[Cite as *State v. Meeks*, 2012-Ohio-4098.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-066**
- vs -	:	
MARY J. MEEKS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000381.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the final judgment in a criminal proceeding before the Lake County Court of Common Pleas. Appellant, Mary J. Meeks, challenges the merits of the trial court's order regarding the forfeiture of certain funds which were found on her person at the time of her arrest. Appellant primarily maintains that the forfeiture of the funds was not justified because the evidence demonstrated that she did not acquire the money as part of any illegal drug transaction.

{¶2} The arrest in question occurred at the American Best Value Inn in Mentor, Lake County, Ohio. As of the date of the incident, June 17, 2010, appellant was renting three rooms at the inn. Since she did not own a home at that time and was not residing with anyone else, appellant was essentially using the three rooms as a storage area for her various belongings. Furthermore, despite the fact that she owned a van which only needed minor repairs, she had been driving a rental car in the weeks leading up to the incident. Appellant had also packed many of her belongings into the rental car; in fact, the car was so full that there was only sufficient room for her to sit in the driver's seat.

{¶3} At approximately 3:30 a.m. on the date in question, the Mentor City Police Department received a request from an employee of the inn to check on the welfare of an individual who appeared to be unconscious or asleep at the wheel of a parked car in the inn's main parking lot. Subsequently, it was discovered that appellant was the sole person in that vehicle. In responding to the call, Patrolman Jeff Balaga pulled his police cruiser behind appellant's rental car, which was sitting directly in front of the inn's main office. Upon exiting the cruiser and approaching appellant's car, the patrolman saw that she was slumped over the steering wheel in the front seat, and that her vehicle's motor was still running.

{¶4} Initially, Patrolman Balaga attempted to rouse appellant by tapping on the window of her car door. When she did not awake immediately, the patrolman observed that her door was not locked. Believing that appellant might need medical attention, the patrolman decided to open the car door. This caused appellant to wake up and appear momentarily startled, but she quickly closed her eyes and stated that she wanted to go back to sleep. Patrolman Balaga then tried to keep her awake by asking her a number of questions, but her answers were generally unresponsive and she continued to act in

an incoherent manner. The patrolman also noted that, after originally looking up at him when he first opened the door, appellant kept staring at a black bag that was between her feet on the floor.

{¶5} In standing beside appellant's car with the door open, the patrolman did not smell any odor of alcohol emanating from the interior. Nevertheless, he did detect a distinct odor which, based upon his prior experience as a police officer, he recognized as fresh marijuana. Moreover, while he was trying to question appellant, he saw a clear "zip-lock" bag protruding from a pocket on the inside of the door. The bag appeared to have a leafy substance similar in nature to marijuana. When Patrolman Balaga asked appellant about the bag, she again looked momentarily startled, but quickly lowered her head as if to go back to sleep.

{¶6} In light of appellant's lethargic state, the patrolman called a second police officer for assistance in removing her from the rental car. In attempting to "walk" her the short distance to the police cruiser, the two officers tried to hold appellant's hands. She kept resisting the officers in that regard, and instead insisted upon placing her hands on the two front pockets of her pants. This led Patrolman Balaga to observe that all four of appellant's pant pockets had unusual bulges. Concerned that one of the bulges might be a concealed weapon, the two officers patted appellant down and then removed the contents of all four pockets. The officers found that each pocket had a significant sum of U.S. currency.

{¶7} After appellant had been taken into custody and the officers had returned to the city police department, they counted the seized money and found that she had a total of $8,727 in her pockets. The officers further found that, even though the total sum was quite considerable, the funds did not contain many "large" bills; i.e., the money was

composed primarily of $50's, $20's, $10's, $5's, and $1's. Additionally, it was noted that some of the funds had been folded into separate packets of $100, consisting of bills of various denominations. Finally, despite the fact that a wallet was found in appellant's possession, it did not contain any money. Nor did she have any checks or credit cards in her possession.

{¶8} After removing the funds from her pockets in the parking lot of the inn, the officers handcuffed appellant and placed her in Patrolman Balaga's cruiser. They then proceeded to conduct a search of the general area around the driver's seat in her rental car. In addition to seizing the medium-sized bag of marijuana in the pocket of the door, Patrolman Balaga also looked in the black bag that had been in the floor by appellant's feet. First, the patrolman found three separate clear bags of marijuana. Each of these bags was smaller than the clear bag located in the door pocket, was tied off at the top, and appeared to have an equal amount of marijuana. Second, the black bag contained a box of ammunition for a small pistol. Six cartridges were missing from the box.

{¶9} Besides the foregoing articles in the black bag, the officers' search of the rental car revealed the following three items: (1) a large clear bag of marijuana, located inside the center console; (2) a holstered 6.35 mm, semi-automatic Armi Galesi pistol, located between the driver's seat and the center console; and (3) a small digital scale, located immediately behind the front passenger seat. Subsequent testing on the scale established that a white residue on one of the trays was powder cocaine.

{¶10} After collecting the various incriminating items from the vehicle, Patrolman Balaga transported appellant to the city police department. In doing so, the patrolman observed that appellant had laid down across the backseat of the cruiser. In assisting her from the cruiser upon their arrival, he further noted that her pants and undergarment

had been pulled down to her knees. Moreover, once appellant had fully exited the car's backseat, he saw that she had been laying on a "large" white rock which subsequently was determined to be crack cocaine.

{¶11} Once inside the building, Patrolman Balaga gave custody of appellant to a corrections officer for the purpose of "processing" her. While the corrections officer was removing the handcuffs and again patting appellant down, the patrolman noticed that appellant appeared to be chewing on something. After convincing her to spit the object from her mouth, the patrolman identified the object as a smaller rock of crack cocaine which had been wrapped in a piece of tissue paper.

{¶12} Based upon the foregoing events, the Lake County Grand Jury returned a six-count indictment against appellant in October 2010. The charges consisted of: (1) one count of having a weapon while under a disability, a third-degree felony under R.C. 2923.13(A); (2) one count of trafficking in marijuana, a fifth-degree felony under R.C. 2925.03(A); (3) one count of possession of cocaine, a fifth-degree felony under R.C. 2925.11; (4) one count of tampering with evidence, a third-degree felony under R.C. 2921.12(A); and (5) two counts of improperly handling a firearm in a motor vehicle, a fourth-degree felony and a fifth-degree felony, respectively, under R.C. 2923.16(B) & (D). Each of the six counts also contained some form of specification that appellant had possession of a firearm during the commission of the underlying offense. Additionally, each of the two "drug" charges had a forfeiture specification pertaining to the funds that were seized during the search of appellant's person.

{¶13} After the indictment had been pending against her for approximately four months, appellant agreed to enter into a plea bargain with the state. As to the count of trafficking in marijuana, the state agreed to amend the basic charge to possession of

marijuana, a minor misdemeanor under R.C. 2925.11. The state further agreed not to go forward on any of the specifications regarding the firearm, except as to its forfeiture under R.C. 2981.04. In response, appellant pled guilty to all six counts, including the amended charge of possession of marijuana.

{¶14} The only issues not resolved by the plea bargain were the specifications under the two "drug" offenses concerning the forfeiture of the seized money. Despite its decision to amend the "trafficking" count under the plea bargain, the state still asserted that the funds should be subject to forfeiture because appellant had obtained it through the sale of marijuana. On the other hand, appellant contended that the marijuana in her possession had only been for her personal use, and that the money in her pockets was her "life savings." In light of this disagreement, the trial court held a one-day bench trial on the forfeiture issue.

{¶15} In support of its position, the state presented the testimony of Patrolman Balaga, Lieutenant Timothy Allen, who generally supervised the search of the rental car after appellant had been taken into custody, and Sergeant Brad Kemp, a member of the Lake County Narcotics Agency. As part of his testimony, Sergeant Kemp indicated that, while he did not participate in the events on June 17, 2010, he had reviewed the items seized during the search and the resulting police reports. Based upon this, the sergeant concluded that appellant had been engaged in the sale of marijuana to other persons. As the grounds for this conclusion, the sergeant stressed, inter alia, that persons who only use marijuana do not usually possess a scale for weighing, no paraphernalia for smoking marijuana was found in the rental car, and some of the marijuana in the black bag had been packaged in a manner which is typically employed in selling the drug.

{¶16} In testifying on her own behalf, appellant focused upon the origins of the

money found in her pockets. According to her, she suffered a serious job-related injury to her back in the late 1970's, which rendered her totally disabled for a period of nearly fifteen years. During the entire 1980's, she received bi-weekly workers' compensation payments; however, at some juncture in the early 1990's, she willingly negotiated a final settlement of her claim for $120,000. After using half of the settlement to purchase a small home and a nice car, she used a substantial portion of the remaining $60,000 to sustain herself over the next ten years. Furthermore, after rehabilitating her back in the early 2000's, she was able to again work full-time for approximately five years until she suffered a new injury to her back.

{¶17} Appellant also testified that, as a result of the second back injury, she is again totally disabled and only receives $700 per month in social security payments. As another consequence of the second injury, she was unable to maintain her home; thus, she now lives in motels and rental cars. As to the remaining money from the settlement based upon her original back injury, appellant stated that she only had approximately $10,000 left, and that, although she had given it to her mother to hold for a long period, it was in her possession the date of her arrest because she was planning to move to the state of Arizona. Besides the remaining settlements funds and the monthly checks from social security, her sole source of income over the past three years was her winnings at a casino in Presque Isle, Pennsylvania.

{¶18} Finally, appellant testified that, due to the two injuries to her back, she is in constant pain. In light of this, she uses cocaine and marijuana on an almost daily basis to help her deal with the pain and relax. Therefore, according to her, her possession of both illegal drugs was only for personal use, and that she had never derived any income from the sale of either drug.

{¶19} After considering the evidence presented during the forfeiture hearing, the trial court issued its judgment ordering the forfeiture of the disputed funds. In support of its decision, the court first concluded that appellant's testimony as to the origins of the funds was not credible. Second, the trial court found that the state's evidence had been sufficient to demonstrate by a preponderance that the money constituted the proceeds of illegal drug transactions by appellant.

{¶20} After conducting a separate sentencing hearing, the trial court rendered its final judgment in the underlying case, ordering appellant to serve an aggregate term of eighteen months on the six counts. Appellant then filed a timely appeal of the forfeiture determination, and has now raised the following two assignments for our review:

{¶21} "[1.] The trial court erred when it ordered the forfeiture of the cash found on defendant-appellant's person where the evidence failed to establish that the cash was associated with drug trafficking activities.

{¶22} "[2.] The defendant-appellant's constitutional rights to due process and fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution were prejudiced by the ineffective assistance of trial counsel."

{¶23} Under her first assignment, appellant asserts that the trial court's forfeiture determination was against the manifest weight of the evidence. Specifically, she argues that the trial court erred in finding that she had obtained the disputed funds through the illegal sale of marijuana. In support of her position, appellant first contends that such a finding was illogical under the evidence because the small amount of illegal drugs in her possession was not consistent with the large sum of funds on her person. Second, she submits that the trial court should have rejected the expert testimony of Sergeant Kemp

because she gave a viable explanation or justification for each fact which Kemp cited as an indication of illegal drug trafficking.

{¶24} The statutory law governing the forfeiture of the property of a defendant in a criminal proceeding is delineated in R.C. Chapter 2981. As to the basic standard for determining when forfeiture is warranted, R.C. 2981.02(A) provides, in pertinent part:

{¶25} "(A) The following property is subject to forfeiture to the state or a political subdivision under either the criminal or delinquency process in section 2981.04 of the Revised Code * * *:

{¶26} "* * *

{¶27} "(2) Proceeds derived from or acquired through the commission of an offense; * * *."

{¶28} In regard to what is considered "proceeds" for purposes of forfeiture, R.C. 2981.01(A)(11)(a) states:

{¶29} "In cases involving unlawful goods, services, or activities, 'proceeds' means any property derived directly or indirectly from an offense. 'Proceeds' may include, but is not limited to, money or any other means of exchange. 'Proceeds' is not limited to the net gain or profit realized from the offense."

{¶30} Given the broad nature of the foregoing definition, it has been held that a finding of forfeiture need not be predicated upon the specific offense which formed the basis of the defendant's conviction: "The action may proceed against property derived from any act considered to be a felony drug offense, regardless of the subsequent charges, convictions, or lack thereof." *State v. McGowan*, 7th Dist. No. 09 JE 24, 2010-Ohio-1309, ¶ 78. Hence, notwithstanding the fact that appellant only agreed to plead guilty to possession of marijuana, the state was still permitted to base the forfeiture of

the seized funds upon the assertion that they had been derived from the illegal sale of that particular drug.

{¶31} As to the procedure which must be followed in a criminal forfeiture, R.C. 2981.04(B) states that if a defendant pleads guilty to, or is convicted of, an offense, and the indictment covering that offense contained a specification for the forfeiture of listed property, the jury or the trial court, as the trier of fact, must then decide if the forfeiture is warranted under the facts of the case. The statute further states that, in order for such a finding to be made, it must be determined if the state has proven "by a preponderance of the evidence that the property is in whole or part subject to forfeiture under section 2981.02 of the Revised Code * * *."

{¶32} In light of the degree of proof which is needed to establish the underlying facts for a forfeiture of property, it has been stated that, even when it is conducted in the context of a criminal prosecution, a forfeiture hearing is considered a civil proceeding. *State v. Watkins*, 7th Dist. No. 07 LE 54, 2008-Ohio-6634, ¶ 31. Therefore, this means that, in reviewing the substance of a forfeiture order on appeal, an appellate court must apply the same standard which is normally followed in relation to a civil judgment. *See State v. Johnson*, 11th Dist. No. 2009-T-0042, 2010-Ohio-1970.

{¶33} "When reviewing a judgment based on a preponderance of the evidence, we will not reverse the judgment if there is 'some competent, credible evidence going to all the essential elements of the case.' *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578." *Id*., at ¶ 28.

{¶34} Upon reviewing the trial transcript in the present case, this court concludes that there was some competent, credible evidence to support the trial court's finding that the cash found in appellant's pockets had been obtained through the sale of marijuana.

During his testimony, Patrolman Balaga gave a detailed description of the various items, including the cash, the two types of drugs, the scales, and the firearm, which he found in the rental car or on appellant's person. Both Patrolman Balaga and Sergeant Kemp then provided statements, based upon their professional experience, as to the meaning of the presence of those items vis-à-vis the issue of whether appellant had been selling marijuana to other individuals.

{¶35} For example, Patrolman Balaga testified that appellant had a total amount of $8,727 in her possession, and that these funds primarily consisted of bills of smaller denominations, such as $20's, $10's, and $5's. Sergeant Kemp then testified that it was very common for drug traffickers to have a large sum of funds in small denominations because drug transactions only involve cash. Similar testimony was presented as to the following points: (1) the nature in which some of the marijuana was packaged in small baggies; (2) appellant's use of a rental car when she was allegedly homeless and poor; (3) the presence of the scales and a loaded firearm in the car; and (4) the absence of any drug paraphernalia in the car which is normally used in smoking marijuana.

{¶36} Before this court, appellant contends that the testimony of Sergeant Kemp should not have been accorded significant weight because she was able to provide an innocent explanation for each of the facts referenced by the sergeant as indicia of drug trafficking. For example, as to the packaging of some of the marijuana, she stated that small amounts of the drug were in little baggies because it had been packaged that way when she bought it from another person.

{¶37} Regarding the weight to be given to appellant's innocent explanations, this court would note that the trial court expressly stated in its written judgment that it found her testimony to have little credibility because her statements were often unsupported

and vague. As a general proposition, we have consistently indicated that questions of witness credibility are primarily for the trier of fact to decide. *Johnson*, 2010-Ohio-1970, at ¶ 17, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The basis of this proposition is that the trier of fact is in a much better position to observe the body language, demeanor, and voice inflections of the witnesses. *Id*.

{¶38} Our review of appellant's testimony readily confirms the trial court's basic assessment that her innocent explanations were simply too vague to warrant significant weight. For example, as to the origins of the cash in her pockets, appellant testified that the disputed funds came from two sources: the remainder of her workers' compensation settlement and certain gambling proceeds. However, in relation to the settlement, she did not submit any separate documentation verifying the existence of her claim and the amount of the final settlement. Moreover, appellant did not provide any explanation as to how she could maintain herself for approximately ten years on $50,000 and still have approximately $10,000 remaining. Similarly, she did not offer any documentation of her winnings at the Pennsylvania casino, despite the fact that, according to her, she won a significant amount on at least two occasions.

{¶39} Regarding her lease of the rental car and the three motel rooms, appellant testified that she had certain "friends" who would willingly pay for these items for her. Yet, when questioned about this matter further, she could not identify the "friends" or explain their motivation for essentially giving her such large amounts of money.

{¶40} Taken as a whole, Sergeant Kemp's explanations as to why certain facts should be viewed as indicia of drug trafficking were more believable than appellant's explanations as to why her actions in regard to the marijuana were innocent in nature.

Furthermore, the mere fact that Sergeant Kemp did not participate in the actual search of appellant's vehicle had no adverse effect upon his credibility. Since the sergeant was testifying as an expert witness, his credibility would be based solely upon his credentials as a narcotics agent and his review of the evidence as discovered by Patrolman Balaga during the search of the rental car and appellant's person. Thus, appellant has failed to demonstrate that the trial court abused its discretion in determining that her testimony was not as credible as that of Sergeant Kemp.

{¶41} As was noted above, appellant argues that the trial court's finding that she had engaged in drug trafficking was not supported by the evidence because the amount of marijuana in her possession was relatively small in comparison to the amount of cash on her person. Regarding this point, this court would agree that the amount of drugs in her possession would not have been sufficient, in and of itself, to establish the offense of trafficking in marijuana. However, the record clearly shows that the state was able to prove other facts which did support a finding of trafficking. In light of those "other facts," the trial court could justifiably conclude that appellant did not have a significant amount of marijuana in her possession at the time of the search because she had just engaged in recent sales and, thus, only had the proceeds of those sales.

{¶42} In addition to appellant's possession of the marijuana and the cash in the sum of $8,727, the state also proved that: (1) some of the marijuana was packaged in a manner in which the drug is typically sold; (2) appellant had scales which are normally used by drug dealers to weigh such a drug; (3) appellant's vehicle did not contain any other drug paraphernalia which is used to smoke marijuana; (4) the vehicle only had an odor of fresh marijuana, not "burnt" marijuana; (5) appellant had a firearm which dealers normally use for protection; and (6) appellant was in a rental car, which dealers typically

use so that their own vehicles are not subject to forfeiture. Given the existence of the foregoing facts, there was clearly some competent, credible evidence upon which the trial court could find that the money in appellant's possession had been obtained solely through the illegal trafficking of marijuana. Therefore, because the trial court's finding of forfeiture was not against the manifest weight of the evidence, her first assignment lacks merit.

{¶43} Under her second assignment, appellant submits that the forfeiture order as to the seized funds must be reversed because she was denied effective assistance of trial counsel during the forfeiture hearing. As the basis of this particular contention, appellant notes that, during her direct examination, the trial court did not allow her trial counsel to introduce two exhibits into evidence which pertained to her gambling at the Pennsylvania casino. According to appellant, the exclusion of the exhibits was directly attributable to her trial counsel because the trial court's decision was predicated upon the failure to provide the copies to the state as part of the discovery process.

{¶44} Although not expressly stated in her appellate brief, it is readily apparent that appellant's "effective assistance" argument is based entirely upon the assumption that she was entitled to the identical constitutional rights during the forfeiture hearing as she would at other stages of a criminal proceeding. A review of the relevant Ohio case law lends *some* support for this assumption. As was discussed above, recent appellate decisions have generally indicated that a forfeiture hearing under R.C. 2981.04 must be viewed as a civil proceeding. *See e.g., Watkins*, 2008-Ohio-6634, at ¶31. Yet, despite designating such a hearing in this manner, the appellate decisions have acknowledged that the hearing still has certain criminal characteristics. *McGowan*, 2010-Ohio-1309, at ¶76. This acknowledgement is consistent with an earlier description in *State v. Lilliock*,

70 Ohio St.2d 23, second paragraph of the syllabus (1982), in which the Supreme Court of Ohio concluded that when the forfeiture hearing is held in conjunction with a criminal trial, the hearing is considered "criminal in nature but civil in form."

{¶45} Given that a forfeiture hearing under R.C. 2981.04 has been deemed to be a quasi-criminal matter, it has been held that certain constitutional protections must be afforded the defendant during the proceeding. For example, in *State v. Casalicchio*, 58 Ohio St.3d 178, 182-183 (1991), our Supreme Court determined that the forfeiture of a motor vehicle constitutes an additional criminal sanction when, inter alia, a felony conviction is a prerequisite for the forfeiture. Based upon this, the *Casalicchio* court ultimately held that the constitutional prohibition against double jeopardy barred the criminal forfeiture when the state did not file its forfeiture petition until after the defendant was sentenced on the underlying drug offenses. *Id.*, at 183.

{¶46} Building upon the *Casalicchio* precedent, the First Appellate District has concluded that the defendant in a criminal forfeiture proceeding has an absolute right to be present at the oral hearing on the issue. *State v. Sutherlin*, 111 Ohio App.3d 287, 293-294 (1996). In support of its analysis, the *Sutherlin* court first noted that, once it is determined that the forfeiture of property must be considered an additional sanction in light of a prior felony conviction, the forfeiture proceeding becomes criminal in nature. *Id*., at 293, quoting *In re Forfeiture of One 1986 Buick Somerset Auto.*, 91 Ohio App.3d 558 (1993). Accordingly, the *Sutherlin* court held that, since the forfeiture hearing was essentially a part of the sentencing stage of the defendant's trial, Crim.R. 43(A) required the defendant's presence at the oral hearing before a valid forfeiture judgment could be rendered. *Id*.

{¶47} In the present case, each of the "drug" counts in the indictment contained

a forfeiture specification regarding the funds that had been found on appellant's person. Moreover, the forfeiture hearing before the trial court went forward after appellant had entered a guilty plea to multiple felony charges, including one felony drug offense. As a result, pursuant to *Casalicchio*, the forfeiture of the disputed funds had to be viewed as an additional criminal sanction imposed upon appellant in light of her conviction.

{¶48} However, the fact that appellant's forfeiture hearing must be characterized as criminal is not dispositive of the "right to counsel" question. This is because it is well-established under both federal and state law that the constitutional right to counsel does not apply in every type of criminal proceeding. That is, it has been held that the Sixth Amendment right to counsel can only be invoked in a proceeding in which a sentence of actual imprisonment has been imposed for a criminal conviction. See *State v. Williams*, 197 Ohio App.3d 505, 2011-Ohio-6269, ¶11 (1st Dist.), citing *Scott v. Illinois*, 440 U.S. 367, 373-374 (1979). This holding is predicated upon the conclusion that actual imprisonment for an offense is inherently different than a fine or a mere threat of incarceration. *State v. Smith*, 5th Dist. No. 2010-CA-00335, 2011-Ohio-3206, ¶42.

{¶49} In summarizing the extent of the application of the right to counsel in the context of a criminal action involving an indigent defendant, this court has stated:

{¶50} "'In the wake of [*Scott*, 440 U.S. 367], there can no longer be any doubt that the right to counsel *does not extend to misdemeanor prosecutions in state courts which result in no jail time for the defendant*. Rather, the Constitution only mandates that an indigent criminal defendant may not be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel.' (Emphasis sic.) * * *." *State v. Mogul*, 11th Dist. No. 2003-T-0178, 2006-Ohio-1873, ¶13, quoting *State v. Boughner*, 11th Dist. No. 98-G-2161, 1999 Ohio App. LEXIS 6116,

*10-11 (Dec. 17, 1999).

{¶51} Obviously, when a criminal defendant is subject to a forfeiture proceeding under R.C. 2981.04, the sole possible sanction is the state's confiscation of property or contraband. In other words, a forfeiture proceeding cannot result in the imposition of an additional term of actual incarceration. Thus, the foregoing case law dictates that, even though the forfeiture hearing in the underlying action was criminal in nature, appellant was not constitutionally entitled to be represented by an attorney during that aspect of her criminal prosecution.

{¶52} A review of the transcript of appellant's forfeiture hearing readily indicates that she was represented by a licensed attorney at that time. Nevertheless, the fact that she actually had legal representation does not entitle her to assert a claim of ineffective assistance of counsel. In *Wainwright v. Torna*, 455 U.S. 586, 587-588 (1982), the United States Supreme Court expressly held that when a criminal defendant does not have a constitutional right to counsel for purposes of a particular proceeding, she is barred from predicating a claim of ineffective assistance upon the acts of her actual attorney. The logical foundation for this holding is that there can be no separate constitutional right to effective assistance of counsel when the basic right to counsel has not attached. *See Rideau v. Russell*, 342 Fed. Appx. 998, 2009 U.S. App. LEXIS 18895, *14, at fn. 2 (6th Cir. 2009). The foregoing logic has been expressly followed by the Supreme Court of Ohio; i.e., when a criminal defendant does not have a constitutional right to counsel, she cannot assert a violation of her constitutional right to effective assistance. *See State v. Smith*, 71 Ohio St.3d 1208, 1209 (1994).

{¶53} Pursuant to this analysis, this court concludes that, since appellant could not invoke the constitutional right to counsel for purposes of the forfeiture hearing under

R.C. 2981.04, the trial court's "forfeiture" decision cannot be reversed on the grounds of ineffective assistance of counsel. Therefore, appellant's second assignment is without merit.

{¶54} As appellant has failed to demonstrate any reversible error in regard to the forfeiture of the funds found in her possession, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J., concurs,

DIANE V. GRENDELL, J., concurs with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs with a Concurring Opinion.

{¶55} I concur in the judgment reached by the majority, affirming the trial court's decision to order the forfeiture of the $8,727 seized at the time of Meeks' arrest. I write separately, however, to further address the argument raised in Meeks' second assignment of error.

{¶56} Under the second assignment of error, Meeks contends that the order of forfeiture should be reversed on the grounds of ineffective assistance of counsel, specifically that "trial counsel failed to submit documentation during discovery supporting Ms. Meeks' claim that the money was in fact obtained through lawful means, thus rendering the evidence inadmissible at the forfeiture hearing."

{¶57} The right to effective assistance of counsel derives from the Sixth Amendment right "to have the Assistance of Counsel." *McMann v. Richardson*, 397 U.S. 759, 771, fn. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ("[i]t has long been

recognized that the right to counsel is the right to the effective assistance of counsel"). "The protections provided by the Sixth Amendment are explicitly confined to 'criminal prosecutions.'" *Austin v. United States*, 509 U.S. 602, 608, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).

{¶58} As the majority opinion recognizes, forfeiture is a civil penalty applied in the context of a criminal prosecution, resulting in a proceeding that may be characterized as quasi-criminal. *Supra* at ¶ 32, 45. Given that the penalty of forfeiture is "civil in form," Meeks was not entitled to have the assistance of counsel. Civil relief could be obtained through an action for malpractice for ineffective assistance of counsel. *See Wainwright v. Torna*, 455 U.S. 586, 587-588, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) ("[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely").

{¶59} The conclusion is supported by federal precedents. "Because a forfeiture proceeding is not a 'criminal prosecution' and is not attended by a risk of the loss of liberty, the courts have uniformly held there is no right to counsel in a forfeiture proceeding." *Brown v. Berghuis*, 638 F.Supp.2d 795, 824 (E.D.Mich.2009) (cases cited therein).

{¶60} Accordingly, the argument raised in Meeks' second assignment of error is inherently flawed and does not provide a basis for reversing the lower court's judgment. Otherwise, I concur in the majority's opinion.