

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

**Certain Parcels of Real Estate and Appurtenance
thereunto belonging and situated on White Oak Run
Welton Road in Hancock County, West Virginia and
particularly described in Deed Book 259 at Page 76,
Alice L. Phillips, co-owner of said property,
Respondent Below, Petitioner**

FILED

April 29, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) **No. 101325** (Hancock County 04-P-53)

**James W. Davis, Jr., Prosecuting Attorney
for Hancock County, West Virginia on
behalf of the State of West Virginia and
Hancock Brooke Weirton Drug Task Force,
Petitioner Below, Respondent**

MEMORANDUM DECISION

Petitioner Alice L. Phillips appeals the circuit court's summary judgment ordering the forfeiture of real property owned by petitioner and her husband, Glenn Phillips, pursuant to the West Virginia Contraband Forfeiture Act. Respondent James W. Davis, Jr., Prosecuting Attorney for Hancock County, West Virginia, has filed a response on behalf of the State of West Virginia.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In August 2004, the Hancock Brooke Weirton Drug Task Force seized the real property involved in this case on the basis that it was being used by its owners, petitioner and her husband, to grow marijuana. In November 2004, Respondent filed this action

seeking forfeiture of the subject property pursuant to the West Virginia Contraband Forfeiture Act, West Virginia § 60A-7-701 et. seq.

In 2005, a jury convicted petitioner of four counts of Manufacturing a Schedule I Controlled Substance (Marijuana). This Court refused her direct criminal appeal. Petitioner's husband was convicted of one count of Manufacturing a Schedule I Controlled Substance (Marijuana) based upon a *Kennedy* plea.¹

Respondent filed a motion for summary judgment alleging that there were no material issues of fact and all the necessary elements for the civil forfeiture were already proven by the State in the underlying criminal convictions of petitioner and her husband. The circuit court granted respondent's motion for summary judgment and ordered the forfeiture of the real property in question. The circuit court held that "the previous finding of guilt by a petit jury . . . against Alice Phillips for the felony offenses of [M]anufacturing a Schedule I Controlled Substance on the subject property to this forfeiture disposes of all triable issues . . . relating to this forfeiture matter." The circuit court made a similar finding based upon the conviction of petitioner's husband based upon his *Kennedy* plea. The circuit court concluded that "no reasonable jury could find in the [petitioner's] favor on the issue of whether [petitioner and her husband] had manufactured a Schedule I Controlled Substance on the property subject to this *in rem* forfeiture, and as such could not find that the property was not subject to forfeiture under the West Virginia Contraband Forfeiture Act."

Petitioner contends that the circuit court erred in granting summary judgment in favor of respondent. Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper when "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." In Syllabus Point 1 of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E. 2d 755 (1994), this Court stated that "[a] circuit court's entry of summary judgment is reviewed *de novo*." This Court has recognized that "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E. 2d 329 (1995).

Petitioner argues that the circuit court improperly granted summary judgment based upon its conclusion that her jury convictions in the underlying criminal case established all the elements required for forfeiture. She contends that the circuit court improperly used the

¹ *Kennedy v. Frazier*, 178 W.Va. 10, 357 S.E. 2d 43 (1987)

doctrine of res judicata in holding that her criminal conviction could form the basis to award summary judgment in a proceeding against her real property. Petitioner also asserts that there are outstanding issues of material fact which should have precluded the entry of summary judgment including that “only certain areas of the property were found to contain marijuana” and that “virtually all of the growing plants were found well beyond the primary living area of the petitioner and her husband.”

Respondent bears the burden of proving that the seized property is subject to forfeiture by a preponderance of the evidence. *See* W.Va. Code § 60A-7-705(e). Real property is subject to forfeiture if it was 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” W.Va. Code §60A-7-703(a)(8). Respondent must also demonstrate by a preponderance of the evidence that there was a substantial connection between the property seized and the illegal drug transaction. *State of West Virginia v. Forty-Three Thousand Dollars and No Cents in Cashier’s Checks*, 214 W.Va. 650, 591 S.E. 2d 208 (2003).

Respondent argues that the preponderance standard is clearly satisfied by the fact that the jury in the criminal case found petitioner guilty beyond a reasonable doubt of four counts of Manufacture of a Schedule I Controlled Substance (Marijuana) on the real property in question. Respondent further argues that the validity of the summary judgment is further bolstered by petitioner’s own arguments wherein she acknowledged that marijuana was found growing on her real property. After reviewing the arguments of the parties and the record, the Court concludes that the circuit court did not err in determining that the burden of proof for forfeiture had been satisfied based upon the facts and circumstances of the present case.

Finally, the Court considers petitioner’s argument that the circuit court’s order of summary judgment must be reversed because it fails to follow the requirements of West Virginia Code §60A-7-705(f), which provides that:

Any order forfeiting property to the State and entered pursuant to this section perfects the State’s right, title and interest in the forfeited property and relates back to the date of seizure: Provided, That in any proceeding under this article the circuit court shall in its final order make specific findings with respect to whether or not probable cause to seize such property existed at the time of such seizure.

Respondent acknowledges that the circuit court’s summary judgment order does not contain a finding that there was probable cause to seize the real property at the time that it was seized. Respondent asserts that if this omission constitutes error, then such error is

harmless because probable cause was duly established as shown by the criminal convictions of petitioner and her husband. This Court concludes under the facts of the case-at-bar that the circuit court's failure to include this finding does not warrant reversal of the summary judgment.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 29, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum