

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	
)	
v.)	
)	
ONE RED 1985 CHEVROLET K-20 PICKUP TRUCK, MAINE REGISTRATION 22989Z, VIN 2GCGK24M3F1120745, WITH ALL APPURTENANCES AND ATTACHMENTS THEREON,)	Civil No. 90-0234 P
)	
Defendant)	

**RECOMMENDED DECISION ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

The government seeks summary judgment in this forfeiture action brought pursuant to 21 U.S.C. ' 881(4), which provides in relevant part as follows:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . .

(4) All . . . vehicles . . . which are used, or . . . intended for use, to transport, or . . . facilitate the transportation . . . of [marijuana].

Andrew Warlick has filed a timely claim to the defendant vehicle.

A motion for summary judgment must be granted if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed R. Civ. P. 56(c). On a motion for summary judgment the court must view the record in the light most favorable to the nonmoving party. *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990).

In a civil forfeiture action the government must establish probable cause to believe that the defendant property "had the requisite nexus to a specified illegal purpose," here its use as a vehicle to transport marijuana. *United States v. One Lot of U.S. Currency (\$68,000)*, No. 90-2073, slip op. at 5 (1st Cir. Mar. 4, 1991) (to be reported at 927 F.2d 30). "Once the government has made a showing of probable cause, the burden shifts to the Claimant to prove by a preponderance of the evidence that the property was not involved in illegal drug activity." *United States v. One 1986 Chevrolet Van*, No. 90-1332, slip op. at 5 (1st Cir. Mar. 4, 1991) (to be reported at 927 F.2d 39).

The government's motion is supported by an affidavit of Kelvin Bickford, an undercover agent with the Maine Bureau of Intergovernmental Drug Enforcement ("BIDE"), in which Agent Bickford recites that on January 3, 1990 the claimant drove "the red 1985 Chevrolet pick-up truck that is named as the defendant in this action" to a prearranged rendezvous point where, from the truck, he handed the agent a bag containing 110 grams of marijuana in exchange for \$600. Affidavit of Kelvin Bickford & 1-2. He also states that the claimant purchased the defendant truck on December 30, 1989 and was its registered owner on the date of the drug transaction. *Id.* & 3.

The claimant does not dispute his participation in the drug transaction itself. Instead, in arguing lack of probable cause he relies on the fact that Agent Bickford in deposition testimony acknowledged that he has never personally run a registration or vehicle identification number check on the truck driven by the claimant at the time in question or a license or registration check on the claimant himself. Deposition of Kelvin Roy Bickford ("Bickford Deposition") at 19, 22, 27. In his own affidavit the claimant states that he owned three red pickup trucks during the period January 3,

1990, the date of the drug transaction, through March 20, 1990, the date on which Agent Bickford's file materials indicate that another agent made a computer registration check of vehicles registered in the claimant's name, but the claimant asserts that he does not remember which of the three vehicles he was driving when the marijuana sale took place. Affidavit of Andy Warlick in Opposition in Plaintiff's Motion for Summary Judgment; Bickford Deposition at 14-17, 20-22 and Exhibit 2 thereto. Indeed, what appears to have happened is that Agent Bickford read the license plate registration number of the vehicle the claimant was driving into the body wire he was wearing, transmitting it to other law enforcement people who were providing him with cover at the time of the drug transaction. Bickford Deposition at 23-24. Bickford did not write the number down anywhere. *Id.* at 25. Apparently it was the responsibility of others on the team to conduct a follow-up vehicle registration check. *See id.* at 26-28, 30.

Although Agent Bickford does state in his affidavit that the claimant was driving the defendant pickup truck at the time the contraband was produced by him from his vehicle, his affidavit does not recite that his statements are based on personal knowledge. *See* Fed. R. Civ. P. 56(e). While the court is free to infer in appropriate circumstances that affidavit statements are made on personal knowledge in the absence of a recitation to that effect, *see Barthelemy v. Air Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990), Agent Bickford's own deposition testimony makes clear that he in fact has no personal knowledge that the pickup truck named as the defendant in this action and identified in the caption by registration and vehicle identification numbers is the one the claimant was driving at the time of the events in issue.¹ Simply put, there is a missing piece in the government's required proof. There is

¹ Because the government's burden in a civil forfeiture case is limited to a showing of probable cause, the government may use hearsay in discharging that burden. *One 1986 Chevrolet Van*, slip op. at 5. Here, however, the government's papers do not suggest that Agent Bickford relies on hearsay in asserting that the vehicle was the one used by the claimant to transport the contraband he sold to

probable cause to believe that the claimant used a red pickup truck to transport the marijuana that he sold to Agent Bickford, but no probable cause to believe that the defendant was that truck. *See United States v. Parcel of Land & Residence at 28 Emery St.*, 914 F.2d 1, 3-4 (1st Cir. 1990) (government must show a "substantive connection" between the property forfeited and the drug activity; "[t]he problem with the government's proof is the lack of a solid evidentiary basis linking the house to the sale of drugs").

For the foregoing reasons, I recommend that the government's motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 10th day of April, 1991.

David M. Cohen

Bickford. To the extent it may be assumed Agent Bickford relied on hearsay, no information is provided that would permit the court to determine its reliability. *See id.* at 6; *see also United States v. Parcel of Land & Residence at 28 Emery St.*, 914 F.2d 1, 5 (1st Cir. 1990) (while hearsay may be considered in evaluating probable cause to forfeit, there must be a substantial basis for crediting the hearsay).

United States Magistrate Judge