

Forfeiture of Currency
Cases

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Forfeiture Act of Pennsylvania
(42 Pa. C.S. sections 6801 et seq.)

- Defined as
 - the divestiture of property without compensation
 - in consequence of a default of an offense
 - a method deemed necessary by the legislature to restrain the commission of the offense and to aid in its prevention
- *Commonwealth v. Salamone, 2006 Pa. Super. 81, 897 A.2d 1209 (Pa. Super. 2006)*

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Common Law Forfeiture

- Common Law forfeiture is, however, a viable alternative if there is no express statutory entitlement.
 - *Commonwealth v. Salamone, 2006 Pa. Super. 81, 897 A.2d 1209 (Pa. Super. 2006)*
 - *Commonwealth v. Crosby, 390 Pa. Super. 140, 568 A.2d 233 (Pa. Super. 1990)*
 - *Commonwealth v. Coghe, 294 Pa. Super. 207, 439 A.2d 823 (Pa. Super. 1982)*
- Thus forfeiture of property is proper under the derivative contraband doctrine.

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Right to Jury Trial in Forfeiture Proceedings

- Under Article 1 of the Pennsylvania Constitution and under *Commonwealth v. One (1) 1984 Z-28 Camaro Coupe*, 539 Pa. 523, 610 A.2d 36, 37-38 (Pa. 1992), the court held that an owner of property subject to forfeiture has a constitutional right to a jury trial of his peers.

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Forfeiture Proceedings

- Forfeitures are generally civil in form yet the proceedings are considered quasi-criminal in character.
 - *In re One 1988 Toyota Corolla*, 675 A.2d 1290 (Pa. Cmmw. 1996)

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General Rationale for Forfeitures

- The forfeiture of proceeds of illegal drug sales serves the purpose of
 - Reimbursing the government for the costs of detection, investigations and prosecution of drug taffickers.
 - Reimbursing society for the costs of combating the allure of illegal drugs.
 - Caring for the victims of the criminal trade when preventative efforts prove unsuccessful.

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Contraband Found in Forfeiture Cases

- Two types of contraband
 - Contraband per se
 - Derivative contraband

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Two Types of Contraband

- Definition of Contraband per se
 - Something which is illegal to possess, such as heroin.
- Definition of Derivative contraband
 - Property which is not inherently illegal but which is used in the perpetration of an unlawful act.

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Commonwealth of Pennsylvania v. \$259.00 Cash

- In any forfeiture of currency under the Forfeiture Act, the Commonwealth has the initial burden of proof.

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*Commonwealth of Pennsylvania
v. \$259.00 Cash*

- The Commonwealth must show
 - that the currency was "furnished or intended to be furnished in exchange for a controlled substance or represents proceeds traceable to such an exchange"
 - OR
 - that the currency "used or intended to be used to facilitate any violation of the Controlled Substance, Drug, Device and Cosmetic Act."
42 Pa. C.S. §6801 (a)(6)(i)(A) (B).

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*Commonwealth of Pennsylvania
v. \$259.00 Cash*

- The Commonwealth **MUST ESTABLISH A NEXUS** between the money and the illegal activity
- Preponderance of evidence standard

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Shifting Burden of Proof

- If nexus is established by Commonwealth then the burden shifts to defendant to show
 - That he owns the money
 - That he lawfully acquired it
 - That it was not unlawfully used or possessed by him
- 42 Pa. C.S. §6802(j)

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Property Cases

- For property cases: Person can also use an "innocent owner's defense."
 - *Commonwealth v. 502-504 Gordon Street*, 147 Pa. Commw. 330, 607 A.2d 839 (Pa. Cmmw. 1992)

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Property Cases

- But, when drugs are involved and found in close proximity to money then **REBUTTABLE PRESUMPTION** as to nexus or link between the two

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Property Cases

- Money and negotiable instruments found in close proximity to controlled substances possessed in violation of the Pennsylvania Controlled Substance Act shall be rebuttably presumed to be proceeds derived from the selling of a controlled substance in violation of the Pennsylvania Controlled Substance Act.
 - *Commonwealth v. \$9,847.00 U.S. Currency*, 550 Pa. 192, 704 A.2d 612 (Pa. 1997)

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Property Cases

- Yet this finding can only be set aside if the defendant presents sufficient evidence showing that the money came from another source.
42 PA. C.S.A. section 6801 (a)(6)(ii)

Commonwealth of Pennsylvania, Appellant v. One (1) 2001 BMW Vin No. WBFAFA53571LM72902 Ezquiel Santiago, 585 Pa. 691, 887 A.2d 1242, 2005 Pa. LEXIS 2433 (Pa. 2005)

- Commonwealth filing of forfeiture petition for vehicle is illegal if it was filed after a Credit Union has first filed a lien against the vehicle and when, as lien holder, the Credit Union never received any notice of the forfeiture petition.
- The appeals court further held that until a forfeiture petition is formally granted the Commonwealth has no legal interest in the vehicle, only a "potential interest" previously owned by Mr. Santiago, (who was subsequently arrested and convicted of a violation of the Controlled Substance Act.)

Commonwealth of Pennsylvania v. Anthony Smothers, Appellant 2007 Pa. Commw. LEXIS 110 (March 9, 2007)

- Court uses "Gross disproportionality test in property cases"
- Anthony Smothers appeals from the order of the Court of Common Pleas of Philadelphia County that granted the petition for Forfeiture of his one-half interest in property at 432 N. Preston Street to the Philadelphia District Attorney's Office on behalf of the Commonwealth of Pennsylvania pursuant to *Section 6801 (a)(6)(i)©*.

*Commonwealth of Pennsylvania v. Anthony Smothers,
Appellant 2007 Pa. Commw. LEXIS 110 (March 9, 2007)*

- The questions presented are
 - Whether Smothers' knowledge of alleged drug sales activity on his property was adequate to justify the forfeiture.
 - Whether the forfeiture is in gross disproportion to the activity claimed to have been committed by Smothers.
 - Whether the forfeiture, which will result in the equitable forced sale of the property, is justified by Smothers' alleged connection to drug activity.

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*Commonwealth of Pennsylvania v. Anthony Smothers,
Appellant 2007 Pa. Commw. LEXIS 110 (March 9, 2007)*

- Smothers and his fiancée, Angela Brown, jointly purchased the property consisting of a three-story row home in 1998, which Smothers noted in his brief was purchased for \$32,000.

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*Commonwealth of Pennsylvania v. Anthony Smothers,
Appellant 2007 Pa. Commw. LEXIS 110 (March 9, 2007)*

- At the July 12, 2005 trial, the Commonwealth presented the testimony of an undercover officer, Brown and Police Officer Alice.
- The undercover officer testified that he and a confidential informant went to Smothers' property on March 22, 2004 and purchased \$20 worth of crack cocaine from Michael Boozer, one of the boarders.
- They returned to Smothers' property the next day, and he answered the door. When asked by the officer for crack cocaine, Smothers pointed to Boozer and said "he's got it". N.T. at p.8

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Commonwealth of Pennsylvania v. Anthony Smothers, Appellant 2007 Pa. Commw. LEXIS 110 (March 9, 2007)

- The officer indicated that Smothers watched as Boozer handed the officer two packets of crack cocaine in exchange for \$20.
- After the purchase was complete, backup officers executed a search warrant and arrested Boozer and Smothers.
- The officers found \$60 in cash, including \$20 of prerecorded buy money, and one additional packet of cocaine on the stairway.
- The officers found no drug scales, cutting agents, paraphernalia or manufacturing ingredients.

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Commonwealth of Pennsylvania v. Anthony Smothers, Appellant 2007 Pa. Commw. LEXIS 110 (March 9, 2007)

- Smothers testified that he did not witness the drug sale on March 23, 2004, and that he was unaware of anyone selling drugs on his property, although he admitted that he sporadically used drugs in the past but never engaged in drug sales.
- He described how he generated monies to purchase the property by using, *inter alia*, his 401K funds and stated that he paid the mortgage on the property prior to his confinement in jail.
- The trial court ordered Smother's one-half interest in the property forfeited and gave him 60 days to vacate the property.

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Commonwealth of Pennsylvania v. Anthony Smothers, Appellant 2007 Pa. Commw. LEXIS 110 (March 9, 2007)

- Smothers argues, however, that forfeiture of his property constituted an unconstitutional excessive fine under the gross disproportionality test set forth in *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998), and under the United States and Pennsylvania Constitutions.

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United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)

- The Court observes that the Supreme Court in 5444 Spruce Street expressly adopted the gross disproportionality test enunciated in Bajakajian and held that the test would apply to all punitive forfeitures “regardless of the form of the underlying proceedings.”

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United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)

- Following those guidelines, this Court recognizes the well-settled rule that an in rem forfeiture resulting from the Forfeiture Act is punitive, 5444 Spruce Street, 890 A.2d 38, and that such a forfeiture will be considered an excessive fine “if it is grossly disproportional to the gravity of the offense.”

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Commonwealth of Pennsylvania v. Anthony Smothers, Appellant 2007 Pa. Commw. LEXIS 110 (March 9, 2007)

- In this particular situation the burden is on the Commonwealth to prove that this was more than a one time incident.

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Commonwealth of Pennsylvania v. Anthony Smothers, Appellant 2007 Pa. Commw. LEXIS 110 (March 9, 2007)

- In deciding an excessive fine challenge, the trial court must compare the amount of the forfeiture to the gravity of the offense, which may be measured by
 - comparing the penalty imposed to the maximum penalty available
 - determining whether the violation was isolated or part of a pattern of misbehavior
 - assessing the harm that resulted from the crime charged.

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Commonwealth of Pennsylvania v. Anthony Smothers, Appellant 2007 Pa. Commw. LEXIS 110 (March 9, 2007)

- In this case the court remanded the case and ordered the trial court to use the gross disproportionality test to decide if Mr. Smothers' one-half interest in his property could be taken away for the amount of drugs and money that were seized at his boarding house.

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Commonwealth v. One 2001 Toyota Camry (Joel Sandler) 894 A.2d 207 (Pa. Cmmw. 2006)

- In this case the Commonwealth court held that the vehicle, which the defendant drove to a parking lot to discuss a possible murder for hire plot, could **NOT** be forfeited since the court deemed that the vehicle was not derivative contraband and therefore there was no nexus between it and the defendant's crime of criminal solicitation to commit murder (for which he was, in fact, convicted).

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Commonwealth v. Hess, 532 Pa. 607, 617 A.2d 307 (1992)

- The Pennsylvania Supreme Court was asked to decide if the Commonwealth could preclude that the defendant was giving money taken in a drug forfeiture to his attorney for his defense.

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Commonwealth v. Hess, 532 Pa. 607, 617 A.2d 307 (1992)

- The court held that the legislature did not intend to authorize pre-conviction restraints on the transfer of assets as payment of legitimate legal fees in enacting the forfeiture statute.

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Commonwealth v. Hess, 532 Pa. 607, 617 A.2d 307 (1992)

- The court also held that ordering the forfeiture of this money would violate an accused's right to counsel afforded by Article I, Section 9 of the Pennsylvania Constitution, and as such the court denied the Commonwealth forfeiture petition insofar as it applied to the payment of attorney's fees for "legitimate criminal defense representation prior to conviction."

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Ion Scan Cases

- *Commonwealth of Pennsylvania v. Three Hundred Ten Thousand Twenty Dollars (\$310,020.00) in United States Currency*
- *In United States Currency: Appeal of Dien Vy Phung*
- *Commonwealth of Pennsylvania v. \$141,370.00 U.S. Currency*
- *Appeal of: Herman Keesee*
894 A.2d 154 (Pa. Cmmw. 2006)

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Ion Scan Cases

- In each case the forfeiture court granted the Commonwealth's forfeiture petition because it concluded that the cash had been used for trafficking in illegal drugs.

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Ion Scan Cases

- And in each case the appellate court affirmed the lower court forfeiture based on the use, by the Commonwealth of an ion scanning device, which showed that there were significant amounts of cocaine residue on the money to be forfeited.

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Ion Scan Cases

- The Commonwealth court held that the expert testimony relating to the legitimacy of the ion scan machine and the science surrounding it was both legitimate and regularly accepted in the scientific and law enforcement community and therefore was not violative of the *Frye* case.

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Ion Scan Cases

- The court also held that the appellants failed to sustain their burden in rebutting the Commonwealth's prima facie case.
- BUT, also see *Collins* case (aka *Commonwealth v. \$9,000 U.S. Currency*, 8 A.3d 379 (Pa.Cmmw. 2010).

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Commonwealth v. \$9,000 U.S. Currency, 8 A.3d 379 (Pa.Cmmw. 2010)

- Officer stopped claimant on interstate highway and conducted consensual search of car and found \$9,000.00 in glove box and driver's side door
- Claimant had suspended driver's license and previous marijuana drug conviction

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Commonwealth v. \$9,000 U.S. Currency, 8 A.3d 379 (Pa.Cmmw. 2010)

- Claimant gave suspicious answer regarding his intention to purchase vehicles at a car auction
- No drugs found in car
- Trial court found nexus between money and illegal drug activity based on method of bundling cash, drug dog's alert and ion scan of money

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Commonwealth v. \$9,000 U.S. Currency, 8 A.3d 379 (Pa.Cmmw. 2010)

- Appellate court reverses and says ion scan not relevant and that above information was insufficient to establish required nexus

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Commonwealth v. \$15,000 U.S. Currency, No. 945 C.D. 2011 (Nov. 17, 2011, Pa.Cmmw.)

Facts of Case:

- Driver and passenger of a rental car were pulled over on a routine traffic stop.
- Both men had previous drug possession and distribution histories
- Both men had suspended driver's licenses

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*Commonwealth v. \$15,000 U.S. Currency,
No. 945 C.D. 2011 (Nov. 17, 2011,
Pa.Cmmw.)*

- Neither drugs nor paraphernalia were found inside of car
- Neither driver nor passenger ever charged with drug related crime
- Neither driver nor passenger ever claimed ownership of cash
- Both driver and passenger gave inconsistent stories to police about the intent of their trip

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*Commonwealth v. \$15,000 U.S. Currency,
No. 945 C.D. 2011 (Nov. 17, 2011,
Pa.Cmmw.)*

Further facts:

- 3rd party female, Ms. Williams rented the vehicle driven by both men
- Neither driver nor passenger knew money was inside of the rental vehicle
- No luggage existed to support men's contention of an overnight stay

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*Commonwealth v. \$15,000 U.S. Currency,
No. 945 C.D. 2011 (Nov. 17, 2011,
Pa.Cmmw.)*

- Consensual search by officers found \$15,000 concealed under back seat of vehicle
- Money was in one thousand dollar increments
- Trooper training indicated to him that this was drug money bundled in one thousand dollar increments

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*Commonwealth v. \$15,000 U.S. Currency,
No. 945 C.D. 2011 (Nov. 17, 2011,
Pa.Cmmw.)*

- 3rd party female, Ms. Williams, claimed ownership of cash
- Ms. Williams told trooper, on cell phone, where the rental money could be located
- Money taken and dog scan showed positive result of illegal drugs
- Bag the money was in smelled of marijuana when opened

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*Commonwealth v. \$15,000 U.S. Currency,
No. 945 C.D. 2011 (Nov. 17, 2011,
Pa.Cmmw.)*

Additional facts:

- Ion scan was done on money and tested positive for cocaine residue
- At forfeiture hearing, Ms. Williams testified that money was not drug money
- Planned to use money to buy a car in New Jersey

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*Commonwealth v. \$15,000 U.S. Currency,
No. 945 C.D. 2011 (Nov. 17, 2011,
Pa.Cmmw.)*

- She testified that she was on work related trip to Delaware and planned to go to NJ to meet driver to purchase the new vehicle
- However, she contradicted herself by then testifying that she was to return to Syracuse, NY to return rental car prior to traveling to NJ to purchase the new vehicle

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*Commonwealth v. \$15,000 U.S. Currency,
No. 945 C.D. 2011 (Nov. 17, 2011,
Pa.Cmmw.)*

- Lower court granted forfeiture of money
Commonwealth Court reversed
Court held:
- Mere suspicion of illegal drug activity is
not enough to forfeit money here

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*Commonwealth v. \$15,000 U.S. Currency,
No. 945 C.D. 2011 (Nov. 17, 2011,
Pa.Cmmw.)*

- Prior criminal history not dispositive on
issue of whether money seized related to
illegal drugs
- No drugs or paraphernalia found in car –
considered a deficiency under PA
Supreme Ct. (Marshal case)
- Neither driver nor passenger asserted
ownership of money

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*Commonwealth v. \$15,000 U.S. Currency,
No. 945 C.D. 2011 (Nov. 17, 2011,
Pa.Cmmw.)*

- Ion Scan irrelevant
- Marijuana odor could show connection to
drugs
- BUT equally likely that bag which held
money previously contained marijuana
and money itself was "VOID OF ANY
ILLEGAL ACTIVITY"

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Commonwealth v. \$15,000 U.S. Currency, No. 945 C.D. 2011 (Nov. 17, 2011, Pa.Cmmw.)

- Odor of marijuana does not meet preponderance of evidence standard in these cases
- Therefore no nexus because Commonwealth NEVER met its burden of proof establishing nexus
- Therefore Williams inconsistent testimony is irrelevant since burden never shifted to her

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Commonwealth v. The One Thousand Two Hundred and Twenty (\$1,220.00) Cash, U.S. Currency Seized from Eric Cook, 749 A.2d 1013 (Pa. Cmmw. 2000)

- In this case it was simply not enough to show
 - that a drug sniffing dog alerted on to money belonging to the appellant
 - that the money was bundled consistent with a drug dealer
 - that the police officer was familiar with the appellant and his companion
 - that the appellant had a pager in his possession
 - that he was also under investigation and had previously sold drugs to undercover officers
- The court further held that the officer's suspicions merited only further investigation or surveillance, but not a seizure of the money in question.

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Commonwealth v. The One Thousand Two Hundred and Twenty (\$1,220.00) Cash, U.S. Currency Seized from Eric Cook, 749 A.2d 1013 (Pa. Cmmw. 2000)

- Additionally, the court noted that the police
 - never formally charged the appellant with any concurrent drug charges relating to the money
 - never observed him engaged in drug related activity on the day in question
- Thus the forfeiture court's granting of the Commonwealth's request was reversed.

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Appellate Standards

- Generally, review of forfeiture and/or return of property cases are limited to
 - whether findings of fact made by the trial court are supported by substantial evidence
 - whether the trial court abused its discretion or committed an error of law
- *Commonwealth v. Real Property and Improvements, 787 A.2d 1117 (Pa. Cmmw. 2001)*

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Jurisdiction

- Generally, jurisdiction lies with the Pennsylvania Commonwealth Court, although the Pennsylvania Superior Court has retained jurisdiction in these types of cases from time to time if there is no objection by any party thereto.

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