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**

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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SUMMARY OF THE ARGUMENT

The Appellant first adopts herein the arguments set forth in the Brief of Appellant filed on March 9, 2009 – the vast majority of said argument goes without contradiction in the Appellee's Brief. As set forth therein, this Honorable Court should hold that Mr. Nations' monies were not subject to the forfeiture provisions of § 41-29-153 as they were not in "close proximity" to any seized alleged drugs or drug paraphernalia as that term is defined by the statute or, in the alternative, the "close proximity" presumption of forfeitability was rebutted by clear evidence that the source of the money was legitimate. The Appellee's Brief relies on facts not in evidence and disingenuous arguments – in reality, the State failed to put forth any relevant evidence that the forfeited monies were possessed by Mr. Nations for the purposes of facilitating an illegal narcotics scheme. The lower court applied an erroneous legal standard, frustrating public policy and the underlying rationale for forfeiture, and improperly held that because legitimately acquired monies were commingled by the actions of the State with alleged drug money, all of the monies were tainted and subject to forfeiture.

ARGUMENT

I. THE APPELLEE'S ARGUMENTS ARE DISINGENUOUS

The Appellee makes a number of fact-based arguments in its brief which are disingenuous. Specifically, the Appellee places special emphasis and reliance upon the following

factual assertions: (1) that Mr. Nations "had an ongoing habit of selling marijuana"; (2) "had no gainful employment"; and, (3) "failed to establish...the amount of his flat-screen television." Appellee's Brief at pages 9 – 13. The Appellee's Brief misstates and/or invents facts. First, the Appellee asserts that two alleged instances of selling marijuana constitute a habit – habit "implies a doing unconsciously and often compulsively" or "an acquired mode of behavior that has become nearly or completely involuntary."[1] The assertion of "habit" is a disingenuous argument intended to distract this Honorable Court from the critical facts established in the court below. The facts establish that Mr. Nations was accused of selling very small amounts of marijuana on only two occasions.

Second, the Appellee relies repeatedly on the contention that Mr. Nations had no gainful employment, in a misguided attempt to distinguish the facts below from those in City of Meridian v. Hodge, 632 So.2d 1309, 1313 (Miss. 1994) and Neely v. State ex rel. Tate County, 628 So.2d 1376 (Miss. 1993). The record below makes no mention of Mr. Nations' employment status, and in fact, Mr. Nations was employed at a local dining establishment during the relevant time period. This Honorable Court should look solely to the facts adduced at the Hearing in this matter and should not be distracted by the State's reliance on invented evidence to justify an unlawful forfeiture.

Finally, the Appellee relies on an absent fact, the price of Mr. Nations new television, apparently arguing that the money confiscated from his residence was earned via illegal action rather than through the lawful sale of his vehicle. This assertion is also a rabbit trail – the testimony in the lower court established that the two alleged sales of marijuana by Mr. Nations' were for very small dollar amounts. Further, Mr. Nations was not in possession of large

1 See http://www.merriam-webster.com/dictionary/habit. *See also* Rule 406 of the MISSISSIPPI RULES OF EVIDENCE (defining habit as "an individual's usual method or manner of doing things.").

quantities of marijuana. The State asks this Honorable Court to believe that Mr. Nations earned $4,801.00 (including $44.00 in change and a two dollar bill) in $70.00 or $140.00 increments. Not only would Mr. Nations have had to possess an exponentially larger sum of marijuana, he would have had to make between 34 and 69 similar sales of marijuana in order to raise $4,801.00. The State's argument is simply not credible – Mr. Nations undoubtedly was not involved in "drug trafficking."[2]

II. COMMINGLING OR COMBINING MONIES FOUND IN DIFFERENT LOCATIONS IN A RESIDENCE WITHOUT DOCUMENTING THE LOCATION AND AMOUNT OF SAME, NOR DOCUMENTING THE EXACT LOCATION OF ALLEGED "BUY MONEY", FRUSTRATES PUBLIC POLICY AND THE UNDERLYING RATIONALE FOR THE FORFEITURE STATUTES

If this Honorable Court affirms the lower court, it will encourage substandard and ill-motivated law enforcement policy and frustrate the intended purpose of forfeiture. If law enforcement officers are allowed to combine monies from different locations found in a particular room or residence without documenting the specific amounts, locations or identity of same the forfeiture system necessarily becomes an avenue which can be used to steal an accused's lawfully gained monies. This 'commingling' policy deprives the trial court and the accused of essential facts and direct evidence which may be needed to distinguish between legitimate and illegitimate funds pursuant to the forfeiture statute. Without official documentation of the amount, location, and ***identity*** of the funds a trial court is more likely to (1) apply the statutory 'close proximity' presumption in favor of the State, *Miss. Code Ann.* § 41-29-153(a)(7), and (2) downplay any legitimate explanation a claimant may have for the source of seized funds Neely v. State ex rel. Tate County, 628 So.2d 1376 (Miss. 1993). In a forfeiture action the State need only meet an already casual preponderance standard to establish that

2 § 41-29-139(g) of the MISSISSIPPI CODE ANNOTATED addresses the crime of drug trafficking. The Appellee is certainly aware that such a characterization of Mr. Nations is patently false and same is clearly an attempt to prejudice this Honorable Court against a gainfully employed college student in hopes that the Court will overlook the facts and law at issue herein.

specific funds were used or intended to be used in furtherance of an illegal narcotics operation Hickman v. State ex rel. Miss Dep't of Public Safety, 592 So.2d 44 (Miss. 1991). If law enforcement is encouraged by this Honorable Court to be less than diligent in recording and documenting critical evidence, in this case the location of the "buy money" in relation to other seized funds, the risk of loss of legitimate monies to citizens of the State becomes great.

Mississippi Code Annotated § 41-29-153(a)(7) allows that "all monies, coin and currency found in close proximity to forfeitable controlled substances...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). When interpreting 'close proximity', the Mississippi Supreme Court has refused to apply "rigid rules...by a particular number of feet, by reference to particular rooms, or by any rule of thumb", but instead has elected to determine 'close proximity' on a case by case basis using both circumstantial *and* direct evidence. City of Meridian v. Hodge, 632 So.2d 1309 (1994), and Hickman, 592 So.2d at 44. If this presumption is rebutted, the State then must prove by a preponderance of the evidence that the monies or property seized were used or intended to be used in furtherance of an illegal narcotics operation. Miss. Code Ann. § 41-29-153(a)(5), (7); Id. The claimant can combat this proof by presenting some alternative, legitimate source from which these forfeited funds came. Neely v. State ex rel. Tate County, 628 So.2d 1376 (Miss. 1993).

In Neely, the claimant was arrested for trafficking narcotics subsequent to a valid stop and search of the claimant's vehicle, resulting in the discovery of a few "rocks" of cocaine in a matchbox and $1,270 on the claimant's person. Neely at 1377-78. However, at the forfeiture hearing, the trial court declined to forfeit the money because they were privy to the fact that the money was on the claimant, while the drugs were simply in the car. By its location in the pocket

of the claimant, the money was considered 'mobile' and therefore in 'close proximity' to nothing else in the car, making the statutory presumption inapplicable. Id.

Furthermore, the Neely court held that whatever presumption would have applied was easily rebutted by the fact that the claimant was gainfully employed at a rate of $300 per week, therefore providing an alternative, legitimate explanation for the $1,270 found on the claimant's person. Neely highlights two important aspects in fairly determining the difference between finances used or intended for use in illegal drug activity and otherwise legal monies: (a) the presence of *all* direct and circumstantial evidence regarding seized funds and (b) any potential alternative, legitimate explanations for those funds.

In the present case, the Lafayette County Metro Narcotics Unit (hereafter Metro Narcotics) commingled monies found in separate locations without properly documenting the amounts, locations or identity of same. Also, Metro Narcotics had previously "marked" certain bills that were allegedly used to buy contraband from the claimant via a confidential informant (CI). Inexplicably, Metro Narcotics refused to note the location of these bills at the time of Mr. Nations arrest. Thus, Metro Narcotics intentionally frustrated the lower court by eradicating evidence of whether or not the marked bills were all in one location or spread throughout the five different locations from which Metro Narcotics seized funds. Instead, Metro Narcotics located the marked bills only after all the money was combined into a 'lump sum'.

This manner of seizing assets frustrates public policy by creating a forfeiture system that encourages the seizure of legitimate funds. First, by immediately combining all of the separately discovered funds, essential and specific facts relating to the proximity, identity and amount of these funds are lost. As was the case here, because Metro Narcotics combined all the money from the five different locations, the trial court was unable to determine from what specific

location the "marked" bills were seized. Furthermore, the trial court was reluctant to perform the task of separation, stating "[f]or the court to find that the money is not a part of illegal drug activity, the court would have to be able to segregate the funds and I cannot do that." Transcript at 30. Here, evidence at the hearing established that *some* of the money was tainted ($140.00 of $4,801.00 or approximately 3%). Thus, because of the actions of Metro Narcotics, the lower court was deprived of evidence which could have been dispositive.

Metro Narcotics' commingling policy frustrates the purpose and intent of the forfeiture statute and unfairly denies favorable evidence to the accused. The hearing for Mr. Nations highlights this unfortunate result quite clearly. Mr. Nations presented the court with a legitimate Bill of Sale for a 2008 Honda, and the court heard credible testimony from the man who bought this vehicle, Mr. Johnny Glass. Both the Bill of Sale and Mr. Glass' testimony unequivocally show that Mr. Nations was compensated nearly $10,000 for the sale of his car. Additionally, the court heard credible testimony from Mr. Nations' ex-girlfriend, Sara Roberts, corroborating Mr. Nations' transaction with Mr. Glass. Furthermore, she testified that Mr. Nations purchased a TV system with some of the proceeds, but intended to use the rest of the money for rent and his current attorney's fees. In light of this evidence, the trial court stated that it was probable that some of the money found in the room were proceeds from the sale of Mr. Nations' car. However, the trial court was still reluctant to release any of the funds stating, in relevant part:

> Although the burden is on the State to prove by a preponderance of the evidence that the money is from illegal drug activity, the court's opinion is once this money is commingled it all becomes the fruit of illegal activity...doesn't mean that one hundred percent of the money was from drug activity, but the fact that the money was...commingled satisfies the State's burden in proving that the money is tainted.

This language highlights the problem that once funds are commingled, there is no way for the

court to distinguish between legitimate and illegitimate funds. Moreover, the ruling eviscerates the State's burden of tying the money to illegal drug activity by immediately tainting all funds in Mr. Nations residence, funds that even the trial court indicated were likely from legitimate sources. Thus, any legitimate explanation for the funds—despite the presence of authentic and legitimate documents for substantiation—falls on deaf ears due to the actions of Metro Narcotics. All of the seized assets are presumed tainted once commingled, and the court is unwilling to separate the lump sum in order to discern between legal and illegal funds. As a result, any legitimate assets Mr. Nations had were forever tainted at the moment they were commingled with the $140.00 in "marked" bills (making up roughly 3% of the total amount seized).

In this case, Metro Narcotics could have easily documented the amounts, locations and identity of the monies seized before commingling them into a lump sum. Additionally, Metro Narcotics should have included brief descriptions of each location where money was found. If the trial court were privy to a slightly more descriptive and thorough report of where money was found and in what amounts *before* the money was commingled, it would be easier for that court to distinguish between legitimate and illegitimate proceeds. Thus, the forfeited amounts would be more justly associated with illegal activity, and the claimant would be able to retain money he acquired through legal means, creating a more equitable forfeiture system.

This Honorable Court should give reasonable guidance to the lower courts and to law enforcement. If the ruling below stands, the incentive for law enforcement is clear. Commingle all assets seized during an investigation of a controlled substances violation in order to frustrate the trial court at a forfeiture hearing. This Honorable Court should not ignore this incentive – law enforcement units such as Metro Narcotics derive funding, vehicles, and other operating assets from the forfeiture statute. Every reasonable protection should be afforded the citizens of

the State of Mississippi to ensure a fair process before law enforcement is allowed to seize funds or other assets for salary, training or other operating purposes.

CONCLUSION

Based on the foregoing analysis, the Appellant respectfully request that the Court reverse the lower court's ruling and vacate the *Order of Forfeiture,* or, in the alternative, reverse and remand for a rehearing. The lower court wrongly held that the money seized in Mr. Nations' apartment was in close proximity to the seized alleged drugs and drug paraphernalia or, alternatively, failed to give proper weight to Mr. Nations' rebuttal of the "close proximity" presumption. In either case, the lower court's ruling that the drug agents' commingling of Mr. Nations' legitimately acquired monies with the one hundred forty dollars ($140.00) in Narcotics Unit funds rendered all of that money subject to forfeiture was wrongly decided and contrary to public policy and the law.

RESPECTFULLY SUBMITTED, this the 19th day of June, 2009.

DEREK NATIONS.
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CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that I have this day served, pursuant to Rule 25 of the MISSISSIPPI RULES OF APPELLATE PROCEDURE, the following listed persons with the *Appellant's Reply Brief* in this matter via United States Mail, postage pre-paid. The Clerk was sent the original and three copies of same pursuant to Rule 31 of the MISSISSIPPI RULES OF APPELLATE PROCEDURE.

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