

BILLY L. GORDON,)	
)	
Petitioner/Appellant,)	Appeal No.
)	01-A-01-9511-CH-00522
v.)	
)	Davidson Chancery
MICHAEL C. GREENE, Commissioner)	No. 94-3552-I
of the Tennessee Department of)	
Safety,)	
)	
Respondent/Appellee.)	

<p>FILED</p> <p>June 26, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR

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AFFIRMED AND REMANDED

O P I N I O N

Petitioner, Billy Gordon, appeals the chancellor's judgment dismissing his petition for review filed pursuant to the Uniform Administrative Procedures Act. Petitioner sought review of a forfeiture order entered by the Commissioner of the Tennessee Department of Safety ("Commissioner").¹ The order forfeited a 1989 Corvette automobile seized from Beate Kittel-Glass under the Tennessee Drug Control Act ("TDCA"). The pertinent facts are as follows.

On 25 July 1993, Officer Shawn Hegna of the Knoxville Police Department arrested Ms. Kittel-Glass for driving under the influence. Ms. Kittel-Glass was driving the Corvette which is the subject of this case. During an inventory search, the officer found sixty-seven ten-milligram Valium pills for which Ms. Kittel-Glass did not have a prescription. When the officer asked Ms. Kittel-Glass who owned the Corvette, she told him that she owned the car "outright, it was paid for." The officer ran a VIN check and found that Ms. Kittel-Glass owned the Corvette. Thereafter, the officers seized the car under the TDCA.

On 13 August 1993, Ms. Kittel-Glass' attorney filed a claim to the Corvette. Ms. Kittel-Glass withdrew this claim nine months later. Approximately seven months after officers seized the car, petitioner filed a claim asserting that he owned the Corvette.

On 9 May 1994, an Administrative Law Judge ("ALJ") held a hearing on petitioner's claim. Although Ms. Kittel-Glass did not

¹Former commissioner Robert Lawson of the Tennessee Department of Safety entered the forfeiture order; however, the court automatically substituted the present commissioner, Michael C. Greene, in this action pursuant to Tennessee Rule of Civil Procedure 25.04.

testify at the administrative hearing, petitioner testified that he purchased the Corvette from Ms. Kittel-Glass prior to the seizure. As payment, he claimed that he gave her a \$5,000.00 cashier's check and did \$9,000.00 worth of work. Ms. Kittel-Glass signed a used car order which evidenced the sale and which listed a sale price of \$15,000.00.

Following the hearing, the ALJ issued an initial order finding: 1) the State proved the Corvette was used to transport or to facilitate the transportation of a controlled substance in violation of the TDCA; 2) petitioner failed to prove that he had an interest in the Corvette which he acquired in good faith; and 3) petitioner's claim was not timely. The ALJ accordingly dismissed petitioner's claim and forfeited the Corvette.

Petitioner appealed the initial order to the commissioner. The commissioner entered a final order adopting the ALJ's findings. As a result, the commissioner ordered the Corvette forfeited to the seizing agency, the Knoxville Police Department. Petitioner timely filed a petition for review pursuant to the Uniform Administrative Procedures Act.

After reviewing the petition, the chancellor found that the commissioner erred in finding that the claim was not timely. He also found, however, that substantial and material evidence supported the commissioner's finding that petitioner was not the owner of the Corvette. The chancellor dismissed the petition, and petitioner filed a timely appeal to this court.

The issue on appeal to the chancery court and this court is whether the commissioner's determination is supported by evidence "which is both substantial and material in the light of the entire record." Tenn. Code Ann. § 4-5-322(h)(5)(1991); *Humana of*

Tennessee v. Tennessee Health Facilities Comm'n, 551 S.W.2d 664, 667 (Tenn. 1977).

Substantial and material evidence is "'such relevant evidence as a reasonable mind might accept [as adequate] to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.'" *Southern Ry. Co. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984)(quoting *Pace v. Garbage Disposal Dist.*, 54 Tenn. App. 263, 267, 390 S.W.2d 461, 463 (1965)). Substantial evidence "requires something less than a preponderance of the evidence but more than a scintilla or glimmer." *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 280 (Tenn. App. 1988)(citation omitted). Neither the trial court nor this court is "allowed to weigh the factual evidence and substitute [its] judgment and conclusions for that of the administrative agency, even if the proof were to support a different determination than that of the agency." *Estate of Street v. State Bd. of Equalization*, 812 S.W.2d 583, 587 (Tenn. App. 1990)(citation omitted). The agency's findings must stand if supported by substantial and material evidence. *CF Indus. v. Tennessee Public Serv. Comm'n*, 599 S.W.2d 536, 540 (Tenn. 1980).

The state has the burden of proving that a person used a vehicle in violation of the TDCA; however, the claimant to a seized vehicle has the burden of proving his interest in the vehicle under Tennessee Code Annotated section 53-11-201(f)(1). That section provides, in pertinent part, as follows:

Whenever, in any proceeding under this section, a claim is filed for any property seized, as provided in this section, by an owner or other person asserting the interest to the owner, the commissioner shall not allow the claim unless and until the claimant proves that: (A) the claimant has an interest in such property which the claimant acquired in good faith

Tenn. Code Ann. § 53-11-201(f)(1)(1991).

Petitioner contends the commissioner erred in finding that he had not satisfied his burden of proof. For petitioner to prevail, he must establish there was no substantial or material evidence to support the findings that petitioner was not a credible witness and that his claim of ownership was unbelievable. Respondent argued that petitioner cannot satisfy this burden because all the evidence supported the commissioner's findings.

The evidence in the record established that Ms. Kittel-Glass told the arresting and seizing officer that the automobile was hers. The car was titled in her name and remained in her name for approximately one year after the date on which petitioner claimed to have purchased the car. Moreover, petitioner purchased the \$5,000.00 cashier's check, which he allegedly gave to Ms. Kittel-Glass, one month before the alleged sale of the Corvette. Additionally, petitioner did not inquire about the car nor did he file a claim or do anything to recover the car for some seven months after officers seized the car. His only explanation for this lack of interest was he "didn't really realize it was this serious."

There is also evidence that the signature on the used car order and the signature on the document withdrawing Ms. Kittel-Glass claim to the Corvette are different. The signature on the withdrawal was hyphenated and contained dots over the two s's. The signature on the used car order was neither hyphenated nor were there dots. Moreover, the g in the withdrawal was printed, but the g in the used car order was written in script.

In addition, the terms in the used car order were different than those described by petitioner. According to petitioner, he

paid a total \$14,000.00 for the car. The used car order, however, listed the sale price as \$15,000.00. Also, the cashier's check, which petitioner asserted was the equity referred to in the used car order, was for \$5,000.00, not \$6,000.00 as stated in the used car order.

Finally, Ms. Kittel-Glass drove the car whenever she wished. She even drove it from Tennessee to Florida on one occasion. She did not have to ask petitioner for permission to drive the car. Petitioner testified that he was married to a cousin of Ms. Kittel-Glass; however, in a cover letter to the ALJ he referred to her as his sister-in-law. Petitioner had worked for Ms. Kittel-Glass for two or three years before the seizure.

While another trier of fact may have determined this issue differently, this court is not permitted to weigh the factual evidence and substitute its judgments and conclusions for those of the commissioner. ***Estate of Street***, 812 S.W.2d at 587; ***see also*** Tenn. Code Ann. § 4-5-322(h)(5)(1991). The concurrent finding by the commissioner and the chancellor that petitioner did not own the Corvette is binding on this court. ***Beare Co. v. Tennessee Dep't of Revenue***, 858 S.W.2d 906, 907 (Tenn. 1993). Petitioner had the burden of proving his ownership interest in the automobile. There is substantial and material evidence that he failed to satisfy this burden.

We have considered the two issues raised by the respondent; however, because of our holding under the issue raised by the petitioner, we pretermit respondent's issues.

It results that the judgment of the chancellor in affirming the commissioner's order is affirmed with costs on appeal assessed

to the petitioner/appellant, Billy L. Gordon. The cause is

remanded to the chancery court for any further necessary proceedings.

SAMUEL L. LEWIS, JUDGE

CONCUR:

HENRY F. TODD, P.J., M.S.

BEN H. CANTRELL, J.