

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

**Sanford D. Creameans and Toni L. Creameans
Respondents Below, Petitioners**

vs) **No. 11-0596** (Cabell County 10-C-830)

**Christopher D. Chiles, Prosecuting Attorney
Cabell County, West Virginia, on behalf of
The Cabell County Sheriff's Department Drug
Unit, Petitioner Below, Respondent**

FILED
February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Sanford D. Creameans and Toni L. Creameans appeal the circuit court order granting the State's Petition for Forfeiture in part, forfeiting \$2,634.00 to the State. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix 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.

This case originated after a traffic stop wherein an individual was pulled over for displaying stolen plates. Both he and his passenger were wanted for multiple crimes, and prescription drugs were found in the vehicle. The individual told the police about multiple illegal activities, including drugs and stolen property located at the home of the petitioners. The police already considered this home a suspected site of drug activity. A warrant was executed on the home. Mr. Creameans attempted to flee and was caught running out the back door. Inside the home, many stolen items were found, along with large amounts of money, oxycodone, coins, a silver bar with the serial number filed off, and other collectibles. The master bedroom contained large numbers of pills and pill bottles, ten cell phones, directions to multiple Florida pain clinics and multiple Florida pharmacies, and a clear plastic bag

containing a leafy green substance thought to be marijuana laying in a drawer with \$2,634 in cash.

Police seized two quantities of cash from the petitioners' home after executing a search warrant, one in the amount of \$10,000, found in the safe, and one in the amount of \$2,634, found in a drawer with the marijuana. The State petitioned for forfeiture of both sums pursuant to the West Virginia Contraband Forfeiture Act, West Virginia Code § 60A-7-701 et seq., and a hearing was held. During the hearing, officers testified that they found "suspected marijuana" in a drawer with the \$2,634. Petitioners moved for summary judgment on the forfeiture petition, and the circuit court granted summary judgment in favor of the petitioners regarding the \$10,000, but found that the \$2,634 was located in close proximity to the marijuana and shall be forfeited to the State.

On appeal, petitioners argue that the circuit court erred in failing to grant petitioners' motion for summary judgment regarding the \$2,634 because the State failed to demonstrate by a preponderance of the evidence that there was a substantial connection between the money seized and an illegal drug transaction and failed to prove the "suspected marijuana" was actually marijuana. Petitioners argue that the word marijuana was only used eleven times during the hearing, and the only testimony regarding the "suspected marijuana" came from Deputy Terry McFann. No lab report showed that the "suspected marijuana" was actually marijuana, and the deputy was not qualified as an expert to render an opinion as to whether he believed the substance was actually marijuana. Petitioners further argue that an essential element of possession of a controlled substance with intent to deliver is proving that there actually was a controlled substance. Petitioners conclude that the State failed to offer evidence of a drug transaction, and thus failed to prove a substantial connection between the money seized and an illegal drug transaction.

The State responds, arguing that there was testimony that the substance in the drawer was marijuana, and petitioners acknowledged as much in their written responses to interrogatories, although they claim it belonged to another individual. The State argues that petitioners' counsel never asked for the substance to be tested nor did he challenge that it was marijuana. Moreover, the State argues that evidence that the substance was marijuana was substantial, uncontradicted and unchallenged, and was even corroborated by the petitioners themselves. Importantly, the issue of whether or not it was marijuana in the bags was never presented before the circuit court, and thus the State argues that this issue has been waived.

Pursuant to Rule 56(c) 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.’ Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E. 2d 329 (1995).” Syl. Pt. 3, *Jocum v. Waste Mgmt. of W.Va., Inc.*, 224 W.Va. 44, 680 S.E.2d 59 (2009). In Syllabus Point 4 of *State v. Forty-Three Thousand Dollars and No Cents (\$43,000.00) in Cashier’s Checks*, 214 W.Va. 650, 591 S.E.2d 208 (2003), we determined, in part, that the State must meet the following standard of proof in a forfeiture case:

Under W.Va.Code, § 60A-7-703(a)(6) (1988), the State, in forfeiting property, is required to demonstrate by a preponderance of the evidence that there is a substantial connection between the property seized and the illegal drug transaction. This finding is in addition to the initial finding of probable cause that an illegal act under the drug law has occurred.

In the present matter, there was testimony by the deputy that marijuana was found in the same drawer as the money. Further, petitioners’ counsel had the opportunity to object to the testimony that the substance found was marijuana, but failed to do so. Likewise, there was no request that the marijuana be tested, nor was there any evidence presented that the substance was not marijuana. In fact, petitioners admitted in their discovery responses that there was marijuana in their home. Thus, this Court finds no error in the circuit court’s ruling, and likewise finds no plain error in the proceedings below.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 13, 2012

CONCURRED IN BY:

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