

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**PAMELA JEAN GAMES-NEELY, PROSECUTING ATTORNEY OF
BERKELEY COUNTY, WEST VIRGINIA ON BEHALF OF THE EASTERN
PANHANDLE DRUG & VIOLENT CRIMES TASK FORCE**

Respondent,

Vs.

Docket No.

**\$3,960 in U.S. Currency and
2005 Audi A8 VIN#WAUML44E95N009079**

Respondent.

**APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
HONORABLE GINA M. GROH, JUDGE
CASE NO. 09-P-171**

PETITION FOR APPEAL

Christopher J. Prezioso, Esq. #9384
Luttrell & Prezioso, PLLC
206 W. Burke Street
Martinsburg, West Virginia 25401
(304) 267-3050

Counsel for Petitioner
Rashiad Robinson

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TABLE OF AUTHORITIES

WEST VIRGINIA STATUTES

West Virginia Code § 60A-7-701et seq.

ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT THE AMOUNT OF \$3,960 AND A 2005 AUDI A8 VIN#WAUML44E95N009079 WAS SUBJECT TO FORFEITURE PURSUANT TO WEST VIRGINIA CODE § 60A-7-701 ET SEQ.

STATEMENT OF THE CASE

Certain property including \$3,960 in U.S. Currency and a 2005 Audi A8 VIN#WAUML44E95N009079 automobile was the subject of a civil forfeiture proceeding pursuant to West Virginia Code § 60A-7-701 et seq.

On December 4, 2009, said civil forfeiture petition was filed and Petitioner Rashiad Robinson was served with a copy of said petition. Subsequent to being served with said petition, Respondent did file timely file a *pro se* answer and later did file an amended answer through trial counsel S. Andrew Arnold, Esq. After certain discovery had been had, the parties agreed to voluntarily waive their right to a bench trial and the same was held on October 18, 2010 in the Circuit Court of Berkeley County, West Virginia.

At said October 18, 2010 bench trial, the Prosecuting Attorney of Berkeley County, West Virginia (hereinafter, State), did call the following witnesses: Chief Kevin Miller, Sergeant Scott Dillon, Corporal Brian Bean, Patrolman Derrick English, and Corporal Andy Evans.

On October 22, 2010, an Order granting the relief filed in the State's petition was granted and the State did forfeit the amount of \$3,960 in U.S. Currency and the 2005 Audi A8 automobile. Said \$3,960 in U.S. Currency was obtained from the search of certain ATM machines in the Berkeley County area.

After being retained, Appellate Counsel immediately filed a Notice of Appearance and Notice of Intent to Appeal on January 24, 2011.

It is from the October 22, 2010 Order Denying Petition for Writ of Habeas Corpus that Petitioner respectfully appeals.

SUMMARY OF THE ARGUMENT

At the October 18, 2010 hearing, absolutely no direct evidence was offered which proved that the seized property was subject to forfeiture pursuant to the provisions of West Virginia Code § 60A-7-701 et seq. At the hearing, the State presented no direct evidence linking said currency or the automobile in question to the manufacture, distribution, dispensing or possession of controlled substances. *See* West Virginia Code § 60A-7-703(1)(2)(3).

As such, it the argument of Petitioner Rashiad Robinson that the Circuit Court of Berkeley County committed reversible error when it did seize the amount of \$3,960 in U.S. Currency and a 2005 Audi A8 VIN#WAUML44E95N009079 owned outright by Petitioner Rashiad Robinson.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

- I. Petitioner Rashiad Robinson affirmatively states that the issues raised in the instant petition are issues that have been authoritatively decided and oral argument is not necessary unless the Court determines that other issues raised upon the record should be addressed. If the Court determines that oral argument is necessary, argument should be held pursuant to Rule 19 of the West Virginia Revised Rules of Appellate Procedure argument and disposition by memorandum decision.

ARGUMENT

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT THE AMOUNT OF \$3,960 AND A 2005 AUDI A8 VIN#WAUML44E95N009079 WAS SUBJECT TO FORFEITURE PURSUANT TO WEST VIRGINIA CODE § 60A-7-701 ET SEQ.

It was error for the Circuit Court of Berkeley County, West Virginia to find that the amount of \$3,960 and the 2005 Audi A8 automobile to subject to forfeiture pursuant to West Virginia Code § 60A-7-701 et seq.

In order for currency to be forfeited, said currency must be in used or intended to be used in violation of West Virginia Code § 60A-7-701 et seq. for use in the manufacture, distribution, dispensing or possession of a controlled substance. *West Virginia Code* § 60A-7-701(7).

Likewise, a vehicle must only be forfeited when said vehicle has been used in any matter to facilitate the “transportation, sale receipt, possession or concealment of property described in subdivision (1), (2) or (3).” *West Virginia Code* § 60A-7-701(5). Before said property can be forfeited, a hearing must be held upon the claims contained within the possession and the State “shall have the burden of proving by a preponderance of the evidence that the seized property is subject to forfeiture. *West Virginia Code* § 60A-7-707(e).

In this case, the State clearly did not meet its burden in proving that the currency or automobile in question was even remotely linked to the possession or distribution of any controlled substances. At trial, the State primarily relied on hearsay testimony and alleged drug transactions that did not directly involve Petitioner. In short, the State cannot be allowed to seize property without meeting the proper evidentiary standards and certainly cannot forfeit said property without the proper causal nexus.

At the October 18, 2010 hearing, the State's first was Chief Kevin Miller of the Martinsburg City Police Department. *Tr. October 18, 2010 Hearing, Pg. 5.* Chief Miller testified that he executed a search warrant on September 6, 2007 on a property wherein an individual by the name of Jackie Goodman had been selling narcotics. *Tr. October 18, 2010 Hearing, Pg. 6.* Chief Miller then testified that they had witnessed Petitioner "flushing" something down the toilet on said date. *Id.* Chief Miller further testified that \$2,400.00 was taken on said day from the residence and the same was forfeited in a prior proceeding. *Id. at Pg. 6-7.* Although trial counsel objected to the relevance of said testimony, the trial court allowed said testimony to continue. *Id. at Pg. 9.* Lastly, Chief Miller testified that search warrants were obtained to search certain Automatic Teller Machines (ATM) lawfully owned by Petitioner in order to seize money that the State believed was obtained from the sale of controlled substances and being laundered through said ATMs but offered absolutely no proof whatsoever that the monies in said ATMs were obtained through ill gotten means. *Id. at Pg. 10-13.*

The next witness to testify was First Sergeant Scott Dillon. *Tr. October 18, 2010 Hearing, Pg. 14.* Sergeant Dillon first testified to a controlled buy that involved Jackie Goodman in August, 2007 and did not link said buy to Petitioner. *Id. at Pg. 15.* Sergeant Dillon then reiterated that 2009 search warrants had been obtained to search certain ATMs in the Berkeley County area after a "confidential informant" had informed the police that Petitioner owned and operated ATM machines in the area and that said machines were used to "store drug money and drugs." *Id. at Pg. 16.* However, said confidential informant did not testify at the hearing and the State offered no other basis to corroborate the seizure of the funds (\$3,960.00) obtained from the search of said ATMs. *Id. at Pg. 17.*

The next witness to testify was Detective Derrick English. *Tr. October 18, 2010 Hearing*, Pg. 18. Detective English claimed that Petitioner had been part of a controlled buy wherein he sold “one ounce of crack cocaine”. *Id. at Pg. 20*. However, said officer did not give the time or date that said event occurred and offered no other details. *Id. at Pg. 17-20*. Lastly, Detective English claimed that an unnamed confidential informant had seen the 2005 Audi being used to deliver controlled substances but admitted he had not personally observed the same. *Id. at Pg. 23*.

The next witness to testify was Corporal Brian Bean. *Tr. October 18, 2010 Hearing*, Pg. 25. Corporal Bean’s testimony was cumulative in nature and was mostly limited to the execution of the 2009 search warrant on the ATM machines but did not offer any evidence to prove that any money found in said ATMs were obtained through Petitioner’s alleged distribution or possession of controlled substances. *Id. at Pg. 26-27*. Corporal Bean did testify that a controlled buy had occurred wherein the Police Task Force did give an undercover operative the amount of \$1,800.00 to buy crack cocaine and that the same was used to buy said crack cocaine at a trailer in Berkeley County. *Id. at Pg. 27*. However, Corporal Bean did admit that he had no direct proof that the task force’s \$1,800.00 was used to buy crack cocaine from Petitioner as it was not found on his person and he did not witness the transaction. *Id. at Pg. 27-28*. Further, said witness testified that other persons besides Petitioner Rashiad Robinson were at the house when said transaction allegedly occurred. *Id. at Pg. 28*.

The last witness to testify was Officer Andrew Evans. *Tr. October 18, 2010 Hearing*, Pg. 29. Officer Andrew Evans’ testimony was limited to the fact that an unnamed confidential informant had said Petitioner had used the 2005 Audi automobile at issue to transport “narcotics” from New York to West Virginia. *Id. at Pg. 31*. On cross examination, said officer admitted

that when he searched the 2005 Audi prior to seizure that he found no drugs in said automobile and no cash in the same. *Id. at Pg. 34.*

In its closing, the State wrongfully argued that the Petitioner was a drug dealer and that his money and car should be taken by the State. The Petitioner argued that the State had presented nothing more than speculation and conjecture and that no “specifics”, “dates”, or “witnesses” had been presented to prove that the \$3,960.00 seized or the 2005 Audi had been used in the distribution or possession of controlled substances. Appellate Counsel respectfully contends that the same is absolutely the case on appeal.

By simply reviewing the record in this case, it is clear that the State did not meet its burden of proving that the money or automobile seized in this case should be subject to forfeiture pursuant to West Virginia Code § 60A-7-701 et seq. Upon information and belief, Petitioner Rashid Robinson is not facing any pending criminal charges. All of the testimony set forth at the October 22, 2010 hearing was second hand hearsay regarding the \$3,960.00 seized and the 2005 Audi. Absolutely none of the alleged confidential informants who had alleged that Petitioner was laundering money in the ATM machines or using the 2005 Audi to distribute and transport controlled substances testified at the hearing. At most, the officers testified that they had interviewed certain witnesses that alleged these actions but gave no specifics, dates, or evidence corroborating the same.

The trial court intentionally chose not to require that any of the confidential informants testify at the hearing and, as such, was deprived of the opportunity to weigh their credibility. It is well known that persons working as confidential informants usually harbor the ulterior motive of helping themselves out of trouble by implicating others. In this case, the officers reiterated

these statements without putting on any further proof of corroboration and Petitioner's property was improperly confiscated.

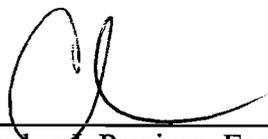
Counsel respectfully notes that the State should be able to seize property pursuant to a criminal conviction or by proof by preponderance of the evidence that said property was in violation of West Virginia Code § 60A-7-701 et seq. However, before the State can be allowed to flex its muscle and seize property from an individual, they must at least be required to meet the preponderance of the evidence standard of proof and not simply seize cars and money from individuals without at least some scintilla of evidence that said cars and money were being used to distribute or possess controlled substances. To approve this seizure and forfeiture would be to deprive Petitioner of his constitutional rights to due process.

As quoted throughout this petition, it is clear that the State had no actual evidence that the property seized was used for purposes of distribution or possession of controlled substances. As such, the practice of allowing property to be taken by speculation and conjecture must cease. Although the preponderance of the evidence standard is not as high as the criminal beyond a reasonable doubt standard, it is a legal standard nonetheless that requires that the State meet its proper evidentiary burden before property is seized and forfeited pursuant to West Virginia Code § 60A-7-701 et seq.

CONCLUSION

Based upon the foregoing, Petitioner Rashiad Robinson respectfully requests that this Honorable Court grant him the relief sought in this Petition for Appeal and that the Court's October 22, 2010 ruling be immediately reversed and his property be returned to him.

Respectfully submitted,
Rashiad Robinson,
By counsel,



Christopher J. Prezioso, Esq. #9384
Luttrell & Prezioso, PLLC
206. W. Burke Street
Martinsburg, WV 25401
(304) 267-3050

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CERTIFICATE OF SERVICE

I, Christopher J. Prezioso, counsel for Petitioner did serve a copy of the instant Petition for Appeal to the following persons at the following address by hand delivery, on this 22nd day of February, 2011:

Christopher Quasebarth, Esq.
Assistant Prosecuting Attorney
380 West South Street, Suite 1100
Martinsburg, WV 25401



Christopher J. Prezioso, Esq. #9384