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JURISDICTION OF THE INDIANA COURT OF APPEALS

Jurisdiction of this civil appeal lies in the Court of Appeals pursuant to Indiana Rule of Appellate Procedure AP. 5(A) for the reason that this is an appeal from a final judgment in a civil case.

STATEMENT OF THE ISSUE

1. The Trial Court erroneously forfeited Smith’s currency after the State failed to admit sufficient evidence to meet its burden of proof at trial that the currency was tainted by criminal activity. This appeal asserts the evidence was insufficient.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a civil forfeiture case wherein the State is seeking to confiscate Smith’s **\$11,180.00** in U.S. currency. The Trial Court found for the State after bench trial and ordered the seized currency forfeited. This appeal is a direct appeal challenging the Trial Court’s *Order* forfeiting Smith’s currency after bench trial.

B. COURSE OF PROCEEDINGS

This case was commenced on **September 24, 2020**, when the State filed its *Complaint For Forfeiture* alleging that **\$11,180.00** in U.S. currency was subject to forfeiture. (*App. Vol. II p. 11.*) On **October 9, 2020**, Smith filed her *Motion To Intervene By The Real Party In Interest*, (*App. Vol. II p.4, 13.*) which the court granted on **October 13, 2020**. (*App. Vol. II p. 15.*) The Intervenor (Smith) filed her *Answer To Complaint For Forfeiture* denying the allegations on **October 15, 2020**. (*App. Vol. II p. 4, 16.*)

The Court conducted a bench trial on **December 2, 2022**, (*App. Vol. II p. 8.*) and on **December 7, 2022**, the Court entered Judgment in favor of the State and Ordered that the **\$11,180.00** be forfeited to the State. (*App. Vol. II p. 9.*) *Notice of Appeal* was filed on **December 7, 2022**, and this timely appeal ensues. (*App. Vol. II p. 8, 46.*)

OVERVIEW OF THE APPEAL

This appeal is about the forfeiture of Smith's U.S. currency that was seized by police from her nephew's residence. The nephew, *Dylan Williams*, never appeared in the litigation and never filed a claim to the currency. The State failed to prove the currency was tainted by any criminal conduct, and further failed to negate Smith's affirmative defense that she was an innocent owner of the currency.

STATEMENT OF FACTS.

The Court conducted a bench trial on **December 2, 2022**, (*App. Vol. II p. 8.*) and on **December 7, 2022**, the Court entered Judgment in favor of the State and Ordered that the currency be forfeited. (*App. Vol. II p. 8, 9.*)

At the bench trial, the State called only one (1) witness and offered seven (7) exhibits. (Tr. Vol. II, p. 5) Detective **Ryan Graber** testified for the State. (Tr. Vol. II, p. 7)

State's *Exhibits 1 & 2* are sentencing documents from a criminal case filed against Dylan Williams. The documents showed that Williams was convicted of *Possession of a Narcotic Drug*, a Level 6 felony. (*Exhibit Volume III, p. 4-7*) (*App. Vol. II p. 38-40*) State's *Exhibits 3-7* are photographs of the U.S. Currency seized by the police. (*Exhibit Volume III, p. 8-13*) (Tr. Vol. II, p. 9-10)

DETECTIVE GRABER TESTIMONY

Detective Graber, employed by IMPD, has been with Metro Drug Task Force since 2011. (Tr. Vol. II, p. 7) On September 18, 2020, Graber came into contact with Dylan Williams and another unnamed individual at an apartment on Woodside Avenue. (Tr. Vol. II, p. 8) Graber testified that Williams lived at the apartment. (Tr. Vol. II, p. 8, line 16)

According to Graber, the apartment had very few items in it but was fairly clean. It was Graber's impression that Dylan Williams had not lived there very

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long but he did observe a master bed, TV, dresser, lamp pole, and clothes in the bedroom closet. (Tr. Vol. II, p. 9, lines 2-7) He further testified:

Q: Did you see anything of interest in the apartment?

A Yes. I did see things. I saw some cash that was in the apartment in a couple different locations, and I observed some narcotics in there as well. (Tr. Vol. II, p. 9, lines 17-19)

Detective Graber said the money was in two (2) locations within the apartment. A portion of the money was observed behind the TV in the bedroom and the other currency was found in Dylan Williams' wallet. (Tr. Vol. II, p. 9, lines 20-22) Graber testified that *Exhibits 3-7* were photographs depicting the currency observed in the apartment. (Tr. Vol. II, p. 10, lines 1-12) The cash behind the TV amounted to \$7,600.00 and \$3,500.00 was found in the wallet. (Tr. Vol. II, p. 10-11)

Graber had a conversation with Dylan Williams about the cash in the apartment and his employment. Graber did not locate any paystubs or work uniforms or evidence of Williams being employed. (Tr. Vol. II, p. 11, lines 7-23) Graber was asked “...*what does the presence of a large amount of cash suggest to you?*”

A: “*Over the years of investigating narcotics trafficking that’s an indicator that we look at as one of the aspects. Different amounts of money banded up for easy access and for quick change to be made for when you’re trafficking narcotics is pretty common.*” (Tr. Vol. II, p. 12, lines 1-3)

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On cross-examination, Graber admitted that no surveillance of Williams' residence occurred, no controlled buys were ever conducted, no ledgers or firearms were located during the search, and no scales were found except on the person of the unidentified visitor to the apartment. (Tr. Vol. II, p. 12-13)

Graber could not say where the wallet was located in the apartment (Tr. Vol. II, p. 15, lines 10-17) and he could not say the exact denominations of the currency that was seized. (Tr. Vol. II, p. 14, lines 15-16) Graber testified that he did not know where in the apartment the narcotics were located. (Tr. Vol. II, p. 16, lines 1-8)

On this evidence the State rested. (Tr. Vol. II, p. 16, lines 16-18) The defense called the Intervenor, Angela Smith.

ANGELA SMITH TESTIMONY

Angela Smith testified that in 2020 she lived in Milwaukee, Wisconsin and Dylan Williams is her nephew. (Tr. Vol. II, p. 17, lines 13-22) In 2020, Smith became involved in an abusive relationship with someone named Kevin Anderson. Anderson would physically and emotionally abuse Angela, and steal money from her. (Tr. Vol. II, p. 15, lines 3-15) As a result of Anderson's abuse, Smith suffered severe head trauma, filed a police report about the abuse, and obtained a protective order. (Tr. Vol. II, p. 18-19) (*Exhibit Volume III, p. 14-20*)

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In 2020, Smith withdrew money from her bank account to keep it from her abuser:

Q: Okay. Back in sometime in 2020 did you make a withdrawal from a bank?

A: I did, yes sir.

Q: And what was your motive in withdrawing money from the bank at that time?

A: To move my money around; to hide the money. To hide the money? From my abuser.

Q: Why did you feel it was necessary to hide your money?

A: Because he was taking it and forcing me to do withdrawals.

Q: Did he also have access to your bank card?

A: He did.

Q: Was he able to withdraw money from the bank using the bank card?

A: He was.

(Tr. Vol. II, p. 20, lines 2-13)

Smith identified *Exhibit F* as her Chase bank statement that demonstrated that she withdrew \$29,000.00 in cash on June 10, 2020. (*Exhibit Volume III, Exhibit F, p. 30*) (Tr. Vol. II, p. 20-21)

In late June 2020, Angela Smith met Williams, her nephew, in Springfield, Illinois at Smith's sister's house to give Williams \$15,000.00 to hold for her. (Tr. Vol. II, p. 21-22) Smith gave the money to Williams to hold because she didn't want her other friends and family members to know she was being abused. She was ashamed. (Tr. Vol. II, p. 23, lines 3-14)

The source of Smith's money primarily came from her employment with the City of Milwaukee where she earned between \$46,000.00 and \$50,000.00 per year. (Tr. Vol. II, p. 24, lines 1-6)

SUMMARY OF ARGUMENT

The evidence was insufficient to support the forfeiture of the seized currency because the State failed to connect the currency to any criminal activity. The Court had no evidence about the amount or weight of the narcotics, their location inside the apartment, or the identity of the drugs. There was no surveillance of the residence suggesting narcotics trafficking, no evidence of drug making paraphernalia, and no firearms or ledgers were recovered.

STANDARD OF REVIEW

This Court reviews the sufficiency of the evidence in a civil case by considering only the evidence most favorable to the judgment and any reasonable inferences that may be drawn therefrom. *Lipscomb v. State*, 857 N.E.2d 424, 427 (Ind. Ct. App. 2006). The Court does not reweigh the evidence or determine the credibility of the witnesses. *Id.* When there is substantial evidence of probative value to support the trial court's ruling, it will not be disturbed. *Id.*

ARGUMENT I.

THE FORFEITURE ORDER IS NOT SUPPORTED BY SUFFICIENT EVIDENCE LINKING THE MONEY TO CRIMINAL ACTIVITY

Forfeitures of money are governed by Indiana Code Section **34-24-1-1(a)(2)**, which provides that the following are subject to forfeiture:

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All money . . . :

- (A) furnished or intended to be furnished by any person in exchange for an act that is in violation of a criminal statute;
- (B) used to facilitate any violation of a criminal statute; or
- (C) traceable as proceeds of the violation of a criminal statute.

However, the State's complaint merely alleged Sections A & C of the statute. The State did not proceed under a "facilitation" theory outlined in section B. (*App. Vol. II, P. 11*) Therefore, the State was required to prove by a preponderance of the evidence that the seized currency was 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 State must establish a nexus between the property and the commission of an offense; this "*requires more than an incidental or fortuitous connection between the property and the underlying offense.*" (*Gonzalez v State* 74 N.E.3d 1228, 1230 (Ind. App. 2017)). Emphasis added.

Moreover, the State never established a *prima facie* case for forfeiture because the State was not entitled to the presumption under **I.C. 34-24-1-1(d)**. The presumption only applies if the person was committing one of nine (9) enumerated offenses and *Possession of Narcotics, a Level 6 felony*, is not included in the statutory scheme. Therefore, Smith had no burden under the statute to rebut the State's evidence because a *prima facie* case was never established.

The evidence at trial demonstrates that Graber observed, while at Williams'

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apartment, an *unknown quantity* of narcotics, which were *never identified* by Graber or any expert witness. The exact *location* of the narcotics was never proven and the manner of packaging and the form of the narcotics (powder, chunks, pills) is left to mere speculation. Graber testified that \$7,600.00 in cash was seen behind the TV, but he did not know where the wallet was found.

There is no evidence that the cash was found in close proximity to the drugs and the State never presented any expert opinion from anyone who performed any forensic testing to identify the substance or the quantity of the contraband. The State never even offered pictures of the observed drugs demonstrating their recovery location or how they were packaged.

The State offered State's *Exhibits 1 & 2* that indicated that Williams was convicted of *Possession of Narcotics*, a Level 6 felony. (*Exhibit Volume III, p. 4-7*) Smith's counsel requested the trial court to take Judicial Notice that, pursuant to **I.C. 35-48-4-6(a)**, the amount of the narcotics would have to be less than 5 grams. (Tr. Vol. II, p. 16, lines 22-25) The trial court took *Judicial Notice* of the statute. (Tr. Vol. II, p. 17, lines 1-2)

The State's exhibits show that Williams' conviction for possession was under **subpart (a) of I.C. 35-48-4-6**. If the amount of the drugs was greater than 5 grams, Williams' conviction would be a Level 5 felony. It wasn't. Williams plead to *Possession* as a Level 6 felony. Therefore, the evidence supports the fact that the quantity of drugs was less than 5 grams:

IC 35-48-4-6 Possession of cocaine or narcotic drug

Sec. 6. (a) A person who, without a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice, knowingly or intentionally possesses cocaine (pure or adulterated) or a narcotic drug (pure or adulterated) classified in schedule I or II, commits possession of cocaine or a narcotic drug, a Level 6 felony, except as provided in subsections (b) through (d).

(b) The offense is a Level 5 felony if:

(1) the amount of the drug involved is at least five (5) but less than ten (10) grams; or

(2) the amount of the drug involved is less than five (5) grams and an enhancing circumstance applies.

In summary then, the evidence most favorable to the judgment consists of Detective Graber observing less than 5 grams of an unknown narcotic located at an unknown location within Williams' apartment. The State offered no evidence describing the physical condition of the drugs or how they were packaged. In addition, Graber observed \$7,600.00 behind a TV in the bedroom, and saw another \$3,500.00 in Williams' wallet. The location where the wallet was found is unknown.

Other relevant evidence not necessarily supporting the judgment included the absence of surveillance indicating unusual traffic at Williams' residence. Moreover, the police did not conduct any controlled buys or recover any guns, ledgers, or drug making paraphernalia.

In *Hughley v. State*, 15 N.E.3d 1000, 1005 Ind., 2014, our Supreme Court recognized that forfeitures have significant criminal and punitive characteristics and "are not favored, and should be enforced only when within both the letter and spirit of the law," citing *Katner v. State*, 640 N.E.2d 388, 390 (Ind.App.1994.)

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In this instance, there is a complete absence of ‘*substantial evidence of probative value*’ to support the trial court's ruling. Other than *less than 5 grams* of narcotics observed by the Detective, there is not a scintilla of evidence linking this currency to criminal activity.

To uphold this forfeiture is to impose additional punishment for the possession of a small amount of narcotics without any evidence of dealing. There is a complete lack of evidence that Williams intended these funds “*to be furnished by any person in exchange for an act that is in violation of a criminal statute,*” or the funds are “*traceable as proceeds of the violation of a criminal statute.*” The evidence is insufficient to support forfeiture, without question, and the judgment should be reversed.

ARGUMENT II.

ANGELA SMITH PROVED THAT SHE WAS THE REAL PARTY IN INTEREST

Angela Smith immediately filed to intervene in the action asserting she was the real party in interest.¹ Smith’s testimony was un-rebutted by the State. As conclusively established by her bank records, there can be no dispute that Smith withdrew \$29,000.00 from her Chase bank account in June 2020, before the seizure date of September 18, 2020. Further, the photographs of Smith and police reports unequivocally demonstrate that she was in an abusive relationship that

¹ Within 15 days of the Complaint being filed.

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culminated in serious personal injuries, the arrest of the abuser, and the issuance of a protective order.

The State never refuted Smith's testimony that she entrusted her money to Williams in late June 2020 out of fear her abuser might steal the money. At the conclusion of the trial, during final argument, the State attacked Smith's testimony, which was never impeached, by merely arguing that the absence of Dylan Williams as a witness makes her testimony less credible. Of course, the State could have issued Williams a subpoena if they believed his testimony was important, but they did not. It was their burden of proof.

In addition, the State argued that Smith had other options to secure her money rather than entrust it to Williams. The issue is not what else Smith might have done with her money, but whether the seized currency is subject to forfeiture in the first instance. The State never outlined their evidence supporting a finding the currency was even subject to forfeiture. The State's entire argument focused on the absence of Williams as a witness at trial, and Smith's decision to entrust the money to Williams rather than choosing an alternate path. (Tr. Vol. II, p. 32-34)

The State seems to miss the point that they must first prove the money is subject to forfeiture as opposed to whether Smith has proven she provided the money to Williams or whether she had other options. Smith was the only opposing party to appear in the litigation and make a claim to the currency. If the State failed to prove its case for forfeiture, the money has to be returned to

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someone. The State never sought a default judgment against Williams nor was a default judgment ever entered against him.

CONCLUSION

It was the State’s burden to present substantial evidence of probative value to support the forfeiture. The State must establish a nexus between the property and the commission of an offense; which “requires more than an incidental or fortuitous connection between the property and the underlying offense.” *Serrano*, 946 N.E.2d at 1143. (quoting *Katner v. State*, 655 N.E.2d 345, 348-49 (Ind. 1995).

Because the nexus was never established the Order of Forfeiture should be reversed.

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’s Brief has been served on the 7th day of February, 2023, by IEFS electronic filing upon:

Attorney General
Indiana Government Center South, Fifth Floor
Indianapolis, Indiana 46204.

/s/ Stephen Gerald Gray

Stephen Gerald Gray