
IN THE
Supreme Court of Virginia

RECORD NO. 180322

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

BRIAN KEITH HALL,

Appellee.

OPENING BRIEF OF APPELLANT

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APPELLEE.	*	

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

This case arises from the Circuit Court of Montgomery County (“trial court”). The Honorable Robert M.D. Turk, Circuit Court Judge, presided.

On February 23, 2017, an Information was filed seeking the forfeiture of a 2014 Dodge Ram Pickup Truck (hereinafter “Truck”) owned by Brian Hall (“Hall”), alleging it was used in substantial connection with an illegal drug transaction. (App. 1-2). Hall filed an Answer, through counsel, denying the allegation. (App 3-4). The trial court heard the case and deferred a decision until December 4, at which time the forfeiture was denied. (App. 6-7).

The Commonwealth filed a Motion to Reconsider on December 7. (App. 8-12). The trial court denied that motion on December 18. (App. 13). The final order was entered on December 28. (App. 14-15). A Notice of

Appeal was filed on January 19, 2018. (App. 16). An Agreed Written Statement of Facts was entered by the trial court on January 30. (App. 18-21). This Court granted the appeal.

ASSIGNMENTS OF ERROR

- I. The trial court erred in holding that the Commonwealth was required to prove the Truck was used in more than one illegal drug transaction. (App. 8, 15).
- II. The trial court erred in holding that the Commonwealth failed to prove, by clear and convincing evidence, that the Truck was substantially connected to an illegal drug transaction. (App. 8, 15).

STATEMENT OF FACTS

On June 14, 2016, a confidential informant (“CI”) working with the New River Regional Drug Task Force arranged to purchase four oxycodone pills from Hall. (App. 18-19). The deal was set to take place in a parking lot of a closed business in the Town of Christiansburg, located in Montgomery County. (Id.). The CI met with Special Officer Brian Queen (“Queen”) and was searched prior to deal, with no drugs or money found. (App. 19). He was wired with a recording device and given \$60. (Id.). The CI then walked to the parking lot where he was to meet Hall. (Id.). Queen and Special Agent Tim Stuart each set up at different locations to surveil the illegal drug transaction. (App. 19-20).

Hall arrived driving the Truck. (App. 19). Queen wrote down the license plate number and confirmed that the Truck was registered to Hall. (Id). The CI completed the drug deal with Hall, who remained seated inside the Truck the entire time. (Id). Hall then drove off in the Truck. (Id.) The CI met back up with Queen and gave him the pills. (Id).

Hall was charged with Distribution of a Schedule II Controlled Substance for this illegal drug transaction in violation of Va. Code § 18.2-248(C). (Id). He pled guilty and was convicted. (Id; App. 22-24).

In a letter opinion dated December 4, 2017, the trial court denied the forfeiture. (App. 6-7). The trial court made the following factual findings:

[t]he evidence presented by the Commonwealth was that on June 14, 2016 the New River Valley regional drug task force executed an undercover buy from Brian K. Hall. This took place at 1750 Depot Street in Christiansburg, Virginia. At that time a confidential informant arranged to buy from Mr. Hall at the above mentioned address. Mr. Hall arrived in the truck, which is the subject of this forfeiture and handed the informant the drugs. The informant and Mr. Hall then left the premises.

(App. 6). The trial court held that “the Commonwealth has failed to meet its burden in establishing that this truck was used in substantial connection with the illegal distribution of controlled substances.” (Id). Rather, the trial court found that the Truck was used “incidentally or fortuitously in the distribution of the illegal drug.” (App. 6-7). Further, the trial court stated

[o]ther than this one time incident, the Commonwealth presented no other evidence that this vehicle had been used in the sale or distribution of an illegal substance(s).

(App. 7).

ARGUMENT AND AUTHORITIES

- I. The trial court erred in holding that the Commonwealth was required to prove the Truck was used in more than one illegal drug transaction.

Standard of Review

This Court reviews questions of law *de novo*. Chamberlain v. Marshall Auto and Truck Ctr., 293 Va. 238, 242, 798 S.E.2d 161, ___ (2017).

Argument

Virginia Code § 19.2-386.22 allows for the forfeiture of property, including motor vehicles, “used in substantial connection with. . . the illegal manufacture, sale or distribution of controlled substances or possession with intent to sell or distribute controlled substances in violation of § 18.2-248...” Va. Code § 19.2-386.22 (A).

In Lee v. Commonwealth, 253 Va. 222, 482 S.E.2d 802 (1997), this Court considered an appeal challenging the forfeiture of a vehicle. An undercover officer named Powell was going to purchase cocaine on March

15, 1995. 253 Va. at 223. Powell went to a parking lot and gave cash to Taylor, who said he had to meet his man and get the drugs. Id. Lee, driving a Nissan Pathfinder, came into the parking lot. Id. Lee got out of the Pathfinder, met with Taylor, and then got back in the Pathfinder and left. Id. at 223-24. Taylor then gave cocaine to Powell. Id. at 224.

A second drug transaction was set up for March 24, 1995. Id. On that date, Powell contacted Taylor before the transaction and Taylor called back and stated he would meet him in 20 minutes because he had to meet his man. Id. Powell and Taylor met in the parking lot and did the transaction. Id. The Pathfinder was observed near the parking lot. Id. There was no evidence the Pathfinder was seen delivering drugs on March 24. This Court held that Pathfinder was substantially connected to an illegal drug transaction because “on March 15, 1995, Lee used the Pathfinder to transport himself and the drugs to the parking lot where the illegal transaction occurred.” Id. at 225.

There is no legal authority requiring the Commonwealth to prove more than one illegal drug transaction. Va. Code § 19.2-386.22 is written in the singular (the illegal manufacture, sale or distribution or possession with intent to sell or distribute). Id. Further, this Court in Lee upheld the forfeiture of a vehicle which was used one time “to transport [the drug

dealer] and the drugs to the parking lot where the illegal transaction occurred.” 253 Va. at 225. Therefore, the trial court erred when it required the Commonwealth to prove that Hall used the Truck in more than one illegal drug transaction in order for the Commonwealth to meet its burden under Va. Code § 19.2-386.10.

- II. The trial court erred in holding that the Commonwealth failed to prove, by clear and convincing evidence, that the Truck was substantially connected to an illegal drug transaction.

Standard of Review

This issue presents mixed questions of law and fact. On review this Court “give[s] deference to the trial court’s factual findings and [views those] facts in the light most favorable to the prevailing part[y], but . . . review[s] the trial court’s application of the law to those facts *de novo*.” Tuttle v. Webb, 284 Va. 319, 324, 731 S.E.2d 909, ___ (2012).

Argument

This Court adopted the “substantial connection” test used by federal courts. 253 Va. at 225. The Fourth Circuit has explained that

[u]nder the substantial connection test, the property either must be used or intended to be used to commit a crime, or must facilitate the commission of a crime. At minimum, the property must have more than an incidental or fortuitous connection to criminal activity....The term “facilitate” implies that the property need only make the prohibited conduct

“less difficult or ‘more or less free from obstruction or hindrance.’

United States v. Schifferli, 985 F.2d 987, 990 (4th Cir. 1990), citing United States v. Premises Known as 3639-2nd St., N.E., Minneapolis, Minnesota, 869 F.2d 1093, 1096 (8th Cir. 1989). This Court stated

[w]e are of the opinion that a common sense interpretation of the phrase ‘substantial connection’ ... is consistent with the General Assembly’s intent to remove from drug traffickers the instrumentalities employed in the furtherance of the drug trade rather than property only incidentally or fortuitously associated with such criminal activity.

253 Va. at 255.

The dictionary definitions of “incidentally” and “fortuitously” are as follows:

- “Incidentally” – as a minor or subordinate matter; apart from the main subject; parenthetically. The American Heritage College Dictionary, Third Edition, p. 687 (1993).
- “Fortuitously” – happening by accident or chance; happening by fortunate accident or chance; lucky or fortunate. Id. at 536.

In Lee, this Court found that “Lee used the Pathfinder to transport himself and the drugs to the parking lot where the illegal transaction occurred.” 253 Va. at 225. There was, therefore, a substantial connection between the vehicle and the illegal drug transaction from only that one

incident. The facts here are nearly identical to those in Lee. Hall used the Truck to transport himself as well as the drugs to the parking lot where the drug deal occurred. (App. 19). Hall conducted the drug deal while seated in the Truck, thus shielding himself from public view. (Id). After the drug deal was concluded, Hall was quickly able to leave the scene in the Truck. (App. 19, 20). The use of the Truck facilitated the drug deal, making it less difficult and more or less free from obstruction or hindrance.

The trial court found that the Truck was used only “incidentally or fortuitously in the distribution of the illegal drug.” (App. 6-7). That is not the case. If, for example, there was a television in the bed of the Truck during the drug deal, that television would have been only “incidentally and fortuitously” associated with the illegal drug transaction. That television does nothing to facilitate the drug deal.

The trial court’s factual findings were that the Truck was used by Mr. Hall to drive to and from the drug deal. (App. 6). Necessarily, the Truck was used to transport the drugs as well. The illegal transaction occurred while Hall was seated in the Truck, thus providing concealment from the general public. (App. 19). The use of the Truck here allowed Hall to make the illegal drug transaction less difficult. The Truck helped him accomplish his goal – selling illegal drugs. Even when looking at the factual findings of

the trial court in the light most favorable to Hall, the Commonwealth did prove, by clear and convincing evidence, that the Truck was used in substantial connection with an illegal drug transaction.

CONCLUSION

For the above stated reasons, the Commonwealth respectfully prays that the final order of the trial court be reversed, and the Truck be forfeited to the Commonwealth and disposed of pursuant to law.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA

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Certificate of Service

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to this Rule, a PDF version of this brief has been filed through VACES and three (3) paper copies delivered to the Clerk's Office. An electronic version has also been delivered via email to D. Stephen Haga, Esq., Counsel for the Appellee, Steve.haga@hagalaw.com, on this the 18th day of October, 2018.

I also certify compliance with the word count in that this brief contains 2,124 words in total.

Patrick R. Jensen /s/