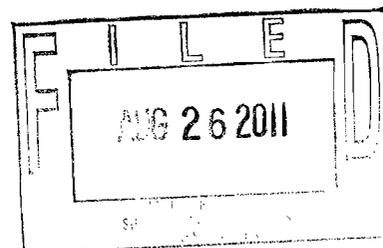


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0283



TRICIA DEAN,

Respondents Below, Petitioner,

v.

STATE OF WEST VIRGINIA AND
JEFFERSON COUNTY SHERIFF'S DEPARTMENT,

Petitioners Below, Respondents.

BRIEF OF RESPONDENTS

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0283

TRICIA DEAN,

Respondent Below, Petitioner,

v.

STATE OF WEST VIRGINIA AND
JEFFERSON COUNTY SHERIFF'S DEPARTMENT,

Petitioners Below, Respondents.

BRIEF OF RESPONDENTS

I.

STATEMENT OF THE CASE

On February 25, 2010, while working with the Jefferson County Sheriff's Department, a confidential informant ("CI") called Tricia Dean ("Petitioner") at her home to arrange the purchase of \$700.00 of crack cocaine ("crack").¹ App. vol. I, 1, 7, 37, 58. During this telephone conversation, Petitioner informed the CI that she had to wait for her drug supplier, Michele Craig ("Craig"), to arrive at her house before she could complete the transaction. *Id.*

Later this same day, Petitioner called the CI and informed him that Craig was at the house; also at the house was Petitioner's boyfriend, Gary Caviness ("Caviness"). App. vol. I, 2, 7-8, 37, 59. Following this conversation, the CI went to Petitioner's house. App. vol. I, 2, 8, 37-38, 59.

¹ Petitioner's house is located at 64 White Tail Lane, Kearneysville, West Virginia. App. vol. I, 2, 6, 7, 8.

There, the CI purchased \$500.00 of crack.² App. vol. I, 2, 8, 38, 59. Immediately following the “buy,” Petitioner requested and received \$100.00 from the CI for setting up the transaction. *Id.* Thereafter, the CI purchased an additional \$100.00 of crack.³ *Id.*⁴

On May 19, 2010, a Federal Grand Jury for the Northern District of West Virginia returned a five count indictment against Petitioner for conspiracy to distribute 5.0 grams of crack (Count 1), distribution of 3.3 grams of crack (Count 2), distribution of 1.5 grams of crack (Count 3), distribution of 4.7 grams of crack (Count 4), and distribution of 4.8 grams of crack (Count 5).⁵ App. vol. I, 42-46.

On April 13, 2010, the State filed a Petition for Forfeiture of Petitioner’s house and real property, upon which the house is situate (hereafter jointly referred to as “Petitioner’s property” or “Petitioner’s house”). App. vol. I, 6-9.

On June 11, 2010, Petitioner moved the circuit court (“court”) to stay the State’s forfeiture

² This transaction occurred with the CI handing Caviness \$500.00 in exchange for the crack. App. vol. I, 8.

³ As before, this second transaction occurred with the CI giving Caviness \$100.00 in exchange for the crack. App. vol. I, 2, 8, 38, 59.

⁴ It should be noted that the telephone conversations between Petitioner and the CI were monitored, and the drug transactions in Petitioner’s house were videotaped. App. vol. I, 2, 7, 8, 37, 58.

⁵ Craig and Caviness were also indicted on the same charges. App. vol. I, 42-46. As discussed more fully below, the facts giving rise to Count 5 of the Indictment involved what occurred in Petitioner’s house on February 25, 2010, as set forth above. The circumstances giving rise to Counts 1, 2, 3 and 4 of the Indictment occurred previous to February 25, 2010, namely throughout the month of January 2010 (Count 1), January 15, 2010 (Count 2), January 19, 2010 (Count 3), and January 22, 2010 (Count 4). Please note that the State declined to prosecute Petitioner and instead deferred to the Federal Government’s prosecution. App. vol. II, Hrg., 2, Sept. 20, 2010; App. vol. I, 42-45.

action pending the resolution of the federal prosecution.⁶ App. vol. I, 28-30.

On June 28, 2010, the court ordered that the State's forfeiture case be stayed until the federal prosecution was resolved. App. vol. I, 34. *See also* App. vol. II, Hrg., 4, June 28, 2010.

On July 2, 2010, Petitioner entered into a Plea Agreement with the federal prosecution, whereby Petitioner agreed to plead guilty to Count 5 of the Indictment. App. vol. I, 47. In exchange, the federal prosecution agreed to dismiss Counts 1 through 4 of the Indictment and make a non-binding recommendation to the Federal Court that Petitioner receive a lighter sentence. App. vol. I, 48, 49.

On July 15, 2010, Petitioner pled guilty to Count 5 of the Federal Indictment.⁷ App. vol. I, 54.

On September 20, 2010, a status hearing was held on the State's forfeiture action against Petitioner. During this hearing, the State agreed to rely on Count 5 of the Federal Indictment in moving for summary judgment.⁸ App. vol. II, Hrg., 3-4, Sept. 20, 2010.

On September 29, 2010, the State filed its Motion for Summary Judgment on its Petition for Forfeiture of Petitioner's property. App. vol. I, 37-41.

On October 26, 2010, the court issued an Order granting the State's Motion for Summary

⁶ Also, on June 11, 2010, Petitioner filed a discovery request with the State. App. vol. I, 25-26.

⁷ Please note that the Federal Court deferred sentencing Petitioner until it received a pre-sentence investigation report. App. vol. I, 55. Please also note that undersigned counsel is uncertain what sentence Petitioner actually received, as the Appendix in the current appeal does not contain an order and/or sentencing hearing transcript from the Federal Court.

⁸ In turn, Petitioner withdrew her earlier discovery request from the State. App. vol. II, Hrg., 3-4, Sept. 20, 2010.

Judgment.⁹ App. vol. I, 58-61.

On January 13, 2011, the court issued a second Order granting the State's Motion for Summary Judgment.¹⁰ App. vol. I, 1-5. Thereafter, Petitioner brought the current appeal.

II.

SUMMARY OF ARGUMENT

In moving for summary judgment, the State set forth certain facts concerning Petitioner's involvement in the sale of crack on her property. Petitioner asserts that these facts, as used by the State and relied upon by the court in granting the State summary judgment, were improper and prejudicial, as they were outside of the agreed-upon record—Count 5 of the Federal Indictment. However, these facts are nothing more than the circumstances that gave rise to Count 5 of the Indictment in the first place. Thus, these facts are not outside of the agreed-upon record and the court committed no error in relying on them in granting the State's Motion for Summary Judgment.

By entering into a Plea Agreement with the federal prosecution and pleading guilty to distribution of crack, Petitioner was subject to a prison term of 20 years and/or a fine up to \$1,000,000.00. The forfeiture of Petitioner's property, valued at \$100,000.00, is not grossly disproportionate to the gravity of her offense, as the forfeiture is well within the permissible range of the \$1,000,000.00 fine that she was subject to under the federal sentencing guidelines. Thus, the court committed no error in finding that the forfeiture of Petitioner's property was not excessive in

⁹ However, unbeknownst to the court, the parties had previously agreed that Petitioner would have an extension of time to file a response to the State's Motion. Petitioner filed this response on November 1, 2010. App. vol. I, 62-68.

¹⁰ It should be noted that, on January 25, 2011, Petitioner filed a Motion for Reconsideration of the court's Order Granting the State's Summary Judgment Motion or, alternatively, modification of the court's Order, which was denied by the court on January 31, 2011. App. vol. I, 86-87, 88.

light of the Excessive Fines Clauses of the Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

There was no need for a full evidentiary hearing in this case, as there was more than adequate evidence in the record for the court to rule upon the State's Motion for Summary Judgment. Finally, a full evidentiary hearing would have done nothing more than defeat the purpose of disposing of this case through summary judgment.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this Court has never fully entertained the constitutionality of a civil *in rem* forfeiture action in light of the Excessive Fines Clauses of the Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution, the State believes oral argument is necessary in this case. For this same reason, the State believes that a memorandum decision is not appropriate in this case. The State will, of course, defer to the wisdom and discretion of the Court on these points.

IV.

ARGUMENT

A. IN MOVING FOR SUMMARY JUDGMENT, THE STATE DID NOT INCLUDE FACTS OUTSIDE THE AGREED-UPON RECORD AND IN DISPUTE. THUS, THE CIRCUIT COURT DID NOT ERR IN INCORPORATING AND RELYING UPON THE STATEMENTS IN THE STATE'S MOTION FOR SUMMARY JUDGMENT.

1. Standard of Review

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the

circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.”

Syl. pt. 2, *State v. Jessie*, 225 W. Va. 21, 689 S.E.2d 21 (2009) (*quoting* Syl. pt. 2, *Walker v. West Virginia Ethics Com'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997)). “A circuit court's entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, *Kidd v. Mull*, 215 W. Va. 151, 595 S.E.2d 308 (2004) (*quoting* Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)).

2. Count 5 of the Federal Indictment, to Which Petitioner Pled Guilty, Arose out of the Same set of Facts as set Forth in the State’s Motion for Summary Judgment. Thus, the State, in Moving for Summary Judgment, and the Court, in Granting the State Summary Judgment in This Case, did not Rely Upon Facts Outside the Agreed-Upon Record.

Under Rule 56(c) of the West Virginia Rules of Civil Procedure, a motion for summary judgment shall be granted when it is shown 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.” “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 2, *Kidd, supra* (*quoting* Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)). “The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. pt. 4, *Kidd, supra* (*quoting* Syl. pt. 3, *Painter, supra*).

In its Motion for Summary Judgment, the State set forth the following facts:

1. On February 25, 2010, a confidential informant working with the Jefferson County Sheriff’s Department made a monitored telephone call to Tricia Dean and arranged for the purchase by the informant of \$700 worth of crack cocaine. Ms. Dean informed the confidential informant that she had to wait until “her girl” arrived at the residence before she could complete the deal.

2. At approximately 3:45 on that day Ms. Dean contacted the confidential informant and informed the confidential informant that “her girl” had arrived at the house. The confidential informant then drove to Ms. Dean’s home, 64 White Tail Lane, Kearneysville, Jefferson County, West Virginia. She was followed by members of the Jefferson County Sheriff’s Department.
3. While at the 64 White Tail Lane residence the confidential informant purchased \$500 worth of crack cocaine. This transaction was facilitated by Ms. Dean and her boyfriend, Gary Caviness. Ms. Dean requested and received from the confidential informant \$100 for facilitating the transaction.
4. On the same date at 64 White Tail Lane the confidential informant asked Mr. Caviness for another gram of crack cocaine. Mr. Caviness provided the confidential informant with an additional gram of crack cocaine for \$100.

App. vol. I, 37-38.

In its Order granting the State’s Motion for Summary Judgment, the court set forth these same, nearly identical, facts. *See* App. vol. I, 1-2. Additionally, in its Order, the court stated as follows:

10. Claimant Dean was the driving force behind the sale of crack cocaine in her residence. At her own insistence she reaped a 20% profit by the sale of a highly dangerous and addictive drug.

App. vol. I, 3.

On appeal, Petitioner asserts that there was an agreement between the State and herself that the State, in moving for summary judgment, would rely only on the facts set forth in Count 5 of the Federal Indictment, to which Petitioner entered into a Plea Agreement with the federal prosecution and pled guilty. Count 5 of the Indictment provides the following:

On or about the 25th day of February, 2010, at approximately 4:00 p.m., in Kearneysville, Jefferson County, West Virginia, within the Northern Judicial District of West Virginia, defendants, MICHELE EVETTE CRAIG, TRICIA LYNN DEAN, and GARY RUFUS CAVINESS, JR., aided and abetted by each other, did unlawfully, knowingly, intentionally and without authority distribute approximately 4.8 grams or more of a mixture and substance containing a detectable amount of

cocaine base, also known as “crack”, a controlled substance, as designated by Title 21, United States Code, Section 812(c) Schedule II(a)(4), to a person known to the Grand Jury, in exchange for \$600.00; in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C) and Title 18, United States Code, Section 2.

App. vol. I, 46.

Petitioner argues that the State went outside of the language of this Indictment in moving for summary judgment. Petitioner further argues that, in relying on the statements of the State in its Motion for Summary Judgment, and including these statements in its Order, the court likewise went outside of the Indictment in granting the State’s Motion. Petitioner asserts that the court’s reliance and incorporation of these statements in its Order granting the State summary judgment in this case was improper and prejudicial thus requiring reversal. *See generally* Pet’r’s Br. 6-8. Petitioner takes particular issue with the State’s statements that Petitioner “arranged for the purchase of \$700.00 worth of crack cocaine” and that she “requested and received \$100.00 for facilitating the transaction.” Pet’r’s Br. 7. Petitioner likewise takes issue with the court’s inclusion of these facts in its Order, as well as its findings that Petitioner “arranged for the purchase of \$700.00 worth of crack cocaine,” that she “received a commission for the sale of \$100.00,” and that she was “the driving force behind the sale of crack cocaine in her residence.” Pet’r’s Br. 8.

Petitioner characterizes these facts as “outside of the agreed upon record and in dispute,” as they “were [not] in evidence before the court,” and “the only undisputed facts were those contained in Count 5 of the Federal indictment; i.e. distribution of approximately 4.8 grams of crack cocaine in exchange for \$600.00.” Pet’r’s Br. 6, 8. With no offense intended, such characterizations are “silly.” The facts that Petitioner complains about—that she arranged for the purchase of \$700.00 of crack, that she requested and received a commission of \$100.00 for facilitating this transaction, and

that she was the driving force behind the transaction at her house—gave rise to Count 5 of the Federal Indictment in the first place. In other words, there never would have been a Count 5 in the Indictment without these facts. So too was the finding of the court:

8. Count 5 of the aforementioned indictment charges Ms. Dean with distributing 4.8 grams of [crack] cocaine on the 25th day of February, 2010 at approximately 4:00 p.m. This conviction is based on the facts as referenced in paragraphs 1-4 of . . . [the State’s] motion and as alleged in paragraphs 5-7 of the State’s “Petition for Forfeiture”.

App. vol. I, 2. As eluded to by the court, paragraphs 1-4 of the State’s Motion for Summary Judgment provide that Petitioner arranged for the purchase of \$700.00 of crack by the CI, that the CI bought \$600.00 of crack in Petitioner’s house, and that Petitioner requested and received \$100.00 for facilitating this “buy.” *See* App. vol. I, 37-38. Paragraphs 5-7 of the State’s Petition for Forfeiture provide likewise, although in more detail.¹¹ *See* App. vol. I, 7-8. Even Petitioner, albeit in a stealthy manner, acknowledges that these facts gave rise to Count 5 of the Federal Indictment:

On July 15, 2010, as a result of facts developed during a criminal investigation by state and federal authorities, Ms. Dean pled guilty to distribution of crack cocaine in violation of 21 U.S.C. § 841(a)(1), in the United States District Court for the Northern District of West Virginia.

Pet’r’s Br. 3.

¹¹ It should be noted that, in filing its Petition for Forfeiture, the State was obligated by statute to set forth these facts.

A petition for forfeiture of the seized property shall be filed within ninety days after the seizure of the property in question. The petition shall be verified by oath or affirmation of a law-enforcement officer representing the law-enforcement agency responsible for the seizure or the prosecuting attorney and shall contain . . . [a] statement of facts upon which probable cause for belief that the seized property is subject to forfeiture.

W. Va. Code § 60A-7-705(a)(4)(vi).

Furthermore, to point out the obvious, by pleading guilty to distributing 4.8 grams of crack, Petitioner also pled guilty to, and accepted as true, the underlying facts—that she set up the deal and profited from it—which led to Count 5 of the Federal Indictment and, to suggest otherwise, is disingenuous and should not be countenanced by this Court. Petitioner’s assertion that the State and the court used and relied upon disputed facts outside the record “begs” the question—If you disagree with and dispute these facts, then why did you plead guilty to Count 5 of the Indictment, which is nothing more than a creature of these facts? In short, there is no genuine issue as to the facts, as used and relied upon by the State and the court in this case, the State is entitled to a judgment as a matter of law, and no rational judge or jury would find otherwise. ““Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.”” Syl. pt. 3, in part, *Kidd, supra* (quoting Syl. pt. 4, *Painter, supra*). Finally, even assuming that the facts, as complained of by Petitioner are outside the record, which they are not, it was permissible for the court to consider these facts, as

Rule 56(c) of the West Virginia Rules of Civil Procedure does not contain an exhaustive list of materials that may be submitted in support of summary judgment. In addition to the material listed by that rule, a trial court may consider any material that would be admissible or usable at trial.

Syl. pt. 1, *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W. Va. 498, 625 S.E.2d 260 (2005).¹²

¹² On appeal, Petitioner also argues that the State, in addition to the factual statements in its written Motion for Summary Judgment, made statements during the hearing on its Motion concerning facts that were outside the record, such as the prosecutor’s statements that “Ms. Dean arranged for the seller to come to the home, and that she sought to profit from the transaction by seeking a 20 percent commission . . . [and that] Ms. Dean was ‘intricately involved in this case given the fact that she set this up and she profited from it.’” Pet’r’s Br. 7. First, at the risk of “beating a dead horse,” these facts are not outside the record, as they gave rise to Count 5 of the Indictment, to which Petitioner pled guilty. Equally important, the prosecutor’s statements are nothing more than good advocacy and argument on his part, which is exactly what the hearing was all about—to hear
(continued...)

B. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE FORFEITURE OF PETITIONER’S PROPERTY DID NOT CONSTITUTE AN “EXCESSIVE FINE” UNDER ARTICLE III, SECTION 5 OF THE WEST VIRGINIA CONSTITUTION OR UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. Standard of Review

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.”

Syl. pt. 1, *State v. Waugh*, 221 W. Va. 50, 650 S.E.2d 149 (2007) (quoting Syl. pt. 2, *Walker*, *supra*).

2. Proportionality Test

In forfeiting Petitioner’s property, the State proceeded under W. Va. Code § 60A-7-703(a) (8), which provides that the government can take a person’s

real property, including any right, title and interest in any lot or tract of land, and any appurtenances or improvements, which are used, or have been used, or are intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of . . . [the Uniform Controlled Substances Act, W. Va. Code §§ 60A-1-101 *et seq.*,] punishable by more than one year imprisonment.¹³

The State’s taking of Petitioner’s property under this provision constitutes a civil *in rem*

¹²(...continued)

argument from the parties on whether the State’s Motion for Summary Judgment was valid and should be granted by the court.

¹³ Under W. Va. Code § 60A-2-206(b)(4), crack is a Schedule II controlled substance. Pursuant to W. Va. Code § 60A-4-401(a)(i), any person who delivers a Schedule II controlled substance “is guilty of a felony and, upon conviction, may be imprisoned in the state correctional facility for not less than one year nor more than fifteen years” and/or “fined not more than twenty-five thousand dollars.” Furthermore, and as discussed more fully below, under 21 U.S.C. § 812(c), crack is a Schedule II controlled substance. Under 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), any person convicted of distributing a Schedule II controlled substance “shall be sentenced to a term of imprisonment of not more than 20 years” and/or fined “\$1,000,000.”

forfeiture action. “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).” Syl. pt. 2, *State ex rel. Lawson v. Wilkes*, 202 W. Va. 34, 501 S.E.2d 470 (1998). The United States Supreme Court has held that such actions “bring into play” the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.¹⁴ “[F]orfeiture ... constitutes ‘payment to a sovereign as punishment for some offense,’ and, as such, is subject to the limitations of the Eighth Amendment’s Excessive Fines Clause.” *Austin v. United States*, 509 U.S. 602, 622 (1993) (citation omitted). However, the Court in *Austin* did not establish a “hard and fast” rule or test for determining whether a particular forfeiture of a person’s real property is excessive and, thus, in violation of the Eighth Amendment’s Excessive Fines Clause.¹⁵

¹⁴ The Eighth Amendment to the United States Constitution, as well as Article III, Section 5 of the West Virginia Constitution, both provide that “excessive fines [shall not be] imposed.”

¹⁵ Nor has this Court developed any such test. However, this Court has found that the State, in forfeiting property, 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.

Under W.Va. Code, § 60A-7-703(a)(6) (1988), the State, in forfeiting property, 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, in part, *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). *See also State v. Green*, 196 W. Va. 500, 473 S.E.2d 921 (1996) (holding that raw materials, products and equipment used to manufacture controlled substances, W. Va. Code § 60A-7-703(a)(2), as well as conveyances used to facilitate the transportation, sale, receipt, possession or concealment of controlled substances, W. Va. Code § 60A-7-703(a)(4), are not punitive for purposes of constitutional guarantees against double jeopardy).

As a result, the Federal Circuit Courts of Appeal have developed and adopted several tests to determine whether a real property forfeiture is excessive for purposes of the Eighth Amendment. One of these tests is known as the “proportionality test.”¹⁶ Under this test, “a punitive forfeiture

¹⁶ Another one of these tests has come to be known as the “instrumentality test.” Under this test,

in determining excessiveness of an *in rem* forfeiture under the Eighth Amendment, . . . a court must apply a three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the property’s role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder. In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following factors: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spacial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. No one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended.

U.S. v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994) effectively overruled by *U.S. v. Bajakajian*, 524 U.S. 321 (1998). The last test is essentially a hybrid/multi factor approach involving aspects of the “proportionality” and “instrumentality” tests. Under this approach,

the factors to be considered by a court in determining whether a proposed *in rem* forfeiture violates the Excessive Fines Clause should include (1) the harshness of the forfeiture (*e.g.*, the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the

(continued...)

violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *U.S. v. Bajakajian*, 524 U.S. 321, 334 (1998). In determining whether a forfeiture is grossly disproportionate to the gravity of a defendant's offense, the following factors are considered: "(1) the amount of the forfeiture and its relationship to the authorized penalty...; (2) the nature and extent of the criminal activity...; (3) the relationship between the crime charged and other crimes...; and (4) the harm caused by the charged crime." *U.S. v. Jalaram, Inc.*, 599 F.3d 347, 355-356 (4th Cir. 2010) (citing *Bajakajian*, 524 U.S. at 337-339).

The most important factor of this test involves the Legislature's judgment of the severity of the underlying offense, as evidenced by the authorized, uppermost penalty for conviction of the offense.

[C]ourts are to consider a number of factors in determining whether a forfeiture is grossly disproportional to the gravity of the offense and therefore unconstitutional. One of the most important is the legislative judgment about the severity of the underlying offense, as evidenced by the penalties authorized for conviction. This requires analysis of the maximums authorized under the Sentencing Guidelines, as well as the statutory penalties. Also to be considered are any other related illegal activities, the harm caused by the offense, and possibly whether full forfeiture would deprive the person of his livelihood.

U.S. v. 300 Blue Heron Farm Lane, Chestertown, Md., With All Bldgs., Appurtenances and Improvements Thereon, 115 F. Supp.2d 525, 528 (D.Md. 2000) (citations omitted).

¹⁶(...continued)
property.

U.S. v. Milbrand, 58 F.3d 841, 847-848 (2nd Cir. 1995).

3. The Forfeiture of Petitioner's Property, Valued at \$100,000.00, is Well Within the Permissible Range of the Fine, \$1,000,000.00, That Petitioner was Subject to Under the Federal Sentencing Guidelines. Thus, the Forfeiture of Petitioner's Property did not Violate the Excessive Fines Clauses of the Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

Here, Petitioner entered into a Plea Agreement with the federal prosecution and pled guilty to distribution of crack. Under 21 U.S.C. § 812(c), crack is a Schedule II controlled substance. Under 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), any person convicted of distributing a Schedule II controlled substance “shall be sentenced to a term of imprisonment of not more than 20 years” and/or fined “\$1,000,000.” Thus, as set forth in the Plea Agreement, “[t]he maximum penalty to which . . . [Petitioner] will be exposed by virtue of her plea of guilty . . . is . . . not more than twenty (20) years incarceration, [and] a fine of up to \$1,000,000.” App. vol. I, 47. As such, the forfeiture of Petitioner's property, valued at \$100,000.00, is not excessive for purposes of the Excessive Fines Clauses of the Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution, as the forfeiture is well within the range of the permissible fine—\$1,000,000.00—of the Federal sentencing guidelines. “[I]n a forfeiture action, if the value of the property forfeited is within or near the permissible range of fines under the sentencing guidelines, the forfeiture almost certainly is not excessive.” *U.S. v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1310 (11th Cir. 1999).

Numerous courts have held that forfeitures, of the type imposed in this case, do not violate the Excessive Fines Clause of the Eighth Amendment. *See generally 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d at 1310 (Civil forfeiture of real property worth \$70,000, under statute permitting forfeiture of property used to facilitate drug trafficking, was not an unconstitutional

excessive fine; the offense underlying the forfeiture involved four sales of cocaine totaling about sixty grams, which under federal law carried a maximum statutory fine of \$1,000,000.); *U.S. v. One Parcel Property Located at 427 and 429 Hall Street, Montgomery, Montgomery County, Ala.*, 74 F.3d 1165, 1172-1173 (11th Cir. 1996) (Holding that forfeiture of property valued at \$65,000 was not excessive where the maximum fine under the sentencing guidelines was \$40,000.); *U.S. v. Certain Real Property and Premises Known As 38 Whalers Cove Drive, Babylon, N.Y.*, 954 F.2d 29 (2nd Cir. 1992) (Held that forfeiture of a condominium whose value was almost 300 times the value of the cocaine sold (\$250.00) therein did not violate the Excessive Fines Clause.); *U.S. v. Real Property Known and Numbered As 429 South Main Street, New Lexington, Ohio*, 52 F.3d 1416 (6th Cir. 1995) (Civil forfeiture of home from which owner allegedly had sold marijuana repeatedly did not violate Eighth Amendment's Excessive Fines Clause; the Government set the value of the home at \$83,700 and the owner could have faced a potential fine of \$500,000 on each of the three counts of marijuana trafficking if prosecuted under federal law.); *U.S. v. Certain Real Property Located at 11869 Westshore Drive, Putnam Tp., Livingston County, Mich.*, 848 F.Supp. 107, 111 (E.D.Mich. 1994) (Finding that forfeiture of a residence valued between \$85,000 and \$105,000 was not excessive because the claimant would have faced a federal fine of \$250,000.).

On appeal, Petitioner asserts that the State's forfeiture of her property is disproportionate to the underlying crime upon which the forfeiture is based and violates the Excessive Fines Clauses of the Eighth Amendment to the United States Constitution, as well as Article III, Section 5 of the West Virginia Constitution. *See generally* Pet'r's Br. 8-12. In support of her assertion that the forfeiture of her property should be reversed, Petitioner states the following:

In this case, the only fact in evidence is that Ms. Dean participated in an

illegal drug transaction of a small amount of crack cocaine for \$600.00. There is no evidence in the record before the Circuit Court that addresses Ms. Dean's past criminal history, if any; her level of participation in the drug transaction, or any other facts that might warrant the Circuit Court's finding that the forfeiture of a house worth \$100,000 dollars was a proportional punishment for a drug transaction of \$600.00. Thus, the forfeiture of Ms. Dean's home for a single drug transaction of \$600.00 violates the subjective test outlined in *Cooper* because the punishment for the particular crime shocks the conscience of the court and society.

Pet'r's Br. 12.¹⁷

To begin with, in making these arguments, Petitioner completely ignores, as fully discussed above, the fact that the forfeiture of her property, valued at \$100,000.00, is well within the maximum authorized fine, \$1,000,000.00, under the Federal sentencing guidelines, which is one of the most important factors that courts look at in determining whether a forfeiture is excessive. Furthermore, Petitioner's characterization of this drug transaction as involving "a small amount [4.8 grams] of crack cocaine for \$600.00" is somewhat misleading. Pet'r's Br. 12. The Federal Plea Agreement, to which Petitioner voluntarily entered into, provides that Petitioner "stipulate[s] and agree[s] that the total drug relevant conduct of . . . [Petitioner] with regard to the Indictment is 14.3 grams of cocaine base, also known as 'crack.'" App. vol. I, 49 (emphasis omitted).

Petitioner's assertion that there is "no evidence in the record before the Circuit Court that addresses . . . her level of participation in the drug transaction" is also misleading. Pet'r's Br. 12.

¹⁷ Petitioner also notes that "it is important to remember that this is not a forfeiture action where the government is claiming that the proceeds of drug sales were used in the purchase of the real property the government seeks to forfeit." Pet'r's Br. 10. Petitioner further notes that "this is not a case, like many other cases, where the house in question was set up in a community to sell drugs, and in fact, is referred to as a 'crack house' where numerous drug transactions worth thousands of dollars take place." *Id.* While this may be true, it is equally important to understand that this is not a case of an innocent property owner, such as where the owner knows absolutely nothing about the drug transaction, or where the owner knows about the drug transaction but has no involvement in the same.

In fact, the record indicates that Petitioner was “up to her neck” in this drug transaction. First, the Plea Agreement indicates that Petitioner “stipulates that she was neither a minor, nor minimal participant in any of the offenses alleged in . . . the Indictment.” App. vol. I, 49. Secondly, there was plenty of evidence before the court on Petitioner’s involvement, as well as the part played by her house, in the drug transaction. Specifically, the record indicates that Petitioner took the CI’s order for the crack at her house, she used the house as a “drop” for the crack by her supplier, she used the house to finalize the sale of the crack, and she used the house to take receipt of a commission of \$100.00 for “brokering” the transaction. Also, Petitioner says nothing of the fact that she peddled and profited from the sale of a highly dangerous and addictive drug, which has been responsible, either directly or indirectly, for killing and/or ruining the lives of thousands, if not hundreds of thousands, of people across this Country, not to mention worldwide.

Given these factors, as correctly found by the court,

the seizure of Ms. Dean’s property does not constitute an[] “excessive fine” in violation of Article III, Section . . . [5] of the West Virginia Constitution or of the Eight[h] Amendment to [the] United States Constitution. Ms. Dean was a knowing and willful participant in the felonious sale of a highly addictive and dangerous drug. Furthermore, she purposefully used the property which is the subject matter of this proceeding to facilitate this transaction. In light of her culpability the seizure of this property by the State of West Virginia is not so excessive as to render it unconstitutional.

App. vol. I, 4.

In her quest to overturn the forfeiture of her property, Petitioner asserts that the forfeiture “shocks the conscience of the court and society.” Pet’r’s Br. 12. For legal support, Petitioner cites the case of *State v. Cooper*, 172 W. Va. 262, 304 S.E.2d 851 (1983). In *Cooper*, the Court set forth two tests, one subjective and one objective, to determine whether a sentence violates the

proportionality standard of Article III, Section 5 of the West Virginia Constitution.¹⁸ The subjective test “asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.” *Cooper*, 172 W. Va. at 272, 304 S.E.2d at 857.¹⁹

At the risk of risk of being too blunt, Petitioner’s reliance on *Cooper* is misplaced. The similarities between *Cooper* and the current case begin and end quickly—they both involve punishment.²⁰ However, the differences between *Cooper* and this case are “stark.” *Cooper* was a criminal case involving the constitutionality of a defendant’s 45 year sentence for robbery, whereas this case involves the validity of a civil *in rem* forfeiture of Petitioner’s property. Thus, *Cooper*

¹⁸ The proportionality standard of Article III, Section 5 of our Constitution requires that “[p]enalties shall be proportioned to the character and degree of the offense.”

¹⁹ Under the objective test,

[i]n determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

Cooper, 172 W. Va. at 272, 304 S.E.2d at 857. This objective test will not be discussed any further than this footnote, as Petitioner does not rely on it in the current appeal in asserting that the forfeiture of her property is unconstitutional. However, *see U.S. v. Real Property Located at 6625 Zumirez Drive, Malibu, Cal.*, 845 F. Supp. 725, 731-732 (C.D.Cal. 1994) (The *Solem* test for determining whether punishment violates the Eighth Amendment’s Cruel and Unusual Punishment Clause, which examines the gravity of the offense and the harshness of the penalty, sentences imposed in same jurisdiction for similar crimes, and sentences imposed in other jurisdictions for commission of the same crime, does not apply when determining whether punishment violates the Eighth Amendment’s Excessive Fines Clause.).

²⁰ Undersigned counsel will not attempt to convince the Court that the State’s forfeiture action against Petitioner’s property is remedial rather than penal—he would have to “get up early in the morning” to get that little “number” by the Court.

involved a prison sentence, and a very long one “to boot,” whereas this case involves a civil penalty. Finally, given the level of her involvement in the underlying drug transaction, the use of her property to facilitate this transaction, as well as the authorized penalty under the federal guidelines for her conviction, the forfeiture of Petitioner’s property is not “shocking to the conscience” at any rate.

C. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE FORFEITURE OF PETITIONER’S PROPERTY WAS NOT EXCESSIVE WITHOUT FIRST HAVING AN EVIDENTIARY PROPORTIONALITY HEARING.

1. Standard of Review

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.”

Syl., *State v. Maisey*, 215 W. Va. 582, 600 S.E.2d 294 (2004) (quoting Syl. pt. 2, *Walker, supra*).

2. There was Ample Evidence in the Record for the Court to Rule on the State’s Motion for Summary Judgment Without the Need for a Full Evidentiary Hearing, and a Full Evidentiary Hearing Would Have Defeated the Purpose of Adjudicating This Case by way of Summary Judgment.

It is the duty of this Court to uphold a forfeiture that is awarded upon a record that contains adequate and substantial evidence demonstrating the propriety of the forfeiture. It is likewise our duty to disallow a forfeiture when there is an insufficiency of such evidence.

State v. Burgraff, 208 W. Va. 746, 748, 542 S.E.2d 909, 911 (2000).

On appeal, Petitioner asserts that the court committed error in ruling that the forfeiture of her property did not constitute an excessive fine without first having an evidentiary proportionality hearing. *See generally* Pet’r’s Br. 13-14. In support of this argument, Petitioner states as follows:

In this case, the record is very limited due to the Circuit Court’s failure to

have an evidentiary proportionality hearing as requested by Ms. Dean. There is no evidence of Ms. Dean's prior criminal record, if any, the actual value of her home, her role in the crime, or what part her home played in the drug transaction. What little evidence that there is in regard to circumstances surrounding the criminal offense in question easily shocks the conscience and demonstrates that the punishment clearly is not proportional to the crime committed.

Pet'r's Br. 14.

On the contrary, as fully discussed above, there was plenty of evidence concerning Petitioner's role in the underlying drug transaction, as well as the part her home played in the transaction. Specifically, the record shows that Petitioner set this drug deal up from her home, had the supplier deliver the drugs to her home, used her home to complete the "buy," and requested and received a "chunk" of money for her, if you will, illegal services. Interestingly, "over and over" in her brief, Petitioner argues that the State's forfeiture of her \$100,000.00 house on a \$600.00 drug deal is unfair. Nowhere in her brief does Petitioner assert that her house is worth any more than a "hundred grand." Finally, a full-blown evidentiary hearing, as Petitioner proposes should have been done, would have defeated the purpose of adjudicating this case by way of summary judgment, which is "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial." *Miller v. City Hosp., Inc.*, 197 W. Va. 403, 407, 475 S.E.2d 495, 499 (1996).

V.

CONCLUSION

The Circuit Court's Order granting the State's Motion for Summary Judgment on its Petition for Forfeiture of Petitioner's property should be affirmed.

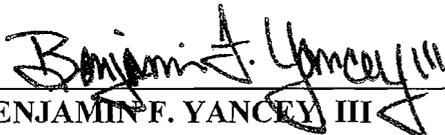
Respectfully submitted,

**STATE OF WEST VIRGINIA and
JEFFERSON COUNTY SHERIFF'S
DEPARTMENT,**

Respondents,

By counsel

**DARRELL V. McGRAW, JR.
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0283

TRICIA DEAN,

Respondent Below, Petitioner,

v.

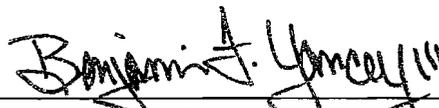
STATE OF WEST VIRGINIA AND
JEFFERSON COUNTY SHERIFF'S DEPARTMENT,

Petitioners Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondents hereby certifies that a true and correct copy of the foregoing **BRIEF OF RESPONDENTS** was mailed to counsel for the Petitioner by depositing it in the United States mail, first-class postage prepaid, on this 26th day of August, 2011, addressed as follows:

Ruth A. McQuade, Esquire
P.O. Box 1774
Shepherdstown, West Virginia 25443


BENJAMIN F. YANCEY, III