

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 32 MAP 2017

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

JUSTEN IRLAND; SMITH AND WESSON 9MM
SEMI-AUTOMATIC PISTOL, SERIAL # PDW0493,
Appellee

APPELLANT'S BRIEF

Appellant's Brief in Support of Appeal from the January 13, 2017
Order Entered by the Commonwealth Court No.448 CD 2015 Reversing
and Remanding the Order of the Court of Common Pleas of Adams
County at No. CP-01-CR-224-2014 Granting the Commonwealth's
Motion for Destruction of Contraband.

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DATE: September 5, 2017

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I. JURISDICTIONAL STATEMENT

The Pennsylvania Supreme Court has jurisdiction in this matter pursuant to 42 Pa. C.S.A. § 724, which allows this Honorable Court to hear review of final orders from the Pennsylvania Commonwealth Court upon allowance of Appeal.

II. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

The Commonwealth Court’s Opinion and Order were filed on January 13, 2017 at No. 97 CD 2016, a copy of which is included within the reproduced record filed in this matter.

III. TEXT OF THE ORDER IN QUESTION

AND NOW, this 13th day of January, 2017, the March 9, 2015 order of the Court of Common Pleas of Adams County (trial court) is reversed. The case is remanded to the trial court with directions to enter an appropriate order that the handgun be returned to Justen Irland.

Jurisdiction relinquished.

(Signature / PATRICIA A. McCULLOUGH)

PATRICIA A. McCULLOUGH, Judge

IV. STANDARD AND SCOPE OF REVIEW

This appeal involves a question of law, and as such the scope of review is plenary and the standard of review is *de novo*. See *Mercury Trucking, Inc. v. Pennsylvania Public Utility Com'n*, 55 A.3d 1056, 1082 (Pa. 2012); *Commonwealth v. Morley*, 681 A.2d 1254, 1256 (Pa. 1996); *Commonwealth v. Nester*, 709 A.2d. 879, 881 (Pa. 1998).

V. QUESTION PRESENTED FOR REVIEW

In this matter in which the Commonwealth Court held that the Commonwealth may not seek forfeiture absent specific statutory authority – a ruling that conflicts with both the Commonwealth Court’s prior holdings and with those of the Superior Court – should this Court find that the doctrine of common law forfeiture is firmly established as valid?

Suggested Answer: Yes.

VI. STATEMENT OF THE FACTS

On November 7, 2013, Eastern Adams Regional Police were dispatched to an Adams County roadway for a report of a road rage incident where the driver of one vehicle, Justen Irland, displayed a handgun to the driver of a vehicle behind him because he believed the vehicle was following too closely. When officers arrived at the scene, Irland was quickly detained without incident. A loaded 9 millimeter handgun used in the assault (the subject of the current appeal) was found on the passenger seat of Irland’s car.

Irland was subsequently arrested on November 7, 2013, and charged with simple assault pursuant to 18 Pa. C.S. § 2701(a)(3); disorderly conduct pursuant to 18 Pa. C.S. § 5503(a)(1) and § 5503(a)(4); and harassment pursuant to 18 Pa.C.S. § 2709(a)(1). On August 25, 2014, Irland entered a negotiated plea to summary disorderly conduct. On December 10, 2014, Irland filed a Motion for return of the handgun. On February 4, 2015, the Commonwealth filed a Motion for destruction of property. Following hearing on both Motions on February 17, 2015, the Adams County Court of Common Pleas denied the Motion for return of property and granted the Motion for destruction on March 9, 2015. A subsequent Motion for reconsideration was denied on March 20, 2015.

On March 26, 2015, a timely appeal followed to the Commonwealth Court. On January 17, 2017, the Commonwealth Court held that common law forfeiture could not be used as a means to effectuate a forfeiture of derivative contraband. This ruling is in direct contravention to prior precedent in the Commonwealth Court as well as current authority from the Superior Court. Therefore, the instant Appeal has commenced.

VII. SUMMARY OF THE ARGUMENT

The Commonwealth Court acted in direct contravention to the status of the law in Pennsylvania when it held that the Commonwealth could not seek forfeiture of contraband absent specific statutory authority. There is ample basis in the history of the Laws of the Commonwealth to support a modern doctrine of common law forfeiture. However, even if this Court finds that common law forfeiture is not historically derived, the doctrine has certainly been developed and sustained in recent decades.

Thirty-five years of appellate precedent in the Superior Court have established a modern common law forfeiture doctrine. In a series of cases, the Superior Court held that statutory authorization is not necessary for the forfeiture of contraband to the Commonwealth. That court then also developed the requirement of a conviction for such forfeiture. Thus, even if common law forfeiture is not historically derived, a doctrine has been developed over time in honing proper use of the practice.

A similar history exists from the Commonwealth Court. Prior to that Court's holding in this matter, the state of jurisprudence from the Commonwealth Court was that common law forfeiture exists as a contemporary doctrine. Even in cases where forfeiture was not permitted by that Court, the existence of the utility has not been seriously drawn into question for more than twenty years prior to the holding

in this case. The case law established over that time not only recognized the existence of common law forfeiture, but added to its complexity.

Finally, the Commonwealth Court's holding is inconsistent with this Honorable Court's prescribed rules. Pa. Rule of Criminal Procedure 588 acts as the functional equivalent of common law forfeiture as it forbids the return of any contraband to its former owner once it has been declared so. As this Court has exclusive procedural rule-making authority, the Commonwealth Court's directive to return the handgun cannot stand.

VIII. ARGUMENT

The Commonwealth Court held that absent specific statutory authority, the Commonwealth cannot seek forfeiture of contraband related to Appellee's conviction for disorderly conduct, and that Appellee is therefore entitled to return of his handgun. This holding lies in direct contravention with decades of appellate precedent both of the Superior Court and of the Commonwealth Court itself. Even if the Commonwealth Court correctly concludes that common law forfeiture is not historically derived, which it is, decades of precedent at both intermediate appellate courts have recognized and developed a valid modern doctrine. To conclude that common law forfeiture has never existed is therefore invalid on its face.

Additionally, this Honorable Court has enumerated Rule of Criminal Procedure 588 to prevent the return of contraband to convicted defendants; the

application of which is the functional equivalent of common law forfeiture. Rule 588 makes no distinction between per se contraband and derivative contraband and forecloses the return of property once declared to be contraband regardless of its nature. The Commonwealth Court’s erroneous holding is therefore counter to both precedent and this Court’s prescribed rules.

A. THE COMMONWEALTH COURT ERRONEOUSLY DISMANTLED THE DOCTRINE OF COMMON LAW FORFEITURE IN CONTRADICTION OF DECADES OF PRECEDENT FROM THAT COURT AND FROM THE SUPERIOR COURT.

The Commonwealth Court’s decision does not merely distinguish, but rejects, a long line of Superior Court cases recognizing the existence of common law forfeiture. *See Irland*, 2017 WL 128643, at *8-11 (disagreeing with the Superior Court’s holdings in, for example, *Commonwealth v. Coghe*, 439 A.2d 823 (Pa. Super. 1982), *Estate of Peetros v. County Detectives*, 492 A.2d 6 (Pa. Super. 1985), *Petition of Maglisco*, 491 A.2d 1381 (Pa. Super. 1985), and *Commonwealth v. Salamone*, 897 A.2d 1209 (Pa. Super. 2006)). According to the Commonwealth Court, these decisions “lack authoritative support” or are “unpersuasive.” *Id.* at *13.

That criticism is surprising, because the Commonwealth Court itself had previously recognized the same doctrine. The Court acknowledges this fact in its opinion. *See id.* at *12 (recognizing that the Court, in *Commonwealth v. One*

1990 Dodge Ram Van, 751 A.2d 1235 (Pa. Cmwlth. 2000), relied on Superior Court precedent to hold that a van was derivative contraband subject to common law forfeiture); *id.* (noting that an *en banc* panel of the Court “arguably” accepted that common law forfeiture exists, in *Commonwealth v. One 2001 Toyota Camry*, 894 A.2d 207 (Pa. Cmwlth. 2006) (*en banc*)). A review of that history reveals that common law forfeiture has been a developing valid practice in Pennsylvania for more than thirty-five years.

1. The Superior Court has recognized the common law forfeiture doctrine with a series of opinions developing standards for its use.

In a series of cases, the Superior Court held that statutory authorization is not necessary for the forfeiture of contraband to the Commonwealth. That court then also developed the requirement of a conviction for such forfeiture. Thus, even if common law forfeiture is not historically derived, a doctrine has been developed over time in honing proper use of the practice.

In *Commonwealth v. Coghe*, 439 A.2d 823 (Pa. Super. 1982), the Superior Court held that forfeiture of derivative contraband, or that which is not inherently illegal to possess but rather has been used in the commission of a crime, is valid practice. *Id.*, 439 A.2d at 824. That case involved a sum of money in which the defendant had used as a down payment to have his wife murdered. *Id.* The court used an unrelated statutory authorization for forfeiture in drug cases to justify the forfeiture of the money. *Id.* Thus, according to the *Coghe* court, forfeiture is proper

even without specific statutory authorization. An unrelated statute could be used to validly bolster a forfeiture claim.

Next, the Superior Court further developed the forfeiture doctrine by recognizing that no statutory authorization was necessary to effectuate a forfeiture. In *Petition of Maglisco*, 491 A.2d 1381 (Pa. Super. 1985), the Commonwealth sought forfeiture of a firearm used by the defendant to shoot her husband. The Superior Court ultimately held that derivative contraband is “forfeitable [even] without statutory authority.” *Id.*, 491 A.2d at 1383. Weighing strongly upon the reasoning of the *Maglisco* court was the proposition that specific forfeiture statutes should not be interpreted to infer the invalidity of common law forfeiture of derivative contraband. *Id.* Clearly the intent of the court was to recognize validity of the common law doctrine allowing forfeiture in all cases involving contraband, per se or otherwise.

The Superior Court’s next development of common law forfeiture was to determine the necessity of a conviction prior to effectuating forfeiture. In *Estate of Peetros v. County Detectives*, 492 A.2d 6 (Pa. Super. 1985), the Superior Court held that certain record books that came into possession of the Commonwealth through a homicide investigation were properly forfeitable as derivative contraband because they were once used in an usurious loaning scheme. *Id.*, 492 A.2d at 9. The Court held that an underlying conviction is not necessary to

authorize forfeiture of derivative contraband. *Id.* Even an acquittal could therefore result in forfeiture of contraband according to the *Peetros* court. *Id.*

At that point, the Superior Court had not only expressly recognized the common law forfeiture doctrine, but considered which types of contraband were forfeitable, what authorization was necessary to effectuate forfeiture, and whether or not a conviction was required before effectuation. In *Commonwealth v. Crosby*, 568 A.2d 233 (Pa. Super. 1990), the Superior Court, despite noting significant doubts regarding the legal underpinnings of the holdings of the three cases discussed above, once again acted in accordance with the proposition that forfeiture of derivative contraband without statutory authorization exists. The majority in *Crosby* noted a developing shift in the common law of Pennsylvania toward a growing acceptance of common law forfeiture. *Id.*, 568 A.2d at 238, n. 1. As such, even if this Court finds that common law forfeiture had once been non-existent in historical Pennsylvania law, it currently has the force of more than thirty-five years of judicial development and use weighing for the validity of the modern doctrine.

All of the previously cited cases discussed above stand for the proposition that, under Superior Court jurisprudence, common law forfeiture of derivative contraband remains a valid method for forfeiting property used in the commission of unlawful acts. Regardless of the questions posed by the *Crosby* court regarding

the legal underpinnings of the aforementioned cases, it is undisputed by any subsequent Superior Court holding that common law forfeiture exists in Pennsylvania. This Honorable Court should therefore reverse the Commonwealth Court's holding in this matter.

2. The Commonwealth Court, prior to its holding in this matter, had not only recognized the existence of common law forfeiture, but contributed to the development of the doctrine by developing the requirements of its use.

Prior to the Commonwealth Court's holding in this matter, the state of the law in that Court was that common law forfeiture exists in contemporary Pennsylvania jurisprudence. Even in cases where forfeiture was not permitted by the Commonwealth Court, the existence of the utility has not been seriously drawn into question for more than twenty years prior to the holding in this case. The Commonwealth Court's Opinion in this matter cites four main cases to detail the development track of common law forfeiture. These cases not only recognize the existence of common law forfeiture, but add to its complexity.

In *Commonwealth v. Cox*, 637 A.2d 757 (Pa. Cmwlth 1994), the Commonwealth Court first addressed the issue of common law forfeiture. The *Cox* court was particularly concerned with the level of caution that the law should apply to the use of common law forfeiture of derivative contraband in order to prevent abuse of the same. *Id.*, 637 A.2d at 760. However, the *Cox* court refused to address

the nature of common law forfeiture's existence; instead deciding the case on procedural grounds. *Id.* 637 A.2d at 759. By refusing to reject non-statutory forfeiture, the Commonwealth Court not only recognized its widespread use, but chose to pass on the opportunity to draw the practice into question.

Following the *Cox* ruling, the Commonwealth Court added to the actual development of the forfeiture doctrine by imposing requirements for its use. In *Commonwealth v. One 1990 Dodge Ram Van*, 751 A.2d 1235 (Pa. Cmwlth 2000), a van that was used in the commission of a kidnapping and murder was held to be derivative contraband because it had a specific nexus to the unlawful act. *Id.*, 751 A.2d at 1236. In so holding, the Commonwealth Court adopted the Superior Court's *Crosby* decision. *Id.* The holding in *One 1990 Dodge Ram Van* left no doubt as to the status of common law forfeiture as an existing doctrine at that time. In fact, the holding actually bolstered the development of the doctrine by requiring a nexus between the unlawful act and the property sought by the Commonwealth.

Six years after the *One 1990 Dodge Ram Van* decision, the Commonwealth Court expressly recognized the existence of non-statutory forfeiture. In *One 2001 Toyota Camry*, 894 A.2d 207 (Pa. Cmwlth 2006), an *en banc* panel of the Commonwealth Court specifically acknowledged the existence of common law forfeiture and re-iterated the built-in protection that the nexus requirement provided. *Id.*, 894 A.2d 211. The nexus requirement offered mitigation against “the

potentially harsh results of permitting the Commonwealth to penalize a citizen by a civil action against his property rather than a criminal action against his person.” *Id* (internal citation omitted). In recognizing the necessity of caution in the utilization of the common law forfeiture doctrine, *Toyota Camry* also served to provide further legitimacy to its valid status in the law.

Finally, in *Commonwealth v. 2010 Buick Enclave*, 99 A.3d 163 (Pa. Cmwlth 2014), the Commonwealth Court added one further layer of protection against common law forfeiture. For common law forfeiture to be effectuated, proof of a conviction must be presented. *Id*, 99 A.3d at 170. Although never expressly declaring the existence of common law forfeiture, the holding implied as much. *2010 Buick Enclave* not only took the existence of the common law forfeiture doctrine as a given, it further added to its development.

In fact, until the Commonwealth Court’s holding below in this matter, by continually expanding requirements which the Commonwealth must prove in order to utilize common law forfeiture, the court offered no indication of anything but continued acceptance and development of the doctrine. The principle of horizontal *stare decisis* demands consideration by the Commonwealth Court of its own long-standing precedent. An abrupt and sweeping change in the law is in contravention to all of the well-served goals of *stare decisis*. It is because of the direct departure from long trending precedential decisions consistent with the existence of common

law forfeiture that it is imperative that this Court reverse the Commonwealth Court in this matter.

3. The Commonwealth Court’s holding is not consistent with the historical development of Common Law Forfeiture.

Although the Commonwealth Court’s opinion declares that its holding reflects an “unquestioned view espoused by various courts and commentators,” that is hardly the case. *Ireland*, 2017 WL 128643, at *15. As noted, the Superior Court does not share this view, nor did the Commonwealth Court prior to now. Moreover, the Commonwealth Court’s opinion wrongly focuses on what courts in other states have held. The relevant inquiry is obviously not how other states or the federal government have interpreted their constitutions and common law forfeiture history, but how the law of Pennsylvania is to be interpreted. The Commonwealth Court’s extensive discussion of federal cases and decisions from other states is therefore misplaced. *Id.* at *3-7. So, too, is its reliance on the “secondary authorities and law review articles” that have nothing to do with Pennsylvania’s development of the law governing contraband. *Id.* at *13.

Had the Commonwealth Court’s opinion properly confined its analysis to Pennsylvania, surely it would have found support for the doctrine of common law forfeiture. For example, the court fails to acknowledge that, contrary to its apparent belief that Article 9, Section 19 of the Pennsylvania Constitution of 1790

“embod[ies] concepts that run counter to and conflict with the idea of common law forfeiture,” *id.* at * 14, that Section explicitly provides for forfeiture “during the life of the offender.” **Pa. Const. art. IX, § 19**. The court also does not address the fact that, even though the Crimes Code abolished common law crimes, it provided in its preliminary provisions that “[t]his section does not affect the power of a court to declare forfeitures[.]” **18 Pa.C.S. § 107(b)**. Additionally, the Commonwealth Court’s decision fails to meaningfully address **Pa.R.Crim.P. 588** or the concept of derivative contraband, both of which strongly support the notion that common law forfeiture has always existed.¹

Furthermore, the Commonwealth Court’s analysis is fundamentally flawed. It singularly focuses on which, if any, of the three kinds of forfeiture as it existed in England was adopted in Pennsylvania. *See Irland*, 2017 WL 128643, at *3-7 (discussing deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture). But the question is not so simple. As the Commonwealth Court recognized, “the Pennsylvania case law experience is somewhat unique.” *Id.* at *7. It is this unique history that evinces Pennsylvania’s adoption of common law forfeiture, albeit a version that may not be so easily lumped in with the

¹ When the Commonwealth Court did look to Pennsylvania law for guidance, it quickly cast those decisions recognizing common law forfeiture aside. Instead, it found support for its position in decisions such as *Commonwealth v. Spisak*, 69 Pa. D. & C.2d 659 (Somerset 1974), a forty-three-year-old trial court opinion from Somerset County.

traditional English categories. Even if this Honorable Court does not find that Pennsylvania has adopted its own version of common law forfeiture through the continued development of its tenets as described above, It should nonetheless find ample basis in the historical underpinnings to justify the doctrine's present existence. The holding of the Commonwealth Court should therefore be reversed.

B. THE COMMONWEALTH COURT'S DECISION ORDERING THE TRIAL COURT TO RETURN THE CONTRABAND HANDGUN IS CONTRARY TO RULE 588, THE FUNCTIONAL EQUIVALENT OF COMMON LAW FORFEITURE.

The Commonwealth Court's decision flies in the face of this Court's exclusive rule-making authority by effectively nullifying **Pa. R.Crim.P. 588**. Although this Honorable Court has not weighed directly upon the merits of the common law forfeiture doctrine, it has developed a rule which acts as its functional equivalent.² The Pennsylvania Constitution and Judicial Code give this Court exclusive power to prescribe general procedural rules. **Pa. Const. art. V, §10(c); 42 Pa.C.S. § 1722(a)(1)**. Pursuant to that authority, this Court enacted **Pa.R.Crim.P. 588** (previously **Pa.R.Crim.P. 324**), which permits a person aggrieved by a search and seizure to move for the return of the property on the

² Although this Honorable Court has not directly addressed common law forfeiture, it has weighed upon various aspects of forfeiture previously. See *Commonwealth v. One 1984 Z-28 Camaro Coupe*, 610 A.2d 36 (Pa. 1992) (owner of property subject to forfeiture under the Controlled Substances Forfeiture Act is entitled to a jury trial); see also *Commonwealth v. Howard*, 713 A.2d 89 (Pa. 1998) (guns legally in possession of defendant that were not then currently being sold illegally were not derivative contraband subject to forfeiture).

ground that he or she is entitled to lawful possession of it. **Pa.R.Crim.P. 588(A)**. The Rule instructs that, “[i]f the motion is granted, the property shall be restored *unless the court determines that such property is contraband*, in which case the court may order the property to be forfeited.” **Pa.R.Crim.P. 588(B)** (emphasis added).

Here, the trial court correctly concluded that the gun claimant brandished at another driver was derivative contraband; it was the instrumentality by which he committed disorderly conduct. Even the Commonwealth Court did not dispute this point. *See Commonwealth v. Irland*, 2017 WL 128643, at *3 (Pa. Cmwlth. 2017) (*en banc*) (“The handgun, or property, was used in perpetration of the summary offense of disorderly conduct.”). Yet, it nevertheless ordered the trial court to return the handgun to claimant. *Id.* at *15. That order is contrary to the plain language of Pa.R.Crim.P. 588(B) and commonsense notions of public safety. Indeed, in just the handful of cases the Commonwealth Court identified as wrongly decided by the Superior Court, this decision would mandate the return of a pistol used by a woman to shoot her spouse; blood money paid by another man to have his spouse murdered; and photographic equipment used to create child pornography. *See Petition of Maglisco*, 491 A.2d 1381 (Pa. Super. 1985); *Estate of Peetros v. County Detectives*, 492 A.2d 6 (Pa. Super. 1985); and *Commonwealth v. Coghe*, 439 A.2d 823 (Pa. Super. 1982).

Notwithstanding the Court's erroneous conclusion that forfeiture was not available, that determination does not mean that the trial court must return the gun claimant used to commit his crimes. On the contrary, Rule 588 precludes this, because the contraband handgun is a tool of crime that should be removed from circulation. To the extent forfeiture of the property was not an available remedy, neither was return. Instead, the law provides that the gun must simply remain in custody of the Commonwealth until an escheatment period elapsed, at which point it would escheat to the state. *See 72 P.S. §§ 1301.1, et seq.*³ The Rule therefore functions just as common law forfeiture does in transferring ownership of contraband to the Commonwealth, even if that contraband is derivative and its forfeiture is not statutorily authorized.

The Commonwealth Court erred by equating the absence of forfeiture authorization to an automatic return right. The proper analysis requires consideration of discrete inquiries, which are not dependent on one another. Indeed, the relevant question to a claim of return is merely whether the property is contraband; if it is deemed to be so, it cannot be returned. **Pa.R.Crim.P. 588(B)**. The Commonwealth Court's decision effectively nullifies this Court's Rule and

³ Where derivative contraband seized in relation to a crime has neither been collected by a county district attorney's office as forfeit, nor claimed by the lawful owner as listed in the police records, the property is presumed abandoned and unclaimed after a period of three years. **72 P.S. § 1301.9**. At that time, the property escheats to the Commonwealth, and the State Treasurer has the authority to sell it at a public auction, with the proceeds going to the General Fund of the Commonwealth. *Id.* at §§ **1301.16, 1301.17, 1301.18**.

requires automatic return of property in all cases where forfeiture is not authorized by a specific statute. That usurpation of this Court's exclusive rule-making authority demands this Court reverse the Commonwealth Court.

IX. CONCLUSION

For the foregoing reasons, Appellant, the Commonwealth of Pennsylvania respectfully requests that this Court reverse the Commonwealth Court and hold that common law forfeiture remains a valid doctrine within Pennsylvania.

Respectfully submitted,

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DATE: September 5, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing document upon the person(s) and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

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Respondent	:	

CERTIFICATE OF COMPLIANCE WITH RULE 2135

Appellant, the Commonwealth of Pennsylvania, by and through undersigned counsel, does hereby certify that the above brief is in compliance with Pennsylvania Rule of Appellate Procedure 2135 governing word limits.

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