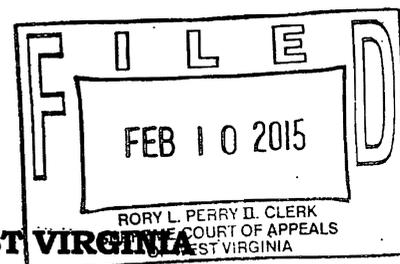


No. 14-0926



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.

**REPLY BRIEF OF PETITIONERS, HUBERT D. MESSER
AND SHARON L. MESSER**

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PETITIONERS' REPLY BRIEF

**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 the Petitioner, 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, 230 W.Va. 40, 736 S.E.2d 40 (2012) 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

The Petitioners will rely on the facts previously stated in their original Petitioners' Brief.

**V. ARGUMENT AND DISCUSSION OF LAW,
RESPONSE TO ARGUMENTS OF RESPONDENT**

The Respondent correctly states the law applicable to this matter. West Virginia Code §60A-7-705(e) requires that the State has the burden of proving by a preponderance of the evidence that the seized property is subject to

forfeiture. The State must demonstrate by a preponderance of evidence that there is substantial connection between the property seized and the illegal drug transaction. See State of West Virginia v. \$43,000.00 in Cashiers Checks, 214 W.Va. 650, 591 S.E.2d 208. The preeminent case in West Virginia as to forfeiture is Dean v. State of West Virginia, 230 W.Va. 40, 736 S.E.2d 40 (2012). This case gives an ample road map to follow in forfeiture cases. The Dean case clearly reaches the conclusion that forfeiture is “punitive” in nature and subject to an “excessive fines” analysis.

In addition, the Dean case concludes that a forfeiture is in violation of the Excessive Fines Clause of the West Virginia Constitution and the United States Constitution if the amount of the forfeiture is grossly disproportionate to the gravity of the offense. The Dean case makes it clear that if a forfeiture action is initiated under state law, the authorized penalty by which the amount of the forfeiture must be compared with is a penalty to which the Petitioner is subject to under West Virginia law, not federal law.

It is the Court’s duty to uphold a forfeiture that is awarded upon a record that contains adequate and substantial evidence demonstrating the propriety of the forfeiture and is likewise the Court’s duty to disallow a forfeiture when there is an insufficiency of evidence. See State of West Virginia v. Burgraff, 208 W.Va. 746, 542 S.E.2d 909.

The West Virginia Contraband Forfeiture Act is to be liberally construed in favor of the person whose property rights are to be affected and strictly construed against forfeiture. See Games-Neely v. Real Property, Including a

Brick Ranch House and Garage Commonly Known as 1175 Sam Mason Road
Located in Mill Creek District of Berkeley County, West Virginia, 211 W.Va.
236, 565 S.E.2d 358.

**A. The Record Does Not Support A Finding
That The Petitioner, Sharon Messer,
Was Involved In The Illegal Activity.**

The Dean case establishes that there must be a showing of substantial connection between the property seized and illegal drug transactions. The evidence was clear in this case that the only connection between the Petitioner, Sharon Messer, who was the joint owner of the property seized in this matter, was that on occasion she brought a bottle of pills to the Petitioner, Hubert Messer. There was no evidence presented that the Petitioner, Sharon Messer, knew of illegal activity or engaged in the same. Thus, clearly, there is no evidence in this case that establishes that there was any reasonable connection between a drug transaction involving the Petitioner, Sharon Messer, and the property seized.

**B. The Circuit Court Did Not Properly
Apply The Analysis Set Forth In The
Dean Case.**

Unfortunately, the State now tries to make an argument that it did not make in the proceedings below. The State now wants this Court to engage in speculation and supposition. The Order entered by the Lower Court in this matter clearly based its analysis of the Excessive Fines Clause on the penalty that one of the Defendants is subject to in a Federal proceeding. This is clearly contrary to the Dean case in which it was stated that since the forfeiture action

was initiated under state law, the authorized penalty by which the amount of forfeiture must be compared with is the penalty to which the Petitioners are subject under West Virginia law, not federal law. The Lower Court's analysis clearly violated this standard. Now, in its Brief, the State essentially admits that the wrong analysis was used, but attempts to get this Supreme Court to analyze the facts and to presume what charges the Petitioner, Hubert Messer, could have been charged with at the state level. The fact of the matter is the Petitioner, Hubert Messer, was never charged at the state level with any drug charge and was only charged with one felony count of receiving and transferring stolen goods in excess of \$1,000.00 which subjected him to one \$2,500.00 fine. It would be wholly improper for this Supreme Court to now become the fact finder and to reach a conclusion of what charge the State could have charged the Petitioner, Hubert Messer, with.

In addition, there is no argument that the Petitioner, Sharon Messer, could have been charged with anything and she was the joint owner of all of these properties. Clearly, the standard utilized at the Lower Court was improper and the forfeiture ordered by the Lower Court is clearly excessive and punitive in nature as compared to the crime charged at the state level.

C. The Record Does Not Support Any Nexus Between The Seized Property And The Drug Transactions. In Addition, There Was No Evidence To Establish The Value Of The Assets Seized.

A thorough reading of the transcript of this matter establishes that, in fact, the State never proved any connection with the items seized to the drug

transactions alleged. The State's primary witnesses stated they could not testify that the items that were seized were purchased via drug transactions or purchased with drug proceeds. (See 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 and Hearing Transcript from March 13, 2014 pgs. 53-55)

In addition, there was never any value for the assets established in the transcript below. No values were established for the assets seized so no proper comparison could be made regardless of what the penalty would be at the state level. This is exactly the scenario that was presented to this Court in the Dean case and this Court concluded a proper analysis under the Forfeiture Act could not be conducted as a result thereof.

VI. CONCLUSION

For the foregoing reasons, the ruling of the Circuit Court should be reversed.

HUBERT D. MESSER and
SHARON L. MESSER

By Counsel,

CICCARELLO, DEL GIUDICE & LAFON

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APPENDIX

**SEE APPENDIX ATTACHED TO THE ORIGINALLY
FILED BRIEF OF PETITIONERS**

CERTIFICATE OF SERVICE

I, Timothy J. LaFon, do hereby certify that the foregoing **"Reply Brief of Petitioners Hubert D. Messer and Sharon L. Messer"** has been served upon all parties by depositing a true and exact copy thereof in the U.S. Mail, postage pre-paid and properly addressed as follows, on the 15th day of February, 2015:

Kenned Skeen, Esq.
Jackson County Prosecutor's Office
P.O. Box 800
Ripley, West Virginia 25271

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