



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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RETIRED JUDGES

May 24, 2019

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*Re: Commonwealth v. One 2016 Chevrolet Tahoe and [Owner]*¹
Case No. CL-2018-3474

Dear Counsel:

This case requires the Court to determine whether the 8th Amendment Excessive Fines Clause and the 14th Amendment Due Process Clause prohibit the Commonwealth from claiming forfeiture of a vehicle worth \$53,000 that was used in the unlawful distribution of 2.72 grams of cocaine with a street-value of \$200.

Procedural Background

This matter came before the Court on February 21, 2019, for trial on an information seeking civil forfeiture of the Owner's 2016 Chevrolet Tahoe pursuant to Code § 19.2-386.22. At the time of trial, the Owner was awaiting sentencing before another judge of

¹ The name of the individual owner of the vehicle, hereafter "the Owner," is not used in order to protect the identity of an investigative source.

OPINION LETTER

this Court after pleading guilty to the offense of distribution of cocaine in violation of Code § 18.2-248, which was the predicate for the civil forfeiture. After taking evidence in the forfeiture case, the Court recessed the trial to allow the other judge to consider the Owner's accommodation defense and to impose sentence in the criminal case. When that judge became unavailable, the criminal matter was assigned to the undersigned. After a hearing in the criminal case, the Court rejected the Owner's accommodation defense, and imposed a suspended sentence of five years' imprisonment and ordered the Owner to perform 100 hours of community service. This sentence was consistent with the sentencing guidelines' recommendation for imposition of a sentence alternative to incarceration. With the criminal conviction now final, the civil forfeiture matter is ripe for decision. For the reasons explained below, the Court holds that forfeiture of this vehicle would be grossly disproportional to the crime committed and therefore would violate the 8th and 14th Amendments to the United States Constitution.

Factual Background

Based on the evidence presented at the February 21, 2019 hearing, the Court makes the following findings of fact: In June 2016, the Owner purchased the subject vehicle new from a dealer for approximately \$66,000. The Owner did not finance the purchase, instead using funds from her investment account to buy the vehicle. Therefore, the vehicle does not secure any indebtedness and is not the subject of any liens.

In January 2018, the Owner received a call from her ex-husband in which he stated that he had run into an old friend of theirs named "Moe" who wanted to "hang out" with them. The Owner divorced her ex-husband nearly 20 years ago, but the two have maintained a close and friendly relationship. The ex-husband explained in a later call that "Moe" was looking to buy cocaine and that "Moe" would call her directly. The Owner's ex-husband made these calls as part of his work as a paid confidential informant for local and federal law enforcement officers targeting illegal drug activity. "Moe," in fact, was not an old friend of the Owner and her ex-husband. Rather, "Moe" was Fairfax County Police Detective E. R. Gay, working in an undercover capacity.

"Moe" called the Owner several times in January 2018 and asked if she knew anyone who could provide cocaine. Each time, the Owner said that she did not. During one such call, the Owner was with a friend who overheard "Moe" asking about buying cocaine. The Owner's friend stated that he could provide it, and the Owner had her friend speak directly to "Moe." After additional communications, the Owner agreed to use her money to purchase \$200 of cocaine from her friend and then deliver the cocaine to "Moe" at a nearby shopping center in exchange for reimbursement of the \$200. Upon agreeing to this arrangement, the Owner drove her vehicle to the bank, obtained \$200 and then

drove to her friend's house where the Owner purchased the 2.72 grams of cocaine. The Owner drove back to her home with the cocaine and then later drove to a nearby shopping center where she had arranged to meet "Moe." Once at the shopping center, the Owner exited her vehicle, provided the cocaine to "Moe" and received from him \$200. The Owner then drove a short distance to a bank located within the shopping center and used the drive-thru teller or ATM to deposit the \$200 into her bank account. "Moe" contacted the Owner several times after this transaction seeking larger quantities of cocaine. The Owner refused these requests. On February 16, 2018, Det. Gay executed a search warrant at the Owner's residence. The same vehicle used in the transaction was parked in front of the home and was seized at that time. The Parties stipulate that the vehicle was worth \$53,000 at the time it was seized and when the information was filed, and that its value on the date of trial was \$41,000.

The Owner does not dispute that the vehicle was used in substantial connection with the illegal sale or distribution of a controlled substance in violation of Code § 18.2-248, and thus subject to forfeiture.² The owner claims that forfeiture of this vehicle under these circumstances would violate the 14th Amendment Due Process Clause³ which incorporates the Excessive Fines Clause of the 8th Amendment,⁴ and which applies to civil *in rem* forfeitures such as this case. *Austin v. United States*, 509 U.S. 602 (1993).⁵

Analysis

In *United States v. Bajakajian*, 524 U.S. 321, 334-40, (1998), the United States Supreme Court provided guidance in determining when a forfeiture becomes constitutionally excessive. The Court held that a forfeiture "violates the Excessive Fines

² On the day of trial in this matter, the Supreme Court of Virginia decided *Commonwealth v. Hall*, ___ Va. ___ (slip op. Feb. 21, 2019) in which it held that a vehicle used in only one drug transaction was subject to forfeiture, and that "substantial connection" does not require proof that the property was integral, essential or indispensable to the crime, but only that the property had more than an incidental, fortuitous or insubstantial connection to the crime.

³ "No State shall ... deprive any person of life, liberty or property, without due process of law..." U.S. Const., Am. XIV.

⁴ "Excessive bail shall not be required, nor excessive fines impose, nor cruel and unusual punishments inflicted." U.S. Const., Am. VIII. The Excessive Fines Clause is incorporated into the 14th Amendment, and thus enforceable against the States. *Timbs v. Indiana*, ___ U.S. ___ (2019).

⁵ At trial, the Owner also claimed that the forfeiture violates the Excessive Fines Clause in Article 1, Section 9 of the Virginia Constitution. The Court rejected this claim at trial, because the Virginia Supreme Court has held that Article 1, Section 9 does not apply to *in rem* forfeitures, *See Commonwealth v. One 1970, 2 Dr. H. T. Lincoln Auto.*, 212 Va. 597, 600, 186 S.E.2d 279, 281 (1972) and that decision has not been reconsidered as of yet in light of the United States Supreme Court's decisions in *Timbs* and *Austin* and in light of the shared language and history of Article 1, Section 9 and the Eighth Amendment Excessive Fines Clause, (both of which were based upon the 1776 Virginia Declaration of Rights). The Court also denied the Owner's related motion *in limine* that the Court find that this forfeiture action was a criminal case due to its punitive nature and should be docketed by the Clerk of Court as such.

Clause if it is grossly disproportional to the gravity of a defendant's offense.” *Id.* at 334. The Court adopted this standard based on two primary considerations: first, “that judgments about the appropriate punishment for an offense belong in the first instance to the legislature[,]” and second, “that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.” *Id.* at 336. A trial court “must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.” *Id.* at 336-37.

In determining the gravity of the offense, the Supreme Court considered four factors: 1) the nature and extent of illegal activity; 2) whether the defendant fit into the class of persons for whom the statute was principally designed; 3) the maximum penalties that a court could have imposed for the offense; and 4) the harm caused by the offense. 524 U.S. at 337–39; *see also United States v. \$134,750 U.S. Currency*, 535 F. App'x 232, 239 (4th Cir. 2013). This Court has considered those factors as they relate to the Owner's conduct.

1) *The nature and extent of the criminal activity*

The Owner stands convicted of one count of distribution of cocaine in violation of Code § 18.2-248. Her criminal conduct consisted of a single transaction involving less than 3 grams of cocaine with a street value of \$200. The Owner was not charged with any other offense arising from or related to this investigation, and in fact refused “Moe's” subsequent requests to sell cocaine. She is not regularly engaged in the business of distributing drugs, and had it not been for the involvement of the Owner's ex-husband claiming he was seeking help for a friend, it is unlikely that the Owner would have committed this offense. The offense committed by the Owner did not qualify as an accommodation distribution because it involved an exchange of cash for the cocaine.⁶ However, it is undisputed that the Owner sold the cocaine for the same amount as she paid for it, and that she never intended to benefit financially or otherwise from the transaction.

⁶ An accommodation distribution occurs when a person acts not “with intent to profit thereby from any consideration received or expected or to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance. The ‘profit’ contemplated by the statute is any consideration received or expected. . . . [I]t does not necessarily mean that a seller of drugs has to sell his drugs to a buyer at a price in excess of the amount the seller paid for the drugs.” *Porter v. Commonwealth*, 66 Va. App. 302, 307-08, 785 S.E.2d 224, 227 (2016), citing Code § 18.2-248(D); *Heacock v. Commonwealth*, 228 Va. 397, 407, 323 S.E.2d 90, 96 (1984) and *King v. Commonwealth*, 219 Va. 171, 174, 247 S.E.2d 368, 370 (1978).

2. *Whether the defendant fit into the class of persons for whom the statute was principally designed*

The Owner was convicted of violating Code § 18.2-248, which makes it unlawful to distribute any controlled substance except in conformity with the Drug Control Act, Code § 54.1-3400 *et seq.* Code § 18.2-248 targets all distributions of controlled drugs, regardless of how they are scheduled or the amounts distributed. This code section targets the smallest street-level dealer to the largest kingpin. There is no question that the Owner fits into the class of persons for whom the statute was principally designed.

3. *The maximum penalties that a court could have imposed for the offense*

The punishment range that the Owner faced for this offense was incarceration from 5 to 40 years plus a fine of up to \$500,000. Code § 18.2-248(C). Pursuant to a plea agreement, the Commonwealth recommended that the sentence imposed be within the Virginia Sentencing Guidelines. Those discretionary guidelines recommended a sentencing range of 8 months to 1 year, 6 months, with a midpoint of 1 year, 3 months.⁷ The sentencing guidelines further recommended that the Owner be sentenced to an alternative punishment in lieu of incarceration. In accordance with the sentencing guidelines and the plea agreement, the Court imposed an alternative sentence in lieu of incarceration. The Court did not impose a fine.

4. *The harm caused by the offense*

No harm resulted from this offense, because the cocaine was sold to an undercover police officer posing as an eager and experienced drug user. Even if the cocaine had been sold to someone who used it, the amount of harm from one individual sale of less than 3 grams of cocaine is minimal.

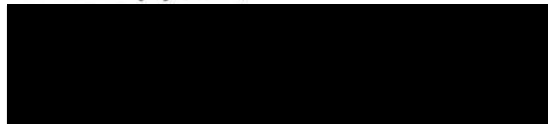
After considering the four factors from *Bajakajian*, the Court must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional, it is unconstitutional. Where, as here, the forfeiture amount falls within the fine range authorized by the Legislature, there is a presumption of constitutionality. *United States v. \$134,750 U.S. Currency*, 535 F. App'x 232, 241 (4th Cir. 2013). Consequently, the Owner "must clear a significantly higher hurdle to show that the ... forfeiture is grossly disproportional to the gravity of [the] offense." *Id.*

After consideration of the four factors above, the Court finds that forfeiture of the Owner's vehicle valued at \$53,000 would be grossly disproportional, and therefore

⁷ Virginia's sentencing guidelines are silent with respect to the imposition of fines.

unconstitutional. The Owner's criminal culpability is relatively minor. She is not regularly engaged in the business of selling cocaine. She was encouraged to commit this offense by her ex-husband, a paid police informant with whom she maintains a close personal relationship. The Owner did not repeat the offense despite requests by the undercover detective. The criminal conduct presented little risk of harm. Although the amount of the forfeiture falls well within the maximum fine that could be imposed for the offense, the statute applies to every distribution of a cocaine less than 500 grams.⁸ In light of the broad range of culpability that the statute is intended to punish, the maximum punishment is not a clear indicator of the seriousness of the Owner's conduct. Furthermore, the Sentencing Guidelines, which cannot take effect if disapproved by the General Assembly,⁹ recommend alternatives to incarceration for offenders such as this Owner who have no prior record of criminal offenses. This strongly suggests that the seriousness of the crime is less than the maximum punishment and fine might suggest. Thus, a forfeiture of property worth \$53,000 under the particular circumstances of this case is grossly disproportional to the gravity of the offense the Owner committed and would violate the United States Constitution. Consequently, this forfeiture action is dismissed, and the vehicle is to be returned to the Owner forthwith. An order to this effect is enclosed.

Sincerely yours,

A large black rectangular redaction box covering the signature of Michael F. Devine.

Michael F. Devine

MFD/hs

⁸ The penalty for distributions involving 500 grams or more of cocaine are enhanced to include a maximum of life imprisonment with a mandatory minimum of 5 years, and a fine of up to \$1,000,000.

⁹ See Code §17.1-804.

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,)
)
 Plaintiff)
 v.) CL-2018-3474
)
 ONE 2016 CHEVROLET TAHOE,)
 et al.,)
)
 Defendants.)

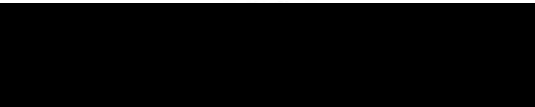
ORDER

For the reasons stated in the letter opinion issued by the Court, which is incorporated herein by reference, the Court finds that the proposed forfeiture is grossly disproportional to the crime committed and thus violates the 8th and 14th Amendments to the United States Constitution. Therefore, it is hereby

ORDERED that the Information is dismissed. It is further

ORDERED that the vehicle be returned forthwith to the registered owner.

Entered May 24, 2019



Michael F. Devine
Circuit Court Judge

Endorsements waived
Rule 1:13 