

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

**State of West Virginia,
Plaintiff Below, Respondent**

vs) No. 11-0140 (Randolph County 10-M-AP-10)

**Sheena Drain,
Defendant Below, Petitioner**

FILED

**November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Sheena Drain appeals the circuit court order affirming her magistrate court guilty verdict on one count of animal cruelty. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response. Petitioner has filed a reply.

This Court has considered the parties' briefs and the record on appeal. 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.

Petitioner was arrested after an anonymous call to the humane officer revealed a dog at her home with an embedded collar that had to be surgically removed. She was arrested on charges of animal cruelty and found guilty in magistrate court. One of the witnesses in magistrate court was the veterinarian who had performed the surgery on the dog. This veterinarian employs the prosecuting attorney's wife. Petitioner moved to recuse the prosecutor's office due to this relationship between the prosecutor's wife and a witness in the matter, but no ruling was made regarding this motion. Petitioner appealed the guilty verdict in circuit court, citing two assignments of error: insufficiency of the evidence and that the dog in question was illegally seized based upon the petitioner's failure to pay taxes on the dog even though the dog was not old enough for taxes to be due on it. The circuit court affirmed the magistrate court's guilty verdict.

On appeal, petitioner argues two errors: that the magistrate court erred in failing to grant her motion to recuse the prosecutor's office, and that the magistrate court erred in

failing to instruct the jury of the terms “intentionally, knowingly or recklessly” contained in West Virginia Code § 61-8-19. However, the record is clear that petitioner’s appeal to the circuit court did not contain either of these two arguments. “‘This Court will not consider questions, nonjurisdictional in their nature, not acted upon by the circuit court as an intermediate appellate court.’ Syllabus point 1, *Pettry v. Chesapeake & Ohio Railway Company*, 148 W.Va. 443, 135 S.E.2d 729 (1964).” Syl. Pt. 2, *Haines v. Kimble*, 221 W.Va. 266, 654 S.E.2d 588 (2007). Although the petitioner argues that the errors rise to the level of plain error and therefore were not waived by her failure to argue these errors before the circuit court, this Court disagrees.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 15, 2011

CONCURRED IN BY:

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