IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1996 Term

No. 23063

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

ROBERT LEE GREENE,
Defendant Below, Appellant

Appeal from the Circuit Court of Cabell County
Honorable Dan O'Hanlon, Judge
Criminal Action No. 94F-116

AFFIRMED

Submitted: January 23, 1996
Filed: July 11, 1996

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Attorney for the Appellant

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

SYLLABUS

1. The scope of the Double Jeopardy Clause in the Fifth Amendment of the Federal Constitution is at least coextensive with that of the Double Jeopardy Clause in the West Virginia Constitution.

2. To determine whether a particular statutorily defined penalty is civil or criminal for the purpose of double jeopardy under Article III, § 5 of the West Virginia Constitution, we must ask: (1) whether the Legislature, in establishing the penalizing mechanism, indicated, either expressly or impliedly, that the statutory penalty in question was intended to be civil or criminal; and (2) where we find that the Legislature has indicated an intention to establish a civil penalty, whether the statutory scheme was so punitive either in

purpose or effect as to negate that intention.

3. West Virginia Code §§ 60A-7-703(a)(2) and (4) are not punitive for the purposes of the guarantees against double jeopardy as expressed in the United States and West Virginia Constitutions.

Albright, Justice:

Robert L. Greene, defendant below and appellant, appeals an order of the Circuit Court of Cabell County, which denied his motion to vacate his sentence and dismiss his indictment. The circuit court ruled that the civil forfeiture of appellant's property, followed by a criminal indictment and conviction that arose from the same conduct, did not constitute double jeopardy. We agree. Based upon a recent decision of the United States Supreme Court, we find that the civil forfeiture of appellant's property did not constitute punishment, and, therefore, appellant was not subjected to double

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[1]We do not address in this opinion any effort to apply the forfeiture statute of this State, W.Va. Code § 60A-7-701, to property belonging to or in which an innocent party has an interest.

jeopardy. Consequently, we affirm.

FACTS

On September 17, 1993, Robert L. Greene, appellant and defendant below, was arrested for driving under the influence of alcohol and possession with intent to deliver a controlled substance. Incident to the arrest, officers seized the 1987 Chevrolet truck appellant was driving, along with a weight scale and a cellular telephone. On October 7, 1993, the State filed a petition requesting forfeiture of the seized property under the West Virginia Contraband Forfeiture Act, W.Va. Code § 60A-7-701, *et seq.* Appellant filed an answer to the forfeiture petition, objecting only to the forfeiture of

the cellular telephone. By order entered December 1, 1993, the State's forfeiture petition was granted with regard to the truck and the weight scale. Thereafter, the grand jury returned an indictment, which was filed on May 10, 1994, charging appellant with one count of possession with intent to deliver a controlled substance.

Appellant initially entered a plea of not guilty on June 10, 1994. However, on December 16, 1994, the court accepted appellant's plea of guilty to the lesser included misdemeanor offense of possession of a controlled substance. On the same day, appellant was sentenced to six months in the Cabell County Jail and fined one

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[2]The answer represented that the cellular telephone was leased from a company that knew nothing of appellant's alleged unlawful activities and that the telephone was not in any way used to facilitate

thousand dollars.

Appellant subsequently filed a motion to vacate his sentence and dismiss his indictment on double jeopardy grounds. Appellant argued that the civil forfeiture of his property and the criminal indictment arose from the same conduct; consequently, he was punished for the same conduct in separate proceedings. The court denied the motion without prejudice and explained that the relief sought properly should be brought under the post-conviction habeas corpus statutes so that appellant would be entitled to a single omnibus hearing. Appellant then filed a motion for correction of sentence under Rule 35(a) of the West Virginia Rules of Criminal

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the alleged crimes.

Procedure. Appellant argued that his sentence was an illegal violation of the double jeopardy principles contained in the Fifth Amendment to the United States Constitution and Article III, § 5 of the West Virginia Constitution. Appellant also filed a motion for stay of execution of his sentence. By order filed June 21, 1995, the Circuit Court of Cabell County denied appellant's motion to correct his sentence and granted his motion for stay of execution. It is from this order that appellant now appeals.

DISCUSSION

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[3]The motion explained that although the court had pronounced that this matter should be raised in a post-conviction habeas corpus petition, W.Va. Code 53-4A-1(e) provided that a post-conviction habeas corpus petition could not be filed until after the expiration of the period of appeal.

The sole issue we are asked to determine on appeal is whether the civil forfeiture of appellant's property, followed by his criminal conviction, violated double jeopardy principles provided for in the Fifth Amendment to the United States Constitution and Article III, § 5 of the West Virginia Constitution. Appellant argues that he was punished for the same conduct in separate proceedings, first through the civil forfeiture of his property, and then when he was sentenced after his guilty plea in the criminal action. We disagree.

In *United States v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980), the United States Supreme Court adopted the following two-part test for determining whether a civil forfeiture

constitutes punishment, which would violate double jeopardy principles:

> Our inquiry [into whether a particular statutorily defined penalty is civil or criminal] has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. See One Lot Emerald Cut Stones v United States, [409 U.S. 232, 236-237, 93 S.Ct. 489, 492-493, 34 L.Ed.2d. 438, 442-443 (1972)]. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. See Flemming v Nestor. 363 U S 603, 617-621, 4 L Ed 2d 1435, 80 S Ct 1367 [1376-1378].

Id. at 248-249, 100 S.Ct. at 2641, 65 L.Ed.2d at 749.

Appellant argues that this two-part test no longer applies. To support this argument, appellant relies on *U.S. v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *as amended by* 56 F.3d 41 (1995), wherein the United States Court of Appeals for the Ninth Circuit reasoned that the Supreme Court had abandoned this two-part test through its decisions in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), and *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), in favor of a new test, which states that a civil sanction constitutes punishment for double jeopardy purposes when the "civil sanction [] cannot fairly be said solely to serve a remedial purpose, but rather can only be

explained as also serving either retributive or deterrent purposes." *$405,089.23 U.S. Currency* at 1218.

$405,089.23 U.S. Currency was appealed to the United States Supreme Court, where it was consolidated with a Sixth Circuit case that had reached a similar conclusion. The Supreme Court granted review in order to determine whether the Court had in fact abandoned its traditional two-prong test for determining whether a civil forfeiture constituted punishment. The Court reversed both cases and held that "civil forfeitures . . . [in general] do not constitute 'punishment' for purposes of the Double Jeopardy Clause." *U.S. v.*

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[4] *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995).

Ursery, 64 U.S.L.W. 4565, ___ (U.S. June 24, 1996). In addition, the Court reaffirmed its traditional two-prong test.

This Court has previously recognized that "[t]he scope of the Double Jeopardy Clause of the Fifth Amendment of the Federal Constitution is at least coextensive with that of the Double Jeopardy Clause in the West Virginia Constitution." *State v. Sears*, __ W.Va. __, __ n.6, 468 S.E.2d 324, 328 (1996); *State v. Frazier*, 162 W.Va. 602, 625 n.16, 252 S.E.2d 39, 51 (1979).

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[5]The Court opined that the Ninth and Sixth Circuit Courts misread *Halper*, *Kurth Ranch* and *Austin*. The Court explained that "*Halper* dealt with in personam civil penalties under the Double Jeopardy Clause; *Kurth Ranch* with a tax proceeding under the Double Jeopardy Clause; and *Austin* with civil forfeitures under the Excessive Fines Clause. None of those cases dealt with the subject of this case; in rem civil forfeitures for purposes of the Double Jeopardy

While this Court retains the view that double jeopardy may be found under Article III, § 5 of the West Virginia Constitution in certain circumstances that would not be so considered under the Fifth Amendment to the United States Constitution, we do not find those circumstances present in the case before us and have not been directed by the parties to any such circumstances. Therefore, we explicitly adopt the traditional two-prong test for determining whether a civil forfeiture constitutes punishment, thereby violating the double jeopardy principles of our State Constitution. We hold that to determine whether a particular statutorily defined penalty is civil or criminal for the purpose of double jeopardy under Article III, § 5 of

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Clause." *Id.* at ___.

the West Virginia Constitution, we must ask: (1) whether the Legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly that the statutory penalty in question was intended to be civil or criminal; and (2) where we find that the Legislature has indicated an intention to establish a civil penalty, whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-363, 104 S.Ct. 1099, 1105, 79 L.Ed. 361, 368 (1984); *United States v. Ward*, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742, 749 (1980). Under the authority of *U.S. v. Ursery, supra*, we likewise apply that test when reviewing this State's forfeiture statute and this case under the Fifth Amendment to the Constitution of the United

States.

Turning to the case at hand, we must first examine the West Virginia Contraband Forfeiture Act, W.Va. Code § 60A-7-701, et seq., to determine whether the Legislature intended to establish a civil or criminal penalty. We need not engage in a lengthy analysis on this point, however, because the Legislature specifically states in W.Va. Code § 60A-7-705(a)(1) that "[a]ny proceeding wherein the state seeks forfeiture of property subject to forfeiture under this article shall be a civil proceeding . . . ."

Having determined that the Legislature intended a civil penalty, we must next determine whether the statutory scheme was

so punitive, either in purpose or effect, as to negate that intention. ""Only the clearest proof" that the purpose and effect of the forfeiture are punitive will suffice to override [the Legislature's] manifest preference for a civil sanction." *United States v. One Assortment of 89 Firearms*, 465 U.S. at 365, 104 S.Ct. at 1106, 79 L.Ed.2d at 370 (citations omitted).

The United States Supreme Court has repeatedly analyzed statutes substantially identical to our forfeiture statute and has found that they are not punitive. *U.S. v. Ursery*, 64 U.S.L.W. 4565 (U.S. June 24, 1996) (finding 21 U.S.C. §§ 881(a)(6) and (a)(7) not punitive); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) (finding 18

U.S.C. 924(d) not punitive); and *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d. 438 (1972) (finding 18 U.S.C. § 545 not punitive).

Although the State's forfeiture petition did not identify the specific sections of the West Virginia Contraband Forfeiture Act under which it sought forfeiture, it appears to us that the only applicable sections are W.Va. Code 60A-7-703(a)(2), which permits forfeiture of "[a]ll raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing compounding, processing, delivering, importing or exporting any controlled substance in violation of this chapter", and W.Va. Code 60A-7-703(a)(4), which permits forfeiture of "[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) or (2), . . ."

West Virginia Code §§ 60A-7-703(a)(2) and (4) are substantially identical to 21 U.S.C. § 881(a)(6) and (7). Although the property subject to forfeiture is different in each of these sections, all of these sections provide for the forfeiture of items "used, or intended for use" in violation of laws related to the illegal use of

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[6]West Virginia Code § 60A-7-703(a)(1) states:

> (a) The following are subject to forfeiture:
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> (1) All controlled substances which have been manufactured, distributed, dispensed or possessed in violation of this chapter[.]

controlled substances. The United States Supreme Court has observed that "[r]equiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes." *United States v. Ursery*, 64 U.S.L.W. 4565 (U.S. June 24,1996). We believe the

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[7]In determining whether the purpose and effect of a forfeiture statute is punitive, the Supreme Court of the United States has also utilized the following list of factors, which it cautions are neither exhaustive nor dispositive: "'Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ." *United States v. One Assortment of 89 Firearms*, 465 U.S. at 365, n.7, 104 S.Ct. at 1106, 79 L.Ed. at 370 (quoting

relevant sections of the West Virginia Contraband Forfeiture Act have a similar instructive, rather than punitive, effect. Thus, we hold that W.Va. Code §§ 60A-7-703(a)(2) and (4) are not punitive for the purposes of the guarantees against double jeopardy as expressed in the United States and West Virginia Constitutions.

For the reasons herein stated, we affirm the June 21, 1995 order of the Circuit Court of Cabell County.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-68, 9 L.Ed.2d 644, 661 (1963)). Viewed against such factors, we find nothing in the record or the briefs of the parties which mandates or suggests the suitability of construing this State's forfeiture statute as punishment that would invoke the double jeopardy principles approved by this Court or the United States Supreme Court.

Affirmed.