *Id.*

With regard to the State’s argument that the 2005 Audi was being used in the furtherance of an unlawful activity at the time of the stop by virtue of the fact that its driver, Mangual, was in possession of 13 small bags of crack cocaine, the Court concludes that the State has not met its burden of proof. Here, the State did not produce any evidence that, by merely possessing the crack cocaine while driving the Audi, there was a direct nexus between the vehicle and the violation of any drug law. Mangual testified that the crack cocaine was his and that it was used for personal consumption only. Each bag was valued at only \$10.00 and Mangual stated that he could easily consume that much and more himself in one day. The State did not produce any evidence to refute that testimony either factually

or by way of expert testimony. As such, the Court is of the opinion that this matter falls within the holdings of *State v. One (1) 1979 Chevrolet Camaro Z-28, supra 202 N.J. Super.* at 231 (Order requiring return of vehicle affirmed despite driver's admission to possession of methamphetamine with intent to distribute) and *Ben Ali v. Towe, supra 30 N.J. Super.* at 24 (Forfeiture denied despite the fact that driver was in possession of 30 packages of cocaine) :

...[W]e hardly think the Legislature in passing a confiscatory statute "for the repression of the *crime*" sought the forfeiture of vehicles, the use of which had no relation whatever with the crime, save a mere coincidence in point of time. To support such a construction of the statute, its terms would have to be clearer than they are.

We thus are brought to the view that the prepositional words in the phrase, "used in, for or in connection with the violation," all refer to a tie of causality or dependency; they represent varying degrees of proximity in the relationship between the use of the car and the violation. The car here, so far as the record goes, did not, in the slightest degree, aid Green in committing the crime; the crime was not in any measure dependent on the car. The prosecutor therefore has not made out his defense.

Id. at 24.

Indeed, if the State could prevail under the present crime theory in this case, then virtually any stop in which illegal drugs were found in the vehicle would lead to an automatic forfeiture of the vehicle. The Court finds it unlikely that the Legislature intended such an interpretation of the statutory language. Otherwise, for example, in *Seven Thousand Dollars*, the Supreme

Court would have required forfeiture of the vehicle used to transport the contraband.

With regard to the State's argument that the 2005 Audi should be forfeited because the facts proved that the vehicle might be used in connection with a future crime, the Court finds that the State has not met its burden. Essentially, the State argues that the presence of the 13 bags of crack cocaine, the replica toy weapons with the missing orange safety caps, the "hockey mask", the five cell phones and the single license plate found in the trunk create a sufficient nexus between the 2005 Audi and "an as-yet-uncommitted criminal activity" so as to justify a forfeiture. In light of the holding and guidance provided by the New Jersey Supreme Court in *Seven Thousand Dollars, supra*, 136 N.J. 223, this Court is constrained to disagree:

When the crime to which the property is allegedly connected is a crime not yet committed, concerns about the penal aspects of civil forfeiture are heightened because the property owner is punished for a crime that he or she might have later decided not to commit.

Id. at 239.

Here, the trial evidence is insufficient to prove that Mangual had the intention of committing any crime in the future. The crack cocaine in the Audi was, according to Mangual, for personal consumption. The State did not provide any evidence that the amount of crack cocaine or the way it was packaged was evidence of future drug transactions. The suboxone was not

evidence of drug trafficking, but rather of an addict trying to deal with his addiction. The cell phones were never checked for operability and there was no evidence presented that multiple cell phones are associated with illegal drug activity. There were no notes or records of any drug transactions inside the 2005 Audi. The \$28.00 that was seized during the search is not indicative of drug trafficking, present or future.

The State did not offer any expert testimony to link the vehicle of the contents of the vehicle to future drug transactions. As was the case in *Seven Thousand Dollars*, the State was unable to prove that Mangual "had been involved in or suspected of illegal drug activity prior to the stop, nor could it show with any specificity a planned drug transaction to be consummated in the future". 136 *N.J.* at 240.

With respect to the authentic toy guns without the orange safety tips, the plastics masks, and the single license plate found in the 2005 Audi, Mangual offered a plausible explanation for those items, as well as the folding knives and multiple cell phones. His "sons" played with toy guns and had knocked the safety tips off; the "Friday the 13th" replica masks were presents that his "sons" wore as Halloween disguises; the cell phones were also used as toys; and the folding knives were used to open boxes at work. Mangual also testified that the vehicle contained

Spiderman toys and “bats and little gloves”, all used by his “sons”. The officers both testified candidly that they did not recall seeing other toys in the vehicle, but they would not deny their existence during the stop and search. The lone license plate found in the trunk was for a car registered to Mangual and was not a fictitious plate.

Conclusion

Accordingly, for the reasons set forth above, the Court finds that the State has not met its burden. After considering all of the credible evidence adduced during the trial, the Court concludes that the State has failed to prove that it is more probable than not that there was the required substantial and direct nexus between the 2005 Audi and either a present or future crime. Accordingly, the Court must enter judgment in favor of the defendant and order that the seized 2005 Audi be returned to its owner, Marcer Mangual.

Very truly yours,

ALAN G. LESNEWICH, J.S.C.

AGL/pfk