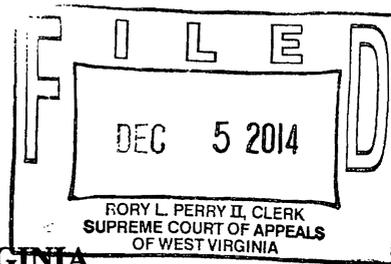


No. 14-0926



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

---

**CHARLESTON, WEST VIRGINIA**

---

**FROM THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA**

**KENNAD L. SKEEN, II, Prosecuting  
Attorney of Jackson County, W.Va.,  
on behalf of the Jackson County  
Sheriff's Department,**

**Plaintiff,**

**v.**

**Case No. 13-P-16**

**\$32,641.00, et al.,**

**Defendant.**

---

**BRIEF OF PETITIONERS, HUBERT D. MESSER & SHARON L. MESSER**

---

Counsel for Petitioners  
Timothy J. LaFon, WWSB#2123  
Keisha D. May, WWSB#10221  
1219 Virginia Street, East  
Suite 100  
Charleston, West Virginia 25301  
304-343-4440 – phone  
304-343-4464 – fax  
tlafon@cdlwv.com – email  
kmay@cdlwv.com – email

**I. TABLE OF CONTENTS**

	<b><u>Page No[s].</u></b>
<b>Authorities Cited.....</b>	<b>3.</b>
<b>Assignment of Errors.....</b>	<b>4.</b>
<b>Statement of the Case.....</b>	<b>4</b>
<b>Proceedings Below.....</b>	<b>4 – 6</b>
<b>Statement of Facts.....</b>	<b>6 – 11</b>
<b>Summary of the Argument and Issues.....</b>	<b>11</b>
<b>Statement Regarding Oral Argument.....</b>	<b>11</b>
<b>Argument &amp; Discussion of Law.....</b>	<b>12 – 14</b>
<b>Conclusion.....</b>	<b>14 – 15</b>
<b>Prayer for Relief.....</b>	<b>15</b>
<b>Signature of Counsel .....</b>	<b>16</b>
<b>Appendix.....</b>	<b>17</b>
<b>Certificate of Service.....</b>	<b>18</b>

**II. AUTHORITIES CITED**

**Page No[s].**

**STATUTES:**

*West Virginia Code §60A-7-703*..... 5, 12, 14

**CASES:**

*Dean v. State*, 230 W.Va. 40, 736 S.E.2d 40 (2012)..... 4, 11,12,13,14

*State of West Virginia v. \$43,000.00*, 214 W.Va. 650, 591 S.E.2d 208 (2003) 12

**PETITION**

**TO THE HONORABLE JUSTICES OF THE  
SUPREME COURT OF APPEALS WEST VIRGINIA**

**III. ASSIGNMENT OF ERRORS**

1. The record did not support a finding by the Circuit Court that Sharon Messer had any knowledge of illegal activity or that any illegal transaction was taking place.

2. The Circuit Court erred by not properly applying *Dean v. State of West Virginia* and the appropriate analysis as to the comparison of assets and values to the minimal fine required pursuant to the charge in Jackson County.

3. The record did not support a finding by the Circuit Court that certain seized property were purchased pursuant to an illegal drug transaction or was the product of an illegal drug transaction.

4. The record did not support a finding as to the connection between any of the assets seized with any illegal drug activity.

**IV. STATEMENT OF THE CASE**

**A. PROCEEDINGS BELOW**

On May 24, 2013, the State of West Virginia and the Jackson County Sheriff's Department filed a Petition for Forfeiture as against certain property owned and possessed primarily by Hubert D. Messer and Sharon W. Messer (hereinafter "Messers"). (*Volume I of Appendix, pgs. 01 – 24*). The Petition Forfeiture was for numerous items of personal and real property, including the Messers' residence, numerous firearms, items of farm equipment, vehicles, \$32,641.00 dollars in cash and other amounts of cash listed as \$356.00 and \$2,345.00, various firearms, hunting equipment, ammunition, various vehicles, and a multitude of sundry

items. (*Volume I of Appendix, pgs. 01 – 24*). On April 18, 2013, the initial seizure of the above referenced items occurred at the Messers' residence located at 9328 Stonelick Road, Gay, Jackson County, West Virginia.

The seizure of property followed the arrest of Hubert Messer in Jackson County, West Virginia for transferring and receiving stolen property. This is the only Jackson County criminal charge that has been filed against the Messers. Hubert Messer was subsequently charged by the Federal Government with certain drug charges, but he was not charged in Jackson County for any drug charge. The Jackson County Sheriff's Department (hereinafter "Sheriff's Department") alleged that all of the vehicles and trailers intended to be seized or used in the conveyance of, transport, facilitation of transportation, sale receipt, possession or concealment of a controlled substance. (*Volume I of Appendix, pgs. 01 – 24*). Further, the Sheriff's Department alleged that all cash, vehicles, trailers, firearms, and other seized items were proceeds traceable to the exchange of funds in return for the sale of controlled substances in violation of West Virginia Code §60A-7-701, et seq. (*Volume I of Appendix, pgs. 01 – 24*).

A hearing was conducted on two separate days on this matter, March 7, 2014 and March 13, 2014. (*Volume II of Appendix, see Hearing Transcripts*). The Court, after hearing all of the evidence, ordered each party to submit Proposed Findings of Fact and Conclusions of Law and a Proposed Order. (*Volume II of Appendix, Hearing Transcript from March 13, 2014*). On August 7, 2014, the Circuit Court's "Judgment Order" was entered with the finding that the majority of the property enumerated in the Petition for Forfeiture are found to be subject to forfeiture, pursuant to *West Virginia Code §60A-7-703* of the West Virginia Contraband Forfeiture Act. (*Volume I of Appendix, pgs. 116 – 145*). The Circuit Court went on to further find that the dwelling house failed to have a significant connection to the drug deals to allow for forfeiture;

however, the remainder of the real property, specifically the 54.09 acres and the barn there was substantially connected to the drug trade. The Court found the property listed in the Petition for Forfeiture, with the exception of the dwelling house and property on which it immediately sits, shall be forfeited to the State. The Circuit Court went on to further hold the seized currency and personal property, with some exceptions, were subject to forfeiture. Excluded was the Ford F-350 truck, the Mahindra tractor and loader. (*Volume I of Appendix, pgs. 116 - 145*).

The Messers now appeal this “Judgment Order” by the Circuit Court of Jackson County, West Virginia and the forfeiture of all the property.

## **B. STATEMENT OF FACTS**

On May 24, 2013, the State of West Virginia and the Jackson County Sheriff’s Department file a Petition for Forfeiture as against certain property owned and possessed, primarily, by Hubert Dwayne Messer and Sharon White Messer. The Petition for Forfeiture was for numerous items of personal and real property, including the Messers’ residence, numerous guns, numerous items of farm equipment, vehicles, and other miscellaneous items that are too numerous to list herein.<sup>1</sup> The initial seizure occurred on April 18, 2013 and occurred at the Messers’ home located at 9328 Stonelick Road, Gay, Jackson County, West Virginia. The seizure included \$32,641.00 in cash and other amounts of cash listed as \$356.00 and \$2,345.00.<sup>2</sup>

---

<sup>1</sup> The Respondent did list in their “Proposed Findings of Fact and Conclusions of Law” as Exhibit A the entire list of items and property seized during this matter. The Respondents’ “Proposed Findings of Fact and Conclusions of Law” are attached and made a part of the Appendix in this Appeals Brief.

<sup>2</sup> It should be noted that the record reflects that according to the West Virginia Department of Motor Vehicles, there is a lien upon the 2007 Dodge 3500 dually truck. The lien is currently held by GE Money Bank. As to the real property, Farm Credit of the Virginias, ACA, has a “Deed of Trust”.

The seizure for the property followed the arrest<sup>3</sup> of Hubert Dwayne Messer for transferring and receiving stolen property (March 1, 2013). This is the only Jackson County criminal charge that has ever been filed against Hubert Dwayne Messer.<sup>4</sup> Subsequently, Hubert Dwayne Messer was charged by the Federal Government with drug charges, but he was never charged in Jackson County, West Virginia or by the State of West Virginia for any drug charge.<sup>5</sup>

Shortly thereafter, the Jackson County filed the Petition for Forfeiture seeking to have all of the property forfeited pursuant to the West Virginia Contraband Forfeiture Act contained in West Virginia Code §60A-7-701, et seq. In summary, the Sheriff's Department alleged all of the vehicles and trailers intended to be seized was used in the conveyance of, transport, facilitation of transportation, sale, receipt, possession and concealment of a controlled substance. Additionally, the Sheriff's Department allege that all cash, vehicles, trailers, guns and other items seized<sup>6</sup> are proceeds traceable to the exchange of funds in return for the sale of controlled substances in violation of West Virginia Code §60A-7-701. It should be noted that neither of the Messers were ever charged with any criminal offense related to a drug charge in Jackson County, West Virginia.

A hearing was conducted regarding the forfeiture on March 7, 2014 and March 13, 2014. The Sheriff's Department presented the following witnesses during the hearings: Ross Mellinger, Corey Raynes, Travis Thompson, Eugene J.C. Casto, Doral D.J. Brown, Granville Murphy, and Harold White.

---

<sup>3</sup> In Jackson County, West Virginia, Hubert Dwayne Messer was charged with one count of "possession of stolen property, in excess of \$1,000.00", which is a felony punishable by imprisonment in the penitentiary for not less than one nor more than ten years, or, in the discretion of the court, confinement in jail not more than one year and a fine of not more than \$2,500.00. This charge was brought in connection with the five stolen guns provided to Mr. Messer.

<sup>4</sup> Criminal charges were not filed against Sharon Messer.

<sup>5</sup> Sharon Messer was never charged in either State or Federal Court.

<sup>6</sup> It should be noted that the majority of the property seized was owned and possessed by the Messers. However, there was evidence presented that a portion of the property, including miscellaneous personal property and an F-350 truck owned by Sharon Messer's father, Harold White was given back.

During the hearings there was very little, if any, evidence presented by the Sheriff's Department as to the value of the assets for which they sought forfeiture. In fact, the only evidence introduced as to the value was by Ross Mellinger, a detective with the Jackson County Sheriff's Department, who testified that he looked up in certain catalogues the value of the guns that were seized and that they had the approximate value of \$15,000.00. . (*Volume II of Appendix, Hearing Transcript from March 7, 2014, pg. 57 – 58*). As to the real estate, vehicles, farm equipment, haul trailers, and remaining miscellaneous items, there was never any evidence placed on the record by the Sheriff's Department as to the value of said items.

Additionally, evidence was presented at the hearings that Sharon Messer received numerous of the items seized as a gift from her father, Harold White. Mr. White testified that he purchased the F-350 vehicle in 2005 and gave it to his daughter as a gift. (*Volume II of Appendix, Hearing Transcript from March 13, 2014, pg. 192*). He also testified that he purchased and gave to her the 2008 Mahindra 5530, four-wheel drive tractor (which included a loader and grader blade), a horse aluminum trailer. (*Volume II of Appendix, Hearing Transcript from March 13, 2014 pgs. 196, 200, & 202*). Mr. White also presented testimony that all the equestrian tack, including but not limited to 5 to 6 saddles riding saddles and 2 pony saddles, was given as gifts. (*Volume II of Appendix, Hearing Transcript from March 13, 2014 pgs. 204 – 206*).

The Messers do not dispute there were numerous witnesses presented at the hearings in this matter to attempt to establish that Hubert Dwayne Messer was involved in drug transactions in Jackson County, West Virginia. However, there was little, if any, evidence that Sharon Messer was involved in drug transactions in Jackson County, West Virginia. There was testimony that she was a courier for certain containers of illegal drugs, but there was no evidence

that she in fact had knowledge that the same were illegal or that any illegal transaction was taking place.

The record will reflect testimony that a barn on the Messers' farm was utilized for certain drug transactions; however, as stated before there was no evidence as to the value of the real estate or this barn area. (*Volume II of Appendix, Hearing Transcript from March 13, 2014, pgs. 20 – 22*). The testimony in this matter only established that there were five guns that were initially removed from the home that gave rise to the transfer and receiving of stolen property charge; however, none of these guns were included in the excess of the fifty (50) guns that were seized by the Sheriff's Department. There was never any testimony given that the guns seized were purchased pursuant to an illegal drug transaction or was the product of an illegal drug transaction. In fact, there was not any testimony and/or evidence presented as to how the guns were obtained or from what proceeds they were obtained with. Further, there was testimony as to a Massey Ferguson 245 tractor that was purchased from Dana Casto by Hubert Dwayne Messer, but there was no testimony that this was pursuant to an illegal drug transaction and in trade in response to an illegal drug transaction.

In regards to the \$32,000.00 in case that was seized from the residence, Ross Mellinger, the lead investigator in this matter, testified that there was no evidence that the cash was actually obtained pursuant to an illegal drug transaction or was a product of an illegal transaction or related to any criminal activity for which Hubert Dwayne Messer was charged. . (*Volume II of Appendix, Hearing Transcript from March 13, 2014, pgs. 30 – 31, and Hearing Transcript from March 7, 2014 pgs. 81 – 83, and 86*).

Corey Raynes<sup>7</sup> was the primary witness presented by the Sheriff's Department in this matter. Mr. Raynes testified as to entering into illegal drug transactions with Hubert Dwayne Messer. However, he was clear in stating that he had no knowledge that Sharon Messer was ever involved in any illegal drug transactions or had any knowledge of any illegal drug transactions other than she delivered a container of illegal drugs on occasion to her husband upon his demand. (*Volume II of Appendix, Hearing Transcript from March 13, 2014 pg. 70*). He also admitted in cross examination that he could not point to any particular farm equipment or other assets and say they were traded for illegal drugs or were purchased with illegal drug money. (*Volume II of Appendix, Hearing Transcript from March 13, 2014 pg. 53 -55*). He also admitted that he knew of Hubert Dwayne Messer trading or "swapping" guns in exchange for other items that were not drug related. (*Volume II of Appendix, Hearing Transcript from March 13, 2014 pg. 55 - 56*). No other evidence as to any of the assets seized or their connection with any illegal drug activity was ever established. (*Volume II of Appendix, Hearing Transcript from March 7, 2014, pgs. 71-74, 86, and 102*).

Ultimately, the Circuit Court found that it did not appear as though the dwelling house in question had a significant enough of a connection to the drug deals to allow for forfeiture. The Circuit Court reasoned that keeping drugs in a house, or conducting a drug deal in a house (which was not established) was not sufficient to show that the house was essential to the deal. The Circuit Court went on to further state there was not enough evidence to show that the house was the result of proceeds of drug transactions. However, the remainder of the real property, specifically the 54.09 acres and the barn, was held to have been substantially connected to the drug trade. The Circuit Court found that the property forfeiture was not grossly disproportionate

---

<sup>7</sup> Corey Raynes was given an immunity agreement by the State of West Virginia for his testimony against the Messers for his testimony at the hearing in this matter. (*Volume II, Hearing March 13, 2014, pgs. 49 - 51*).

to the gravity of Hubert Dwayne Messer's offense. Amazingly, this was done without any values established for the forfeited assets. The Circuit Court also held that Sharon Messer's involvement in the drug activity, her knowledge and assistance, was sufficient to permit the taking of her interest in the farm. The Court found the real property listed in the Petition for Forfeiture, with the exception of the dwelling house and the property on which it immediately sits, shall be forfeited to the State. The Circuit Court went on to further hold the seized U.S. currency and the personal property, with some exceptions, and the remainder of the personal property to also be subject to forfeiture. However, the 2000 Ford F-350 truck, Mahindra 4WD tractor with loader was to be returned to the Messers. (*Volume I of Appendix, pgs. 141 - 145*).

**V. SUMMARY OF THE ARGUMENT AND ISSUES**

Did the Circuit Court of Jackson County, West Virginia, err by not dismissing the Petition for Forfeiture and returning all property confiscated back to Hubert Messer and Sharon Messer? Whether the Circuit Court's record supported a finding that Sharon Messer had any knowledge of illegal activity? Whether the record supported a finding that certain seized property was purchased pursuant to an illegal drug transaction? Whether the Circuit Court properly applied the analysis as set forth in *Dean v. State of West Virginia*?

**VI. STATEMENT REGARDING ORAL ARGUMENT**

The Petitioners (the "Messers") are requesting oral argument in this matter. The Petitioners represent that the facts and legal arguments presented in this brief, record on appeal, and the decisional process would be significantly aided by oral argument. The case should be set aside for a Rule 19. The case is not appropriate for a memorandum decision only. The case involves assignments of error in the application of settled law and the Petitioners claim the Circuit Court used an unsustainable exercise of discretion in the matter.

## VII. ARGUMENT AND DISCUSSION OF LAW

In cases involving the applicability of the Excessive Fines Clause to a forfeiture proceeding, and where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, a de novo standard of review is applied. *Dean v. State*, 230 W.Va. 40, 736 S.E.2d 40 (2012).

Pursuant to West Virginia Code §60A-7-703(a)(5), all property that is “used, have been used or are intended to 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” is forfeitable. West Virginia Code §60A-70-703(a)(1) includes in said substances from which a forfeiture can flow, controlled substances (i.e., illegal drugs).

In addition, West Virginia Code §60A-7-703(a)(7) makes assets which were used in the illegal drug trafficking or are the products of said illegal drug activity forfeitable. The Petitioners have the burden of proof by the preponderance of evidence standard that there was a substantial connection between the property seized and the illegal drug transaction. This burden is in addition to the initial burden that must be met by the State of West Virginia by the preponderance of the evidence that there was probable cause that an illegal act under the drug law occurred. *State of West Virginia v. \$43,000.00 in Cashiers Checks*, 214 W.Va. 650, 591 S.E.2d 208 (2003).

One of the preeminent cases on forfeiture pursuant to West Virginia Code §60A-7-701, et. seq. is *Dean v. State*, which makes it clear that forfeiture is usually disfavored as a legal remedy and the Contraband Forfeiture Act is to be liberally construed in favor of the person or persons whose property rights are to be affected and strictly construed against forfeiture. *Dean v. State*, 230 W.Va. 40, 736 S.E.2d 40 (2012). In *Dean v. State*, this honorable Supreme Court

held that the forfeiture action brought pursuant to Contraband Forfeiture act was subject to the Excessive Fines Clause of the state constitution and the Eighth Amendment to United States Constitution. This case established that forfeiture of property under the Contraband Forfeiture Act violates the Excessive Fines Clause found in the State Constitution and the 8<sup>th</sup> Amendment to the United States Constitution if the amount of forfeiture is grossly disproportionate to the gravity of the defendant's offense. *Id.*

Factors to be considered in assessing whether the amount of forfeiture under the Contraband Forfeiture Act is grossly disproportionate to the gravity of the offense, and thus in violation of the Excessive Fines Clause of the state constitution and the Eighth Amendment to the United States Constitution, include:

- (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.<sup>8</sup>**

The burden of proof rests upon the State of West Virginia to show that by a preponderance of evidence that there is a substantial connection between the property seized and the illegal drug transaction. *Id.* An analysis and comparison of the fine, to which the Defendant could have faced pursuant to the charged crime and the value of the property to be seized, must be completed.

In *Dean v. State*, in a similar situation to the one at hand, attempted to argue that the maximum fine that could be imposed upon the defendant would be determined under the federal

---

<sup>8</sup> *Dean v. State*, 230 W.Va. 40, 51, 736 S.E.2d 40, 51 (2012).

criminal statute to which the defendant plead guilty with the value of the property and the amount of the forfeiture compared to the maximum fine for the federal case. *Id.* at 51. However, this position was deemed incorrect whereas this honorable Supreme Court disagreed and stated that because the forfeiture action was initiated under state law, the authorized penalty by which the amount of the forfeiture must be compared with is the penalty to which the defendant is subject to under West Virginia law, not federal law. *Id.* at 51.

In the matter currently before the Court, the record is void of evidence regarding the values of the property. The values of the seized property must be proven by the State of West Virginia as part of their burden. See *Dean v. State*, 230 W.Va. 40, 736 S.E.2d 40 (2012). The only way this forfeiture analysis can take place is if there is evidence as to the overall value of the property being attempted to be forfeited. There simply must be a nexus established and connection between the illegal activity and the property sought to be seized. There must be some evidence proven by the Sheriff's Department by preponderance of the evidence that the items seized were a product of the crime alleged or was used in the commission of the crime. It is this analysis to which should have been applied to the facts of this case but were not.

### VIII. CONCLUSION

The Circuit Court erred by concluding that all real and personal property enumerated in the Petition were subject to forfeiture pursuant to West Virginia Code §60A-7-703. The Court was incorrect in finding the Sheriff's Department met its burden of proving by a preponderance of evidence that the seized property is subject to the forfeiture and that a substantial connection between the property seized and the illegal drug transaction was met. Further the Court failed to correctly apply the relevant case, *Dean v. State*, which held that a forfeiture of real property

under West Virginia Code §0A-7-703 violates the Excessive Fines Clause and the Eight Amendment if the amount of the forfeiture is grossly disproportionate to the gravity of a defendant's offense. The Court failed to include in its decision that for this particular case, the only crime charged in Jackson County is one count of transferring and receiving stolen property that has a total financial penalty of \$2,500.00. Forfeitures are generally disfavored as a legal remedy and therefore the West Virginia Contraband Forfeiture Act should have been strictly construed in favor of Hubert Messer and Sharon Messer in this case. The Sheriff's Department failed to produce clear evidence as to the value for the overall assets seized in this case. Additionally, the record did not reflect how the majority of the evidence was used in an illegal drug transaction. There simply was no establishment of a connection between the properties to an illegal drug transaction. The judgment of the Circuit Court of Jackson County must be reversed.

**IX. PRAYER FOR RELIEF**

Wherefore, the Petitioners, Hubert and Sharon Messer, respectfully prays that this Supreme Court of Appeals rules the errors committed by the Circuit Court of Jackson County in this matter are reversible errors and remand this case to the Circuit Court of Jackson County for further proceedings in accordance with the laws of the State of West Virginia; and grant unto the Petitioners such other, further, and general relief as may seem proper to this honorable Supreme Court.

Respectfully submitted,

**HUBERT D. MESSER, &**

**SHARON L. MESSER,**

By Counsel.



---

Timothy J. LaFon, WVSB#2123

Keisha D. May, WVSB#10221

Ciccarello, Del Giudice & LaFon

1219 Virginia Street, East

Suite 100

Charleston, West Virginia 25301

304-343-4440 – phone

304-343-4464 – fax

**APPENDIX**

**VOLUME I:**

**Page No[s]:**

1.	Petition .....	01 – 24
2.	Answer.....	25 – 33
3.	Proposed Findings of Fact and Conclusions of Law (Plaintiff...)	34 – 94
4.	Proposed Findings of Fact and Conclusions of Law (Defendant).	95 – 115
5.	Judgment Order.....	116 – 145

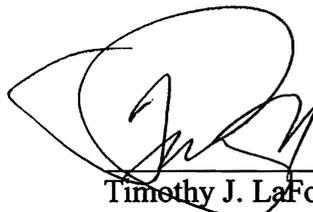
**VOLUME II:**

1. Transcript of Evidentiary Hearing from March 7, 2014
2. Transcript of Evidentiary Hearing from March 13, 2014

**CERTIFICATE OF SERVICE**

I, Timothy J. LaFon, attorney for Hubert D. Messer, do hereby certify that I served the Petition for Appeal on the 5th day of December, 2014, upon counsel of record, by placing a copy of the same, addressed as follows:

**Kenned Skeen, Esquire**  
Prosecuting Attorney of Jackson County  
Post Office Box 800  
Ripley, West Virginia 25271



Timothy J. LaFon, WVSB#2123  
Keisha D. May, WVSB#10221  
Ciccarello, Del Giudice & LaFon  
1219 Virginia Street, East  
Suite 100  
Charleston, West Virginia 25301  
304-343-4440 – phone  
304-343-4464 – fax