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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-596 / 91-1887

IN THE MATTER OF PROPERTY SEIZED FROM GARY DEAN DeCAMP,

GARY DEAN DeCAMP,

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Appellant.

Appeal from the Iowa District Court for Boone County, Carl D. Baker, Judge.

Gary DeCamp appeals the district court's order which forfeited his truck and semitrailer to the State. **REVERSED AND REMANDED.**

Jerry R. Foxhoven, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Karen Doland, Assistant Attorney General, and Steven Oeth, County Attorney, for appellee State.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

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SCHLEGEL, J.

Gary Dean DeCamp is a truck driver who resides in DeSoto, Iowa. DeCamp owns the truck and semitrailer which he uses for his employment.

On August 29, 1991, at about 1:30 p.m., DeCamp went to the rural Madrid residence of Wayne Benson. DeCamp parked his semi on the highway near the access road to the Benson residence because there was not room to turn his semi around at the residence. DeCamp stored a red Firebird automobile at the Benson residence.

Police officers had arrested Benson at about 11:30 a.m. that day, after an undercover police officer had purchased methamphetamine from him. Benson was handcuffed outside the home when DeCamp arrived. Also, a marked police car, several unmarked cars, and many police officers were in the yard.

DeCamp walked into the yard and was stopped by Special Agent Dana Weir. DeCamp stated he was there to pick up some four-by-four posts. Weir asked DeCamp about a bulge in his pants pocket. DeCamp then withdrew two wads of cash from his pocket. Weir counted one wad, which contained $500 in $20 bills. Weir folded the money in half and returned it to DeCamp.

After DeCamp was at the Benson residence for approximately one hour, Special Agents Kevin Farnsworth and Todd Pattison accompanied DeCamp to his semi to get his driver's license and to conduct a search of the truck. At

the truck, DeCamp unlocked the driver's side door, then went across the cab to unlock the passenger side door. Farnsworth met DeCamp on the passenger side of the cab. Pattison followed DeCamp into the cab.

When DeCamp emerged on the passenger side of the cab he had his driver's license and other papers. DeCamp began removing items from a storage chamber in the cab. Farnsworth then noticed a small plastic canister behind the front passenger side tires of the semi. When tested, the canister was found to contain 4.92 grams of methamphetamine.

After the canister was discovered, DeCamp was arrested and placed in handcuffs. Pattison testified DeCamp was placed in Farnsworth's car, where he remained until taken to the Boone County Jail. Farnsworth testified DeCamp was allowed to walk around, but remained handcuffed, until taken to jail.

Once DeCamp was taken to the jail, officers found only one wad of money on his person, and this contained $361. The next day, August 30, 1991, Farnsworth returned to the area where DeCamp's semi had been parked. He found $500 in $20 bills in a ditch. However, this money was tightly wound into a roll and secured with a rubber band.

The State seized DeCamp's truck and semitrailer and filed notice of forfeiture. DeCamp filed an application for the return of his property. He also filed an affidavit stating he made his living by driving the semi and that it was used for the support of himself, his wife, and child.

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The district court entered an order on November 8, 1991, approving the forfeiture of the semi. The court found the following factors justified seizure of the truck:

> 1. DeCamp arrived at the Benson residence several hours after the sale of illegal drugs to an undercover agent. There was testimony that it is typical behavior for the supplier of drugs to come to the location of the sale shortly after it occurs to collect money.
>
> 2. DeCamp was a truck driver from DeSoto, and Special Agent Weir had been told by Benson and McPherson that the supplier of methamphetamine was a truck driver from DeSoto.
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> 3. DeCamp had between $800 to $900 on his person at the Benson residence and later had only $361. $500 was recovered from the ditch near where the semi had been parked.
>
> 4. DeCamp went through the cab of the semi. Shortly after this, officers found the canister containing methamphetamine near the semi.

The court concluded the evidence supported a finding that DeCamp's semi was used to facilitate criminal activity, which in this case was the possession or sale of methamphetamine. The court found there was a substantial connection between the semi and the crime. The court found that although the evidence was circumstantial, it led to the conclusion that DeCamp possessed the canister containing methamphetamine in his semi. DeCamp has appealed.

In forfeiture proceedings our scope of review is for the correction of errors of law. In re Property of Rush, 448 N.W.2d 472, 477 (Iowa 1989). If the trial court's findings are supported by substantial evidence and

justified under the law, the findings are binding on us, and the judgment will not be disturbed on appeal. Id. A finding is supported by substantial evidence if it may be reasonably inferred from the evidence. Id.

Although forfeiture statutes are not criminal statutes, they are penal in nature and must be strictly construed. In re Property of Kaster, 454 N.W.2d 876, 877 (Iowa 1990). We nevertheless construe forfeiture statutes with a view to promote their legitimate purposes. Id. The burden is on the State to prove by a preponderance of the evidence that the property was forfeitable. Rush, 448 N.W.2d at 476.

Under Iowa Code section 809.1(2), forfeitable property includes any property illegally possessed and any property which has been used to facilitate a criminal offense. State v. Dykes, 471 N.W.2d 846, 847 (Iowa 1991). The term "facilitate" has been interpreted to require a substantial connection between the property and the underlying criminal activity. Kaster, 454 N.W.2d at 879.

DeCamp contends the district court's decision is not supported by substantial evidence. He claims the State failed to meet its burden to show a substantial connection between his property and any criminal activity.

We will address each of the four factors relied upon by the district court.

I. The first factor is DeCamp's arrival at the Benson residence. Although there was testimony that drug suppliers sometimes arrive shortly after a sale in order to

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collect the proceeds, we find this factor does not show DeCamp's participation in any criminal activity. The police officers stated there was a marked police car in the driveway of the Benson residence, several police officers were in the area in jackets which had the word "police" on them, and Benson was in the yard with handcuffs. If DeCamp had been a drug supplier, it seems very unlikely that he would have proceeded into the yard of the Benson residence with all of this activity going on. We conclude this factor does not tend to show DeCamp was involved in the drug sale at the Benson residence.

II. The second factor is the fact DeCamp was a truck driver from DeSoto, and this is consistent with an informant's statement. Special Agent Weir testified that Dorothy McPherson, an associate of Benson's, made the statement. McPherson did not testify, and thus, this evidence is hearsay unless it comes within some recognized exception. The State claims the evidence was not inadmissible hearsay based on the coconspirator exception in Iowa Rule of Evidence 801(d)(2)(E).

In order to admit statements pursuant to rule 801(d)(2)(E), the district court must find by a preponderance of the evidence there was a conspiracy. State v. Florie, 411 N.W.2d 689, 695 (Iowa 1987). When there is substantial evidence of a conspiracy, everything said by any conspirator in furtherance of the common purpose is deemed to have been said in behalf of all

parties to the conspiracy. State v. Beckett, 383 N.W.2d 66, 67-68 (Iowa App. 1985). For the statements to be admissible it is first necessary for the State to produce proof of the conspiracy by evidence other than the coconspirator's statements. State v. Property of Rios, 478 N.W.2d 870, 874 (Iowa App. 1991).

In this case, there was evidence of several telephone calls between DeCamp's residence and Benson's residence. The only evidence concerning the content of the calls was the testimony of DeCamp's wife, Bonnie DeCamp, who testified she knew Benson's girlfriend, Janet Santi, and would call her at Benson's residence. There was also evidence that DeCamp stored an automobile at Benson's residence.

We find this evidence at most shows only that DeCamp and his wife knew Benson. The evidence does not tend to show DeCamp was involved in a criminal conspiracy with Benson and McPherson. We conclude the State has failed to produce sufficient proof of a conspiracy. Therefore, Weir's testimony concerning McPherson's statement does not come within the coconspirator exception in rule 801(d)(2)(E).

The general rule is that error in the admission of hearsay evidence is presumed prejudicial unless the contrary is affirmatively established. State v. McKetrrick, 480 N.W.2d 52, 60 (Iowa 1992). We must determine whether there is sufficient other evidence in the record to support the forfeiture.

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III. The third factor is the fact DeCamp had $500 plus another wad of money when he was confronted at the Benson residence. When he was taken to jail, he had only $361. Also, the police found $500 in a ditch near where DeCamp's truck was parked.

The district court found the $500 found in the ditch was the same money which had earlier been held by DeCamp. Because the money found in the ditch is the same sum as that held by DeCamp, this seems to be a logical conclusion. However, Special Agents Weir and Pattison both testified that Weir folded the money in half and returned it to DeCamp when he finished counting it. The money found in the ditch was wound tightly into a roll and secured with a rubber band. DeCamp was placed in handcuffs soon after he, Farnsworth, and Pattison arrived at the truck. The State has produced no explanation of how DeCamp could roll up the money, secure it with a rubber band, and then throw it some twenty feet while his hands were secured by handcuffs.

Furthermore, the fact DeCamp had a large amount of cash does not necessarily support an inference that he was involved in criminal activity involving drugs. See In re Property of Daniels, 478 N.W.2d 622, 623 (Iowa 1991); State v. $2,434 Cash, 461 N.W.2d 346, 347 (Iowa App. 1990). There was no evidence connecting the money with drug dealing. There was evidence DeCamp used cash to pay for fuel for his truck. We conclude this factor does not tend to show DeCamp was involved in the sale of drugs.

IV. The final factor is the fact a container of illegal drugs was found near DeCamp's truck. The State points out the container was found behind a wheel of the truck, and it would have been crushed by the wheel if the container had been present before the truck arrived at the scene. The State's theory is that DeCamp tossed the container of drugs behind the wheel while Special Agents Farnsworth and Pattison were not looking.

However, Farnsworth and Pattison both testified there was at most five to ten seconds when DeCamp was exiting the cab of the truck that he was not under their observation. Farnsworth went around the front of the cab to meet DeCamp, and Pattison followed DeCamp through the cab. The State did not test the container for fingerprints. We also note there was a period of about an hour after DeCamp parked his truck before he returned with the officers.

This factor presents a closer question. We conclude the State has not sufficiently shown the drugs belonged to DeCamp or that they were transported in the truck.

Looking at the factors relied upon by the district court, we conclude there is not substantial evidence in the record to support the forfeiture of DeCamp's truck. All of the evidence presented by the State is circumstantial evidence. Circumstantial and direct evidence are equally probative. Rush, 448 N.W.2d at 477. However, circumstantial evidence must have sufficient probative force to constitute the basis for a legal inference, not

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for mere speculation. Harsha v. State Sav. Bank, 346 N.W.2d 791, 800 (Iowa 1984). Circumstantial evidence must do more than raise a suspicion; it must amount to proof. Id.

We find the evidence presented here presents only a speculation that DeCamp's truck was involved in the transport or sale of drugs. The State has failed to show a substantial connection between the truck and a crime. We determine the district court should have granted DeCamp's application for the return of his property. We therefore reverse the decision of the district court and remand.

REVERSED AND REMANDED.