STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Rashiad Robinson,
Respondent Below, Petitioner

vs) No. 11-0415 (Berkeley County 09-P-171)

Pamela Games-Neely, Prosecuting Attorney of Berkeley County, West Virginia, on behalf of the Eastern Panhandle Drug & Violent Crimes Task Force, Petitioner Below, Respondent

FILED
June 21, 2012
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

In this case, petitioner Rashiad Robinson appeals from the October 22, 2010, order of the Circuit Court of Berkeley County. This order subjects $3,960 in U.S. Currency and an Audi automobile,[1] which are owned by the petitioner, to forfeiture pursuant to the West Virginia Contraband Forfeiture Act (hereinafter "the Act"), codified at W. Va. Code §§ 60A-7-701 to -707 (1988). The petitioner contends that the circuit court erred in finding that this property is subject to forfeiture, and he seeks reversal of the order. As set forth below, we find that the circuit court erred in subjecting the Audi automobile to forfeiture but did not err by subjecting the $3,960 to forfeiture. We therefore reverse the circuit court's forfeiture order as to the Audi automobile and affirm as to the $3,960.

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. This Court has examined the parties' briefs, the record on appeal, and parties' oral arguments. Upon consideration of the standard of review, the briefs, the record presented, and the oral arguments, 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.

[1] 2005 Audi A8 VIN #WAUML44E95N009070

On November 17, 2009, the Eastern Panhandle Drug & Violent Crimes Task Force (hereinafter "Task Force") executed a warrant to search the residence at which the petitioner was staying. The warrant was issued in connection with a controlled purchase of one ounce of crack cocaine by a confidential informant. During a search of the residence, the police recovered marked bills used in the controlled purchase. The police also seized keys from the residence and discovered, through discussion with the confidential informant, that the keys opened automated teller machines ("ATMs") owned by petitioner. The confidential informant told the police that the petitioner used the ATMs to store drugs and drug money. The Task Force then obtained warrants to search three ATMs, and seized a total of $3,960 from the ATMs. The confidential informant also allegedly told the Task Force that the petitioner's Audi automobile was used to transport drugs between New York and West Virginia.

On December 4, 2009, Pamela Jean Games-Neely, Prosecuting Attorney of Berkeley County and respondent herein, filed for civil forfeiture of the $3,960 seized from the ATMs and the Audi automobile under W. Va. Code §§ 60A-7-701 to -707. In response to receiving notice of the Petition for Forfeiture, the petitioner filed a handwritten answer regarding the money and vehicle on January 12, 2010. Robinson subsequently obtained counsel, S. Andrew Arnold, who filed a formal answer on behalf of Robinson on February 19, 2010.

At the bench trial on October 18, 2010, on the Petition for Forfeiture, testimony was given by five police officers involved in the case. The confidential informant did not testify. The petitioner did not testify and did not present any witnesses or evidence. The circuit court found that the $3,960 and the Audi automobile were involved in violations of W. Va. Code §§ 60A-7-701 to -707, and it ordered that the money and vehicle be forfeited. The circuit court entered its Findings of Facts and Conclusions of law on October 22, 2010. The petitioner now appeals the circuit court's October, 22, 2010, order.

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).

The petitioner claims that there was no direct evidence offered during the October 18, 2010, hearing to support the circuit court's order subjecting his $3,960 and his Audi automobile to civil forfeiture pursuant to the Act. We agree with the petitioner that the vehicle was improperly subjected to forfeiture; however, we agree with the respondent that the currency was properly subjected to forfeiture.

"The [Act] provides for State seizure and disposition of items used in connection with illegal activities involving controlled substances." *State v. Forty-Three Thousand Dollars and No Cents ($43,000.00) in Cashier's Checks*, 214 W. Va. 650, 653, 591 S.E.2d 208, 211 (2003). In syllabus point 1 of *Frail v. $24,900.00 in U.S. Currency*, 192 W. Va. 473, 453 S.E.2d 307(1994), this Court held as to the forfeiture of currency, "West Virginia Code, 60A-7-703(a)([7]) (1988),[2] which is part of the West Virginia Contraband Forfeiture Act, provides that moneys, negotiable instruments, and other things of value furnished or intended to be furnished in violation of the [Act] in exchange for a controlled substance, and all proceeds traceable to such exchange, are subject to forfeiture." West Virginia Code § 60A-7-703(a)(5) subjects 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."

In a forfeiture proceeding, the burden lies on the State to prove by a preponderance of the evidence that the property is subject to forfeiture. W. Va. Code § 60A-7-705(e). Furthermore, this Court has held that the State must show probable cause that the seized property is "substantially connected" to illegal drug activity. Syl. pt. 4, *$43,000.00 in Cashier's Checks*, 214 W. Va. 650, 591 S.E.2d 208. As the Court recognized in *Frail*, a "substantial connection" is in addition to and greater than the connection needed to establish probable cause necessary to seize property. *Frail*, 192 W. Va. at 478–79, 453 S.E.2d at 312–13. Upon the State's showing that there is probable cause that a substantial connection exists between the seized property and illegal activity described in the Act, the burden shifts to the property owner to show by a preponderance of the evidence that his or her property was not used for or derived from illegal drug activity. *See United States v. One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794, 804 (3d Cir. 1994); *United States v. $121,100.00 in U.S. Currency*, 999 F.2d 1503, 1505 (11th Cir. 1993).

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[2]Both *Frail* and *$43,000.00 in Cashier's Checks* refer to W. Va. Code § 60A-7-703(a)(6) when discussing forfeiture of moneys, negotiable instruments, and other things of value. The statute addresses these items in § 60A-7-703(a)(7), not (a)(6). This Opinion has been written to reflect the correct code section.

The facts of *$43,000.00 in Cashier's Checks* are similar to the case sub judice. In that case, the appellee, Kenneth Jenkins, was arrested for illegally dealing in prescription drugs. *$43,000.00 in Cashier's Checks*, 214 W. Va. at 652, 591 S.E.2d at 210. During controlled "sting" purchases between himself and the Mon Valley Drug Task Force ("MVDTF"), Jenkins withdrew funds from his safe deposit box to purchase drugs from the MVDTF. *Id.* Pursuant to a search warrant executed shortly after Jenkins' arrest, the MVDTF found, among other things, a safe deposit key. *Id.* The MVDTF obtained another warrant to search the safe deposit box and found therein the $43,000 in cashier's checks at issue in the case. *Id.*

The appellees, the State and the MVDTF, moved the circuit court to grant summary judgment in their favor and subject to forfeiture the $43,000.00 in cashier's checks belonging to the appellant. *Id.* at 651–52, 591 S.E.2d at 209–10. The circuit court granted the motion, and on appeal, this Court affirmed the forfeiture. *Id.* at 652, 591 S.E.2d at 210. In so doing, the Court said "that the State met its burden of proving by a preponderance of evidence that there was a substantial connection between the property seized and an illegal drug transaction." *Id.* at 655, 591 S.E.2d at 213. We continued by noting that "Jenkins' only sources of income were social security disability benefits, food stamps, and a medical card." *Id.*

In the case now before the Court, the petitioner stored the $3,960 at issue inside three ATMs he owned. The circuit court, in finding that the currency was subject to forfeiture, observed that the "behavior of Rashiad Robinson is that of one of a drug dealer." The circuit court also found that the petitioner had shown no lawful income and that evidence was presented that Rashiad Robinson was involved in the sale of crack-cocaine.

We do not dispute the finding of the circuit court that probable cause existed to seize the $3,960 because the evidence available to the Task Force showed a fair probability, in light of the Task Force's work with the confidential informant, that the currency is the proceeds of illegal drug transactions. In addition, we agree with the circuit court's disposition as to the $3,960 in that we see a substantial connection between currency and the petitioner's illegal activity. Like in *$43,000.00 in Cashier's Checks*, the petitioner sold drugs for money. The keys to the ATMs from which the $3,960 was seized were located in close proximity to proceeds of the controlled buy that ultimately lead to the petitioner's arrest.

Upon the Task Force's showing of probable cause and a substantial connection between the $3,960 and illegal drug activity, the burden shifted to the petitioner to show by a preponderance of the evidence that the currency was not involved in illegal drug activity.

The circuit court did not err in finding that the petitioner failed to meet this burden. As per the circuit court's order, "[A]t no time since the seizure of the money . . . [did] Rashiad Robinson ever [bring] any paperwork, receipts or other documents to show where the money was derived from . . . ." Therefore, this Court concludes that the circuit court correctly subjected the $3,960 to forfeiture.

The respondent alleged in its Petition for Forfeiture that the Audi automobile was used "to make regular trips to New York City where he would get additional amounts of crack-cocaine and transport the same back to Berkeley County" in violation of the Act. The circuit court found that "the additional income needed to make the purchase of the 2005 Audi came from the proceeds derived from the sale of controlled substances and further finds that the Respondent Property was lawfully seized."

At the October 18, 2010, hearing on the Petition for Forfeiture, only one witness discussed the vehicle in any detail—Corporal Andrew Evans. He stated that the confidential informant told him that the vehicle had been used to transport drugs. The vehicle was seized pursuant to a warrant, but Cpl. Evans testified that no drugs or substantial sums of money were found in the vehicle. Furthermore, although additional ATM keys were found inside the vehicle, Cpl. Evans said that these ATM keys belonged to machines that were no longer at the locations described on the keys, and thus the subsequent search warrants were fruitless. Cpl. Evans also stated that he researched the title of the Audi automobile, found that the total purchase price of the vehicle was $30,000, and found that a $10,000 down payment had been made at the time of purchase.

This Court concludes that the circuit court erred in finding that the State satisfied its burden as to the Audi automobile. We do not dispute that the police had adequate probable cause to seize and search the vehicle; however, we find that based on the facts presented at the October 18, 2010, hearing, no substantial connection existed between the vehicle and alleged drug activity. The only evidence directly linking the vehicle to drug activity is the statements of a confidential informant who did not testify at the hearing. Without the confidential informant's own testimony, without drugs or substantial sums of money present in the vehicle, and without a direct link to an ATM containing drugs or drug money, the State has failed to show by a preponderance of the evidence that the Audi automobile was used to conduct illegal drug activity. Finally, because the State did not meet its burden, the petitioner was not required to show a legitimate source of income to support the purchase of the vehicle.

For the foregoing reasons, we affirm, in part, reverse, in part, and remand to the circuit court.

Affirmed, in part, reversed, in part, and remanded.

ISSUED: June 21, 2012

CONCURRED IN BY:

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