IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEREK NATIONS **APPELLANT**

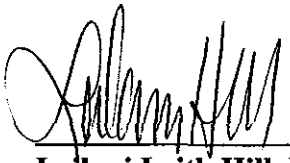
v. **CAUSE NO: 2008-CA-02126**

LAFAYETTE COUNTY METRO NARCOTICS UNIT **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The following listed parties have an interest in the particular outcome of this appeal and may be substantially affected by the outcome of the proceedings.

1. Derek Nations, Appellant
2. Kevin Frye, Counsel for Appellant
3. Justice & Alexander, P.A., James B. Justice, Alan T. Alexander, Counsel for Appellant
4. Ben Creekmore, District Attorney, Third Judicial District
5. Honorable Andrew Howorth, Circuit Court Judge, Third Circuit Court District



Leilani Leith Hill, [redacted]
Assistant District Attorney

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COMES NOW, the State of Mississippi, ex rel, Ben Creekmore, District Attorney, Oxford Police Department and Lafayette County Metro Narcotics Unit, Appellee herein and Defendant in the court below, and respectfully requests this Honorable Court uphold the Order of Forfeiture dated December 10, 2008, and entered by the Honorable Andrew K. Howorth, in the Lafayette County Circuit Court in the case of State of Mississippi, ex rel, Ben Creekmore, District Attorney, Oxford Police Department and Lafayette County Metro Narcotics Unit v. Four Thousand Eight Hundred One Dollars ($4,801) and Derek Nations, Cause No. L08-781.

STATEMENT OF ISSUES

WHETHER THE TRIAL COURT'S RULING WAS "CLEARLY ERRONEOUS" WHEN THE FORFEITED MONIES WERE IN CLOSE PROXIMITY TO A FORFEITABLE CONTROLLED SUBSTANCE AND FORFEITABLE PARAPHERNALIA AND THE PRESUMPTION OF FORFEITURE WAS NOT REBUTTED BY THE APPELLANT.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case results from the Defendant's appeal of the Lafayette County Circuit Court's order that four-thousand, eight-hundred and one dollars ($4,801.00) in currency discovered in the Appellant's bedroom during a lawful search subsequent to arrest be forfeited under pertinent

controlled substance statutes. In that proceeding, Defendant was charged with one count of sale of marijuana, for which, under Miss. Code Ann. § 41-29-143(7), he was subject to forfeiture of (in relevant part):

> ...All monies, coin and currency found in close proximity to forfeitable controlled substances, to forfeitable drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture or distribution of controlled substance...

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On December 10, 2008, the Hon. Judge Andrew Howorth, presiding over the Circuit Court of Lafayette County, Mississippi, held a hearing on Defendant's motion to set aside forfeiture of four-thousand, eight-hundred and one dollars ($4,801.00) discovered in Appellant's bedroom subsequent to an arrest for the sale of narcotics. The Honorable Andrew Howorth, Circuit Court Judge, denied Defendant's motion and entered an Order of Forfeiture for said currency. It is from that decision that the current appeal follows.

III. STATEMENT OF FACTS

On January 28, 2008, Derek Nations, the Appellant in the case at bar, sold marijuana to a confidential informant on the campus of the University of Mississippi. (T. 3) Subsequently, Nations was arrested by the Lafayette County Metro Narcotics Unit (hereinafter "the narcotics unit") for the sale of less than 30 grams of marijuana in April of 2008. (Id.) On December 4, 2008, Nations was again arrested by the narcotics unit for sale of marijuana. (T. 4-5) It is from this second arrest that the present appeal arises.

Two days prior to Nations' second arrest for sale of marijuana, Agent Keith Davis of the narcotics unit was approached by a confidential informant (hereinafter "CI"), who indicated to

Agent Davis that Nations would sell him marijuana. (T. 3) Following standard protocols and procedures, the narcotics unit searched the CI for any contraband or currency prior to the proposed transaction and issued him monitoring equipment as well as one-hundred and forty dollars ($140.00) in Official Metro Funds which had previously been photocopied for serial number identification. (T. 4)

Using the marked funds provided to him by the narcotics unit, the CI was able to purchase marijuana from Nations. (Id.) On December 4, 2008, as a result of this transaction, Agent Davis and several other members of the narcotics unit executed an arrest warrant on Nations. (Id.) After being allowed into the apartment by Nations' roommate, the narcotics unit observed marijuana paraphernalia, including a large bong and a marijuana pipe, in the common living room of the apartment. (T. 5) After noting the presence of this paraphernalia, Agent Davis entered Nations' bedroom. (Id.)

As officers entered Nations' bedroom, Nations was asleep in bed. (Id.) Upon awakening, Nations was informed of the warrant for his arrest and was read his Miranda rights by Agent Davis before volunteering his consent to the search of his bedroom. (T. 7) After having been read his Miranda rights, Nations informed the narcotics unit that "everything inside of the apartment including outside of his bed room [sic] was his and his roommates had nothing to do with it nor any knowledge of it." (Id.) Following this admission, Nations informed the officers that he wished to make no further statements without his attorney present. (Id.) Agent Davis and the other officers present complied with this request and continued to search the bedroom. (Id.)

Upon executing the search of Nations' bedroom, the officers recovered various drug paraphernalia, including plastic sandwich bags, a set of digital scales, a marijuana bong, pipes

and other instruments used in smoking narcotics. (Id.) The officers also recovered twenty-one and a half (21.5) grams of marijuana (T. 12), including some on the desk located in Nations' bedroom. (T. 6) Furthermore, Agent Davis and the other officers found four-thousand eight-hundred and one dollars ($4,801.00) in cash spread throughout five distinct locations within the bedroom. (T. 9) Based upon the presence of the marijuana and paraphernalia in the bedroom, as well as the large amount of money present throughout the room, Agent Davis testified that he believed that Nations "was selling Marijuana from his room and keeping his money in his apartment with him." (T. 10)

Of the money seized, forty-four dollars ($44.00) was confiscated from a jar atop a refrigerator in the room, (T. 8) two dollars ($2.00) was confiscated from a jar atop the desk, (T. 9) one-thousand, three-hundred and twenty-seven dollars ($1,327.00) was taken from a folder beneath Nations' mattress (T. 8) and another three-thousand, four-hundred and twenty-eight dollars ($3,428.00) was located either on or in Nations' desk. (Id.) Upon seizure of all monies, the officers calculated the total amount from each individual location before collectively placing the money on Nations' bed in order to secure the money for catalog and transport. (T. 11-12)

After all the monies were seized and counted, Agent Davis inspected all the bills located in the bedroom. (T. 11) Using serial numbers, Agent Davis identified, within the currency confiscated from Nations' bedroom, seven (7) twenty (20) dollar bills which had been provided to the CI two days earlier for the purchase of narcotics from Nations. (T. 10)

Following Nations' arrest, the State of Mississippi instituted a forfeiture proceeding against him, asserting that the monies recovered from his bedroom were in furtherance of or acquired through an illegal narcotics operation. On December 8, 2008, by way of proving the

lawful origins of the seized money, Nations alleged to Agent Davis that Nations had recently sold a vehicle and all but seventy dollars ($70) of the confiscated currency was from such transaction rather than from the sale of narcotics. (T. 10)

At the forfeiture hearing before Judge Howorth in the Circuit Court of Lafayette County on December 10, 2008, Nations alleged as much, presenting two witnesses purporting to verify that at least some of the confiscated funds were the result of Nations having earlier sold his automobile. To this end, Nations produced two witnesses: John Glass and Sara Roberts. Glass, an employee of Paul Moak Honda in Jackson, Mississippi, testified that on December 1, 2008, Nations traded his 2008 Honda Accord for an older automobile and nine-thousand nine-hundred and ninety dollars ($9,990.00). (T. 15) Roberts, Nations' former girlfriend, testified that Nations used the proceeds from this transaction to purchase "a big nice TV" and corresponding stand. (T. 21) Roberts also testified that Nations returned with "some" of the money from the vehicle transaction, but that he was going to use the proceeds to pay "his rent and pay the attorney bill and school and stuff." (T. 21)

After hearing this testimony, the court ruled in favor of the State, declaring that the State had satisfied its burden in proving that the commingled funds were the tainted profits of illegal transactions.

SUMMARY OF THE ARGUMENT

The monies seized by the State which are the subject of this forfeiture action were properly subject to the forfeiture provisions of § 41-29-153. The currency in question was in "close proximity" to forfeitable controlled substances, as well as to narcotics distribution

paraphernalia such as plastic sandwich bags and digital scales. Under the circumstances, such currency is presumed forfeitable unless the claimants of the property can rebut such presumption. In the instant case, the Appellant failed to raise a sufficient rebuttal to overcome the presumption. Further, the lower court did not apply an erroneous legal standard by holding that because legitimately acquired monies were commingled by the action of the State with drug money, all of the monies were tainted and subject to forfeiture.

ARGUMENT

I. STANDARD OF REVIEW

"The appropriate standard of review in forfeiture cases is the familiar substantial evidence/clearly erroneous test." City of Meridian v. Hodge, 632 So.2d 1309, 1311 (Miss. 1994). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. UHS-Qualicare, Inc. V. Gulf CoastCmty. Hosp. Inc., 525 So.2d 746, 754 (Miss. 1987) The Supreme Court has held that they will not disturb a circuit court's findings unless it has applied an erroneous legal standard to decide the question of fact." Hodge, 632 So.2d at 1311.

Under Mississippi Code Annotated section 41-29-153(a)(5) and (7) (Supp. 2008), money is subject to forfeiture if it has been "used, or intended for use, in violation" of the Uniform Controlled Substances Law and having been found in close proximity to forfeitable drug manufacturing or distributing paraphernalia. The Court must decide "whether, given all of the evidence considered together, a rational trier of fact may have found by a preponderance of the

evidence that [the] funds were the product of or instrumentalities of violations of this state's controlled substances act." Hickman v. State, **592 So. 2d 44**, 48 (Miss. 1991). The trier of fact may act on circumstantial evidence and inferences as well as direct evidence. Id. at 46.

II. THE MONEY TAKEN FROM THE APPELLANT'S BEDROOM WAS SUBJECT TO FORFEITURE

The trial court did not err in making its finding. Consequently, this Honorable Court should affirm the decision of the trial court.

A. The "close proximity" presumption applies.

Mississippi Code Annotated § 41-29-153(a)(7), commonly known as the Controlled Substances Act, states in pertinent part that "...[a]ll monies, coin and currency found in close proximity to forfeitable controlled substances, to forfeitable drug manufacturing or distributing paraphernalia...are presumed to be forfeitable under this paragraph; the burden of proof is upon claimants of the property to rebut this presumption." Miss. Code Ann. § 41-29-153(a)(7). In City of Meridian v. Hodge, the Mississippi Supreme Court asserted that courts should not apply "rigid rules for fixing 'close proximity' by a particular number of feet, by reference to particular rooms, or by any rule of thumb." Rather, the court cited with approval the explanation offered by the Supreme Court of Arkansas that "'close proximity' simply means 'very near'" and that the meaning of the phrase is to be determined on a case-by-case basis. City of Meridian v. Hodge, 632 So. 2d 1309 (1994)(citing Limon v. State, 685 S.W.2d 515, 516-517 (Ark. 1985)).

In the case sub judice, the record indicates that law enforcement officers conducted a search of the Appellant's home during which they discovered two boxes of plastic sandwich bags, various pipes, bongs and other devices used to smoke marijuana, a set of digital scales, a jar

containing twenty-one and a half (21.5) grams of marijuana and money from several locations inside the appellant's bedroom. The money seized totaled four-thousand eight-hundred and one dollars ($4,801.00) and was discovered in five separate locations within the bedroom. Given that the money was found exclusively within the Appellant's bedroom - a bedroom which also contained twenty-one and a half (21.5) grams of marijuana, as well as plastic sandwich bags and digital scales used in the distribution of narcotics - such monies were within "close proximity" or "very near" to a forfeitable controlled substance. That being true, all the money was "presumed to be forfeitable" under § 41-29-153(a)(7), and there was no burden on the State to show separately a specific intent that the money was to be used for illicit drug purposes.

The Appellant mistakenly relies on Hodge, which is factually distingushable from the present case. In Hodge, the record was silent as to the exact location of where the money was found and its proximity to the marijuana and other drug paraphernalia, whereas the record in the present case makes clear that the forfeited money was found in the same bedroom as the marijuana and other drug paraphernalia. Even if this were not the case, the record contains evidence sufficiently supporting the lower court's ruling and ought to be granted deference. Significantly, this Court explicitly stated in Hodge that based on the evidence the trial court could have concluded that all the cash in question was the product of or used in the trafficking of marijuana, but chose to give deference to the trial court's determination of these facts.

B. The Appellant failed to rebut the "close proximity" presumption

Once monies are presumed to be forfeitable, the burden of proof is upon the claimant to rebut this presumption. Miss. Code Ann. § 41-29-153(a)(7).

The Appellant contends that even if the "close proximity" presumption applies, the presumption was overcome at trial by the admission of testimonial evidence. Specifically, the Appellant contends that the testimony of John Glass and Sara Roberts established that the Appellant acquired nine-thousand, nine-hundred and ninety dollars ($9,990.00) days before his arrest and it was this money, and not drug-related money, which was seized by police during their search. This contention is without merit as the Appellant did not present credible evidence at trial sufficient to rebut the statutory presumption.

According to the record, John Glass testified that the Appellant was issued a check for nine-thousand nine-hundred and ninety dollars ($9,990.00) on or about December 1, 2008. (T. 15) Sara Roberts, the Appellant's former girlfriend, further testified that the Appellant used this money to purchase a large flat-screen television and television stand. (T. 21) Roberts did not know how much the Appellant actually paid for his new flat-screen television, but did testify that it was "big" and "nice" and that he had "some" money leftover after the purchase. (T. 21)

While no evidence was adduced at trial regarding the cost of the Appellant's new television and accessories, or how much money was leftover after his purchases, evidence was admitted at trial which established the Appellant as a habitual seller of marijuana. According to the record, on December 4, 2008 the Appellant was arrested for selling marijuana for one-hundred and forty dollars cash ($140.00) to a confidential informant working for the Lafayette County Metro Narcotics Unit. (T. 4) At the time the transaction occurred, the Appellant was also under indictment by the Lafayette County Circuit Court for the offense of the sale of less than thirty (30) grams of marijuana dating back to January of 2008. (T. 3)

The one-hundred and forty dollars ($140), which had previously been marked as Official

Metro Funds, was discovered by officers on December 4, 2008 when they conducted a search of the Appellant's bedroom. (T. 9) The additional sums of money were all found within the same bedroom in various locations. While on indictment for the sale of marijuana, the Appellant was again arrested by police for selling drugs. Given that the Appellant had an ongoing habit of selling marijuana, had no gainful employment at the time, and failed to establish at trial the amount of his flat-screen television or the money leftover from the purchase, any attempt by the Appellant to rebut the statutory presumption was legally insufficient.

The Appellant's reliance on Neely v. State ex rel. Tate County, 628 So.2d 1376 (Miss. 1993) is misplaced. In Neely, evidence was adduced to show that the defendant was gainfully employed and that he was earning more than three-hundred dollars ($300.00) per week, and no evidence was offered to contradict Neely's proof of an alternate source of funds. Unlike Neely, the record in the present case indicates that no evidence was adduced at trial to show that the Appellant was gainfully employed and earning a weekly income. Rather, the evidence showed that the Appellant acquired income by selling marijuana and that the Appellant offered no proof regarding the sources of the separately found monies or the amount of money leftover from the exchange of his vehicle.

C. Despite the fact that the close proximity presumption applies and was never rebutted by the Appellant, the State proved by a preponderance of the evidence that the forfeited monies were possessed by the Appellant for the purposes of facilitating an illegal narcotics scheme.

The question in this instance is whether, given all of the evidence taken together, a rational trier of fact could have found that, by a preponderance of the evidence, the money seized was intended to be used in furtherance of or acquired by way of an illegal narcotics operation. In

considering this question, the trier of fact may consider circumstantial evidence and inferences as well as direct evidence. Hickman v. State ex rel., Miss. Dep't of Public Safety, 592 So. 2d 44, 48 (Miss. 1991).

In the present case, there is sufficient circumstantial evidence for a rational trier of fact to find that the money in question was the product or instrumentality of an illegal narcotics operation. The money was seized from the same bedroom as marijuana and narcotics distributing paraphernalia such as digital scales and plastic sandwich bags. While neither of these items, by itself, is wholly suggestive of drug dealing, they are the tools of the trade for traffickers. Moreover, when combined with Nations' known history of drug dealing, the presence of marijuana in the bedroom, and the marked narcotics task force buy funds mixed amidst the currency within the room, these seemingly innocuous instruments suggest by a preponderance of the evidence that Nations was involved in illegal drug trafficking out of his apartment bedroom.

Furthermore, at the time of his arrest, Nations was unemployed and had no source of income. Although he claims that at least some of the money in question was acquired from the lawful exchange of his automobile, Nations offers only vague evidence regarding his financial situation. In fact, the record establishes only that Nations received $9,990 for exchanging his car several days prior to his arrest and that he purchased a television and corresponding stand with the proceeds, leaving him with "some" of the money from the transaction remaining at the time of his arrest. (T. 21) However, Nations has produced neither a receipt for his purchases nor bank records or documents supporting the contention that the money seized was the remainder of the money received after the exchange of his vehicle. In fact, Nations can produce no evidence that

unequivocally links the money seized following his arrest to the money he received from this lawful transaction. Instead, Nations relies solely on temporal proximity and the fact that some of the seized money was found in a bank envelope as conclusive proof of a connection between the seized funds and the vehicle exchange. Moreover, while Nations submits only nebulous evidence regarding the purported nature of the seized money, the State, by proving the presence of Official Metro Funds within the bedroom, has definitively established that Nations had a propensity to store the proceeds of narcotics transactions within the confines of his room. Clearly, the record, on its face, lacks any convincing evidence that the rest of the funds in question were for any purpose or acquired in any way other than the sale or distribution of illegal drugs.

In Jackson v. State, 591 So.2d 820 (Miss. 1991), this court upheld a forfeiture of $1,087, citing with approval the Fifth Circuit case of United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars ($364,960.00) In United States Currency, 661 F.2d 319 (5th 1981), which said that "...from the sheer quantity of currency seized under these circumstances, a court may permissibly infer a connection with illegal narcotics trafficking..." Certainly, $4,800 in cash is a substantial sum of currency for an unemployed, 22-year old college student to have hidden in various locations throughout his apartment bedroom. Furthermore, as discussed above, Nations has not furnished, on the record, credible evidence of the money's lawful origins. Thus, using the logic of the aforementioned case, as well as the fact that Nations has a history of drug dealing, it is no stretch for a rational trier of fact to infer that the currency in question was used in furtherance or acquired as a result of an illegal narcotics operation.

The facts of this case are clear and essentially undisputed: an unemployed college student with a history of drug dealing was arrested for selling narcotics and, in a search incident to that arrest, it was found that he had thousands of dollars in unexplained cash – including certified and marked narcotics task force buy money - hidden in various locations throughout his apartment bedroom. Moreover, the bedroom also contained traces of marijuana and narcotics distribution paraphernalia. Although he has claimed that a portion of the money was obtained through a lawful transaction, Nations has furnished no substantial proof that such an assertion has any merit. Under these facts, it is apparent that the State has met its burden in proving that, based upon a preponderance of the evidence, the money in question either resulted from or facilitated an illegal narcotics operation. Therefore, since the applicable standard of appellate review is whether, based upon the entirety of the record, "a reasonable fact-finder may have done as was done," this court should rightly affirm the forfeiture order. McLendon v. State, 539 So.2d 1375, 1377 (Miss. 1989).

CONCLUSION

Based on the preceding analysis, the Appellee respectfully requests that the Court uphold the lower court's ruling and affirm the Order of Forfeiture. The lower court correctly held that the money seized from Nations' bedroom was in close proximity to illegal narcotics and distribution paraphernalia. Furthermore, the Appellant has failed to rebut the "close proximity" presumption with anything more than unsubstantiated or vague testimonial evidence. Moreover, despite the fact that the close proximity presumption applies and was never properly rebutted by the Appellant, the State has also met its burden, by a preponderance of the evidence, in proving that the seized currency was either obtained by or used to facilitate an illegal narcotics trafficking

operation. In any case, the lower court applied a correct legal standard to the case at bar and was justified in determining that all of the currency present in the bedroom was forfeitable under the statute.

RESPECTFULLY SUBMITTED, this the 2nd day of June, 2009.

STATE OF MISSISSIPPI
LAFAYETTE COUNTY
METRO NARCOTICS UNIT
APPELLEE

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CERTIFICATE OF SERVICE

I, the undersigned, Assistant District Attorney in and for the Third Circuit Court District of Mississippi, hereby certify that I have this day served a true and correct copy of the above and foregoing "Appellee's Brief" upon the following, to-wit:

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JUSTICE AND ALEXANDER, P.A.
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This, the 2nd day of June, 2009.

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