

**THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

**STATE OF OHIO**                    )  
    **Plaintiff**                    )  
            **vs**                        )  
                                      )  
**EDWARD WALKER**                )  
    **Defendant**                    )

**CASE NO. CR 429590**  
  
**MEMORANDUM OF OPINION  
AND ORDER**

**FRIEDMAN, J.:**

¶1. The Court has before it a proposed Journal Entry of Forfeiture, prepared by the Cuyahoga County Prosecutor. For reasons set forth herein the Court grants forfeiture as to the vehicle (a Ford Explorer, VIN FMZU73K22UD19005) and firearm (Serial Number PA27306), but denies forfeiture as to the remaining item: \$1,050.00 U.S. currency.

¶2. The operative facts in this case are relatively straightforward, and may be summarized as follows:

a. The Defendant was charged in a seven-count indictment with various drug-related offenses:

- 1: Possession of Drugs (Crack Cocaine, 25-100 grams);
- 2: Possession of Drugs (Marijuana, 200-1,000 grams);
- 3: Trafficking in Drugs (Crack Cocaine, 25-100 grams);
- 4: Carrying a Concealed Weapon, a loaded firearm;
- 5: Trafficking in Drugs (Marijuana, 200-1000 grams);
- 6: Having a Weapon While Under Disability.
- 7: Possession of Criminal Tools.

b. Counts 1, 2, 3, and 5 each included a one-year firearm specification, charging that, while committing the offense, the defendant had a firearm on or about his person or under his control.

c. Although counts three and five charged the defendant with "Trafficking in Drugs", they did not allege that he actually sold any of the drugs; rather, they alleged that

he “. . .unlawfully did knowingly prepare for shipment, ship, transport, deliver, prepare for distribution or distribute” those substances.

d. The defendant waived a jury trial, and trial accordingly proceeded to the Court. At the close of trial, the Court delivered its verdict, finding the defendant guilty as to all counts, including (in counts 1, 2, 3, and 5) the firearm specifications. A sentencing hearing has been set for May 16, 2003.

¶3. The State seeks forfeiture of the cash, the vehicle, and the gun as “contraband” pursuant to Ohio Rev. Code §2933.41. That section provides that:

(C) A person loses any right that the person may have to the possession, or the possession and ownership, or property if any of the following applies:

(1) The property was the subject, or was used in a conspiracy or attempt to commit, or in the commission, of an offense other than a traffic offense, and the person is a conspirator, accomplice, or offender with respect to the offense.

(2) A court determines that the property should be forfeited because, in light of the nature of the property or the circumstances of the person, it is unlawful for the person to acquire or possess the property.

¶4. Inasmuch as this case was resolved by trial, rather than by plea agreement, the record discloses no stipulation by the defendant agreeing to the forfeiture of any of the property seized. Accordingly, before the Court can find that these items are subject to forfeiture, it must determine whether the State has established any basis to authorize this Court to order forfeiture under Ohio law.<sup>1</sup> The Court notes that there are two separate, and quite distinct, provisions respecting forfeiture of property involved in a criminal action. Ohio Revised Code §2933.43, cited by the State, governs forfeiture of “contraband” generally, while §2925.42 provides specifically for the “forfeiture of property in connection with a felony drug abuse offense or act.”<sup>2</sup>

¶5. The Court recognizes, accordingly, that any property of the defendant seized at the time of his arrest, and which is found to have been in connection with the drug offenses for

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<sup>1</sup> U. S. Constitution, Amendments V and XIV; Ohio Constitution, Art. I, §19.

<sup>2</sup> It should be noted that the Code is somewhat confused in its definition of what property is subject to forfeiture. Section 2933.41(C), as noted, states under what conditions a person may lose the right to possession, or possession and ownership, of property. Compare this with §2933.42(A), which refers specifically to *contraband*. The Court finds, however, that its determination as to each of the items involved remains unchanged under either provision.

which he has been found guilty, would thus be subject to the specific provisions of §2925.42, while any other property of the defendant could be subject to forfeiture only if found to be “contraband” under Ohio law.

¶6. The Court will consider first the specific provision of Rev. Code Rev. Code §2925.42<sup>3</sup>—that is, whether any of the property at issue is subject to forfeiture as being “in connection with a felony drug abuse offense or act.” Pursuant to that section, a person who is convicted of or pleads guilty to a felony drug abuse offense:

loses any right to the possession of property and forfeits to the state any right, title, and interest the person may have in that property if either of the following applies:

- (a) The property constitutes, or is derived directly or indirectly from, any proceeds that the person obtained directly or indirectly from the commission of the felony drug abuse offense or act.
- (b) The property was used or intended to be used in any manner to commit, or to facilitate the commission of the felony drug abuse offense or act.

¶7. Inasmuch as the defendant was found guilty of transporting drugs, as charged in counts three and five, and of possessing the van “with purpose to use it criminally”, as charged in count seven, it cannot be seriously disputed that the vehicle was being used by the defendant “in connection with a felony drug abuse offense or act”, and thus is subject to forfeiture under §2925.42(A)(1)(b). Furthermore, the defendant was found guilty of having the firearm on or about his person or under his control while committing the underlying offenses, pursuant to the firearm specification in counts 1, 2, 3, and 5; accordingly, that weapon also is clearly subject to forfeiture pursuant to §2925.42(A)(1)(b).

¶8. With respect to the \$1,050.00 seized from the defendant at the time of his arrest, the Court notes that he was not charged with any offense involving the sale of drugs, and further that this case did not involve any “controlled buys” by the police or a confidential informant. None of the money seized from the defendant was alleged to have been marked by the authorities. Thus, the State has failed to establish that the money either “constitutes, or was derived directly or indirectly from, any proceeds that [the defendant] obtained di-

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<sup>3</sup> “‘Drug abuse offense’ means any of the following: (1) A violation of . . . 2925.03 . . . [or] .2925.11. . . of the Revised Code” Rev. Code §2925.01(G)

rectly or indirectly from the commission of the felony drug abuse offense or act," (Rev. Code §2925.42(A)(1)(a), or "was used or intended to be used in any manner to commit, or to facilitate the commission of, the felony drug abuse offense or act." (§2925.42(A)(1)(b).

¶9. The Court next must consider whether the general forfeiture statute may apply in any respect to the charges in this case. In its proposed order the State cites Rev. Code §2933.42, which states that: "No person shall possess, conceal, transport, receive, purchase, sell, lease, rent, or otherwise transfer any contraband."

¶10. "Contraband" is defined in Rev. Code §2901.01(A)(13). That provision sets forth a number of categories of property which may be classified as "contraband", of which the only following need concern us:

(a) Property that in and of itself is unlawful for a person to acquire or possess;

(b) Property that is not in and of itself unlawful for a person to acquire or possess, but that has been determined by a court of this state, in accordance with law, to be contraband because of its use in an unlawful activity or manner, of its nature, or of the circumstances of the person who acquires or possess it, including, but not limited to, goods and personal property described in division (D) of section 2913.34 of the Revised Code;

(c) Property that is specifically stated to be contraband by a section of the Revised Code or by an ordinance, regulation, or resolution;

(d) Property that is forfeitable pursuant to a section of the Revised Code, or an ordinance, regulation, or resolution, including, but not limited to, forfeitable firearms, dangerous ordnance, obscene materials, and goods and personal property described in division (D) of section 2913.34 of the Revised Code;

(e) Any controlled substance, as defined in section 3719.01 of the Revised Code, or any device, paraphernalia, money as defined in section 1301.01 of the Revised Code, or other means of exchange that has been, is being, or is intended to be used in an attempt or conspiracy to violate, or in a violation of, Chapter 2925. or 3719. of the Revised Code.

\* \* \*

¶11. The Court already has found that the van is subject to forfeiture under Rev. Code §2925.42, as being used in the commission of a felony drug abuse offense. It further is clear that that vehicle is a "criminal tool" as charged in Count 7 of the indictment, and thus also is subject to forfeiture as contraband under Rev. Code §2901.01(A)(13)(b).

¶12. The Court similarly has found that the defendant possessed the firearm illegally (Count 6, Having a Weapon While Under Disability); thus, the gun as well may be forfeited under Rev. Code §2901.01(A)(13)(d).

¶13. Although the Court has found the defendant guilty of Possession of Criminal Tools, as charged in Count 7, the record should be clarified that this finding referred only to the vehicle and the firearm, and that the evidence at trial failed to support a verdict of guilty as to this charge with respect to the \$1,050.00.

¶14. The Court finds that there was no evidence presented at trial, nor has the State suggested any basis in law to justify forfeiture of the \$1,050.00 seized from the defendant. Being legal tender of the United States, it cannot be contraband *per se*, nor was it shown to be the proceeds of drug transactions or in any way used in connection with any criminal activity. Accordingly, the Court finds that there is no authority under the relevant statutory provisions for it to order the money to be forfeit to the State.

¶15. The Court next must consider how to dispose of the \$1,050.00 being held by the Cleveland Police. A review of the relevant case law does provide some guidance in this regard. In *Witherspoon v. Belt, Clerk of Courts* (1964), 177 Ohio St. 1, the defendant had on his person \$147.70 at the time of his arrest, "which was money unconnected with the crime." The money was seized by the county sheriff and turned over to the Clerk of Courts. The defendant subsequently pled guilty to breaking and entering, and was sentenced to the reformatory. He demanded that the money be returned to him, and the Clerk of Courts answered that he had issued execution upon that money for the payment of fines and costs in the case. In its *per curiam* opinion the Supreme Court held that:

The liability for the costs in a criminal prosecution wherein the accused either pleads or is found guilty is primarily upon the accused. \* \* \*

The determinative sections in this case are Sections 2949.14 and 2949.15, Revised Code. Under the provisions of Section 2949.14, Revised Code, the clerk has the duty to prepare a cost bill. Once such bill is prepared, in the event it is not paid Section 2949.15, Revised Code, places the mandatory duty upon the clerk to levy execution on the property of the accused to collect such costs. \* \* \*

Money that an accused has in his possession at the time he is taken into custody and which is turned over to and remains in the possession of

law enforcement officers is 'property' within the meaning of this section and is subject to execution for the payment of the costs of the prosecution.

177 Ohio St., at 2.

¶16. For the reasons set forth herein, the Court orders that the Clerk of Courts shall prepare a cost bill for all costs incurred in connection with this case, said cost bill to include all fees paid for counsel assigned to represent the defendant. The defendant having been found indigent at the time of his arraignment, the Clerk is further ordered to levy execution for said costs on the \$1,050.00 presently being held by law enforcement. Any excess funds remaining after payment of all costs shall be returned to the defendant.<sup>4</sup>

¶17. With respect to the remaining items for which the State has requested forfeiture: viz. the 2002 Ford Explorer VIN #FMZU73K22US19005 and the gun, serial number PA27306, the Court hereby declares that all rights, title, and interest to that property, which were formerly held by Edward Walker now vest in the State effective from the date of seizure. The State is ordered to direct the City of Cleveland, Department of Public Safety, Division of Police (the seizing law enforcement agency) to dispose of the said contraband pursuant to Ohio Rev. Code §2933.41(D)(1)-(7). Contraband not described in those provisions shall be

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<sup>4</sup> The Court notes, with particular relevance to this matter, the recent Report of the Ohio Criminal Sentencing Commission, "A Plan for Ohio's Criminal Asset Forfeiture Law", issued March, 2003. That Report proposes a number of substantial changes in Ohio's laws respecting forfeiture of property of a person charged with a felony or misdemeanor offense. It would define "contraband" even more narrowly than present law, and add two new categories of property subject to forfeiture: "proceeds" involved in any offense, and "instrumentalities" connected to the commission or facilitation of a felony or misdemeanor, as specifically authorized by law.

Under the proposed new forfeiture code, Ohio R. C. §2901.01(A)(13), §2929.1412, and Ch. 2981, forfeiture of property, including money, involved in the possession or trafficking in illegal drugs would be limited to certain specified circumstances, and the State would be required to establish its right to forfeit property alleged to be the proceeds of drug- or other criminal activity. At the same time, nothing in the proposed legislation would affect either the obligation of the Court under existing law to collect court costs from a defendant who pleads or is found guilty of any criminal offense, or its authority to satisfy that obligation by the use of money seized from the offender at the time of his or her arrest. As has been noted previously, this duty exists even where the money seized is not involved in any way in the criminal activity charged. The Court further notes that, under both current and proposed law, money or other forfeited property may not be used to pay any court-imposed fines.

used by that agency pursuant to R. C. §2933.41(D)(8), transferring all right, title, and interest to the City of Cleveland.

¶18. The City of Cleveland is ordered to submit to the State, within sixty (60) days of the receipt of a copy of this Order, a written report verifying that the said forfeited contraband has been disposed of pursuant to the terms of this Order.

¶19. It is further ordered that the Clerk of Courts of Cuyahoga County forward a certified copy of this Journal Entry to the Office of the Cuyahoga County Prosecutor.

**IT IS SO ORDERED**

**Dated: May 14, 2003**

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**Judge Stuart A. Friedman**