

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**Hubert D. Messer and Sharon L. Messer,  
Petitioners**

**vs) No. 14-0926**

**Kennad L. Skeen, II, Prosecuting Attorney of Jackson County, West Virginia, on  
behalf of the Jackson County Sheriff's Office,  
Respondent**

**FILED**  
**November 6, 2015**  
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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioners Hubert D. Messer and Sharon L. Messer, by counsel Timothy LaFon and Keisha D. May, appeal the order of the Circuit Court of Jackson County, entered on August 7, 2014, ordering that certain real and personal property of the Messers be forfeited to the State. Respondent Kennad L. Skeen, II, Prosecuting Attorney of Jackson County, on behalf of the Jackson County Sherriff's Office, filed a response. The Messers filed a reply.

This Court has considered the record on appeal, the parties' briefs, and their oral arguments. Upon our review, we believe that this case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for a memorandum decision reversing the circuit court's order. For the reasons expressed below, the May 1, 2014, order is reversed and this matter is remanded for further proceedings consistent with this decision.

In February of 2013, a patrolman of the Spencer Police Department approached Jackson County Police Officer Ross Mellinger about recovering stolen firearms. According to Officer Mellinger, the patrolman believed that Mr. Messer had purchased the stolen firearms, that Mr. Messer knew the firearms had been stolen when he purchased them, and that the firearms were presently on the farm owned by Mr. and Mrs. Messer. On February 28, 2013, the Jackson County Sheriff's Department obtained and executed a search warrant on the Messers' property. During the search, Mr. Messer cooperated with the police and directed them to the firearms, which were wrapped in a blanket and placed underneath hay in the barn's loft. The police recovered the stolen firearms and seized \$32,641.00 in United States currency and various bottles of hydrocodone tablets in the names of Mr. Messer and others. On March 1, 2013, Mr. Messer was placed under arrest and charged with one felony count of "Receiving or

Transferring Stolen Goods in Excess of \$1,000” in violation of W. Va. Code § 61-3-18 (1923) for purchasing and possessing the stolen firearms.

On March 4, 2013, Cory Raines, a “cooperating individual,” told police that Mr. Messer engaged in illegal prescription narcotics transactions at the farm. Using this information, the police obtained a second search warrant for the Messers’ farm to locate and seize any contraband relating to the illegal sale and distribution of controlled substances. The police executed the warrant on March 5, 2013, seizing a large amount of personal property, including firearms, vehicles, farm equipment, and United States currency.<sup>1</sup> Two additional search warrants were obtained to search the Messers’ farm.

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<sup>1</sup> The full list of property seized on March 5, 2013, as described in the State’s petition for forfeiture, is as follows: Remington model 7600 .243 caliber with scope, serial number (“SN”) 8531416; Oregon Arms .22 caliber bolt action, SN 40651; Winchester model 94 .30-30 caliber, SN 1341815; Remington model 6 .22 caliber rifle, SN 461293; Smith/Wesson M&P 1522 .22 caliber, SN DYZ24087; Arms Company .22 caliber pistol, SN 046001; Mossberg model 500 12 gauge (camo), SN 7377219; Mossberg model 500 12 gauge, SN 6156335; Remington model 870 .28 gauge, SN T420632J; Winchester model 12 gauge, SN 1589951; Winchester model 1911, SN 47981; Savage model 24 20 gauge .22, SN A815782; H&R 10 gauge camo single shot, SN AS234253; Remington model 700 .243 with scope, SN A6523475; Mossberg 20 gauge model 500, SN D021521; Marlin model 60 .22 rifle, SN 97412395; Remington model 870 20 gauge, SN T310682X; Remington model 700 .30-06, SN E6519454; Remington 512-X .22 caliber, SN unknown; Remington Sportsman 12 gauge, SN W152137M; Winchester model 37 20 gauge, SN unknown; Winchester model 290 .22 caliber, SN B1604083; Remington model 514 .22 caliber, SN unknown; Remington 760 .270 caliber, SN A7401327; unknown .22 caliber rifle light color wood, SN unknown; Remington model 870 20 gauge, SN T508081X; CVA Muzzleloader (camo) with scope, SN 61-13-015724-02; Remington 870 12 gauge, SN 1116641V; NEF .25-06 laminated handi rifle, SN NP272191; Remington Targetmaster .22 rifle, SN unknown; Remington .30-60 7400 auto, SN 8278913; Savage 22 rifle, SN 55887; Savage .22 rifle syn stock, SN 398456; Remington 870 12 gauge, SN AB958529M; Winchester 1200, SN L560108; Marlin 22, SN 11515692; Crossbow Tornado, no SN; Taurus 38 Special, SN VA68760; Ruger 380 LCP, SN 374-61585; “Deringer” North American Arms 22, SN E137962; “Deringer” 22, SN L023220; two thousand three hundred forty-five (\$2,345.00) dollars United States currency; three hundred fifty-six (\$356.00) dollars United States currency; Troy Bilt edger, SN 10112DK1426; Toro 18HP mower, SN 220000352; Troy Bilt 21” push mower, SN 1F021K31362; Husqvarna pressure washer model 900, SN 1019567760; Briggs/Straton 580 pressure washer, SN 101907433; Honda Foreman CS, SN 1HFTE317X84300571; Coleman Powermate generator, SN 90020404; Craftsman 6HP 32 gallon air compressor, SN 2002192911; General GP5500 generator, SN 6751763E; Stihl M5440 chainsaw, SN FS45C; Weedeater, SN 264145717; two (2) (continued . . .)

Upon execution of these warrants on April 18, 2013, police seized tires, hunting equipment, and additional farm equipment.<sup>2</sup>

On May 24, 2013, the Jackson County Sheriff's Department, as represented by the State of West Virginia, filed a Petition for Forfeiture pursuant to the West Virginia Contraband Forfeiture Act ("the Act"), W. Va. Code §§ 60A-7-701 to -707, which permits the seizure and forfeiture of private property used or acquired in violation of controlled substances laws. The petition sought the civil forfeiture of currency, over one hundred pieces of the Messers' personal property,<sup>3</sup> and all real property at the Messers' address. The petition provided:

Petitioner believes that the property subject to seizure is subject to forfeiture pursuant to [the Act] (West Virginia Code §60A-7-703). The

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Passload nailers, SN F3505; DeWalt hammer drill, SN 907524; Yamaha Rhino, SN 5Y4AM20459A002092; three (3) Husqvarna chainsaws; Stihl weedeater; Poulan weedeater; Milwaukee saws all; Century safe (black); River's Edge tree stand; green ammo can filled with ammo; bucket filled with ammo; 2007 Dodge 3500 dually truck, white in color, VIN #3D7MX49C87G730087, titled in the name of Hubert Dwayne Messer and Sharon Messer, filled with numerous hard sided and soft sided gun cases; 2000 Ford F350 truck, white in color, VIN #1FTSX31FXyec08944, titled in the name of Hubert Dwayne Messer and Sharon Messer; "Messer Stables" aluminum stock fifth-wheel trailer, VIN #4LAAS242665036787, filled with numerous saddles, bridles, leads, and equipment; aluminum gooseneck stock trailer, VIN #4FGL4242XC044098; 2005 Chevrolet Aveo, burgundy in color, VIN #KL1TD52615B304781; white horse trailer, VIN# unknown; Gator 30' gooseneck utility trailer, VIN #4Z1GF302X7S003421; 1999 Mazda 3400 X-cad truck, tan in color, VIN #4F4ZR17X7XTM08050; six foot red brush hog; six foot yellow brush hog; Mahindra four wheel drive model 5530 tractor loader, SN SRSM1227 J7; Massey Ferguson 245 tractor with box blade, SN unknown; 16' Gator brand dump trailer, VIN #5LEBK182491007169; 16' utility trailer, SN unknown; and Farm Pro Trak King yellow dozer, SN unknown.

<sup>2</sup> The list of property seized on April 18, 2013, as described in the State's petition for forfeiture, is as follows: four (4) eight lug aluminum wheels with used tires; one (1) camo tent/groundmax; one (1) alpine micro compound bow (camo); one (1) Mathews compound bow (camo); one (1) EZ Go brand red golf cart, SN unknown; one MTD riding lawn mower with 42" deck, SN 1C165B7246; black Cannon gun safe with unknown contents; Wolfe System 24X power tanning bed, SN SPIH89501; Wildgame trail camera, Wildgame Innovations trail camera; Moultrie trail camera; Eight (8) horse saddles.

<sup>3</sup> See *supra* notes 1 and 2.

vehicles and trailers were conveyances which were used, had been used, or were intended for use, to transport, or any manner to facilitate the transportation, sale, receipt, possession or concealment of a controlled substance in violation of [the Act]. The cash, vehicles, trailers, guns and other seized items are believed to be proceeds traceable to the exchange of funds in return for the sale of controlled substances in violation of [the Act], or are monies which are intended to be used to facilitate any violation of [the Act].

On July 30, 2013, Mr. Messer was indicted in the United States District Court for the Southern District of West Virginia on three counts: (1) knowingly conspiring to distribute oxycodone in violation of 21 U.S.C. § 846 (1988); (2) maintaining a place for the purpose of unlawfully manufacturing, distributing, and using oxycodone in violation of 21 U.S.C. § 856(a)(1) (2003); and (3) possessing stolen firearms in violation of 18 U.S.C. § 922(j) (2005) and 18 U.S.C. § 924(a)(2) (2006). The indictment also alleged that Mr. Messer, upon his conviction, should forfeit \$149,360.00, which the United States alleged constituted the gross proceeds derived from Mr. Messer's drug conspiracy, and 54.09 acres of real property, including the Messers' farm and home. Neither an indictment nor drug charges were sought in state court against Mr. Messer. No charges were brought against Mrs. Messer.

During the pendency of the federal criminal action against Mr. Messer, the circuit court held a hearing on the State's petition for forfeiture on March 7, 2014, and March 13, 2014. During the hearing, the circuit court heard the testimony of numerous witnesses. Mr. Raines, the cooperating individual, testified that he had witnessed Mr. Messer trade personal property, including weed eaters, chainsaws, guns, four-wheelers, and "anything of value," for drugs. Mr. Raines conceded, however, that Mr. Messer also conducted apparently legitimate trades of personal property, and Mr. Raines was largely unable to specifically identify which property was traded for drugs. Mr. Raines testified that he witnessed Mrs. Messer fetch narcotic pills at Mr. Messer's request that Mr. Messer then sold. Mr. Raines also stated that Mr. Messer bragged that money contained in a safe was "from dope."

Three additional witnesses—Travis Thompson, Carl Eugene "J.C." Casto, and Doyle "D.J." Brown—testified that they had each witnessed Mr. Messer sell or trade various narcotics. Mr. Thompson stated that he was unable to identify any specific pieces of property that may have been obtained with drug money. He did, however, testify that he had witnessed Mrs. Messer deliver pills to Mr. Messer during a drug transaction. Mr. Casto claimed he saw Mr. Messer drive one of his trucks to Mr. Casto's father's garage to sell drugs. Mr. Brown identified a specific firearm as having been traded to Mr. Messer in exchange for pills.

Officer Mellinger provided the only testimony as to the value of the property at issue in the case. He testified that he had searched various websites, including “Gun Broker,” “Guns International,” and “Guns America”<sup>4</sup> to formulate his estimation that the total value of the firearms seized from the Messers’ farm was approximately \$15,000, give or take \$2,000.<sup>5</sup>

Mrs. Messer’s father, Harold White, testified that some of the seized property had a legitimate source, *i.e.*, that it was unconnected to illegal drug activity. He specifically identified the following property as gifts he gave to his daughter’s family: a 2000 Ford F-350 four-wheel drive truck purchased in 2005, a 2008 Mahindra 5530 tractor with loader and grader blade, a horse trailer with “Messer Stables” written on the side, and horse equipment in the trailer, including saddles belonging to the Messers’ young daughter.

At the conclusion of the hearing, the circuit court requested that the parties submit proposed orders.

Thereafter, on March 27, 2014, Mr. Messer signed a plea agreement with the United States in federal court. In return for a guilty plea for counts one and three of the indictment against him, the United States agreed to move to dismiss the remaining count and the forfeiture count against him. While the federal government no longer sought forfeiture of Mr. Messer’s property, the agreement entered into by the government and Mr. Messer included the following provision:

**5. WAIVER OF OWNERSHIP INTEREST.** Mr. Messer hereby waives any ownership interest he may have in approximately \$35,342 in U.S. currency seized from his residence on or about February 28, 2013, and approximately 46 firearms which were seized from his residence on or about February 28, 2013, March 4, 2013, or April 18, 2013, as more fully described in the search warrant returns provided in discovery, and agrees not to challenge any lawful disposition or destruction of the firearms by law enforcement authorities.

On August 7, 2014, the circuit court entered its judgment order in the Jackson County forfeiture matter. The circuit court determined that the Messers’ farm “served as a ‘front’ for Mr. Messer’s drug trade, and facilitated in [sic] interstate pill trafficking.” The court concluded that

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<sup>4</sup> Officer Mellinger did not provide the internet addresses for the websites he used to determine the value of the firearms. The record does not contain documentation related to the valuation of the firearms.

<sup>5</sup> Office Mellinger did not testify as to the individual value of each firearm.

Mr. Messer's drug dealing was so prolific that it seeped into every corner of his property: the house was used to store the pills that Mr. Messer sold/traded, and to store cash and guns, obtained in exchange for the illegally delivered pills; the large barn was likewise used to store the pills he sold and the cash and guns he obtained - it was also the location of countless buys; and the farm itself was used a [sic] front for the drug trade, a pretense used to travel interstate to obtain pills to sell.

The circuit court also determined that "Mrs. Messer's hands are as soiled as Lady MacBeth's. . . . Mrs. Messer was more than complacent - she was an accomplice." The court permitted the couple to retain the dwelling house, and it ordered the return of the couple's 2000 Ford F350 truck and the Mahindra 4WD model 5530 tractor with the loader. The court ordered that all of the remaining property described in the petition for forfeiture be forfeited to the State.

The Messers now appeal the circuit court's August 7, 2014, order. The Messers challenge the forfeiture of their property, asserting that the record does not support the circuit court's finding that Mrs. Messer had any knowledge of illegal activity or that she knew any illegal transaction was taking place; that the circuit court failed to conduct an excessiveness analysis pursuant to *Dean v. State*, 230 W. Va. 40, 736 S.E.2d 40 (2012); and that the record does not support a finding that there is a connection between any of the seized property and illegal drug activity.<sup>6</sup>

In reviewing cases appealed from a circuit court, we have held, "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). In regard to the circuit court's treatment of facts and its ultimate disposition, we have held, "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*." Syl. pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

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<sup>6</sup> W. Va. R. App. P. 16(d)(7) requires that petitions for appeal "contain an argument, exhibiting clearly the points of fact and law presented . . . *arranged under headings that correspond with the questions presented.*" (Emphasis added). We note that the Messers' brief fails to comply with this requirement in so much as it does not organize its arguments under headings corresponding with the assignments of error. We remind counsel for the Messers that "a lawyer has a duty to plead and prove his case in accordance with established court rules." *State, Dep't of Health & Human Res., Child Advocate Office v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995).

First, we address the Messers' contention that while testimony given during the hearing on the petition for forfeiture establishes that Mrs. Messer "was a courier for certain containers of illegal drugs, . . . there was no evidence that she in fact had knowledge that the same were illegal or that any illegal transaction was taking place." In response, the State asserts that "the record includes strong circumstantial evidence of action and knowledge on the part of Mrs. Messer." (Footnote omitted). We agree with the State and conclude that the circuit court was not clearly erroneous in finding that Mrs. Messer had knowledge of and assisted in Mr. Messer's drug trade. The record includes the testimony of two witnesses who claim to have seen Mrs. Messer procure for Mr. Messer narcotic pills that Mr. Messer then sold or traded. Even though Mrs. Messer may not have been present to witness the sale of the narcotics, the testimony supports the inference that Mrs. Messer knew that the pills and her delivery thereof were part of a criminal enterprise. *See Cmty. Antenna Serv., Inc. v. Charter Commc'ns VI, LLC*, 227 W. Va. 595, 607, 712 S.E.2d 504, 516 (2011) ("Circumstantial evidence is information that tends directly to prove or disprove not a fact in issue but a fact or circumstance from which, either alone or in connection with other facts and circumstances, one may, according to the common experience of mankind, reasonably infer the existence or nonexistence of a fact that is in issue." (quoting Franklin D. Cleckley, 1 *Handbook on Evidence for West Virginia Lawyers*, § 1-2(F)(2) (4th ed. 2000))).

Second, we examine the Messers' assertion that the circuit court failed to conduct an analysis of the excessiveness of the forfeiture pursuant to *Dean*. In syllabus point 6 of *Dean*, the Court held that "[a] forfeiture action brought pursuant to West Virginia Code § 60A-7-703(a)(8) (2010) is punitive in nature and, therefore, subject to the Excessive Fines Clause of article III, section 5 of the West Virginia Constitution and the Eighth Amendment to the United States Constitution." 230 W. Va. 40, 736 S.E.2d 40. The Court further held:

A forfeiture of real property under West Virginia Code § 60A-7-703(a)(8) (2010) violates the Excessive Fines Clause found in article III, section 5 of the West Virginia Constitution and the Eighth Amendment to the United States Constitution if the amount of the forfeiture is grossly disproportionate to the gravity of a defendant's offense. Factors to be considered in assessing whether the amount of the forfeiture is grossly disproportionate to the gravity of an offense, 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.

Syl. pt. 7, *id.*

In their proposed order in the proceedings below, the Messers suggested that the circuit court deny the petition for forfeiture and order the return of the seized property. This proposed order included a discussion of *Dean* and included a proposed conclusion asserting that “there was no sufficient evidence presented to allow for a proper analysis as to whether the seizure would constitute an excessive fine in violation of the West Virginia and United States Constitutions as no value was established for these assets,” and that “[t]here must be dramatically more presented pursuant to the case of [*Dean*].”

The order ultimately issued by the circuit court observes:

By means of his plea in federal court, Mr. Messer is facing imprisonment for a period of up to thirty years, and a fine of *at least* \$1,250,00.00.

Furthermore, not only is there a fair correlation between the forfeiture of the real property and the authorized penalty of the convicted crimes, but there is also a strong relationship between the crime[s] charged and other crimes . . . .

The testimony at hearing further illustrated that the “nature and extent of the criminal activity” of the Messers was pervasive.

Based on this, the circuit court concluded that the ordered forfeiture was constitutionally permissible pursuant to *Dean*.

Having reviewed the circuit court’s order, we agree with the Messers’ contention that the circuit court’s conclusion that *Dean* is satisfied is unsupported by the record. First, we observe that the only penalties recognized by the circuit court are federal penalties, not state penalties. In *Dean*, we said that when a forfeiture action is initiated under state law, “the authorized penalty by which the amount of the forfeiture must be compared with is the penalty to which the Petitioner is subject under West Virginia law, not federal law.” *Id.* at 51, 736 S.E.2d at 51. Therefore, the circuit court has erred by relying on federal penalties for its analysis instead of state penalties.

Additionally, even if the circuit court had properly examined state penalties, we conclude that because the record is devoid of evidence establishing the value of the property—aside from the firearms—the circuit court could not properly evaluate the first prong in *Dean*. Upon our de novo review of the case, without evidence establishing the value of the property, we cannot evaluate whether the forfeiture complies with the state and federal constitutions.

The Court faced the same obstacle in *Dean*. The Court observed that “[i]t 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.” *Id.* at 52, 726 S.E.2d at 52 (quoting *State v. Burgraff*, 208 W. Va. 746, 748,

542 S.E.2d 909, 911 (2000)). Because no evidence of value of the real property that was the subject of the State’s petition for forfeiture was presented, we could not conduct a de novo review to determine the constitutionality of the forfeiture. *Id.* Thus, the Court ordered that the case be reversed and remanded for the circuit court to conduct an evidentiary hearing and an analysis of the constitutionality of the forfeiture. *Id.* We believe the same approach to be appropriate in the present matter.

The State alleges that the lack of evidence of value and the circuit court’s failure to evaluate the excessiveness of the forfeiture do not require that the case be reversed. The State claims that it

could potentially charge hundreds, if not thousands, of counts of “Delivery of a Controlled Substance – Schedule II Narcotic”, in violation of West Virginia Code, § 60A-4-401(a)(i), for which *each count* would carry a possible penalty of imprisonment in the state correctional facility for not less than one nor more than fifteen years, or fined not more than \$25,000.00, or both imprisonment and fine. Assuming Mr. Messer was charged with merely Two Hundred Fifty counts of individual deliveries of controlled substances (a fraction of the number of deliveries testified to by the aforementioned witnesses), the maximum fine to which Mr. Messer would be subjected is Six Million Two Hundred Fifty Thousand Dollars (\$6,250,000.00), and *easily* exceeds the value of the property forfeited to the State in the underlying action.

We decline to adopt the State’s suggestion that we simply assume the value of the property seized is exceeded by the possible penalties that could be imposed upon the Messers. The Act unambiguously imposes upon the State the burden of proving that the property is subject to forfeiture. W. Va. Code § 60A-7-705. The State must present facts—evidence of the value of the property—to overcome that burden. Without those facts, the circuit court cannot properly weigh the first prong in *Dean*.

Therefore, as we did in *Dean*, we conclude that this case must be reversed and remanded for the circuit court to conduct an evidentiary hearing to take evidence of the value of the seized property and to analyze the constitutionality of the forfeiture pursuant to our holdings in *Dean*.

Finally, we turn to the Messer’s contention that the record does not support a finding that there is a connection between the seized property and illegal drug activity. With regard to the connection required to prove that property may be subject to forfeiture, we have held 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.<sup>7</sup> 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. \$43,000.00 in Cashier's Checks*, 214 W. Va. 650, 591 S.E.2d 208 (2003) (emphasis added) (footnote added). Whether there is a substantial connection between the property seized and an illegal drug transaction depends on “a common sense evaluation of the facts.” *Id.* at 655, 591 S.E.2d at 213; *see also Lee v. Commonwealth*, 482 S.E.2d 802, 804 (Va. 1997) (indicating that a substantial connection exists between property constituting “the instrumentalities employed in the furtherance of the drug trade rather than property only incidentally or fortuitously associated with such criminal activity”); *In re Forfeiture of \$5,264*, 439 N.W.2d 246, 255 (Mich. 1989) (“The ‘substantial connection’ test, in our view, strikes the proper balance between the rights of the individual property owners and the state’s need to use the weapon of forfeiture in its war on wholesale drug dealing.”).

At the outset of our analysis of this issue, we observe that the Messers continue to challenge the forfeiture of the firearms and the currency, despite Mr. Messer’s waiver of his ownership interest in that property in his March 27, 2014, federal plea agreement. Because he has waived his ownership right to this property, it is unnecessary for the State to establish a connection between this property and drug activity to support the forfeiture.<sup>8</sup>

With regard to the remainder of the property, our review of the circuit court’s August 7, 2014, order shows that the order does not make any determination as to whether a substantial connection exists between the cache of seized personal property and the illegal drug activity. In fact, the only property for which the circuit court states a substantial connection to the drug trade exists is the real property, excluding the Messers’ house. We held in syllabus point 1 of *Commonwealth Tire Co. v. Tri-State Tire Co.*, 156 W. Va. 351, 193 S.E.2d 544 (1972), that

Rule 52(a) [of the West Virginia Rules of Civil Procedure] mandatorily requires the trial court, in all actions tried upon the facts

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<sup>7</sup> Neither a criminal charge nor a conviction for an illegal drug transaction is a necessary predicate to the seizure and forfeiture of property under the Act. *See* W. Va. Code § 60A-7-703 (2001) (describing the conditions under which different types of property may be subject to forfeiture).

<sup>8</sup> The value of the firearms and the currency remains a relevant consideration in determining whether the forfeiture of the other property is constitutional.

without a jury, *to find the facts specially and state separately its conclusions of law thereon* before the entry of judgment. The failure to do so constitutes neglect of duty on the part of the trial court, and if it appears on appeal that the rule has not been complied with, the case may be remanded for compliance.

(Emphasis added). Rather than attempt a piecemeal analysis of the property described in the petition for forfeiture, we determine that the unique facts of this case necessitate that the circuit court fully evaluate the evidence before it and that the court make the detailed determinations required by *Commonwealth Tire*.<sup>9</sup>

For the foregoing reasons, we reverse and remand this case for further proceedings consistent with this decision.

Reversed and remanded.

**ISSUED:** November 6, 2015

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Menis E. Ketchum

**CONCURRING AND WRITING SEPARATELY:**

Justice Allen H. Loughry II

I concur in the majority’s decision to remand this matter to the circuit court for the purpose of conducting an evidentiary hearing on the value of the seized property and analyzing the constitutionality of the amount of the forfeiture in relation to the authorized penalty. I write separately for two reasons. First, I want to emphasize the importance of civil forfeiture as a weapon in the State’s arsenal to combat illegal drug activity in West

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<sup>9</sup> We note that the legitimate sources defense is pertinent in determining whether seized property should be subject to forfeiture. *See* Joseph Cramer, *Civilizing Criminal Sanctions—A Practical Analysis of Civil Asset Forfeiture Under the West Virginia Contraband Forfeiture Act*, 112 W. Va. L. Rev. 991, 1002 (2010) (“In a ‘legitimate sources defense,’ a claimant attempts to show that the seized funds or property had an independent, innocent source and are not traceable to criminal activity.”).

Virginia. As provided in the West Virginia Contraband Forfeiture Act (“WVCFA”),<sup>1</sup> the state may seize and dispose of items used, or intended to be used, in connection with illegal activities involving controlled substances. Second, while I agree that only state penalties associated with violations of the West Virginia Uniform Controlled Substances Act (the “Act”)<sup>2</sup> may be considered in the circuit court’s proportionality analysis as the WVCFA is currently written,<sup>3</sup> I believe that related federal convictions necessarily have considerable utility in state civil forfeitures.

The purpose of civil forfeiture proceedings is to provide an economic deterrent, in addition to criminal prosecutions, in combating illegal drug activity. As one court has aptly explained,

Actions for civil forfeiture, in the context of illegal drugs, are designed to be a relatively efficient means to remove, from its owner, property used to further illegal trafficking in drugs . . . . Serving more than a punitive purpose, civil forfeiture proceedings advance diverse legislative interests—while punishing and deterring those who have engaged in illegal drug activity, forfeiture simultaneously advances other non-punitive, remedial legislative goals. First, forfeiture creates an economic disincentive to engage in future illegal acts. It also serves another significant, albeit secondary, purpose. Forfeiture advances our Legislature’s intent to minimize taxation by permitting law enforcement agencies, via the sale of property seized, to defray some of the expense incurred in the battle against drug dealing.

*Katner v. State*, 655 N.E.2d 345, 347-48 (Ind. 1995) (internal citations omitted); *see also Serchion v. State*, 496 S.E.2d 333, 336 (Ga. Ct. App. 1998) (finding that forfeiture proceeding “serves various nonpunitive goals, among them, rendering illegal behavior nonprofitable and ensuring that persons do not profit from their illegal acts. Other nonpunitive goals include the removal from circulation of forbidden merchandise and

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<sup>1</sup>W.Va. Code §§ 60A-7-701 to -707 (2014).

<sup>2</sup>W.Va. Code §§ 60A-1-101 to -11-6 (2014 & Supp. 2015).

<sup>3</sup>“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 Petitioner is subject to under West Virginia law, not federal law.” *Dean*, 230 W.Va. at 51, 736 S.E.2d at 51. Although this statement was not elevated to a syllabus point, and while we articulate new points of law through syllabus points, as required by our state constitution, the WVCFA clearly contemplates that state penalties under the Act are to be considered.

firearms unlawfully used or intended for illegal use, and all property declared to be contraband . . . .”) (internal citations omitted); *State v. Rosenfeld*, 540 N.W.2d 915, 921 (Minn. Ct. App. 1995) (“One such remedial goal of forfeiture under Minnesota’s drug forfeiture statute is protecting the public by preventing continued drug trafficking. This remedial goal is accomplished by the forfeiture of instrumentalities of drug crimes.”); *Stuart v. State Dept. Of Safety*, 963 S.W.2d 28, 33-34 (Tenn. 1998) (“While all forfeiture statutes no doubt have certain punitive aspects, they also serve important nonpunitive goals. First, requiring the forfeiture of property used to commit drug violations serves the remedial goal of encouraging property owners to make sure the property is not used for illegal purposes. Second, the forfeiture may also abate a nuisance. With respect to proceeds, the forfeiture serves the nonpunitive goal of ensuring that persons do not profit from their illegal acts.”).

Through its enactment of the WVCFA, our Legislature has provided law enforcement agencies in this state with a valuable tool in the “battle against drug dealing.” *Katner*, 655 N.E.2d at 348. As we previously held, “[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). In *Lawson*, we also observed that under West Virginia Code § 60A-7-703(a), “[t]he culpability of the actual owner is not directly in issue; [rather] the central question is whether the *property* derives from illegal drug transactions.” *Lawson*, 202 W.Va. at 40, 501 S.E.2d at 476 (quoting *United States v. \$22,155.00, More or Less, in United States Currency*, 821 F.Supp. 424, 425 (S.D. W.Va. 1993). Property, both real and personal, that is subject to forfeiture if involved in the commission or intent to commit a *violation* of the Act is described in West Virginia Code § 60A-7-703.<sup>4</sup>

In addressing a civil forfeiture of real estate in *Dean v. State*, 230 W.Va. 40, 736 S.E.2d 40 (2012), we set forth the burden of proof necessary for the forfeiture, as follows:

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<sup>4</sup>See W.Va. Code § 60A-7-703(a)(5) (subjecting to forfeiture “[a]ll 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 . . . .”); W.Va. Code § 60A-7-703(a)(7) (subjecting to forfeiture “[a]ll moneys . . . 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 . . . or which have been used, or which are intended to be used to facilitate any *violation* of this chapter . . . .”); W.Va. Code § 60A-7-703(a)(8) (describing “[a]ll real property . . . 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 this chapter punishable by more than one year imprisonment” as subject to forfeiture) (emphasis added).

“[u]nder 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 in Cashier’s Checks*, 214 W.Va. 650, 591 S.E.2d 208 (2003).

*Dean*, 230 W.Va. at 42, 736 S.E.2d at 42, syl. pt. 5. It is in this regard that I believe federal convictions can have utility. Other courts agree.

In *ONE (1) 1979 FORD 15V, VIN # E14HBEE7506 v. State of Mississippi ex rel. Bureau of Narcotics*, 721 So.2d 631 (Miss. 1998), the state pursued a civil forfeiture against a van that had been used in criminal drug activity. The owner of the van, Earnest Conrod, pled guilty in federal court to conspiracy to distribute 500 grams of cocaine and to the commission of a drug crime with a firearm. In conducting a proportionality analysis to determine whether the forfeiture of the van was excessive in light of the Eighth Amendment, the Mississippi Supreme Court explained that

we must determine whether, after a review of all relevant facts, the forfeiture divests the owner of property which has a value that is grossly disproportionate to the crime . . . .

After careful review of the record, we hold that the forfeiture of the van was not grossly disproportionate to the crimes committed . . . . As noted above, Conrod was engaged in a conspiracy to distribute a large amount of cocaine. When arrested, Conrod had over \$90,000 in his possession. In light of the severity of the crime and the amount of drugs and money involved, we can not say that the lower court erred in ordering forfeiture of the 1979 Ford van.

721 So.2d at 637. Research reveals that courts often pursue state forfeitures that have related federal convictions. *See Burnett v. State*, 912 S.W.2d 441, 442 (Ark. Ct. App. 1995) (observing that vehicle owner was charged and convicted in federal court for possessing methamphetamine but setting aside civil forfeiture of vehicle where state failed to prove statutory requirement that vehicle was used to transport methamphetamine “for the purpose of sale or receipt”); *In re Young*, No. 02-1353, 670 N.W.2d 430 (Table) (Iowa Ct. App. 2003) (upholding state’s civil forfeiture of cash in defendant’s bank account and coat pocket following his conviction on federal drug trafficking charges where evidence established nexus between money and drug activity); *Com. v. \$3,200.00 U.S. Currency*, 856 A.2d 288 (Pa. Commw. Ct. 2004) (finding state’s withdrawal of criminal drug charges in light of federal prosecution did not divest trial court of

jurisdiction over civil *in rem* forfeiture proceeding and noting that Pennsylvania forfeiture statute requires neither criminal prosecution nor conviction); *State v. Narvaez*, 900 S.W.2d 846 (Tex. Ct. App. 1995) (finding state's suit seeking forfeiture of 2.61 acres of land arising out of seizure of nine tons of cocaine following related federal conviction was not barred on ground of res judicata although federal jury refused to forfeit same property). Clearly, it is not unusual for state and federal authorities to cooperate in criminal drug investigations, nor is it unusual for states to yield to federal prosecutions. Where, as here, there have been federal convictions, the circuit court can look to such convictions as an outline of the state-equivalent *violations* under the Act that gave rise to the civil forfeiture proceeding.

As reflected in the statutory provisions cited above, the WVCFA does not require a conviction or criminal charge under the Act; it merely requires proof by a preponderance of the evidence that a *violation* of the Act has occurred. *See Dean*, 230 W.Va. at 42, 736 S.E.2d at 42, syl. pt. 5. Accordingly, although Mr. Messer was not criminally prosecuted in state court, without question, his federal convictions, which can find state equivalents in the Act, prove by a preponderance of the evidence that *violations* of the Act occurred. As seen below, like West Virginia, other states do not require a conviction in order to pursue civil forfeitures.

In *State v. ONE 1980 CADILLAC*, 21 P.3d 212 (Utah 2001), the Supreme Court of Utah addressed the appellant's challenge to the forfeiture of his property in state court where he was never prosecuted under the Utah Controlled Substances Act and was, instead, convicted in federal court. In disposing of this challenge, the Utah court reasoned, as follows:

The statute does not require that a property owner be charged criminally or convicted under the Utah Controlled Substances Act for Utah courts to have jurisdiction over the seized property. Rather, this statute requires only that the property subject to forfeiture be used for purposes or acts "in *violation* of this chapter," . . . and that the state establish by a preponderance of the evidence (in the civil forfeiture proceeding) that a *violation* occurred, as it did here . . . .

Thus, although the claimant was never prosecuted or convicted under Utah law, in this case the state presented ample evidence that he committed a *violation* under this chapter of the Utah Controlled Substances Act. He was in possession of illegal narcotics in Utah and, furthermore,

was convicted of federal offenses for the same conduct—conduct clearly in violation of the chapter as required by section 58-37-13.<sup>5</sup>

*ONE 1980 CADILLAC*, 21 P.3d at 217 (footnote omitted) (footnote added) (emphasis added); *see also Walker v. State*, 636 S.E.2d 705 (Ga. 2006) (observing that in rem civil forfeiture proceedings do not require conviction of property owner as element of civil forfeiture); *Smith v. Com.*, 205 S.W.3d 217 (Ky. Ct. App. 2006) (noting that criminal conviction unnecessary to sustain forfeiture action against individual); *Garcia-Mendoza v. 2003 Chevy Tahoe*, No. A13-0445, 2015 WL 853350 (Minn. Ct. App. Mar. 2, 2015) (recognizing that forfeiture statute in effect at time property was seized did not require conviction before property could be forfeited); *Com. v. \$6,425.00 Seized From Esquilin*, 880 A.2d 523, 530 (Pa. 2005) (stating that “for property to be deemed forfeitable [under the Controlled Substances Forfeiture Act], neither a criminal prosecution nor a conviction is required.”).

Once the State proves a substantial connection between the property seized and a violation of the Act, the circuit court’s analysis does not end there. Holding that “[a] forfeiture action brought pursuant to West Virginia Code § 60A-7-703(a)(8) (2010) is punitive in nature and, therefore, subject to the Excessive Fines Clause of article III, section 5 of the West Virginia Constitution and the Eighth Amendment to the United States Constitution[,]”<sup>6</sup> we set forth the following factors to be considered by the circuit court in determining whether the amount of the forfeiture is grossly disproportionate to the gravity of an offense: “(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.” *Dean*, 230 W.Va. at 42, 736 S.E.2d at 42, syl. pt. 7, in part.

In proceeding through these four factors, as prescribed in *Dean*, the circuit court’s thirty-three-page-order describes the extensive evidence supporting the forfeiture.<sup>7</sup> As the circuit court summarized:

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<sup>5</sup>In 2013, the Utah Legislature repealed Utah Code Annotated § 58-37-13 and, in the same legislation, enacted Utah Code Annotated § 24-4-102(1) (2013), addressing the issue of state and federal offenses in the context of state civil forfeitures. *See Utah Code Ann. § 24-4-102(1)* (providing, in part, that “all property that has been used to facilitate the commission of a *federal or state offense* and any proceeds of criminal activity may be forfeited under this chapter [.]”) (emphasis added); *see also Utah Code Ann. §§ 24-1-101 to -4-118* (2013) (Forfeiture and Disposition of Property Act).

<sup>6</sup>*Dean*, 230 W.Va. at 42, 736 S.E.2d at 42, syl. pt. 6.

<sup>7</sup>I do not believe the Court’s statement in this Memorandum Decision that the circuit court’s order “does not make any determinations as to whether a substantial  
(continued . . .)

the “nature and extent of the criminal activity” of the Messers was pervasive. Mr. Messer sold and traded pills on a regular and extensive basis. Yet, he was not satisfied with merely being a direct dealer—Mr. Messer also gave pills to [others] so that they could deal drugs on his behalf. If substance abuse is a cancer to a community, then Mr. Messer did all within his power to assure that the malignant disease was spread far and wide.

The young men who testified . . . how their addictions grew stronger and deeper through their associations with Mr. Messer. In the same testimony that established the extent of the criminal activity – a breadth that spans years and includes thousands and thousands of dollars – it was also established the harm caused by the crimes – a harm that touched countless young, impressionable lives. . . . By the testimony given at the trial, it appears that the harm to the four individual men who testified is but a sample of the lives that Mr. Messer’s selfish and greedy acts have affected, as the young men in question spoke of the many others they witnessed Mr. Messer give drugs to.

The circuit court further stated that “not only is there a fair correlation between the forfeiture . . . that the authorized penalty of the convicted [federal] crimes, but there is also a strong relationship between the crime charged and other crimes, including the thousands of times that Mr. Messer sold and traded in controlled substances.”

Although Mr. Messer’s federal convictions had utility in the instant civil forfeiture proceeding as indisputable evidence of *violations* of the Act, as indicated above, the circuit court’s proportionality analysis should have been restricted to the state penalties under the Act, and not the federal penalties associated with his federal convictions. *See Dean*, 230 W.Va. at 51, 736 S.E.2d at 51 (“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 Petitioner is subject to under West Virginia

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connection exists between the cache of seized personal property and the illegal drug activity” is entirely accurate. From my review of the circuit court’s order, I believe that the court has made that connection with at least some the seized personal property, including the “Dodge dually truck”; the Chevrolet Aveo car; the aluminum trailer with “Messer Stables” written on the side; and the Massey Ferguson 245 tractor. The order also contains more generalized findings concerning other items of personal property, such as chains saws, weed-eaters, generators, and miscellaneous farm equipment. Certainly, on remand, the circuit court must enter an order that makes sufficient findings for *all* of the personal property seized before ordering the forfeiture of that property.

law, not federal law.”). While I personally believe that a circuit court should be able to consider the penalties associated with federal convictions related to the criminal activity that gave rise to the forfeiture proceeding, as the WVCFA is currently written, only state penalties may be considered in the court’s proportionality analysis. I would encourage our Legislature to consider a possible amendment to the WVCFA that would allow courts to consider the penalties associated with related federal convictions in state civil forfeiture proceedings.<sup>8</sup>

As indicated above, civil forfeiture serves the significant societal goal of ensuring that persons do not profit from their illegal acts. “In a state where drug abuse is so prevalent and where its devastating effects are routinely seen in cases brought before this Court,”<sup>9</sup> all legislatively supplied weapons must employed in the fight against criminal drug activity. While civil forfeiture is indisputably one such weapon, I recognize that the seizure of a person’s property is a punitive act that should not be undertaken lightly and one that should be pursued with great care. Accordingly, it is incumbent upon the State when pursuing a civil forfeiture to present all evidence necessary to prove not only that the property seized was used, or was intended to be used, in violation of the Act, but also to marshal valuation evidence concerning the seized property for purposes of the trial court’s proportionality analysis. The State will have that opportunity on remand.

Accordingly, I respectfully concur.

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<sup>8</sup>*See supra* note 5.

<sup>9</sup>*Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mingo Cty.*, 235 W.Va. 283, \_\_\_, 773 S.E.2d 627, 641 (2015) (Loughry, J., dissenting).