

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002474-MR  
AND  
NO. 2006-CA-002477-MR  
AND  
NO. 2006-CA-002478-MR

CARROLL RICKARD

APPELLANT

APPEALS FROM HOPKINS CIRCUIT COURT  
v. HONORABLE SUSAN WESLEY MCCLURE, JUDGE  
ACTION NOS. 05-CR-00131, 05-CR-00367 AND 06-CR-00110

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART, AND REMANDING

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BEFORE: ACREE, VANMETER, AND WINE, JUDGES.

WINE, JUDGE: Carroll Rickard appeals from an order of the Hopkins Circuit Court ordering forfeiture of vehicles, currency, coins and other items seized following his arrests for trafficking in controlled substances. He argues that the

Commonwealth failed to present minimal evidence of a nexus between these items and his illegal activity. We agree with Rickard that the Commonwealth failed to show that Rickard's use of the vehicles was directly related to his trafficking activities. With respect to the currency, coins, and cash equivalents, we find that the Commonwealth presented sufficient evidence to raise a presumption of forfeiture. However, Rickard presented uncontested evidence showing that he obtained the collectible coins and currency from legal sources. Therefore, the trial court clearly erred by ordering forfeiture of these items. But, the trial court did not clearly err in finding that Rickard failed to rebut the presumption of forfeiture with respect to the other currency, coin and cash equivalents. Hence, we affirm in part, reverse in part, and remand for entry of a new forfeiture order.

The charges underlying this action arise from three separate searches of Rickard's property: February 18, 2005, October 26, 2005, and March 20, 2006, respectively. The searches and subsequent arrests all involved Rickard's actions in selling his prescription medications. Following the February 18, 2005, search, a Hopkins County grand jury returned an indictment charging Rickard with two counts of second-degree trafficking in a controlled substance (Lortab), possession of a handgun by a convicted felon, and being a persistent felony offender in the second degree (PFO II). Indictment No. 05-CR-00131. Following the October 26, 2005, search, the grand jury returned an indictment charging Rickard with first-degree trafficking in a controlled substance (Dilaudid) with weapon enhancement, and second-degree trafficking in a controlled substance (Lortab). Indictment No.

05-CR-00367. And following the March 20, 2006, search, the grand jury returned an indictment charging Rickard with first-degree trafficking in a controlled substance (Dilaudid), second-degree trafficking in a controlled substance (Lortab), and tampering with physical evidence. Indictment No. 06-CR-00110.

The charges were subsequently consolidated for trial. On September 18, 2006, Rickard accepted the Commonwealth's offer to plead guilty to four counts of second-degree trafficking (Lortab), two counts of first-degree trafficking (Dilaudid), possession of a firearm by a convicted felon, and tampering with physical evidence. In accord with the Commonwealth's recommendation, the trial court sentenced Rickard to a total of five years' imprisonment.

During the searches which led to Rickard's arrests, the police seized drugs, vehicles, money (currency and coins), gift cards, and other personal property from Rickard's residence. As part of his guilty plea, Rickard agreed that certain items were subject to forfeiture by the Commonwealth. The parties also agreed that some items were the property of Rickard's son and should be returned. And the Commonwealth agreed that certain other items were personal in nature and not subject to forfeiture. However, the parties disputed the appropriate disposition of certain items. In particular, two automobiles, cash, coins (change and foreign and collectible coins), stamps, and a number of store gift cards. After considering the briefs and arguments of counsel, the trial court concluded that all of the disputed items were subject to forfeiture. Rickard filed notices of appeal in

each of the actions below, and his appeals have been consolidated before this Court.

As an initial matter, we agree with Rickard that the two vehicles were not subject to forfeiture under the facts of this case. Kentucky Revised Statutes (“KRS”) 218A.410(h) provides for forfeiture of “[a]ll conveyances, including . . . vehicles, . . . which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in paragraph (e) or (f) of this subsection.” Subsection (e) provides for forfeiture of “[a]ll controlled substances *which have been manufactured, distributed, dispensed, possessed, being held, or acquired in violation of this chapter.*” (*Emphasis added*).

The trial court found that Rickard had used the two vehicles “to transport himself to the pharmacies where the controlled substances were purchased and to transport the controlled substances after the purchases (from the pharmacies).” The trial court and the Commonwealth read the statute as allowing forfeiture of vehicles used to transport any controlled substances. However, the clear language of the statute allows forfeiture only of vehicles used to transport controlled substances “which have been manufactured, distributed, dispensed, possessed, being held, or acquired in violation of this chapter.” The Commonwealth presented no evidence that Rickard acquired the prescription medications illegally. Furthermore, there was no evidence that he used the vehicles to transport the medications for illegal sale or distribution. While the Commonwealth argues that Rickard used the vehicles to facilitate the drug

transactions that occurred after he legally acquired the prescriptions, this use of the vehicles was too attenuated from the later criminal acts to warrant forfeiture. Therefore, Rickard's use of the automobiles to drive to and from the pharmacies where he legally obtained the prescriptions is not a basis for forfeiture of the automobiles.

The cash and "cash equivalents" present a more complex issue. KRS 218A.410(j) permits forfeiture of "all proceeds . . . traceable to the exchange, and all moneys . . . used or intended to be used, to facilitate any violation of this chapter[.]" Subsection (j) further provides:

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 forfeited 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 all real property is forfeitable under this paragraph.

In *Osborne v. Commonwealth*, 839 S.W.2d 281 (Ky. 1992), the

Kentucky Supreme Court explained that this presumption does not arise until the Commonwealth presents evidence that the property subject to forfeiture is traceable to the exchange or intended violation.

The Commonwealth may meet its initial burden by producing slight evidence of traceability. 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. In practical application, the Commonwealth must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a *prima facie* case. Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade.

*Id.* at 284.

During each search, the police found large amounts of ordinary currency on or near Rickard's person: \$1,399.00 was seized during the first search; a total of \$5,493.96 was seized during the second search; and a total of \$1,785.00 was seized during the third search. We disagree with Rickard that all of the currency must be traceable to the exchange or intended violation. It is sufficient that some portion of the currency is traceable to the exchange or intended violation. *Id.* Furthermore, unlike in *Harbin v. Commonwealth*, 121 S.W.3d 191 (Ky. 2003), there was testimony that some of this money was found on Rickard's person along with the money from the controlled drug buys. The remaining money was found in close proximity to Rickard and the drugs. We conclude that this evidence was sufficient to raise the presumption that this money was subject to forfeiture.

Rickard also contends that some of this money came from his prior sales of real property and a car. However, his bank records show that the proceeds from the sale of the house were deposited in his account. And given the fungible nature of the currency and his repeated conduct of trafficking in prescription

medications, the trial court was not obligated to believe his testimony regarding the source of the money. Consequently, we agree with the trial court that the Commonwealth presented sufficient evidence to warrant forfeiture of this currency.

Likewise, we agree with the trial court that the ordinary coins were subject to forfeiture. During the first search, the police seized a jar of assorted pennies, two large containers of assorted change, a jar with \$48.00 in half-dollar coins, a canvas bag with \$75.00 in half-dollar coins, a canvas bag with \$125.00 in bagged quarters and \$38.00 in half-dollars, \$180.00 in rolled quarters, \$10.00 in rolled quarters, \$10.00 in rolled nickels, a box of 64 \$1.00 coins, a box of 124 \$1.00 coins, six \$1.00 coins, thirteen Susan B. Anthony dollar coins, and a Sacagawea gold dollar coin.<sup>1</sup> KRS 218A.410(j) permits forfeiture of all currency and coin found in close proximity to controlled substances. And while none of these coins were traced to a particular drug transaction, these coins are not sufficiently unique to be distinguishable from the currency. Furthermore, we cannot say that Rickard's testimony regarding the source of these coins was so overwhelming that the trial court was compelled to accept it. Consequently, the trial court did not clearly err by ordering these coins forfeited.

The collectible currency and coins are a different matter. During the first search, the police seized three commemorative coin sets, a \$20.00 gold coin,<sup>2</sup>

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<sup>1</sup> With respect to this coin, the word "gold" refers to color and not to metal content.

<sup>2</sup> With respect to this coin, the word "gold" refers to the metal content.

two 1985 coin sets, two U.S. proof sets, five Bicentennial coin sets, a \$1,000.00 bill in a plastic case, seven commemorative coins, seven old coins, and two U.S. proof coins sets. During the second search, the police seized two \$1,000.00 bills, one troy ounce silver coin, one coin ring and two foreign coins. KRS 218A.410(j) does not distinguish between ordinary currency and these types of currency and coins. However, their unique nature makes it easier to trace their origin.

Rickard and members of his family testified that he was a long-time coin and currency collector. There was also corroborated testimony that Rickard had collected silver coins since the 1960s and gold coins since the 1980s. Likewise, the coin sets and proof sets pre-date any period when Rickard was selling drugs. Moreover, there was no evidence that Rickard acquired these coins in exchange for drugs. Thus, to the extent these collectible coins were subject to a presumption of forfeiture by virtue of their proximity to the other currency and coins, we conclude that Rickard presented clear and convincing evidence to rebut that presumption.

Similarly, several witnesses testified that the \$1,000.00 bills were gifts from Rickard's sister. The Commonwealth suggested that Rickard could have exchanged drug proceeds for these bills. However, there was no evidence supporting this suggestion. Rather, the only evidence presented was that Rickard acquired one of the bills in the early 1990s, one in 1998, and the last in 2001. These bills are not commonly circulated and have more value as collector's items



than as currency.<sup>3</sup> Furthermore, there was no evidence that Rickard acquired these bills in exchange for drugs, or even that it is a known practice for such collectible currency to be exchanged for drugs. Under the circumstances, we conclude that Rickard presented clear and convincing evidence to rebut any presumption that these bills were subject to forfeiture.

Lastly, we reach the issue of the gift cards and other items. During the first search, the police seized an Electronic Benefit Transfer (EBT) card issued to Frankie Bivins, and a Lowe's gift card. During the second search, the police seized four Wal-Mart gift cards, one Cracker Barrel gift card, two Peebles gift cards, a Lowe's gift card, and seven lottery tickets. There was no evidence that these items were furnished to Rickard in exchange for controlled substances. However, Detective Mike Lantrip testified that EBT cards, store gift cards, and lottery tickets are commonly used in exchange for drugs.

Admittedly, the connection between these items and the illegal trafficking activity was tenuous. But since they are redeemable at face value, the trial court properly characterized them as "cash equivalents." Given the number of these items found near the scene of the trafficking and the expert testimony that these cards are commonly used to purchase drugs, we agree with the trial court that

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<sup>3</sup> On July 14, 1969, the United States Department of the Treasury and the Federal Reserve System announced that currency notes in denominations of \$500.00, \$1,000.00, \$5,000.00, and \$10,000.00 would be discontinued immediately due to lack of use. Although they were issued until 1969, they were last printed in 1945. These notes are legal tender and may be found in circulation today. However, most such notes still in circulation are in the hands of private numismatic dealers and collectors. Source: United States Bureau of Engraving and Printing, <http://www.moneyfactory.gov/section.cfm/5/61> (Accessed March 20, 2008).

the Commonwealth established that these items are subject to forfeiture. And unlike with the collectible coins, Rickard failed to present clear and convincing evidence that he legally acquired these cards and lottery tickets. Consequently, the trial court did not clearly err by ordering them forfeited.

Accordingly, the forfeiture order of the Hopkins Circuit Court is reversed with respect to the 1976 Chevrolet truck, the 1997 Cadillac automobile, the commemorative and proof coin sets, gold and silver coins, foreign coins, old or historic coins, the three \$1,000.00 bills, and the coin ring. These items or the proceeds therefrom shall be returned to Rickard or his designated representative. The forfeiture order with respect to all other currency, coins and items is affirmed. This matter is remanded to the Hopkins Circuit Court for entry of a new forfeiture order in accordance herewith.

ACREE, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS IN PART BY SEPARATE  
OPINION.

VANMETER, JUDGE, DISSENTING IN PART: I respectfully dissent from so much of the majority opinion as holds that Rickard's vehicles were not subject to forfeiture.

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