

**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,
Glenn 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. 101326 (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 Glenn Phillips appeals the circuit court's summary judgment ordering the forfeiture of real property owned by petitioner and his wife, Alice 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 his wife, to grow marijuana. In November 2004, Respondent filed this action seeking

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

In 2005, a jury convicted petitioner's wife, Alice Phillips, of four counts of Manufacturing a Schedule I Controlled Substance (Marijuana). This Court refused her direct criminal appeal. Petitioner 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 in the civil forfeiture action alleging that there were no material issues of fact at issue and all the necessary elements were already proven by the State in the underlying criminal convictions of petitioner and his wife. The circuit court granted respondent's motion for summary judgment and ordered forfeiture of the real property in question. The circuit court recognized that "although Glen(n) Phillips entered a guilty plea pursuant to *North Carolina v. Alford*² and [*Kennedy v. Frazier*], the nature of his guilty plea sufficiently disposes of all triable issues in this matter as Glen[n] Phillips acknowledged that there was sufficient evidence to convict and sentence him for the felony offense of manufacturing a Schedule I Controlled Substance on the property which is subject to this forfeiture." The circuit court made a similar finding based on petitioner's wife's convictions on four counts of Manufacturing a Schedule I Controlled Substance (Marijuana) following a jury trial. The circuit court concluded that no reasonable jury could find in favor of petitioner on the issue of whether he and his wife had manufactured a Schedule I Controlled Substance on the real property in question 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).

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

² *North Carolina v. Alford*, 400 U.S. 25 (1970)

Petitioner argues that the circuit court improperly granted summary judgment based upon its conclusion that his conviction based upon his *Kennedy* plea in the underlying criminal case established all the elements required for forfeiture. Petitioner argues that a entry of a *Kennedy* plea is not an admission of guilt and cannot be used to establish guilt in this proceeding. Even if the conviction stemming from his *Kennedy* plea could be used as a basis for the summary judgment in this case, Petitioner also contends that there are outstanding issues of material fact which should have precluded the entry of summary judgment as to whether the real property was used or had been intended to be used to commit or facilitate the manufacture of marijuana.

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 circuit court properly considered petitioner’s conviction stemming from his *Kennedy* plea as support for entry of summary judgment in the civil forfeiture case because “it is apparent from the [nunc pro tunc sentencing] order that the petitioner did not plead guilty while asserting his innocence...[t]he [nunc pro tunc sentencing] order reflects that the petitioner answered in the affirmative that he entered his guilty plea because he was in fact guilty of the offense...[f]urther, after the summary of the State’s evidence, petitioner and his counsel were asked if they disputed the State’s evidence, and they answered in the negative...[p]etitioner acknowledged that the State’s evidence, if believed, was sufficient for a criminal conviction.” Given these circumstances, respondent contends that the circuit court did not err in relying upon the conviction stemming from the plea to support entry of summary judgment. Further, respondent notes that the circuit court also had before it evidence that petitioner’s co-defendant, his wife, had been convicted by a jury of cultivation of marijuana on the same 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, where such probable cause was duly established as shown by the criminal convictions of petitioner and his wife. This Court concludes under the facts of the case at bar that the 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