

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2011-CA-01516-COA

**OLIVIA D. JEFFERSON A/K/A OLIVIA
JEFFERSON**

APPELLANT

v.

CITY OF KOSCIUSKO, MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 09/02/2011
TRIAL JUDGE: HON. JOSEPH H. LOPER JR.
COURT FROM WHICH APPEALED: ATTALA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: ROSALIND HAYDEN JORDAN
ATTORNEY FOR APPELLEE: JOHN E. SHAW
NATURE OF THE CASE: CIVIL - OTHER
TRIAL COURT DISPOSITION: GRANTED FORFEITURE
DISPOSITION: REVERSED AND RENDERED: 04/09/2013
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE GRIFFIS, P.J., MAXWELL AND FAIR, JJ.

GRIFFIS, P.J., FOR THE COURT:

¶1. Olivia Jefferson appeals the forfeiture of her vehicle. Olivia's vehicle was seized after the arrest of her brother, Willie Joe Jefferson. Olivia raises four issues: (1) the forfeiture violated Mississippi Code Annotated section 41-29-153(a)(4)(D) (Rev. 2009); (2) the forfeiture hearing was premature because Willie's criminal action was still pending; (3) the forfeiture was inappropriate when the substance recovered from the vehicle was obtained through an unlawful search; and (4) the forfeiture violated the Excessive Fines Clause of the Mississippi Constitution. Finding reversible error, we reverse and render the circuit court's judgment.

FACTS

¶2. In October of 2008, Olivia purchased a Chevrolet Tahoe. Willie frequently drove the Tahoe. On January 20, 2011, Officer Jimmy Earl Evans Jr., with the Kosciusko Police Department, saw Willie driving the Tahoe and noticed the tag was expired. Officer Evans initiated a stop, and Willie pulled into the driveway of his residence. Willie got out, locked the door, and walked toward Officer Evans.

¶3. Officer Evans determined that Willie did not have a valid license and placed him under arrest for no license, no insurance, and an expired tag. Officer Evans placed Willie in the patrol car. Officer Herbert Dew then arrived. Officer Dew and Officer Evans searched the Tahoe. They found a bag of marihuana under the passenger seat.

¶4. Willie was charged with felony possession of marihuana under Mississippi Code Annotated section 41-29-139(c)(2)(C) (Rev. 2009). Officer Brice Cole seized and drove the Tahoe to the Kosciusko Police Department.

¶5. On January 21, 2011, Willie was served with a notice of intent to forfeit seized property. On February 16, 2011, the City of Kosciusko filed a complaint for forfeiture against Olivia and Willie. On March 28, 2011, Olivia filed her answer. The circuit court entered a default judgment against Willie on May 10, 2011.

¶6. On August 9, 2011, Willie was indicted for possession of more than thirty grams but less than 250 grams of marihuana under section 41-29-139(c)(2)(C).

¶7. On August 24, 2011, the circuit court held a hearing on the forfeiture complaint. Six law enforcement officers testified. The Mississippi Crime Laboratory stated in its report and at the hearing that the substance obtained during the search was 238.6 grams of marihuana.

¶8. The circuit court found that there was evidence that Olivia drove the Tahoe, and there was “no indication she had knowledge of her brother’s drug activity.” However, the circuit court found that Willie had dominion and control over the Tahoe such that Olivia was a mere “straw man,” and Willie was the true owner. By an order entered on September 6, 2011, the circuit court granted the forfeiture of Olivia’s Tahoe.

¶9. On September 28, 2011, in Willie’s criminal action, the circuit court held a hearing on Willie’s motion to suppress the marihuana. Willie argued that the search violated his Fourth Amendment rights. Officers Dew and Evans testified about the police department’s policy to search vehicles of any person under arrest. The circuit court held that the search of the Tahoe was an unlawful search. The circuit court granted Willie’s motion to suppress, and the criminal charges against Willie were dismissed with prejudice.

¶10. Olivia filed her notice of appeal on October 6, 2011.

STANDARD OF REVIEW

¶11. “The appropriate standard of review in forfeiture cases is the familiar substantial evidence/clearly erroneous test.” *Galloway v. City of New Albany*, 735 So. 2d 407, 410 (¶15) (Miss. 1999) (citation omitted). We “will not disturb a circuit court’s findings unless it has applied an erroneous legal standard to decide the question of fact.” *Id.* We review questions of law de novo.

ANALYSIS

Validity of Forfeiture

¶12. The City’s complaint for forfeiture claimed that the “2007 Chevrolet Tahoe . . . is subject to forfeiture under the provisions of section 41-29-153(a)(4) of the Mississippi Code

Annotated . . . having been used, or intended for use, to transport or to facilitate the transportation, sale, receipt, possession or concealment of controlled substances or property described in section 41-29-153(a)(2)” Mississippi Code Annotated section 41-29-153(a) (Rev. 2009), in relevant part, provides:

The following are subject to forfeiture:

- (1) All controlled substances which have been manufactured, distributed, dispensed or acquired in violation of this article or in violation of Article 5 of this chapter;
- (2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this article or in violation of Article 5 of this chapter;
- (3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2) of this subsection;
- (4) All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of property described in paragraph (1) or (2) of this subsection; however

.....

- D. A conveyance is not subject to forfeiture for a violation of section 41-29-139(c)(2)(A), (B) or (C)

The City’s complaint cites two subsections, 41-29-153(a)(2) and (4). The City, in this appeal, does not contend that subsection (a)(2) applies. Instead, the Tahoe is a vehicle and is specifically considered for forfeiture under section 41-29-153(a)(4).

¶13. Olivia argues the forfeiture was not valid under the forfeiture statute. She claims that

the property was excluded from forfeiture under section 41-29-153(a)(4)(D). Thus, the dispositive issue is the quantity of marihuana found when Willie was stopped and arrested.

Willie was indicted under section 41-29-139(c)(2)(C), which provides:

(2) Marihuana . . . in the following amounts shall be charged and sentenced as follows:

. . . .

(C) More than thirty (30) grams but less than two hundred fifty (250) grams may be fined not more than One Thousand Dollars (\$1,000.00), or confined in the county jail for not more than one (1) year, or both; or fined not more than Three Thousand Dollars (\$3,000.00), or imprisoned in the State Penitentiary for not more than three (3) years, or both

The Mississippi Crime Laboratory determined that the marihuana recovered from the vehicle in the search was 238.6 grams.

¶14. The City of Kosciusko argues that the “proper charge for this defendant for the possession of 238.6 grams of marihuana would be under 41-29-139(c)(2)(D),” which provides:

(2) Marihuana . . . in the following amounts shall be charged and sentenced as follows:

. . . .

(D) Two hundred fifty (250) grams but less than five hundred (500) grams, by imprisonment for not less than two (2) years nor more than eight (8) years and by a fine of not more than Fifty Thousand Dollars (\$50,000.00)

Miss. Code Ann. § 41-29-139 (c)(2)(D) (Rev. 2009). The City does not explain how or why the proper charge would be under subsection (c)(2)(D) instead of subsection (c)(2)(C). The City does not point to any evidence that would support its argument that Willie possessed

was more than 250 grams of marihuana when he was arrested and the vehicle was seized.

¶15. The trial court’s decision was based on *One Ford Mustang Convertible v. State ex rel. Clay County Sheriff’s Department*, 676 So. 2d 905, 906 (Miss. 1996), where the court determined that a “straw person” was not the owner of the automobile for the purpose of the innocent-owner defense in section 41-29-153(a)(4)(B). There, the controlled substance was cocaine, and section 41-29-139(c)(2)(C) was simply not applicable. The dissent cites this case as authority but does not explain how it applies to the case before us.

¶16. The forfeiture statute, section 41-29-153(a)(4)(D), expressly excludes the forfeiture of property based on a violation of section 41-29-139(c)(2)(C). Here, the indictment and the Mississippi Crime Laboratory’s report clearly establish that the amount of marihuana recovered in the search was 238.6 grams. Thus, the proper charge would be under section 41-29-139(c)(2)(C), and not under section 41-29-139(c)(2)(D). As a matter of law, the quantity of marihuana recovered and charged was statutorily excluded from forfeiture. Accordingly, we find as a matter of law that the circuit court erred when it granted the forfeiture. We reverse and render on this issue.

¶17. The dissent agrees with this analysis but goes much further to find: “However, the evidence supported that Olivia constituted a straw man owner over the course of several years and that the vehicle facilitated the ongoing sale, receipt, or possession of illegal controlled substances.” The dissent does not cite a statute or case that is authority for this proposition. Mississippi Code Annotated section 41-29-153 (Rev. 2009) only authorizes the forfeiture of property in certain circumstances. The statute does not allow for a forfeiture because law enforcement believes it *may* have been used in the “ongoing sale, receipt, or

possession of illegal controlled substances.” The statute provides for an exception when the amount of the controlled substance seized is less than 250 grams of marihuana. The dissent admits that this exception applies, yet wants to allow forfeiture based on some authority other than the relevant law. We respectfully disagree.

¶18. Because the first issue is dispositive, the remaining issues are moot.

¶19. THE JUDGMENT OF THE ATTALA COUNTY CIRCUIT COURT IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

LEE, C.J., IRVING, P.J., BARNES, ISHEE, ROBERTS, MAXWELL, FAIR AND JAMES, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

CARLTON, J., DISSENTING:

¶20. I respectfully dissent from the majority’s opinion in this case. Olivia Jefferson appeals the civil forfeiture of her vehicle. I would affirm the judgment of the trial court because the evidence in the record and the findings of the trial court reflect that the City met its burden to prove the allegations set forth in the complaint for civil forfeiture of the vehicle at issue. The record and the findings of the trial judge show Olivia knowingly served as a straw man for her brother who, while engaging in illegal drug activity, exercised dominion and control over the vehicle over the course of several years, using the vehicle for the facilitation of drug activity by the vehicle’s use in the transportation, sale, receipt, possession, or concealment of illegal controlled substances. I would therefore affirm the adjudged civil forfeiture. The subject of the forfeiture is the vehicle at issue, the red Chevrolet Tahoe, and the forfeiture complaint alleged the vehicle was used to engage in forbidden activity in violation of Mississippi Code Annotated section 41-29-153(a)(4) (Rev.

2009) for having been used, or intended for use, to transport or to facilitate the transportation, sale, receipt, possession, or concealment of controlled substances or property described in Mississippi Code Annotated section 41-29-153(a)(2) (Rev. 2009). As stated, the findings and judgment of the trial court, as well as the evidence in the record, show that the City met its burden to prove that the vehicle was used to engage in the prohibited uses, and Olivia failed to show that such use was without her consent.

¶21. The separate and distinct criminal proceedings reflect the State’s prosecution of Olivia’s brother for the quantity of marihuana he possessed on one particular occasion on January 20, 2011, upon being stopped for an expired tag. The State’s prosecution of him as an individual fails to impact the separate in rem proceeding against the vehicle for its use in the facilitation of forbidden criminal drug activities over the course of several years and its resulting forfeiture.¹ A civil forfeiture constitutes an in rem proceeding, and the action proceeds upon a legal fiction that the property itself is guilty of wrongdoing. In contrast, a criminal prosecution commences against a person rather than a thing.² The forfeiture before us consists of a civil in rem proceeding against a “thing,” a vehicle, and not a criminal prosecution against an individual to determine his or her guilt and imposition of punishment. The civil forfeiture proceedings are not dependent upon whether criminal charges proceed

¹ See *Smith v. State*, 716 So. 2d 1076, 1080-81 (¶¶24-30) (Miss. 1998); *Miss. Bureau of Narcotics v. Harrison Cnty.*, 623 So. 2d 267, 268-70 (Miss. 1993); *State ex rel. Miss. Bureau of Narcotics v. Lincoln Cnty.*, 605 So. 2d 802, 803-04 (Miss. 1992).

² See *State v. Fleming*, 726 So. 2d 113, 114-15 (¶7) (Miss. 1998); *Lincoln Cnty.*, 605 So. 2d at 803-04.

against an individual or the outcome of any such prosecution.³

¶22. Civil forfeiture proceedings and criminal prosecutions, resulting from a violation of our state's drug laws, constitute separate and distinct proceedings.⁴ Mississippi Code Annotated section 41-29-179(2) (Rev. 2009) sets forth the procedures and burden of proof applicable in civil forfeiture actions for property, including conveyances such as vehicles seized due to their use in the transport, facilitation of transportation, sale, possession, or concealment of illegal controlled substances as set forth in section 41-29-153. In this case, the City met its burden of proof to show by a preponderance of the evidence that the property forfeited, the red Tahoe vehicle, constituted a conveyance of property that was used or intended for use or in any manner facilitate the transport, sale, receipt, possession, or concealment of illegal controlled substances pursuant to section 41-29-153.

¶23. In civil forfeiture cases, the relevant question is whether, given all the evidence taken together, a rational trier of fact could have found that the funds were the products of or instrumentalities used in violations of the state's uniform controlled substance laws.⁵ Moreover, our civil forfeiture statutes place the burden on the individual claiming ownership to prove that he or she possessed no knowledge of and did not consent to the vehicle's, or any other conveyance's, use in any manner to facilitate the sale, transport, receipt, possession, or concealment of illegal controlled substances. The evidence in the record

³ See *Smith*, 716 So. 2d at 1080-81; *Harrison Cnty.*, 623 So. 2d at 268-70.

⁴ *Evans v. City of Aberdeen*, 926 So. 2d 181, 183 (¶5) (Miss. 2006); *Hickman v. State ex rel. Miss. Dep't of Pub. Safety*, 592 So. 2d 44, 46-48 (Miss. 1991).

⁵ See *Evans*, 926 So. 2d at 183 (¶5); *Hickman*, 592 So. 2d at 46.

shows that the state's narcotics task force received a tip from a confidential informant in 2009 that an African American male was selling drugs out of the vehicle at issue. The record provides ample evidence in support of the trial judge's findings that Olivia knowingly constituted nothing more than a "straw man owner" of the vehicle to avoid the potential of losing it in the event her brother was arrested, and that in addition to paying for the vehicle, her brother enjoyed actual ownership as reflected in his exercise of possession, dominion, and control over the vehicle. The evidence shows that with her brother's money, Olivia purchased the vehicle in October 2008 and that in 2009, the narcotics task force received a tip that a male was selling drugs out of that vehicle. The narcotics task force maintained surveillance on the activities of the vehicle from 2009 to January 2011 when Olivia's brother was arrested for having an expired tag. Sufficient evidence was presented to prove ongoing facilitation of drug activity by use of the vehicle for the transport, sale, possession, and concealment of illegal drugs as set forth in section 41-29-153(a)(1)-(2).

¶24. The majority finds that since the State indicted Olivia's brother for a violation of Mississippi Code Annotated section 41-29-139(c)(2)(C) (Supp. 2012) for the marijuana found in the Tahoe vehicle on the particular date of his arrest, January 20, 2011, then the City could not pursue a forfeiture of the vehicle due to the vehicle's facilitation of illegal drug transport, use, or possession. The majority concludes that section 41-29-153(a)(4)(D) (Rev. 2009) does not allow civil forfeitures for violations of Mississippi Code Annotated section

41-29-139(c)(2)(A),⁶ (B),⁷ or (C) (Supp. 2012).⁸ The majority correctly acknowledges that testimony reflects that at the particular time when Olivia's brother was arrested for having an expired tag, the amount of marijuana found in his possession was 238.6 grams. However, the evidence supported that Olivia constituted a straw man owner over the course of several years and that the vehicle facilitated ongoing sale, receipt, or possession of illegal controlled substances.

¶25. The record shows that Olivia's brother gave her \$27,000 to purchase the vehicle in 2008 and then later bought her another vehicle. Olivia testified that the vehicle at issue was garaged in Attala County, where her brother lived. The evidence also showed, and the trial judge found, that Olivia possessed a limited income with support from Supplemental Security Income and food stamps, and that after expenses, little remained. The trial court found that even though she possessed limited income, Olivia claimed to have purchased rims and big tires for the vehicle for \$3,700 and to have paid the insurance on the vehicle. The record shows that Olivia claimed to own two vehicles her brother gave her money to purchase, and she claimed to pay the insurance on both. She also testified that her brother gave her money periodically.

¶26. The trial court found that the car was issued a tag from Attala County. The evidence in the record shows that the address provided for the vehicle tag was the address of Olivia's

⁶ Mere possession of thirty grams or less of marijuana by an individual on one occasion. Possession on different occasions, or dates, would be charged separately.

⁷ Mere possession by an operator of a vehicle of one to thirty grams on one occasion.

⁸ Mere possession by an individual of more than thirty grams but less than 250 grams on one occasion.

brother, not Olivia, and the tag was issued from Attala County, where Olivia's brother lived, rather than Holmes County, where Olivia resided. The evidence and the trial court's findings also show that Olivia's brother engaged a repairman on two occasions to work on the vehicle and to change the rims. Olivia claimed she painted the vehicle its current bright red color after she bought the vehicle with her brother's money.

¶27. Significantly to the issue in this case, eight different law enforcement officers testified that they had seen an African American male driving the vehicle from 2009 to the time of the seizure, but they had never seen a female driving the vehicle. The testimony also showed that the vehicle had been previously placed under surveillance due to a tip that a male was selling drugs out of the vehicle. The trial court also found that the testimony showed that Olivia's brother claimed to be the owner of the vehicle on two distinct occasions. On one occasion, he claimed ownership when reporting damage from vandalism occurring at the Lexington Christmas parade to the chief of police. Olivia's brother also claimed to be the owner of the vehicle when an officer stopped him for an expired tag, giving rise to the sequence of events leading to the forfeiture in this case.

¶28. After reviewing the evidence, the trial court found that Olivia constituted a straw man "owner" who was attempting to claim ownership in the event of a future forfeiture.⁹ More specifically, and with respect to her credibility as to ownership, the trial court found that

⁹ See *One Ford Mustang Convertible v. State ex rel. Clay Cnty. Sheriff's Dep't*, 676 So. 2d 905, 907-08 (Miss. 1996) (straw man not owner of automobile for purposes of innocent owner defense to forfeiture); *Parcel Real Prop. v. City of Jackson*, 664 So. 2d 194, 200 (Miss. 1995) (finding that property owners must do "all that is reasonably expected to prevent the proscribed use of the property" and explaining that "reasonable affirmative conduct," not heroics, must be exercised to prevent the property from being used to facilitate illegal drug transactions).

Olivia knowingly placed the vehicle in her name so that she could claim ownership if and when her brother was arrested, and the vehicle would not be lost. Olivia failed to rebut the evidence of her brother's dominion, control and actual ownership of the vehicle for illegal drug activities, and the trial court properly found that the evidence showed that Olivia's brother actually constituted the individual who exercised possession, dominion, and control over the vehicle.

¶29. Based on the foregoing, I respectfully dissent.