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IN THE INDIANA COURT OF APPEALS

CAUSE NO. **_22A-MI-02910_**

ANGELA Y. SMITH	)	
	)	
Appellant,	)	Appeal from the Marion Superior Court
	)	
v.	)	Case No.: **49D03-2009-MI-033278**
	)	
STATE OF INDIANA	)	Honorable Gary Miller, Judge
	)	
Appellee.	)	

REPLY BRIEF OF ANGELA Y. SMITH

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INTRODUCTION

The State's brief expends considerable effort discussing allegations of fact that were never admitted at trial in a transparent effort to distract or otherwise mislead this court. The search warrant and the contents of its affidavit were not admitted at trial, contained inadmissible hearsay, and were prepared by Detective Wallace who did not testify at trial. [*Appellee Appendix, Vol. II, p. 8*] The search warrant permitting the search of the residence was never an issue in this litigation and is irrelevant to Smith's argument that the evidence at trial was insufficient.

Likewise, the probable cause affidavit [*Appellee Appendix, Vol. II, p. 5*] was, again, prepared by Detective Wallace who did not testify at trial and the affidavit was not evidence admitted at trial to justify the forfeiture.

Detective Graber prepared a one-page affidavit [*Appellee Appendix, Vol. II, p. 4*] merely for the purpose of justifying the initial seizure of the currency, which contained inadmissible hearsay and was never offered or admitted at trial. The evidence admitted at trial are the only relevant facts for this appeal.

SUMMARY OF ARGUMENT

1. The State argues that sufficient evidence supported the forfeiture. (*Appellee's Brief, p. 11.*) The State observes, "*Williams's possession of 'some*

narcotics,' his guest's possession of a scale, and the pile of banded money in his small apartment are all consistent with drug trafficking and drug possession related to that money." (*Appellee's Brief, p. 13-14*.) This contention is contrary to our Supreme Court's holdings in *Serrano* and *Katner (Infra)* because that evidence does not establish a nexus between the money and criminal activity.

2. The State further contends that Smith did not *prove* that she is the owner of the currency, notwithstanding her sworn testimony was uncontradicted, she clearly withdrew $29,000.00 from her bank account shortly before the seizure, she proved her motive for entrusting the money to her nephew, and the State concedes that Williams did not have a job where he might have earned the money. It is difficult to imagine what additional evidence Smith might have offered to show her ownership of the currency. She was the sole claimant.

REPLY ARGUMENT I.

THE EVIDENCE AT TRIAL DID NOT ESTABLISH A NEXUS BETWEEN CRIMINAL ACTIVITY AND THE SEIZED CURRENCY

The State concedes that, at best, Williams possessed less than 5 grams of a narcotic drug. (*Appellee's Brief, p. 14*.) Detective Graber's testimony that he observed "some narcotics," (*Appellee's Brief, p. 12*.) does not inform the court whether Williams merely possessed drug residue or some other amount less than 5 grams. Without more, the trial court could not rule out that Graber only observed drug residue or an inconsequential amount of a narcotic drug.

In *Katner v. State*, 655 N.E.2d 345, 349 (Ind. 1995), the State attempted to forfeit Katner's vehicle because he possessed a small amount of cocaine residue while driving his 1987 Toyota truck. The Supreme Court held, "*The Indiana forfeiture statute requires more than a mere demonstration that the vehicle's operator possessed cocaine*."

The Court required the State must show a nexus between the act of possessing the contraband and the property sought to be forfeited. *Katner* at 347. In this case, the only evidence is that Graber observed an unknown quantity of an unidentified narcotic drug, at an unknown location within the residence, in an unknown form packaged in an unknown way. There was no evidence of drug dealing such as paraphernalia, guns, ledgers, controlled buys, or surveillance.

Just as in *Katner*, the Indiana forfeiture statute requires more than a mere demonstration that Williams possessed a narcotic drug, but the State must show the money was connected to the contraband.

Likewise, in *Serrano v. State*, 946 N.E.2d 1139 (Ind. 2011), again, the Indiana Supreme Court emphasized the necessity of proving a link between the currency and a drug offense enumerated in the forfeiture statute. *Serrano at 1143.* After police stopped Serrano for a traffic offense, cocaine residue was located on the carpet of his vehicle. The Court noted that our forfeiture statute "*requires more than an incidental or fortuitous connection between the property and the underlying offense*." *Serrano at 1143.* In holding that the State could not forfeit

Serrano's truck, the mere presence of a small amount of cocaine was merely incidental or fortuitous to the operation of the truck:

> "Put another way, the State's evidence does not compel a conclusion that the presence of cocaine was anything more than "incidental or fortuitous."..."
> *Serrano v. State*, 946 N.E.2d 1139, 1143 (Ind. 2011)

Based on the forfeiture Complaint filed here, the State was required to prove by a preponderance of the evidence that the seized currency was either intended to be furnished for a violation of a criminal statute, or was proceeds derived from a violation of the law. (I.C. 34-24-1-1) The simultaneous possession of currency in a residence and an unknown quantity of a narcotic drug establishes nothing more than an *incidental or fortuitous* connection between those items.

The State never proved their lawful ability to forfeit the seized money in the first instance because there was no evidence that the money was proceeds or intended for a violation of the law.

REPLY ARGUMENT II.

SMITH IS THE OWNER OF THE CURRENCY

The State argues that Smith has not proven that she is the owner of the currency. (*Appellee's Brief, p. 9.*) This argument is raised for the first time on appeal and has been waived by the State. [Issues not raised at the trial court are waived on appeal. *Cavens v. Zaberdac*, 849 N.E.2d 526, 533 (Ind.2006). "*In order to properly preserve an issue on appeal, a party must, at a minimum, `show that it*

gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal." (*In re Involuntary Termin. of Parent-Child*, 875 N.E.2d 369, 373 (Ind. App. 2007)

First, Smith filed her petition to intervene within 15 days of the Complaint being filed. The State never objected to her intervention, nor did it challenge her standing after the parties rested at trial. The State's only argument in the trial court focused on the absence of Williams to testify at trial and assist Smith in proving the currency was not tainted by criminal activity. In fact, the State conceded the money belonged to Smith, but argued the money was nevertheless tainted by Williams' criminal activity.

And Mr. Williams has clearly chosen not to be here to assist his aunt in the recovery of her money; I think the Court can, well come to the conclusion as to why that is. (Tr. Vol. II, p. 33, lines 10-12) (emphasis added.)

The State merely contended and the Court only found the money was subject to forfeiture because of Williams' alleged criminal activity:

"The Court now determines that the currency in question is subject to forfeiture in this case and the State has met its burden of proof by a preponderance of the evidence that the currency should be seized." (*App. Vol. II p. 9*.)

The State never asked the court to find that Smith did not prove she was the owner of the money and the court never made that finding. Such a finding would have been clearly erroneous in light of Smith's sworn, uncontradicted testimony that she withdrew $29,000.00 from her bank account shortly before the seizure,

with documented corroboration for both the withdrawal and her domestic abuse motive for doing so.

STATE'S IMPROPER ARGUMENT

The State continually mixes alleged facts, never admitted at trial, with evidence at trial. Williams did not testify at trial. Nevertheless, the State argued:

"By not appearing at the hearing, Williams avoided being confronted with his own prior statements claiming the money was his and that it was scholarship money for barber school (State App. 6-7). Based on this evidence, the trial court properly rejected Intervenor Smith's claim." (*Appellee's Brief, p. 10*.)

This statement, attributed to Williams by Detective Graber, only appeared in the probable cause affidavit which was never admitted at trial. If "*based on this evidence*," as the State argues, the court rejected Smith's claim, the Order is clearly erroneous as based on facts never admitted at trial. This clearly improper argument is a continuation of the State's efforts to distract and mislead this court.

In a desperate attempt to unjustly forfeit the seized currency, the State argues that if the State failed to prove the money was tainted by criminal activity, this Court should order the money forfeited anyway pursuant to **Indiana Code Section 34-24-1-3(e)**.

(e) If, at the end of the time allotted for an answer, there is no answer on file, the court, upon motion, shall enter judgment in favor of the state and shall order the property disposed of in accordance with section 4 of this chapter.

The problem with this argument is that there was an answer on file, specifically the one filed by Smith, and no motion has ever been made by the State under this section. The statute clearly requires the statute may only be invoked "*upon motion*" <u>and</u> if no answer has been filed.

Further, the State never asked the Court to enter a default judgment against Williams and no evidence exists that Williams was ever personally served with the Complaint and summons. It is questionable whether proper service of process on Williams was ever perfected. The Complaint was filed on **September 24, 2020**, yet, <u>almost two years later</u>, service of the summons on Williams was not returned until **May 2, 2022**. Service by *copy service* 19 months after the Complaint was filed was likely ineffective. (*Smith App. Vol. II p. 6*.)

The only evidence before the trial court regarding the source of the seized money was from Smith's sworn testimony, corroborated by her bank records. Smith proved her motive for allowing Williams to hold her money which was again corroborated by stipulated police records. There was no evidence that the source of the money was from criminal activity and the State must return the money to the only claimant in the absence of conflicting evidence of ownership.

<u>CONCLUSION</u>

The State never met its burden to prove by a preponderance of the evidence that the seized currency was linked to any criminal activity. The record is devoid of facts identifying the quantity of contraband, its location within the residence,

and how, it was packaged, if at all. There is no evidence of the proximity of the drugs to the money, and not a scintilla of evidence was admitted at trial of dealing or surveillance indicating such. The State's repeated improper references to alleged facts outside the record demonstrates their desperate attempt to steal currency which clearly is not subject to forfeiture.

Respectfully submitted,
/s/ *stephen gerald gray*
Stephen Gerald Gray
Attorney at Law

CERTIFICATE OF SERVICE

I hereby affirm under penalties for perjury that a copy of Appellant Angela Y. Smith's *Reply Brief* has been served on the _19th_ day of March, 2023, by the Indiana Electronic Filing System 'IEFS' upon all parties of record including:

Indiana Attorney General
402 West Washington Street
Indianapolis, Indiana 46204.

/s/ stephen gerald gray
Stephen Gerald Gray