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24-P-507

Appeals Court

COMMONWEALTH vs. ONE (1) CHECK IN THE AMOUNT OF \$480.00 FOR
1,600 PIECES OF WILD OYSTERS (CRASSOSTREA VIRGINICA).¹

No. 24-P-507.

Barnstable. March 4, 2025. - September 26, 2025.

Present: Desmond, Ditkoff, & Englander, JJ.

Shellfish. Municipal Corporations, Shellfish. Division of
Marine Fisheries. Wampanoag Tribal Council. Forfeiture
Proceeding. Practice, Civil, Forfeiture proceeding,
Summary judgment.

Civil action commenced in the Falmouth Division of the
District Court Department on December 16, 2019.

The case was heard by Lisa F. Edmonds, J., on motions for
summary judgment.

Jeffrey B. Loeb (Jonathan R. Loeb also present) for
Cheenulka Pocknett.

Maryanne Reynolds, Assistant Attorney General, for the
Commonwealth.

DITKOFF, J. This case involves the civil forfeiture of
wild oysters pursuant to G. L. c. 130, § 12, and G. L. c. 257,

¹ Cheenulka Pocknett, intervener.

statutes that have not yet been applied in our published case law. The Commonwealth asserts that the special, Commonwealth-favorable rules applicable to civil forfeiture of drugs apply to such civil forfeitures. We write to dispel that notion, which is not supported by the statutory text.

We consider whether the Commonwealth was entitled to summary judgment, applying the usual rule that the plaintiff has the burden to establish its case. We conclude that the Commonwealth met its burden where the record showed that the fisherman affixed tags to the oysters with his commercial fisherman permit number and sold those oysters to a licensed wholesaler prohibited by law from buying oysters from anyone who was not a licensed commercial fisherman. Accordingly, there was no genuine issue of material fact concerning the capacity in which the fisherman was acting. The summary judgment record establishes as a matter of law that the fisherman was acting in his capacity as a commercial fisherman, and not as a Native American exercising his right to fish for sustenance.

We also consider the fisherman's defense that the civil forfeiture was barred by the fact that, after the oysters were seized, the fisherman received a warning citation. We conclude that an environmental police officer who has properly seized wrongly taken fish need not impose a fine or suspend the fisherman's commercial fishing license to proceed with civil

forfeiture of the seized fish. Accordingly, we affirm the order of the Appellate Division of the District Court affirming the decree of forfeiture.

1. Background. The basic facts are not in dispute. The fisherman and claimant, Cheenulka Pocknett, holds a valid commercial shellfishing permit issued by the Division of Marine Fisheries (DMF). He is also a member of the Mashpee Wampanoag Tribe and, as such, has certain rights to fish for sustenance. See Commonwealth v. Maxim, 429 Mass. 287, 289-292 (1999).

On Wednesday, December 4, 2019, Pocknett and a friend took a large number of wild oysters from Green Pond in Falmouth. Green Pond is closed to commercial fishing on Wednesdays (as well as Sundays, Mondays, and Fridays). See Chapter 275, Article II, § 15(D) of the Code of Falmouth.² See also G. L. c. 130, § 52, par. 1 (authorizing municipalities to regulate shellfish fisheries).³ Pocknett kept some oysters for personal consumption; the Commonwealth took no action regarding those oysters and appears to recognize Pocknett's right to take

² As the Supreme Judicial Court has stated that the prior rule against taking judicial notice of municipal bylaws is "a relic of another era," we take judicial notice of Falmouth's bylaws. City Council of Springfield v. Mayor of Springfield, 489 Mass. 184, 190 n.6 (2022). Accord Six Brothers, Inc. v. Brookline, 493 Mass. 616, 620 n.9 (2024).

³ The town of Falmouth created the Green Pond oyster fishery through aquaculture, and the restrictions are presumably to prevent overfishing.

oysters for personal consumption.⁴ Pocknett placed 1,600 oysters in containers and affixed the containers with "DMF-required shellfish tags with [his] name[], [his] DMF issued permit number, as well as the date, time and location of the harvest." He then sold those oysters to Big Rock Oysters in Harwich, a licensed wholesale shellfish dealer.

The same day, the Falmouth harbormaster contacted the Massachusetts Environmental Police to report unlawful shellfishing in Green Pond. The next day, an environmental police officer went to Big Rock Oysters and inspected the DMF shellfish tags that stated that the oysters were taken by Pocknett from Green Pond on a Wednesday. The officer told Big Rock Oysters that it should not have accepted those oysters. He instructed Big Rock Oysters to sell the oysters but that the state would be seizing the proceeds.⁵ The officer then called Pocknett and orally advised him of the seizure and that he would be filing an action in libel (the term used in the statute).

⁴ Pocknett asserts that he shared some of the oysters with friends and family, used some shells for art and jewelry, and traded some for jewelry, food, and gasoline. If so, those oysters are also not a part of this case.

⁵ The officer did the same with the oysters sold to Big Rock Oysters by Pocknett's friend. The friend did not appeal the decree of forfeiture regarding the oysters he sold, and those oysters are not before us.

Three days later, the same officer issued Pocknett a warning citation for possession of shellfish from an area closed to commercial harvest, in violation of 322 Code Mass. Regs. § 16.09(2) (2019).⁶

On December 16, 2019, the officer filed a complaint in libel in District Court for forfeiture of a check for \$480, which appears to be the wholesale proceeds of the oysters. Pocknett promptly appeared as a claimant and unsuccessfully moved to dismiss the complaint. On the parties' cross motions for summary judgment, a judge of the District Court granted summary judgment to the Commonwealth and entered a decree of forfeiture.

Pocknett filed a timely notice of appeal to the Appellate Division of the District Court. The Appellate Division affirmed the decree. Pocknett then filed a timely notice of appeal pursuant to G. L. c. 231, § 109. This appeal followed.

2. Actions in libel. An environmental police officer with "reasonable cause to believe, and [who] does believe, that fish taken, held, kept, possessed, transported or held for

⁶ That regulation makes it unlawful for a "[c]ommercial fisherman to harvest, attempt to harvest, sell, or attempt to sell any shellfish from any growing area, or part thereof, that is not open to commercial harvest by the [DMF] or the municipality that regulates commercial harvest." 322 Code Mass. Regs. § 16.09(2) (2019). All citations to sections of title 322 Code Mass. Regs. in this opinion are to the version in effect in 2019 when the events at issue occurred.

transportation or sale in violation of law" may search for such without a warrant and "seize any such fish," as well as "any boat, vessel, fish car, bag, box, locker, package, crate, any motor vehicle . . . or any other personal property used in a violation of the laws relative to marine fisheries and hold the same for forfeiture." G. L. c. 130, § 9, par. 1.⁷ "All fish unlawfully taken, held, possessed or dealt with contrary to" the marine fishery laws or regulations, as well as "all boats, vehicles and apparatus used therein may, in addition to any or all of the penalties contained therein, be seized, libelled and forfeited to the commonwealth." G. L. c. 130, § 12, par. 1. In the case of uncontaminated fish, the seized fish may "be sold at private sale or public auction, and the net proceeds of such sale may be libelled in the same manner and with the same effect as if such proceeds were the property itself." G. L. c. 130, § 12, par. 2. The statute explicitly states that the procedures of G. L. c. 257 shall apply to such actions. G. L. c. 130, § 12, par. 2.

General Laws c. 257, in turn, applies to "[p]roperty which has been forfeited for an offence" where "no other provision is

⁷ The statute defines "fish" as "any animal life inhabiting the ocean or its connecting waters including any crustacean or marine fish, whether free swimming or free moving, and any shellfish or sea worms, whether or not imbedded in the soil." G. L. c. 130, § 1.

made." G. L. c. 257, § 1. Within fourteen days of the seizure, the person making the seizure must "file a libel" in either Superior Court or District Court "stating briefly the cause of the seizure without the details, and praying for a decree of forfeiture." G. L. c. 257, § 2. The court then issues an order of notice. G. L. c. 257, §§ 4-5.⁸

"If a claimant appears, he may allege and answer any matter material for his defence." G. L. c. 257, § 6.⁹ If the libellant prevails, "the court shall decree a forfeiture and sale of the property and a distribution of the proceeds, or other appropriate disposition thereof." G. L. c. 257, § 7. If the claimant prevails, "the court shall decree a restitution of the property to the claimant," G. L. c. 257, § 7, and, if "the seizure was groundless," the court shall award "reasonable damages" to the claimant, G. L. c. 257, § 9.

In the District Court and the Appellate Division, the Commonwealth repeatedly asserted that the special civil forfeiture provisions relating to drug forfeitures apply to

⁸ The statutes direct publication of the notice either in a newspaper in the county or by posting it "in a public place," depending on whether the libel is in Superior Court or District Court. G. L. c. 257, §§ 4-5. Here, notice was served at Pocknett's home by a deputy sheriff. This is a wise practice when the claimant's identity is known.

⁹ Even if no claimant appears, the court may order that the property be returned to its owner if the libellant is unable to demonstrate that it should be forfeited. G. L. c. 257, § 6.

libels under G. L. c. 257, thus dramatically lowering the Commonwealth's burden of proof. Under G. L. c. 94C, § 47 (d), the Commonwealth seeking to forfeit proceeds or certain instrumentalities of drug transactions need show only probable cause. See Commonwealth v. Martinez, 480 Mass. 777, 790-791 (2018). The "claimant shall then have the burden of proving that the property is not forfeitable" or that another exception applies. G. L. c. 94C, § 47 (d). Accord Commonwealth v. One 2004 Audi Sedan Auto., 456 Mass. 34, 37 (2010).

By its own terms, G. L. c. 94C, § 47, applies only to controlled substances and certain items related to the distribution or manufacture of controlled substances. Its unusual burdens of proof and procedural requirements apply only in that context. As the Supreme Judicial Court pointed out, c. 257 "is of long standing and the Legislature could have referred to it in enacting c. 94C in 1971, but did not." Commonwealth v. One 1976 Cadillac DeVille Auto., 380 Mass. 411, 418 (1980) (One 1976 Cadillac). Moreover, "[t]he fact that c. 94C has a number of procedural provisions at variance with those of c. 257 makes it all the harder to justify the analogical attraction to it of § 2 of c. 257." One 1976 Cadillac, supra. The Commonwealth-favorable burdens of proof in G. L. c. 94C, § 47, have no place in litigation pursuant to G. L. c. 257.

Rather, we repair to the general rule that the plaintiff, here the libellant, bears the burden to prove, by a preponderance of the evidence, that the property is forfeitable. See Fidalgo v. Columbus McKinnon Corp., 56 Mass. App. Ct. 176, 183 (2002). Presumably, the claimant bears the burden of proving any affirmative defense by a preponderance of the evidence. See DeWeese-Boyd v. Gordon College, 487 Mass. 31, 43 (2021), cert. denied, 142 S. Ct. 952 (2022). With this understanding, we proceed to Pocknett's challenges to the decree of forfeiture.

3. Warning citation. Citing G. L. c. 90C, § 2 (the "no-fix" statute), Pocknett argues that the libel was barred by the warning citation issued by the environmental police officer. Under that statute, a police officer must issue a citation for a motor vehicle violation at the time and place of the violation. G. L. c. 90C, § 2, par. 4. Failure to do so "shall constitute a defense in any court proceeding for such violation," unless one of several exceptions applies. G. L. c. 90C, § 2, par. 5. Accord Commonwealth v. Foley, 496 Mass. 320, 324 (2025); Commonwealth v. Ray, 95 Mass. App. Ct. 848, 851 (2019).

Consistent with the theme of this opinion, the unusual citation procedures for motor vehicle violations cannot be imported into the realm of marine fishery regulation. The "no-fix" statute does not reflect a generally applicable concept of

law, but rather reflects a particular legislative solution "to replace the old system, where the decision whether to issue a warning was made over a three-day period, because that created the 'opportunity for subsequent maneuvering or pressure' in favor of the well connected." Burlington Police Dep't v. Hagopian, 100 Mass. App. Ct. 720, 729 (2022), quoting Newton Police Ass'n v. Police Chief of Newton, 63 Mass. App. Ct. 697, 699 (2005). It is a sui generis system, designed to correct a problem particular to the enforcement of motor vehicle violations.

Here, the officer seized the oysters and then promptly called Pocknett to inform him that he had done so and that he would be filing an action in libel. Three days later, he issued a warning citation, rather than suspending Pocknett's fishing license, as authorized by 322 Code Mass. Regs. § 16.11(1), or imposing a fine of \$50, as authorized by Chapter 275, Article II, § 23(B) of the Code of Falmouth. Nothing in that chain of events could have led Pocknett reasonably to believe that the seizure would be undone. Similarly, both G. L. c. 130, § 12, par. 1, governing the seizure and forfeiture of fish, and 322 Code Mass. Regs. § 16.11(1) use the word "may," meaning that the Commonwealth has the discretion to seize or suspend, or both (or neither), as the circumstances dictate. See Cumberland Farms, Inc. v. Board of Health of Braintree, 495 Mass. 225, 235 (2025),

quoting Commonwealth v. Dalton, 467 Mass. 555, 558 (2014) ("The word 'may' reflects 'the Legislature's intent to grant discretion or permission' and does not impose a mandate"). Similarly, whether to seek a civil fine is a matter of "prosecutorial discretion [that] belongs to the executive branch alone." Commonwealth v. Kardas, 93 Mass. App. Ct. 620, 625 (2018). We see no reason why the officer could not choose to seize and forfeit the fish but seek no other penalty against Pocknett.

4. Forfeiture. "We review a grant of summary judgment de novo to determine 'whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law.'" Mittas Early Learning, LLC v. MDC Properties - Westford Rd, LLC, 104 Mass. App. Ct. 615, 617 (2024), quoting Cottrell v. Laidley, 103 Mass. App. Ct. 483, 489 (2023). Here, the Commonwealth had the burden of showing that the oysters in question were "taken . . . [or] held for . . . sale in violation of law." G. L. c. 130, § 9. Because the law in question is 322 Code Mass. Regs. § 16.09, the Commonwealth had to show that the fish were taken by a "[c]ommercial fisherman [who] harvest[ed] . . . from any growing area, or part thereof, . . . that is not open to commercial harvest."

Because it is uncontested that the oysters were taken from Green Pond on a Wednesday, that Green Pond was closed to commercial fishing on Wednesdays, and that the oysters were sold to Big Rock Oysters, the only remaining question is whether Pocknett was acting as a commercial fisherman or instead exercising his rights as a member of the Mashpee Wampanoag Tribe to fish for sustenance.

In this regard, it is important to recall that the Commonwealth did not seize the oysters that Pocknett kept for personal consumption or to share with his friends and family. Rather, the Commonwealth seized only the oysters that Pocknett sold to Big Rock Oysters. Pocknett admits that he personally affixed DMF shellfish tags to these oysters with his DMF commercial fisherman permit number. As a licensed wholesaler, Big Rock Oysters was required to obtain the fisherman's name and DMF number from any person who sold it fish. See 322 Code Mass. Regs. § 7.07(4)(b). Furthermore, it could not "accept any species of fish from persons not commercially permitted by DMF." 322 Code Mass. Regs. § 7.07(5)(d). In short, it was only by acting as a commercial fisherman that Pocknett was able to sell the oysters in question to Big Rock Oysters. Accordingly, there is no genuine issue of material fact and it is established as a matter of law that Pocknett was acting as a licensed commercial fisherman in taking these particular oysters and holding them

for sale to Big Rock Oysters. Summary judgment was properly granted to the Commonwealth. The decision and order of the Appellate Division is affirmed.

So ordered.