

**[J-68-2014][M.O. – Baer, J.]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 40 EAP 2013
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered on
	:	12/18/12 at No. 1345 CD 2011,
v.	:	affirming the order entered on 4/28/11 in
	:	the Court of Common Pleas, Criminal
	:	Division, Philadelphia County at No.
	:	CP-51-MD-0009453-2010
TODD ALLEN,	:	
	:	
Appellee	:	ARGUED: September 9, 2014

**DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: December 29, 2014**

The Court presently approves the transfer of legal title to private property to the government absent notice or process reflected on the present record, and it allows for such transfer at the end of a 30-day limitations period immediately following jeopardy. I respectfully dissent.

The right to acquire, possess, and protect property is deeply engrained in the federal and Pennsylvania Constitutions. See, e.g., PA. CONST. art. I, §1. Correspondingly, the presumption that, if reasonably possible, title to property should remain with, or be restored to, its rightful owner is strengthened by multiple interrelated constitutional propositions, including that the owner may not be deprived of it except by due process of law, see U.S. CONST. amend. XIV; PA. CONST. art. I, §9, and that the government may not take private property except for public use and upon payment of just compensation, see PA. CONST. art. I, § 10; U.S. CONST. amend. V.

Our statutory law also reflects the primacy of guaranteeing to citizens the secure ownership of their property. Statutes authorizing the taking of property often expressly require that due process be observed, see, e.g., 66 Pa.C.S. §2704(d); 53 P.S. §57401, and the Legislature has constrained eminent domain takings even more restrictively than is required by the Constitution, see 26 Pa.C.S. §204(a); Reading Area Water Auth. v. Schuylkill River Greenway Ass'n, \_\_\_ Pa. \_\_\_, 100 A.3d 572 (2014).<sup>1</sup> Additionally, the Disposition of Abandoned and Unclaimed Property Act mandates that unclaimed property be held in custody – e.g., by the Commonwealth or a financial institution – for several years before title may transfer, all with the ultimate goal of returning the property in question to its owner. See 72 P.S. §1301.3 (reflecting escheatment periods of from three to fifteen years depending on the type of property). See generally Delaware Cnty. v. First Union Corp., 605 Pa. 547, 550, 992 A.2d 112, 114 (2010) (describing a seven-year escheatment scheme).

In the police forfeiture setting, procedural safeguards seem particularly important because of the possibility of a conflict of interest – namely, the property seized and forfeited to law enforcement authorities is ultimately transferred to the use of those same authorities. See 42 Pa.C.S. §6801(e)-(h).<sup>2</sup> So long as the seizure and forfeiture are adjudicated as legally proper, any actual conflict abates, as the forfeiture provisions are then shown to be serving their lawful aims, including deterring crime and preventing

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<sup>1</sup> Although the seizure of property through the exercise of governmental power other than eminent domain does not give rise to a takings claim, see Bennis v. Mich., 516 U.S. 442, 452, 116 S. Ct. 994, 1001 (1996), the dual requirements of public use and just compensation are mentioned here as illustrative of the broader point that protecting title to property against arbitrary government confiscation has been a foundational concern since the beginning of the Republic.

<sup>2</sup> To the degree the Commonwealth believes it may retain property purportedly forfeited outside the Section 6801 framework, the legal basis for such entitlement is unclear.

the continued illicit use of the subject property. See Bennis, 516 U.S. at 452, 116 S. Ct. at 1000; Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679, 94 S. Ct. 2080, 2090 (1974). The propriety of the seizure, however, cannot be simply assumed. If no pre-deprivation hearing is held, then a post-deprivation process is required to give the owner notice and an opportunity to state why the property should be returned to him. See Zinermon v. Burch, 494 U.S. 113, 128, 110 S. Ct. 975, 984-85 (1990); see also 42 Pa.C.S. §6801(c) (requiring that, in the event of a seizure without process, proceedings for the issuance of process “shall be instituted forthwith”). See generally Commonwealth v. West, 937 A.2d 516, 526 (Pa. Super. 2007) (“Although . . . a vehicle may be validly seized without process under the Forfeiture Act, a person’s property rights therein are not extinguished until a court holds forfeiture proceedings and orders the forfeiture.”).<sup>3</sup>

Nevertheless, the Court presently finds no basis to require any process at all to ensure that property was appropriately seized, ruling instead that an automatic transfer of title may occur after the passage of 30 days. During this period, the individual – who may be innocent of any criminal wrongdoing and unlearned in the law – may have no indication that a minimal window of opportunity is closing on his ownership of the subject property. In cases (such as this one) where the property owner is charged with a crime, moreover, it seems unlikely that the defendant would be primarily concerned

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<sup>3</sup> The Commonwealth claims that a forfeiture order issued in April 2002, seven months before it dismissed all charges against Allen. See Brief for Commonwealth at 13 n.4. However, the papers that the Commonwealth now proffers as supporting its contention have not been included as part of the record on appeal, and, moreover, it does not appear that any judicially recognized docket information is present. In any event, the issue accepted for review – as framed by the Commonwealth – lacks any suggestion that a forfeiture may have occurred, see Commonwealth v. Allen, 621 Pa. 119, 74 A.3d 121 (2013) (per curiam), and the import of the majority opinion transcends the individualized circumstances presented.

with recovering the seized property during his period of jeopardy, as his most pressing concern would appear to be avoiding criminal punishment. Again, however, under the majority's holding title is automatically transferred to the government after this brief period following jeopardy, simply because the government has physically taken it from the citizen.

The availability of a motion for the return of property under criminal procedural rule 588 has been held to satisfy the requirement of post-deprivation process. See, e.g., McKenna v. Portman, 538 Fed. Appx. 221, 224-25 (3d Cir. 2013). That rule contains a restriction regarding the forum where the motion may be filed, see Pa.R.Crim.P. 588(a) ("Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized."), but it does not contain any time limitation. The majority's solution is to impose a 30-day statute of limitations under a "waiver" rubric. See Majority Opinion, slip op. at 14. Waiver precepts, however, ordinarily pertain when the aggrieved party could have raised an issue at an earlier proceeding that actually occurred, but failed to do so. Here, there was no earlier in rem proceeding relative to the seized property, and hence, the majority is left to resort to a jurisdictional "tail" pertaining to the criminal matter which, although associated with the seizure in terms of the underlying facts, is nonetheless a distinct type of legal proceeding.<sup>4</sup> Indeed, there is nothing in Rule 588 that purports to contextualize a motion for return of property within any criminal proceeding, as it clearly contemplates a

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<sup>4</sup> The intermediate court has explained that

[c]ivil forfeitures are the in rem consequence for wrongdoing prescribed by statute. Property is forfeited not as a result of the criminal conviction, but through a separate proceeding, civil in form but quasi-criminal in nature[.]

Commonwealth v. Perez, 941 A.2d 778, 780 (Pa. Cmwlth. 2008) (citation omitted).

motion made even where no criminal charges are filed. As such, application of the 30-day jurisdictional period as an overlay upon Rule 588 is unsupported by the rule's text, highly attenuated, and contrary to the general precept that legal authorization for property forfeiture should be strictly construed. See Commonwealth v. \$2,523.48 in U.S. Currency, 538 Pa. 551, 556-57, 649 A.2d 658, 660-61 (1994).

Finally, I remain unmoved by the prospect that the Commonwealth may be inconvenienced by not knowing for a period of time whether it will ultimately take title to the property. If the Commonwealth wishes to settle title without waiting for the owner to file a Rule 588 motion, it has recourse to the Forfeiture Act. See 42 Pa.C.S., Part IV, Chapter 68. Until forfeiture is judicially decreed, the Commonwealth is statutorily designated as the custodian of the property, but not the owner. See 42 Pa.C.S. §6801(d).

As for the present case, it is undisputed that the Commonwealth ultimately decided not to pursue criminal charges against Allen. Thus, on this record, and within the boundaries of the issue presented to this Court, see supra note 3, the Commonwealth remained merely the custodian of the money it seized from Allen, as explained above. If a defendant in such circumstances files a Rule 588 motion for the return of property, I see no reason why the motion should not be adjudicated on its merits. I would therefore vacate and remand to the common pleas court for such an assessment.

Accordingly, I respectfully dissent.

Madame Justice Todd joins this dissenting opinion.