
No. 21-

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD MEYER

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

PETITION FOR A WRIT OF CERTTIORARI

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QUESTIONS PRESENTED

- I. DOES THE KENTUCKY COURT OF APPEALS DECISION IN THIS CASE STAND IN DIRECT CONTRADICTION TO THIS COURT'S DECISION IN *TIMBS V. INDIANA*, 139 S.Ct. 682 (2019)?**

- II. DOES THE PRESUMPTION OF FORFEITABILITY FOUND IN KENTUCKY REVISED STATUTES (KRS) 218A VIOLATE THE DUE PROCESS CLAUSE?**

List of All Parties

Petitioner is Richard Meyer. Counsel of record for Mr. Myer is the Hon. Joshua D Farley, 111 W Washington Street, Suite 400, Louisville, Kentucky 40202.

Respondent is the Commonwealth of Kentucky, represented by, Hon. Jeanne Anderson, Special Assistant Attorney General and Hon. Daniel Cameron, Attorney General of the Commonwealth of Kentucky, 1024 Capital Center Drive, P.O. Box 2000, Frankfort, Kentucky 40602-2000, (502) 696-5342, Counsel for Respondent.

List of Proceedings Below

Commonwealth v. Meyer, 16CR3131 Jefferson Circuit Court (Kentucky) Trial Court Forfeiture Order
 11/27/2017

Meyer v. Commonwealth, 2018-CA-000135-MR, Kentucky Court of Appeals.
 Opinion Affirming 06/05/2020

Meyer v. Commonwealth, 2020-SC-0303, Kentucky Supreme Court. Order Denying Discretionary Review 12/09/2020

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CONSTITUTIONAL PROVISIONS

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OPINIONS BELOW

The Petitioner filed a CR 60.02 appellate motion with the trial court. The trial court denied this motion. The Order denying is attached here at the Appendix. The trial court ruling denying Petitioner's CR 60.02 motion was appealed to the Kentucky Court of Appeals, who issued an opinion affirming the trial court's denial on June 5, 2020. The Kentucky Supreme Court denied discretionary review on December 9, 2020.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a). The Kentucky Court of Appeals issued its Opinion affirming the trial court on June 5, 2020; and the Kentucky Supreme Court issued its decision denying discretionary review on December 9, 2020 (and thereby affirming the Kentucky Court of Appeals Opinion). This petition has been filed within ninety days of the latter Order, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

1. Summary

Petitioner was charged with trafficking in marijuana under 8 ounces enhanced by a firearm, based upon his possession of a personal use amount of marijuana in a safe next to an inoperable handgun. The Commonwealth used this discovery to seize nearly \$500,000.00 in cash also found in the safe.

At an evidentiary hearing, prior to conviction, the Commonwealth relied upon a presumption created by Kentucky Revised Statutes (KRS) 218A.410, that money found in proximity to drugs shall be forfeited, to order the nearly \$500,000.00 be forfeited. The trial court failed to determine whether the amount of the forfeiture was excessive, given that the largest possible fine under Kentucky law was \$10,000.00. KRS 218A.410 placed the burden upon the Petitioner to rebut the presumption. The trial court ordered the totality of the cash to be forfeited.

Immediately following forfeiture, the Commonwealth dismissed all charges against the Petitioner; proving that the indictment was done solely in an effort to seize the \$500,000.00.

The Petitioner appealed. The Kentucky Court of Appeals affirmed the forfeiture and

the Kentucky Supreme Court denied discretionary review.

2. Preservation of Federal Question

Petitioner questioned both the excessiveness of his fine and constitutionality of KRS 218A.410 with the trial court and again at the Kentucky Court of Appeals. The trial court addressed these arguments; however, the Kentucky Court of Appeals neglected to do so. See Appendix at 31-34 and 42, *infra*

3. Facts

The origins of this case involve the warrantless seizure, from Petitioner's home, of a very small amount of marijuana undisputedly for personal use¹, and nearly \$500,000.00 seized and ordered forfeited.

On May 26, 2016, Louisville police detective Joe Tapp came to the home of Petitioner Richard Meyer, claiming to be present based on a "complaint" that someone was smoking marijuana outside the house². The police bore no search warrant, nor does the Commonwealth maintain they had any lawful grounds for such. The responding officer

¹ VR 10/13/17, at 1:05:09; 1:10:30; 1:23:44, et seq.

² Tapp1, 0:00:00 to approx. 2:30:00

activated a body cam recorder and interacted with the Petitioner outside the house³ briefly. The officer later testified to having smelled “fresh marijuana” from outside⁴. Upon asking the Petitioner if he had marijuana in the house Petitioner readily admitted that he did have a small quantity⁵.

Petitioner led police to a safe where he had explained his marijuana was and opened it. Police obtained from the safe a bag containing the remnants of a “dime bag” of marijuana. At some point a single marijuana cigarette was also found in the house. Police readily admitted that the entire, small, quantity of marijuana taken from the Petitioner was clearly for his personal use.

Also, inside the safe was a broken handgun, which no one disputes was lawfully possessed by the Petitioner; and a large quantity of U.S. Currency in packages⁶. Upon questioning about the money, Petitioner told police it was his⁷. Some considerable time later

³ Much, if not all, of the police interaction with Appellant is recorded on body cam videos which were tendered as exhibits by the Commonwealth during the 10/13/17 hearing. There are 10 separate videos on the tendered disk, which are each entitled “Tapp1—Redacted” through “Tapp10—Redacted,” and will be referred to as such through this brief. Times referenced on such exhibits are from the MP4 video player.

⁴ VR 10/13/17, at 1:01:45 *et seq*

⁵ Tapp1 at 0:04:10

⁶ The total was approximately \$499,800. TR at 15.

⁷ Tapp4 at 17:00 to 20:00.

in this search of his house, after officers seated the Petitioner and stood around him, they began to demand “look at me: who’s money is this?”⁸ and “I think you’re holding his money . . . I know some of this belongs to Joe Lanham.” One officer announces during this discussion “lock him up, lock her up, call a car from the Home of the Innocents⁹ to come get the kids.”¹⁰ Following this, Petitioner begins to agree with officers that “some” of the money is Joe Lanham’s, and eventually signs a form stating this. Following his signing of the form, Petitioner was then not arrested, nor was his girlfriend, nor were the children taken to the Home of the Innocents.

At the conclusion of the police visit, Petitioner was charged by citation in connection with the marijuana. The charge was based entirely on the remains of marijuana found in a small baggie described in testimony as a “dime baggie,” as well as a “tin can” and “cigarette pack” with a very small amount of marijuana. To date, there has been no dispute by the Commonwealth that these quantities were solely for the personal use of the Petitioner. Also found in the safe was a firearm which Petitioner stated was broken, and the Commonwealth did not dispute was never proven to be operable. The entire

⁸ Tapp4 at 9:13.

⁹ The Home of the Innocents is well-known as the shelter in Louisville to which children are taken when removed from their families.

¹⁰ Tapp4 at 3:50

evidence that the firearm was connected in any way to unlawful drugs was its being placed in the safe which held the small baggie of marijuana. The Petitioner has no prior criminal record of any felony or serious offenses or drug offenses.

Petitioner's charge was pending in District Court until August 3, 2016, when the Commonwealth voluntarily dismissed it without prejudice. The Petitioner was then indicted nearly four months later, on November 28, 2016, for trafficking in marijuana under 8 ounces, enhanced by a firearm. Finally, nearly a year after Petitioner's indictment, in October, 2017, an evidentiary hearing was held with regard to the Commonwealth's Motion to Forfeit the seized currency. The Commonwealth informed the court that the forfeiture was essentially all they were seeking, and that forfeiture "would be determinative."¹¹ The Commonwealth also, without dispute, did not provide certified mail notice, publication, nor any written notice¹² to the person they claimed owned the money in lieu of Petitioner¹³.

The Commonwealth's position at the forfeiture hearing was built on a series of

¹¹ VR 10/13/17; Opinion and Order 8/21/19, at p. 1

¹² See KRS

¹³ Some 18 months later, a different prosecutor claimed without proof that the previous prosecutor had 'telephoned the attorney' for this alleged alternative owner.

inferences. There were vague claims that the un-joined third person (Joe Lanham) alleged to own the currency was a marijuana dealer, who was *indicted* on some other day in connection with some other quantity of marijuana held at some other time.¹⁴ Because Petitioner associated with this Mr. Lanham at some point, the money in question must be proceeds of drug transactions.

The trial court entered an order forfeiting the entirety of the seized funds on November 22, 2017; and the court then dismissed the entirety of charges without prejudice upon the Commonwealth's Motion. The trial court's order of forfeiture contains no findings of fact of any kind, nor any application of law to the facts in this case. It merely recites that the currency is forfeited, and states how to distribute the funds.

New counsel for Petitioner filed a motion challenging the legality of this forfeiture on several bases, including the constitutionality of the forfeiture. The trial court ultimately denied the Petitioner's post-judgment motion by Opinion and Order entered August 21, 2019, and Appellant then filed an appeal with the Kentucky Court of Appeals.

¹⁴ Over the defense objection, the Commonwealth relied solely on the fact of indictment for "proof" that Lannham was a marijuana dealer. VR 10/13/17 at 1:29:00 to 1:31:00

The Kentucky Court of Appeals affirmed the forfeiture while ignoring Petitioner's claims of unconstitutionality. The Kentucky Supreme Court then denied discretionary review. Petitioner now seeks *certiorari* with this Court.

REASONS THE COURT SHOULD ISSUE THE WRIT OF CERTIORARI

I. THE KENTUCKY COURT OF APPEALS DECISION IN THIS CASE STANDS IN DIRECT CONTRADICTION TO THIS COURT'S DECISION IN *TIMBS V. INDIANA*, 139 S.Ct. 682 (2019).

In *Timbs v. Indiana*, 139 S.Ct. 682 (2019), this Court held that the Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause. *Id.* at 686-691. In doing so this Court stated, "This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." *Id.* at 686-687, citing *McDonald v. Chicago*, 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). Specifically, this Court found that the Excessive Fines Clause was applicable to the States in forfeiture actions. *Id.* at 690.

In *Timbs*, Petitioner was convicted of crimes that lead to a civil forfeiture of his vehicle. *Id.* at 686. Petitioner here was ordered to forfeit nearly \$500,000.00, without conviction or trial.¹⁵ Petitioner was charged with trafficking in marijuana under 8 ounces, enhanced by a firearm. The financial penalty for trafficking in marijuana under 8 ounces with a firearm enhancement in Kentucky is no more than \$10,000.00.¹⁶ Petitioner was punished by the Kentucky Courts through the use of forfeiture at a rate nearly fifty (50) times the fine permitted by statute. Certainly if the forfeiture in *Timbs* that was nearly four (4) times the permissible fine was ordered to be reviewed by the lower courts for excessiveness under the Eighth Amendment, the clearly excessive forfeiture here should be as well. *Timbs* at 686.

Petitioner alerted the Kentucky Court of Appeals to the application of *Timbs* to his case; however, this issue was ignored by the in their opinion affirming the forfeiture. Never was consideration given by Kentucky courts to whether the forfeiture of nearly \$500,000.00, done without a conviction, was excessive.

¹⁵ The total was approximately \$499,800. TR at 15.

¹⁶ KRS 218A.1421(2)(a) defines trafficking in marijuana under 8 ounces as a Class A Misdemeanor, this is enhanced by the firearm under KRS 218A.992 to a Class D Felony. A Class D Felony is punishable by a fine of up to \$10,000.00 for a singular offense under KRS 534.030(1).

The Petitioner requests that this Court grant *certiorari* to order review by the Kentucky courts of whether the forfeiture is excessive under the guidance provided for in *Timbs v. Indiana*, 139 S.Ct. 682 (2019) and the Eighth Amendment's Excessive Fines Clause.

II. KENTUCKY REVISED STATUTES (KRS) 218A.410 VIOLATES THE DUE PROCESS CLAUSE.

KRS 218A.410 governs Kentucky forfeiture law. Under that statute, any proceeds, including personal property traceable to an exchange of a controlled substance in violation of KRS 218A, are subject to forfeiture.¹⁷ Furthermore:

It is well-established that the Commonwealth bears the burden of proof in forfeiture actions. *Osborne v. Commonwealth*, 839 S.W.2d 281 (Ky.1992). To meet its burden of proof and make a *prima facie* case, the Commonwealth must produce "slight evidence of traceability." *Id.* at 284. This means that the Commonwealth must "produce some evidence that the currency or some portion of it had been used or was intended to be used in a

¹⁷ See KRS 218A.410(j).

drug transaction." *Id.* If the Commonwealth provides additional proof that the currency sought to be forfeited was found in close proximity, then it is deemed sufficient to make a *prima facie* case. If the Commonwealth establishes its *prima facie* case, the burden is then on the defendant to rebut this presumption by clear and convincing evidence. *Id.*

Smith v. Commonwealth, 339 S.W.3d 485, 487 (Ky. App. 2010).

Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime -- that is, an "ultimate" or "elemental" fact -- from the existence of one or more "evidentiary" or "basic" facts. E.g., *Barnes v. United States*, 412 U.S. 837, 843-844; *Tot v. United States*, 319 U.S. 463, 467; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 42.

The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree

to which the device curtails the factfinder's freedom to assess the evidence independently. See *In re Winship*, 397 U.S. 358, 364; *Mullaney v. Wilbur*, 421 U.S. at 702-703, n. 31.

County Court of Ulster County v. Allen, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777, 792 (1979).

This Court defines a statutory presumption as an evidentiary device which is constitutionally permissible "which allows--but does not require--the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant." *Ibid.* A mandatory presumption is a troublesome evidentiary device. It tells the trier that they must find the elemental fact upon proof of the basic fact, unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. *Ibid.* KRS 218A.410 violates this rule.

KRS 218A.410(j) creates a presumption that currency found in close proximity to controlled substances ... are presumed to be forfeitable. The statute then makes the presumption a conclusive fact rather than a mere rational presumption by posing an insurmountable, and therefore constitutionally impermissible, burden on the victim of the forfeiture, stating: "The burden of proof shall

be upon claimants of personal property to rebut this presumption by clear and convincing evidence." *Ibid.*

Thus, the victim of the forfeiture is required to prove a negative, not only to the satisfaction of the trier of fact, but "by clear and convincing evidence." Whether the property is traceable to the drug transaction may well be inferable from the totality of the circumstances, but Congress has no power to make the mere fact of proximity, standing alone, conclusive proof that the money is drug-related unless the victim of the forfeiture can persuade the trier of fact to the contrary by "clear and convincing evidence."

KRS 218A.410(j) violates the Due Process Clause. For a legislature to create a presumption that overrides the judicial requirement for actual evidence and that places a burden on the defendant to prove a negative, is unconstitutional, at least as applied to this case, and particularly since the fundamental constitutional right of Due Process is at issue. The presumption is unconstitutional in this case, because without its invocation, the Commonwealth has utterly failed in its burden to demonstrate traceability or forfeitability.

Here, the Commonwealth made its case built on a pyramid of inference on inferences and did not carry its burden. The evidence showed that the currency seized was in a safe,

near an amount of marijuana so small that the lead detective repeatedly conceded that this was only for the Petitioner's personal use. Beyond that, though, the Commonwealth wishes to rely upon vague claims that some un-joined third person (Joe Lanham) was a "known marijuana dealer," who was indicted on some other day in connection with some other quantity of marijuana. Because Petitioner associated with this Mr. Lanham at some point (so goes the argument), the money in question must be proceeds of drug transactions.

This insecure foundation of inference does not avail the Commonwealth to say that the Petitioner's marijuana was "in proximity to" the currency, when they failed to offer any proof that trafficking was occurring. The Commonwealth's "evidence" was nothing more than proof premised upon a pyramid of inferences, and as such is invalid for any purpose.

The Petitioner requests that this Court grant *certiorari* and declare KRS 218A.410 an unconstitutional abridgement of the separation of powers doctrine and a violation of the Due Process Clause.

CONCLUSION

For the reasons set out above, the Court should grant a *writ of certiorari* to review the decision of the Kentucky Court of Appeals.

Respectfully submitted,

*JOSHUA D FARLEY

F. TODD LEWIS

* *Counsel of Record*

No. 21-

IN THE
SUPREME COURT OF THE UNITED
STATES

RICHARD MEYER

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

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APPENDIX

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RENDERED: DECEMBER 9, 2020
NOT TO BE PUBLISHED
Commonwealth of Kentucky
Kentucky Supreme Court
No. 2020-SC-0303

RICHARD MYER APPELLANT
APPEAL FROM JEFFERSON CIRCUIT
COURT
v.
COMMONWEALTH OF KENTUCKY
APPELLEE

ORDER

The motion for review of the decision of the
Court of Appeals is DENIED.

RENDERED: JUNE 5, 2020; 10:00 A.M.
NOT TO BE PUBLISHED
Commonwealth of Kentucky
Court of Appeals
NO. 2018-CA-000135-MR

HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 16-CR-003131

RICHARD MYER APPELLANT
APPEAL FROM JEFFERSON CIRCUIT
COURT

v.
COMMONWEALTH OF KENTUCKY
APPELLEE

OPINION
AFFIRMING
** ** *

BEFORE: CLAYTON, CHIEF JUDGE;
ACREE AND LAMBERT, JUDGES.
CLAYTON, CHIEF JUDGE:

Richard Myer appeals from a Jefferson Circuit Court order of forfeiture and an opinion and order denying his subsequent Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate that order. Myer raises numerous arguments relating to the forfeiture of almost \$500,000 in cash seized from his safe by the police. We affirm because Myer lacks standing to contest the forfeiture.

On May 26, 2016, the police visited Myer at his residence in Jefferson County

after receiving complaints that someone was smoking marijuana outside the house. Detective Joseph Tapp of the Louisville Metro Police Department testified at the forfeiture hearing that he could smell fresh marijuana while standing by Myer's front door. Myer admitted to the police he had a small amount of marijuana for personal use and voluntarily led them to a safe in an upstairs bedroom. A security camera in the room was trained on the safe. Myer warned Tapp that there was a broken gun in the safe. Inside the safe, Tapp found a small amount of marijuana, the gun, and a black computer-type bag containing vacuum sealed plastic bags of cash. Myer initially told the police the bag contained \$50,000, then raised that amount to \$100,000. Ultimately, the amount of packaged cash in the bag was found to total almost \$500,000.

According to Detective Tapp, in his experience large quantities of packaged and bundled cash are indicative of drug trafficking. Specifically, he suspected a connection between Myer and Joseph Lanham, a large-scale marijuana dealer known to police. Tapp had been conducting surveillance of Lanham for some time and had observed Myer visit Lanham's address several times. Tapp had pulled over several people who had visited Lanham's residence and almost all of them had guns or drugs or both.

Upon questioning by detectives from the narcotics division, Myer denied the cash was his and said it belonged to Lanham. Sergeant

William Young of the Asset Forfeiture Division testified Myer told him the cash was not his and that he was holding it for Joseph Lanham. Myer signed a currency seizure form disclaiming ownership of funds totaling \$499,800. He signed another currency seizure form claiming ownership of \$560 in cash, described on the form as “personal money.” The currency was placed in tamper proof bags and Sergeant Young told Myer to give Lanham the receipts. A search of the rest of the house uncovered an assault rifle, more small amounts of marijuana, a digital scale, and another handgun.

Later the same day, the police executed a search of Lanham’s residence and found \$37,000 and several pounds of marijuana. Several weeks later, the officers found \$300,000 buried in Lanham’s back yard, with a surveillance camera trained on it.

Myer was initially charged by citation with possession of marijuana. His charge was pending in district court until August 3, 2016, when it was dismissed without prejudice. Myer was thereafter indicted on November 28, 2016, for one count of trafficking in marijuana (less than 8 ounces) while in possession of a firearm (complicity).

The Commonwealth filed a motion pursuant to Kentucky Revised Statutes (KRS) 218A.410 for the forfeiture of the \$499,800 in cash seized from Myer’s house. Following a hearing on the motion, the circuit court

entered the Commonwealth's tendered order on November 22, 2017, directing the funds to be forfeited. The indictment against Myer was dismissed without prejudice on January 3, 2018. Myer filed an appeal of the forfeiture order which was delayed by his attorney's failure to timely file a brief and by Myer ultimately having to retain new counsel.

On April 2, 2019, Myer's new counsel filed a motion pursuant to CR 60.02(e) and (f) to vacate the forfeiture order, and seeking the return of the currency or for a new forfeiture hearing. The motion argued that the forfeiture violated Myer's due process rights, constituted an excessively disproportionate fine, and that he received ineffective assistance of counsel at the trial and appellate stages. The earlier appeal was held in abeyance pending the circuit court's ruling on the CR 60.02 motion. On August 21, 2019, the circuit court entered an opinion and order denying the motion. The appeal was thereafter returned to the active docket.

In denying the CR 60.02 motion, the circuit court explained that its decision to order forfeiture of the \$499,800 was based primarily on Myer's lack of standing to object to the forfeiture of money he had expressly disclaimed and stated belonged to Lanham. "[T]he existence of a plaintiff's standing is a constitutional requirement to prosecute any action in the courts of this Commonwealth[.]" *Commonwealth Cabinet for Health and Family Services, Department for Medicaid Services v.*

Sexton by and through Appalachian Regional Healthcare, Inc., 566 S.W.3d 185, 188 (Ky. 2018), reh’g denied (Feb. 14, 2019), cert. denied sub nom. *Sexton ex rel. Appalachian Regional Healthcare, Inc. v. Kentucky Cabinet for Health and Family Services*, 140 S. Ct. 448, 205 L. Ed. 2d 252 (2019). “[A]ll Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only justiciable causes proceed in court, because the issue of constitutional standing is not waivable.” *Id.* at 192 (emphasis in original) (footnote omitted).

“The trial court’s ultimate determination on the standing issue is a pure legal question. Therefore, our review of that issue is de novo. Under de novo review, we owe no deference to the trial court’s application of the law to the established facts.” *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 111 (Ky. App. 2014) (citations omitted). On the other hand, any “preliminary, factual determinations” made by the trial court “are entitled to deference.” *Id.* (citation omitted). “We cannot reverse factual findings that are supported by substantial evidence.” *Id.* (citation omitted). “Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Id.* at 111-12 (citation and internal quotation marks omitted).

“Kentucky’s forfeiture statute was intended by the legislature to be a civil, in rem proceeding. Forfeitures pursuant to the statute are specifically structured to be impersonal by targeting the property itself. Personal property may be seized without process preparatory to forfeiture under KRS 218A.415(1). Nor does the Fourth Amendment apply to suppress evidence at a seizure hearing. [See KRS 218A.415(3)(a)(3).]” *Smith v. Commonwealth*, 205 S.W.3d 217, 221 (Ky. App. 2006) (citation omitted). “KRS 218A.410(1)(j), which describes the types of property which may be seized for forfeiture, places the burden on the claimant to rebut by clear and convincing evidence the presumption that ‘all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are . . . forfeitable[.]’ The Commonwealth need only produce ‘slight evidence of traceability’ plus ‘proof of close proximity’ in order ‘to sustain the forfeiture in the absence of clear and convincing evidence to the contrary.” *Id.* (quoting *Osborne v. Commonwealth*, 839 S.W.2d 281, 284 (Ky. 1992)).

As the factual basis for its finding that Myer lacked standing to challenge the forfeiture, the circuit court relied on the testimony of three police officers at the forfeiture hearing that Myer stated the \$499,800 in cash was not his, and on his written disclaimer to that effect. The circuit

court also noted that Myer did not directly state an interest in the funds during that hearing, arguing instead that the presence of the cash was not associated with his alleged crime of possession of a small amount of marijuana and a handgun. The court also ruled that Myer did not have standing to object to the forfeiture on behalf of another, presumably Lanham.

The testimony at the forfeiture hearing fully supports the circuit court's findings, and its conclusion that Myer lacked standing or failed to assert any grounds for standing is well-founded.

Under the sections of CR 60.02 relied upon by Myer, a court “may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.” CR 60.02. The denial of such a motion is reviewed for abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010), overruled on other grounds by *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). The test for abuse of discretion is whether the trial court's decision was “arbitrary, unreasonable, unfair, or

unsupported by sound legal principles.”
Commonwealth v. English, 993 S.W.2d
 941, 945 (Ky. 1999) (citations omitted).

In his statement of the facts, Myer alleges that the police employed coercive techniques in questioning him at his home, threatening to “lock up Myer and his girlfriend” and take her children to a shelter, apparently to force him to incriminate Lanham. The circuit court rejected this argument as grounds for relief pursuant to CR 60.02 because Myer was afforded an opportunity at the forfeiture hearing to raise any claims he was improperly pressured by the law enforcement officers. “The purpose of CR 60.02 is to bring before a court errors which (1) had not been put into issue or passed on, and (2) were unknown and could not have been known to the moving party by the exercise of reasonable diligence and in time to have been otherwise presented to the court.” *Young v. Edward Technology Group, Inc.*, 918 S.W.2d 229, 231 (Ky. App. 1995) (citation omitted). Myer does not explain why the claim of police coercion could not have been raised at the forfeiture hearing.

“KRS 218A.410(1)(j) [places] the burden on a claimant to rebut by clear and convincing evidence the presumption that the property, in this case money, is forfeitable.” *Harbin v. Commonwealth*, 121 S.W.3d 191, 196 (Ky. 2003), as modified (Dec. 18, 2003). Myer also does not explain why he did not seek to rebut this presumption at the hearing, which

afforded him an opportunity to claim ownership of the funds and to identify their source.

On appeal, Myer does not unambiguously claim ownership or other interest in the funds sufficient to provide him with standing to rebut the presumption that the funds are forfeitable. His argument on appeal as to standing relates solely to the Commonwealth's alleged failure to notify Lanham, whom he characterizes as an "alleged alternative owner" of the funds and a necessary party to the forfeiture proceedings. At the hearing on the CR 60.02 motion, Myer's counsel accused the Commonwealth of never joining as a party the person to whom the disputed funds do belong, i.e., Lanham. "[T]he principle 'that some substantial claim to a personal right must be alleged' by a party is part of the basic law of standing." *Bell v. Commonwealth, Cabinet for Health and Family Services, Dep't for Community Based Services*, 423 S.W.3d 742, 750 (Ky. 2014) (quoting *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978)). Myer has failed to assert such a personal right. At no point does he renounce his signed disclaimer form, or expressly claim ownership or some other substantial personal interest in the \$499,800 cash recovered from his safe. Under the circumstances, the circuit court did not abuse its discretion in denying his CR 60.02 motion.

For the foregoing reasons, the Jefferson Circuit Court's order of forfeiture and its

opinion and order denying the CR 60.02 motion are affirmed. ALL CONCUR.

BRIEF FOR APPELLANT:

F. Todd Lewis

Louisville, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron

Attorney General of Kentucky

Jeanne Anderson

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16-CR-003131

JEFFERSON CIRCUIT COURT
DIVISION FIVE (5)

JUDGE MARY M. SHAW

COMMONWEALTH OF KENTUCKY,
PLAINTIFF

RICHARD MYER, DEFENDANT

OPINION AND ORDER

This action comes before the Court on a motion for extraordinary relief under CR 60.02(e) and (f) brought by the Defendant, Richard Myer, as regards a forfeiture order entered in favor of the Plaintiff, the Commonwealth of Kentucky. After careful consideration of the record and the memoranda of the parties, as well as the applicable case, statutory, and procedural law and being otherwise sufficiently advised, the Court OVERRULES the motion.

FACTS

On May 26, 2016, law enforcement officers visited Mr. Myer at his residence in Jefferson County. Mr. Myer consented to a search of the residence, whereupon officers found \$499,800.00 in cash. Mr. Myer was thereafter indicted for trafficking while in possession of a firearm on November 28, 2016, and the Court conducted a forfeiture hearing on October 13, 2017. The Court signed the

Commonwealth's tendered order, which the clerk entered on November 22, 2017. Mr. Myer's indictment was dismissed without prejudice on January 5, 2018. Mr. Myer appealed and on April 2, 2019 filed the immediate motion challenging forfeiture. It is the Court's understanding that the Court of Appeals is holding the appeal in abeyance pending a ruling on this motion.

Three Louisville Metro Police Department (hereinafter "LMPD") officers testified during the forfeiture hearing. Officer Joseph Tapp testified that he visited Mr. Myer's residence on May 26, 2016 and could smell marijuana while standing by the front door. Mr. Myer acknowledged the presence of marijuana and consented to a search, leading Detective Tapp to a small safe in an upstairs room. A security camera mounted on the wall or ceiling pointed in the direction of the safe. Mr. Myer warned that there was a broken gun inside, so Detective Tapp instructed him to step aside for safety after unlocking the safe. Detective Tapp then looked in the safe and found the broken gun, a computer case that he initially thought contained marijuana, and, shortly afterwards, a small container of marijuana. The computer case contained a large amount of cash in \$100 bills that had been double wrapped and heat sealed. Mr. Myer said he thought there may have been \$50,000.00, then changed the number to \$100,000.00. He said he was holding the money for someone else and could not account for where the money originated. Officers

conducted a broader search of the house and found what the Commonwealth characterizes as an assault rifle in attic space adjacent to Mr. Myer's bedroom and a scale and handgun in a downstairs bedroom. They also found a small amount of marijuana in the living room.

Detective Tapp summarized why he thought the cash was related to drug trafficking. In his experience, large amounts of packed and bundled cash are invariably indicative of drug trafficking. He had been surveilling a known trafficker, Joseph Lanham, for a while and had seen Mr. Myer visit that address several times. Detective Tapp had pulled over several people who had visited Mr. Lanham's address and almost all of them had guns and drugs or both. He mentioned the camera's presence in conjunction with evidence found at Mr. Lanham's address later the same day, officers executed a search of Mr. Lanham's residence and found \$37,000.00 and several pounds of marijuana, and six weeks later, officers found \$500,000.00 buried in Mr. Lanham's back yard. As with the small safe in Mr. Myer's room, the location of the cash had a security camera trained on it.

Detective Joseph Lamb testified that he went to Mr. Myer's house to assist. He spoke with Mr. Myer, who said the money belonged to Mr. Lanham, the subject of several drug trafficking investigations. Mr. Lanham had four separate indictments as of the day of the hearing.

LMPD's asset forfeiture officer, Sergeant William Young, also testified. He also spoke with Mr. Myer about the cash in question. Mr. Myer said the money was not his and signed a disclaimer of ownership form; Mr. Myer told Sergeant Young the cash belonged to Mr. Lanham.

At the end of the hearing the Parties agreed to submit simultaneous briefs. The Commonwealth filed one, addressing the issue of standing, while Mr. Myer did not. The Court found the Commonwealth's position persuasive and signed its tendered order.

Now asserting an ownership interest in the money, Mr. Myers filed the immediate motion arguing that many aspects of the underlying case and forfeiture proceeding require relief under CR 60.02(e) and (f). The Parties presented their respective positions during a hearing and submitted briefs thereafter. The motion stands ready for a ruling.

ANALYSIS

CR 60.02 provides as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake,

inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend operation.

Courts have long proceeded cautiously under subsection (f), CR 60.02's catch-all clause. *Lewallen v. Com.*, 584 S.W.2d 748, 749 (Ky. App. 1979). "Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is

made." *Com. v. Bustamonte*, 140 S.W.3d 581, 583 (Ky. App. 2004) quoting *Bishir v. Bishir*, 698 S.W.2d 823, 826 (Ky. 1985). Even then, the movant is entitled to relief only if the asserted grounds of relief are not encompassed within the first five clauses of CR 60.02: mistake, inadvertence, surprise or excusable neglect, newly discovered evidence, perjury or falsified evidence, and fraud. *Id.* Each of these grounds point to information that becomes available after judgment is entered that could affect the ability to timely file an appeal.

The Court made November 22, 2017 ruling primarily on grounds that Mr. Myer lacks standing to object to forfeiture of money he disclaimed and said belonged to Mr. Lanham. All three officers testified during the hearing that Mr. Myer stated the cash was not his, and Mr. Myer signed a written disclaimer of the money. He did not directly state an interest in the cash during the hearing, instead arguing that the money's presence was unassociated with his alleged crime, involving possession of a small weight of marijuana and a handgun. Unfortunately for Mr. Myer, on several occasions he disclaimed an interest in the money. As the cash was not his, he had no standing to object to forfeiture. Additionally, he has no standing to object to forfeiture on behalf of another, and any arguments about pressure from law enforcement officers cannot be subject to a 60.02 motion because all of the evidence relating to the arrest was before the Court in 2017; Mr. Myer presents no new evidence other than that related to his

attorney during the proceedings. Nevertheless, although the motion must be overruled for these reasons, the Court will address the other arguments in turn as they entail analysis of the Court's secondary ground for its order: the forfeiture is not excessive given the circumstances.

Mr. Myer argues that the forfeiture in question represents an unconstitutionally excessive fine. The Kentucky Constitution, 17, states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted." With this provision as its guiding light, the legislature enacted KRS 418A.405 et seq., which governs forfeitures of cash and other property associated with drug trafficking. Specifically, cash is subject to forfeiture:

Everything of value furnished,
or intended to be furnished, in
exchange for a controlled
substance in violation of this
chapter, all proceeds, including
real and personal property,
traceable to the exchange, and
all moneys, negotiable
instruments, and securities
used, or intended to be used, to
facilitate any violation of this
chapter; except that no property
shall be forfeited under this
paragraph, to the extent of the
interest of an owner, by reason
of any act or omission

established by him or her to have been committed or omitted without his or her knowledge or consent. It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence. The burden of proof shall be upon the law enforcement agency to prove by clear and convincing evidence that real property is forfeitable under this paragraph; and

KRS 418A.410(1)(j). The Kentucky Supreme Court gave the following guidance on how to proceed under the statute:

On examination of the foregoing statute, it is apparent that any property subject to forfeiture under (j) must be traceable to the exchange or intended violation. This requirement

exists without regard to the presumption which appears later in the statute...

The Commonwealth may meet its initial burden by producing slight evidence of traceability. Production of such evidence plus proof of close proximity, the weight of which is enhanced by virtue of the presumption, is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary. In practical application, the Commonwealth must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a prima facie case. Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade.

Osborne v. Com, 839 S.W.2d 281, 284 (Ky. 1992). If the Commonwealth prevails on this burden of persuasion, the trial court must determine "whether the forfeiture is grossly disproportionate to the particular offense.

Some of the factors to be considered are the gravity of the offense, the potential penalties, the actual sentence, sentences imposed for similar crimes, and the effect of the forfeiture on innocent parties." *Harbin v. Com.*, 121 S.W.3d 191, 197 (Ky. 2003). The impact of *Timbs v. Indiana*, 139 S.Ct. 682 (2019) is not as meaningful as argued by Mr. Myer because Kentucky courts have recognized that the Eighth Amendment's excessive fines clause applies to forfeitures since at least 1997. *Harbin, supra* at 197 citing *Com. v. Fint*, 940 S.W.2d 896 (Ky. 1997). That said, *Timbs* makes clear that there is no longer a distinction between *in rem* and *in personam* forfeitures. *Timbs, supra*, at 686-87.

In the immediate action, the Commonwealth presented persuasive evidence given the applicable standard that the moneys in the safe were the proceeds of drug trafficking. The money was wrapped in plastic consistent with other proceeds from trafficking offenses; it was found next to marijuana; there was a camera pointed at the safe similar to the scenario encountered in Mr. Lanham's back yard; Mr. Myer had been to Mr. Lanham's property several times; Mr. Lanham was at the time suspected of trafficking; cash was found at Mr. Lanham's property bundled in a similar manner; and Mr. Myer stated he was keeping the money for Mr. Lanham. While keeping cash and a firearm are innocuous in and of themselves, this evidence creates a strong inference that all the money originated from illicit drug sales. In other words, the

forfeiture was not for possession of a small amount of marijuana; it was because the evidence created a strong inference that all the money originated from trafficking.

It is for this reason that the forfeiture was not unconstitutionally excessive; the Commonwealth met the applicable burden of proving all of the moneys were proceeds of drug trafficking. This scenario is inapposite to the ones cited by Mr. Myer; for example, it could be an excessive penalty to seize an automobile purchased with hard legally earned cash as a result of the driver/owner trafficking in a small amount of marijuana. The property seized does not have a very close relationship with the crime. But, here the evidence is that the money was bundled together and belonged Mr. Lanham, a suspected drug trafficker, and was used to facilitate trafficking. See *United States v. Ursery*, 518 U.S. 267, 291 (1996) and *Com, v. Coffee*, 247 S.W.3d 908, 911 (Ky. 2008).

Citing *Com v. Burnett*, 2012 WL 3144027 (Ky. App.) Mr. Myer next argues that the Court lacked jurisdiction under KRS 218A.460 to hold a forfeiture hearing because there was no underlying conviction. While the statute's current iteration includes language that arguably requires a conviction to move forward with a forfeiture motion, the 1990 amendments included similar language and the *Osborne* Court gave the following guidance in 1992: "At the outset, it should be observed that nothing in the forfeiture statute requires

criminal conviction of the person whose property is sought to be forfeited... " 839 S.W.2d at 283. Mr. Myer's argument is viscerally appealing, but the Court is bound by *Osborne's* ruling.

Mr. Myer also argues he suffered ineffective assistance of counsel during pretrial proceedings, including the forfeiture motion. He acknowledges being foreclosed from filing a motion under RCr 11.42, but makes substantively similar arguments as those filed under the rule in support of his contention that his situation is indeed extraordinary. In addition to several other alleged deficiencies, he argues that counsel failed to object to the forfeiture motion on grounds that Mr. Lanham was not afforded an opportunity to be heard. Unfortunately for Mr. Myer, he has no standing to argue insufficient notice on behalf of Mr. Lanham; given that he disclaimed ownership of the cash he would not have been entitled to it had Mr. Lanham participated. Further, this facet of Mr. Myer's motion is not properly the subject of CR 60.02, arguments about counsel's performance notwithstanding. Nevertheless, the Court will address the argument because notice was of concern when reviewing the motion in 2017.

KRS 218A.460(3) provides instruction on when and how the Commonwealth must give notice of a forfeiture motion. It follows in relevant part:

. . . [I]f the owner of the property is known in fact to the Commonwealth at the time of the hearing...the attorney representing the Commonwealth shall give notice of the ancillary hearing by registered mail, return receipt requested, to each person having such interest in the property, and shall publish notice of the forfeiture once each week for two (2) consecutive weeks in a newspaper of general circulation as defined in KRS Chapter 424 in the county where the forfeiture proceedings will occur. The notice shall be mailed and first published at least four (4) weeks prior to the ancillary hearing and shall describe the property; state the county, place, and date of seizure; state the name of the law enforcement agency holding the seized property; and state the name of the court in which the ancillary hearing will be held and the date of the hearing. However, the Commonwealth shall be obligated only to make a diligent search and inquiry as to the owner of subject property; and if, after diligent search and

inquiry, the Commonwealth is unable to ascertain the owner, the actual notice requirements by mail shall not be applicable.

Thus, the Commonwealth need provide notice only if the owner is known in fact. Here, the Commonwealth suspected that Mr. Lanham was the owner, but did not know in fact whose it was, and there were compelling reasons for anyone to disclaim the money, not the least of which is additional scrutiny by law enforcement and possible charges. Even assuming the Commonwealth considered Mr. Lanham to own the money in fact, it averred that it gave Mr. Lanham's counsel notice of the hearing, and counsel said Mr. Lanham would not participate. While this notice is not to the letter of KRS 218A.460(3), the Commonwealth substantially complied such that he received adequate due process. Also, it is difficult to believe that anyone who has nearly \$500,000.00 in cash confiscated by law enforcement would not carefully track its whereabouts and attempt to recover it. Thus, contrary to Mr. Myer's arguments otherwise, the Commonwealth did not violate any notice provisions in the way it participated in the forfeiture proceedings.

ORDER

IT IS HEREBY ORDERED AND ADJUDGED that Mr. Myer's motion is OVERRULED.

/S/ Mary Shaw, Judge