

ORDER OF COURT

July 25, 1984, it is ordered that the expense of purchasing the alleged obscene material is a taxable cost and allowed in these proceedings, the taxing of the costs by the Prothonotary is affirmed, and it is ordered that the defendant shall pay to the Prothonotary the sum of \$60.37.

IN RE: FORFEITURE OF ONE 1973 FORD TRUCK, C.P.
Franklin County Branch Criminal Division, Volume 5, Page 152

Liquor Code - Forfeiture of Vehicle - Proof of Illegal Use

1. The Commonwealth may not use an earlier prosecution and conviction of employees of a beer distributor for illegal sale of liquor as proof against the truck in a separate matter.
2. Forfeiture of a vehicle under the liquor code is discretionary with the court.
3. At a forfeiture hearing the Commonwealth has the initial burden to produce evidence that the property in question was unlawfully possessed or used.

Frederic G. Antoun, Jr., Assistant District Attorney, Attorney for Commonwealth

Dennis A. Zeger, Esquire, Attorney for Respondent

James M. Schall, Esquire, Attorney for Defendants

OPINION AND ORDER

EPPINGER, P.J., June 4, 1984:

In this proceeding, we are asked to declare forfeited a 1973 Ford truck owned by Evelyn Clevenger, who is also the owner of a beer distributorship in McConnellsburg, Pennsylvania. The petition for forfeiture filed by the Commonwealth, alleges that on December 8, 1982, the truck "was used to deliver brewed beverages to an unlicensed 'speak-easy' for illegal resale (of alcohol beverages) in violation of . . . the Liquor Code." We learned in the evidence that the establishment was in the Village of Fort Loudon and that it was known as the Orchard Motel or Fort Loudon Hunter's Club.

The owner of the truck denied it was used for an illegal purpose and appeared at the hearing to contest the forfeiture.

The Commonwealth sought to introduce evidence that Paul Johnston and Rex Akers, both of whom were in the truck on December 8th were charged with and convicted by a jury of selling malt or brewed beverage to a person engaged in the business of illegally selling liquor or malt or brewed beverages. The owner objected to the admission of this evidence and when the Commonwealth argued that such evidence was admissible to prove the illegal use of the truck, we reserved ruling and heard the remainder of the case. We should have sustained the owner's objection and now do. The Commonwealth may not use an earlier prosecution and conviction to show illegal activity. *Commonwealth v. Confiscated Liquor*, 91 PA. Super. 165, 169-70 (1927). In the criminal proceedings, the issue was the guilt or innocence of the defendants. This action was brought against the truck and the owner was not represented in the criminal cases. Since that is so, the Commonwealth must produce original and direct evidence of the unlawful use. *Id.*, at 171.

There was also evidence that Malcolm Joe Butler, the owner of the motel, was placed on ARD after the place was raided November 21, nearly a month before these events. He was charged with selling liquor and malt or brewed beverages without a license. That record was likewise inadmissible.

Forfeiture proceedings are governed by the Liquor Code, 47 P.S. §6-601 et seq., and forfeiture is discretionary with the court. Code §6-602 (e); *Commonwealth v. One 1956 Oldsmobile Sedan (Stoner)*, 202 Pa. Super. 571, 573, 198 A.2d 414 (1964). "Judicial discretion, however, requires action in conformity with the law upon the facts and circumstances before the court after hearing and due consideration." *Pa. L.C.B. v. McClairan*, 20 Pa. Cmwlth. Ct. 300, 303, 342 A.2d 153, 154 (1975). At the time of the hearing, the Commonwealth has the initial burden to "produce evidence that the property in question was unlawfully possessed or used", §6-602(e), in order to sustain the petition for forfeiture. *Commonwealth v. 20 Full Cases of Beer*, 163 Pa. Super. 418, 422, 62 A.2d 111, 113 (1948).

Besides the convictions of Johnston and Akers and the ARD order accepted by Butler, the only evidence the Commonwealth presented was the testimony of a state police officer. He said that before December 8, 1982, he had obtained a search warrant for

the truck; that on December 8th the truck was backed into the motel; that the warrant was executed and thirty-three cases of beer and three cases of soda were found on the truck. No beer was observed outside of the truck or being carried into the building. However, the truck cap was opened and a hand truck was present. According to the police officer, the owner of the truck was not present at the scene, though Johnston and Akers both told him they worked for her.

The officer said that the motel was under surveillance before a raid occurred on November 21st but he did not say what was discovered when the raid was made, except to state, in answer to a question by the owner's attorney, that on the day of the raid, all the liquor, cash register, and other paraphernalia on the premises were confiscated. There was no testimony that anyone went into the premises between November 21st and December 8th or of any activity outside the place to support a conclusion that it continued to be used as a "speak easy".

After the Commonwealth rested, the owner moved to dismiss on the grounds that the Commonwealth had not made out a case for forfeiture of the truck. Since we had not ruled on the admissibility of Johnston's and Aker's convictions and of Butler's ARD order, we reserved ruling and heard the owner's evidence, the force of which was that the truck was being used by Johnston and Akers to transport beer purchased by the owner's son from the beverage company to the motel for a trucking company party he was giving.

We should have sustained the owner's motion to dismiss and now do as the evidence offered by the Commonwealth in its case was insufficient. In addition to the other reasons which have been stated, without evidence that the motel was being operated illegally on December 8, and there was none, we cannot find that the truck was actually being used for an unlawful purpose. *Commonwealth v. One Plymouth Coach*, 28 Del. 93, 94 (1938); *Commonwealth v. One 1950 Ford*, 13 Beaver 292 (1952).

ORDER OF COURT

June 4, 1984, the motion of the owner of the 1973 Ford Truck, V.I.N. F25YCS00812, to dismiss the Commonwealth's Petition to forfeit the truck made at the close of the Commonwealth's case is granted, and the case is dismissed. The costs of these proceedings shall be paid by the County of Franklin.



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