

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,

Appellee/Petitioner Below,

DOCKET NO.: 11-0415
(Berkeley County Case No: 09-P-
171)

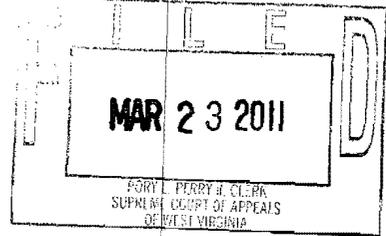
vs.

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

Respondent Below.

RASHIAD ROBINSON,

Appellant.



RESPONSE OF APPELLEE TO PETITION FOR APPEAL

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I. ASSIGNMENT OF ERROR.

A. WHETHER THE CIRCUIT COURT PROPERLY FOUND THAT THE AMOUNT OF \$3,960.00 AND A 2005 AUDI A8 WERE SUBJECT TO FORFEITURE PURSUANT TO W. Va. CODE §60A-7-701, ET SEQ.?

II. STATEMENT OF CASE.

1. On December 4, 2009, the Appellee filed for civil forfeiture of the \$3,960.00 in U.S. Currency and a 2005 Audi A8 (VIN#WAUML44E95N009079) under the West Virginia Contraband Act, W.V. Code §60A-7-701, et seq. [Petition for Forfeiture, 12/04/09.]

2. The Petition for Forfeiture stated that the \$3,960.00 in U.S. Currency and the 2005 Audi were seized by the Eastern Panhandle Drug & Violent Crimes Task Force (hereinafter, Task Force) on November 17, 2009, after a series of search warrants were executed following a controlled purchase of one ounce of crack cocaine from the Appellant. [Petition for Forfeiture, 12/04/09.]

3. The Appellant was identified as a possible owner of the Respondent Property, service was attempted upon the Appellant, but prior to being served with a copy of the Petition for Forfeiture the Appellant filed a document characterized as a handwritten claim/answer to the Respondent Property with the Berkeley County Circuit Clerk's Office. [Handwritten Answer, 01/12/10.]

4. A formal answer was subsequently filed with the Court by the Appellant's attorney below, S. Andrew Arnold. [Formal Answer, 02/19/10.]

5. On September 9, 2010, a status hearing was held and the Appellant withdrew his

previously made request to have a jury trial, a bench trial was set for October 18, 2010. [Order, 09/10/10.]

6. On October 18, 2010, a bench trial was held and sworn testimony was taken from Chief Kevin Miller, First Sergeant Scott Dillon, Detective Derrick L. English, Corporal Brain Bean, Corporal Andy Evans. [Tr. 10/18/10, 5-34.]

7. Chief Kevin Miller testified that prior to being Chief of the Martinsburg City Police Department he was assigned to work at the Task Force for the five previous years. In September 2007, Chief Miller was the lead investigator for a search warrant that he obtained for a residence located at 1544 Berkeley Station Road, Martinsburg, Berkeley County, West Virginia. The search warrant was based on evidence that Jackie Goodman was acquiring crack cocaine from within that residence and selling that crack cocaine to his confidential informant. During the execution of that search warrant, the Appellant was found in the bathroom flushing crack cocaine and there were small remnants of crack-cocaine in the toilet. Chief Miller assisted with some of the search warrants executed in November 2009, one upon the same residence located at 1544 Berkeley Station Road and others upon several ATM machines owned by the Appellant located at multiple sites around Berkeley County. Chief Miller recovered various amounts of currency from an ATM located at Rock Cliff Pizza and Subs and another at the Lamp Chop Club. [Tr. 10/18/10, 5-13.]

8. First Sergeant Scott Dillon testified that as a member of the Task Force in August 2007 he assisted Chief Miller in a drug investigation. First Sergeant Dillon followed Jackie Goodman and a confidential informant to a residence located at 1544 Berkeley Station Road. Dillon observed Jackie Goodman enter the residence and leave shortly

thereafter. Then both parties returned back again to the original location where a controlled buy of crack cocaine was completed. In November of 2009, Dillon was the lead officer in securing the three search warrants used on the three ATM machines in Berkeley County owned by the Appellant. Dillon obtained the search warrants for the ATM's after a search warrant was executed on the 1544 Berkeley Station and ATM access keys were found within the residence coupled with the information that the Appellant was using the ATM's to store proceeds from drugs sales and store crack cocaine too. Dillon obtained three search warrants, one for each ATM located at the Rock Cliff Subs and Pizza, another at the Lamb Chop club, and a third located inside a Hot Dog Hut on Winchester Avenue. Dillon seized in total \$3,960.00 in U.S. Currency from the ATMs and submitted those monies to be forfeited. Dillon did not locate any drugs in any of the ATM machines. [Tr. 10/18/10, 13-18.]

9. Patrolman Derrick English testified as a member of the Task Force, he debriefed a cooperating individual who was found in possession of one ounce of crack cocaine by Martinsburg City Police officers. That the cooperating individual provided the following information: that the Appellant was his source for the one ounce of crack cocaine recovered from his person; that the Appellant owns several ATM machines in the area and that the Appellant uses the ATM Machines to place his drug money proceeds in as well as store his illegal drugs; that the Appellant, brings a lot of crack cocaine from New York City to Martinsburg, using a 2005 Audi which was currently parked at a residence in Berkeley County; and that the Appellant has used the 2005 Audi to personally deliver crack cocaine to him. Then English used the cooperating individual to make an additional one ounce controlled buy of crack cocaine from the Appellant for \$1,800.00 in

U.S. Currency. The cooperating individual took the \$1,800.00 in buy money, met with the Appellant at the 1544 Berkeley Station Road residence and returned with one ounce of crack cocaine. English was present during the execution of the search warrant at the 1544 Berkeley Station Road residence and verified with Corporal Brian Bean that the money found at the residence was the same money used in the controlled buy. English stated that he fully believes that information that was provided by the cooperating individual was truthful, in so much, that the cooperating individual was able to purchase one ounce of crack cocaine from the Appellant as promised; that the cooperating individual made them aware of these ATMs and that officers did subsequently find the ATMs access keys at the residence and later searched the ATMs; and that officers were able to find the 2005 Audi as described by the cooperating individual. [Tr. 10/18/10, 19-24.]

10. Corporal Brian Bean testified that as a member of the Task Force he has participated in a ongoing drug investigation involving the Appellant. Bean assisted with the execution of a search warrant at the 1544 Berkeley Station residence and assisted with the recovery of \$1,800.00 in U.S. Currency from the residence which was verified as the same money by denomination and serial number as the money used in a controlled buy from the Appellant that occurred prior to the execution of the search warrant. Bean stated that ATM access keys were recovered in the same room where the controlled buy money was found. Bean assisted with one of the search warrants executed on one of the ATMs. Bean called the Appellant at the Eastern Regional Jail to request the Appellant to provide the access codes to the inner safe. The Appellant did not give the code and officers used force to open the inner safe area in all the ATMs' machines. [Tr. 10/18/10, 24-29.]

11. Corporal Andy Evans testified that as a member of the Task Force in August of 2007, he was lead investigator of an ongoing drug case involving Jackie Goodman. Evans determined that Jackie Goodman was acquiring the crack cocaine that she sold to his confidential informant from a residence located at 1544 Berkeley Station Road. Evans acquired and executed a search warrant upon the 1544 Berkley Station Road residence in 2007. Evans is the lead investigator of ongoing drug case involving the Appellant, since the execution of the search warrant in 2007. In November of 2009, Evans was met by a cooperating individual who could make a controlled buy of crack cocaine from the Appellant and that the controlled buy was organized and performed by Patrolman English. Evans stated that during the execution of search warrant at 1544 Berkeley Station Road, officers found the controlled buy money, ATM access keys and paperwork showing that the Appellant had another place of residence in Berkeley County. Evans stated that those facts coupled with the information provided to Task Force members from the cooperating individual which substantiated the claims made by the cooperating individual about the presence and usage of ATMs and that three search warrants were obtained for the those ATMs. Evans obtained a search warrant for the other residence of the Appellant at 151 Bent Oak Road, Hedgesville, West Virginia. Based upon the substantiated claims and information of the cooperating individual Evans found and seized a 2005 Audi A8 (VIN#WAUML44E95N009079). Evans researched the 2005 Audi and determined that the Appellant purchased the car in September of 2008 and paid over \$30,000 for it and made a \$10,000 deposit. Evans found no liens on the 2005 Audi. Evans located the Appellant's New York state issued operator's and noted that the car was registered in New York to him. Evans stated that at no time since the

seizure of the money or the vehicle that the Appellant ever brought any paperwork, receipts of other documents to show where the money was derived from and/or where the money came from to buy and/or possess those items nor has the Appellant ever shown him any lawful sources of income. [Tr. 10/18/10, 29-35.]

12. The Appellant did not testify nor did he present any witnesses or evidence. [Tr. 10/18/10, 35.]

13. The trial court found that the \$3,960.00 in U.S. Currency and 2005 Audi A8 (VIN#WAUML44E95N009079) were in violation of the West Virginia Contraband Act, W. Va. Code §60A-7-701 et seq., ordered those items forfeited to the Petitioner, and entered its Findings of Facts and Conclusion of Law on October 22, 2010. [Tr. 10/18/10, 41-43, Findings of Facts and Conclusion of Law, 10/22/11.]

14. The trial court instructed the Appellant's counsel below to advise Mr. Robinson of his rights to appeal the court's ruling and the timeframes to file his notice of intent to appeal. [Tr. 10/18/10, 43.]

15. The Appellant filed his Notice of Intent to Appeal on January 25, 2011. [Notice of Intent to Appeal, 01/25/11.]

16. The Appellant now appeals the Findings of Facts and Conclusion of Law. [Petition for Appeal, 02/22/11.]

17. The Appellee respectfully requests this Court to refuse the Petition for Appeal.

III. SUMMARY OF THE ARGUMENT.

The Appellant filed an untimely Notice of Intent to Appeal pursuant to W. Va. Code §60A-7-705(i).

The trial court heard from five different witnesses on behalf of the Appellee. The Appellant did not present any evidence nor did the Appellant testify on behalf of the Respondent Property. Based upon the evidence presented, the trial court properly found that there was probable cause to seize the \$3,960.00 in U.S. Currency and the 2005 Audi A8. The trial court properly found, based upon a preponderance of the evidence presented, that there was a substantial connection between the \$3,960.00 in U.S. Currency and the 2005 Audi A8 and illegal drug transaction(s) in violation of the West Virginia Contraband Act. The trial court properly ordered those items to be forfeited to the Appellee.

The Petitioner respectfully requests this Court to refuse the Petition for Appeal.

IV. ARGUMENT.

A. THE CIRCUIT COURT PROPERLY FOUND THAT THE AMOUNT OF \$3,960.00 AND A 2005 AUDI A8 WERE SUBJECT TO FORFEITURE PURSUANT TO W.Va. CODE §60A-7-701, ET SEQ.

1. Standard of Review.

The general standard of review, applicable to each of these issues presented in this appeal, is:

“This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo.’ Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).”

Syl. Pt. 1, State v. Smith, 225 W.Va. 706, 696 S.E.2d 8 (2010).

This Court also holds:

“In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” Syllabus Point 1, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

Syl. Pt. 1, State ex rel. Radcliff v. Davidson, 225 W.Va. 80, 689 S.E.2d 808 (2010).

2. Discussion.

The Appellee respectfully requests this Court to dismiss this appeal based upon the Appellant's untimely filing their Notice of Intent to Appeal. The Notice of Intent to Appeal was filed with the Berkeley County Circuit Clerk's Office on January 25, 2011, approximately ninety-five (95) days after the trial court entered the Findings of Facts and Conclusions of Law on October 22, 2010. [Findings of Facts and Conclusion of Law, 10/22/11 and Notice of Intent to Appeal, 01/25/11.]

The legislature provides by statute that in case concerning forfeitures arising from the West Virginia Contraband Act that:

An appeal of a decision of the circuit court concerning a forfeiture proceeding brought pursuant to this chapter must be filed within one hundred twenty days of the date of entry of the final appealable order. *The appellant shall be required to give notice of intent to appeal within thirty days of the entry of such appealable order.*

W. Va. Code §60A-7-705(i), emphasis added.

There is a clear deadline of thirty day to file the Notice of Intent to Appeal established in W. Va. Code §60A-7-705(i). The Notice of Intent to Appeal in this case was filed sixty-five

days late. By analogy, this Court bars the filing of an appeal from a criminal case unless the thirty Notice of Intent deadline is met. See: W.V.R.App.P. 3(b) (as in effect at the time of entry of the final Order in this case). The thirty day deadline to file the Notice of Intent to Appeal is further discussed in W. Va. Code §60A-7-707(k) as it relates to the disposition of forfeited properties.

No disposition shall occur until all applicable periods for filing a notice of intent to appeal has expired and no party in interest shall have filed such notice. The filing of the notice of intent to appeal shall stay any such disposition until the appeal has been finally adjudicated or until the appeal period of one hundred eighty days has expired without an appeal having actually been taken or filed, unless a valid extension of the appeal has been granted by the circuit court under the provisions of section seven, article four, chapter fifty-eight of this code.

W. Va. Code §60A-7-707(k).

At the conclusion of the bench trial, the trial court stated upon the record to that Appellant's trial counsel to "[m]ake sure you do that so he's [the Appellant] aware of the timeframe running on his right to file a notice of intent to appeal the Court's decision." [Tr. 10/18/10, 43.]

The Appellant's Petition for Appeal must be denied because the Appellant's Notice of Intent to Appeal was filed well outside the time guidelines set forth in W. Va. Code §60A-7-705(i).

The Appellee respectfully requests this Court to refuse the Petition for Appeal.

If the Court were to deny the Appellee's request for dismissal, the Appellee requests the Court to affirm the circuit court's ruling and refuse the appeal.

The trial court did properly find that the \$3,960.00 in U.S. Currency and the 2005 AUDI A8 were subject to forfeiture pursuant to W. Va. Code 60A-7-701, et seq.

In 1988, the West Virginia State Legislature created and adopted W. Va. Code §60A-7-701, et seq, as amended, commonly referred to as the West Virginia Contraband Act (hereinafter “the Act”). It was the Legislature’s intent to allow law enforcement agencies to seize and forfeit various types of property, including monies and vehicles, used in one way or another including the manufacturing, the transportation and/or the distribution of illegal drugs, or the proceeds derived there from and to further allow those law enforcement agencies to use those newly founded funds in the fight against illegal drugs within the State of West Virginia.

Syl. Pt. 2, State ex rel. Lawson v. Wilkes, 202 W.Va. 34, 501 S.E.2d 470 (1998) holds that “[a] forfeiture action brought under the *West Virginia Contraband Forfeiture Act*, W.Va.Code §§ 60A-7-701, et seq., is an action *in rem* that is brought against the item(s) sought to be forfeited, and not an action against the owner of such item(s).”

The Act provides for what types of property are forfeitable in W. Va. Code §60A-7-703.

These items include:

All conveyances, including aircraft, vehicles or vessels, which are used, have been used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of property described in subdivision (1), (2) or (3) of this subsection, except that:

(i) [...]

(ii) A conveyance shall not be forfeited under the provisions of this article if the person owning the conveyance establishes that he or she neither knew, nor had reason to know, that the conveyance was being employed or was likely to be employed in a violation of this chapter; and

(iii) [...]

W. Va. Code §60A-7-703(a)(5); and

All moneys, negotiable instruments, securities or other things of value furnished or intended to be furnished in violation of this chapter by any person in exchange for a controlled substance, all proceeds traceable to the exchange and all moneys, negotiable instruments and securities used, or which have been used, or which are intended to be used to facilitate any violation of this chapter: Provided, That no property may be forfeited under

this subdivision, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without his or her knowledge or consent.

W. Va. Code §60A-7-703(a)(7).

The Act sets forth the requirements for seizure of forfeitable property and procedures for forfeiture in W. Va. Code §60A-7-704 and 705, respectively. In order to seize property under the Act, “the State must have probable cause to believe that the property is subject to forfeiture, which means more than a mere suspicion, but less than prima facie proof.” Syl. Pt. 4, Frail v. \$24,900.00 in U.S. Currency, 192 W.Va. 473, 453 S.E.2d 307 (1994).

Furthermore under the Act, the forfeitable property in this case only needs to be either used to facilitate a violation of Chapter 60A or have been furnished or intended to have been furnished in violation of Chapter 60A, which would include violations of W. Va. Code §60A-4-401(a), “it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance.” There is no requirement under the Act that a conviction or arrest must be made of the suspected owner of the forfeitable property.

Under West Virginia State Code, crack cocaine is a Schedule II substance. (W. Va. Code §60A-2-206).

At trial, the Prosecuting Attorney, on behalf of the seizing law enforcement agency “is required to demonstrate by a preponderance of the evidence that there is a substantial connection between the property seized and the illegal drug transaction; this finding is in addition to the initial finding of probable cause that an illegal act under the drug law has occurred.” Syl. Pt 4, State v. Forty Three Thousand Dollars And No Cents (\$43,000.00) In Cashier's Checks, 214 W.Va. 650, 591 S.E.2d 208 (2003).

In this case, the trial court heard from five witnesses on behalf of the Appellee. The trial

court heard that the Appellant, as part of a controlled buy performed by the Task Force, sold one ounce of crack cocaine to a confidential informant working for the Task Force for \$1,800.00 in marked U.S. Currency. The trial court heard that this same confidential informant was found in possession of an additional one ounce of crack cocaine prior to performing the controlled buy. The confidential informant named the Appellant as the source of that additional ounce of crack cocaine. The Appellant provided in all two ounces of crack cocaine. The confidential informant also provided information that the Appellant was using certain ATMs around town to store his drug proceeds and drugs, and that the Appellant was transporting cocaine from New York in 2005 Audi. [Tr. 10/18/10, 21-23, 25.]

The trial court heard that when the search warrant was executed later that day at 1544 Berkeley Station Road, officers from the Task Force located and recovered the exact same \$1,800.00 in U.S. Currency control buy money from within a room where the Appellant had some of his belongings, including lease paperwork as to another residence where that he possessed and further appeared to be staying in that room. [Tr. 10/18/10, 21-22, 25.]

The trial court heard that during that the search warrant of the residence officers from the Task Force located and recovered the ATM keys. Another set of ATM keys were recovered from within the 2005 Audi. [Tr. 10/18/10, 17-18, 26 & 31-32.]

The trial court heard how the officers had to breach the ATMs and recovered \$3,960.00 in U.S. Currency in total from all three ATMs. [Tr. 10/18/10, 9-11, 15-18, 26-27.]

The trial court heard that the confidential informant working for the Task Force directed the officers to the exact location of the 2005 Audi. [Tr. 10/18/10, 31-33]

The trial court also heard additional evidence which substantiated the claims made by the confidential informant to officers of the Task Force as to the three ATM's maintained by the

Appellant. That the 2005 Audi was used by the Appellant, as well as, the vehicles exact location. [Tr. 10/18/10, 22-23, 30-32.]

The trial court heard evidence of the Appellant's history of dealing crack cocaine in Berkeley County in 2007, two years before this seizure. That in 2007, members of the Task Force observed their confidential informant go with Jackie Goodman to the Appellant's residence at 1544 Berkeley Station Road. Thereafter, the confidential informant returned with crack-cocaine. That a search was obtained and upon execution the Appellant was found destroying evidence as he attempted to flush crack cocaine down a toilet as officers enter the residence, which is the exact same residence in 2009. [Tr. 10/18/10, 6-9, 12, 14-16, 29-31.]

None of this evidence was refuted by the Appellant, who offered no evidence whatsoever.

The trial court properly found that \$3,960.00 in U.S. Currency recovered from the ATMs and the 2005 Audi A8 owned by the Appellant were subject to seizure and forfeiture under the Act. The trial court found there to be probable cause to believe that the \$3,960.00 in U.S. Currency seized from the ATMs and the 2005 Audi A8 were used or intended to be used in violation of Chapter 60A of the West Virginia State Code. The trial court found that the Appellant was a dealer of illegal drugs. Based upon a preponderance of the evidence, the trial court found that the \$3,960.00 in U.S. Currency and the 2005 Audi A8 were subject to forfeiture. State v Forty Three Thousand Dollars And No Cents (\$43,000.00) in Cashier Checks, 591 S.E.2d 208 (W.Va. 2003); Frail ex rel. W. Va. Dep't of Pub. Safety v \$24,900 in U.S. Currency, 453 S.E.2d 307 (1994); and W. Va. Code §60A-7-701, et seq. [Tr. 10/18/10, 41-43, Findings of Facts and Conclusion of Law, 10/22/11.]

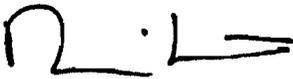
The Appellee respectfully requests this Court to refuse the Petition for Appeal.

V. CONCLUSION.

This Petition for Appeal should be denied because the Appellant filed his Notice of Intent to Appeal outside the thirty day window to do so, thus failing to comply with W. Va. Code §60A-7-705(i). The Appellant failed to demonstrate that the trial court committed reversible error by finding that the \$3,960 in U.S. Currency and the 2005 AUDI A8 (VIN#WAUML44E95N009079) was subject to forfeiture pursuant to §60A-7-701, et seq. The Appellant fails to carry his burden that there was insufficient evidence to support the trial court's findings of fact and conclusion of law. The Appellee respectfully requests this Court to refuse the Petition for Appeal.

Respectfully submitted,
PAMELA JEAN GAMES-NEELY, PROSECUTING ATTORNEY,
Appellee,

by counsel,

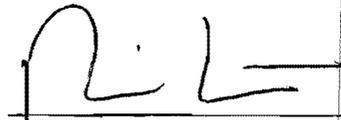


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CERTIFICATE OF SERVICE

I, Richard D. Stephens, Assistant Prosecuting Attorney for Berkeley County, West Virginia, do hereby certify that I have served a true and accurate copy of the attached Response of Appellee to Petition for Appeal upon the counsel for the Appellant via United States First Class mail, postage prepaid on this 21st day of MARCH, 2011:

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