

PETITION TO TRANSFER

QUESTIONS PRESENTED ON TRANSFER

1. Did the Trial Court erroneously order Smith's currency forfeited when no nexus existed connecting the forfeited funds to criminal activity?
2. Did the Court of Appeals erroneously accept the State's argument that Smith lacked standing to contest the forfeiture which the State raised for the first time on appeal?

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IN THE INDIANA SUPREME COURT

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.)	

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In a memorandum opinion issued on July 24, 2023, a panel of the Court of Appeals held that Smith “lacked standing” to contest the forfeiture of the seized currency notwithstanding this argument was raised by the State for the first time on appeal. [*“But this argument presupposes that Smith has standing as the owner of the currency to raise it in the first place.”* (Opinion, p. 5.)]

There is little dispute that the evidence at trial did not connect the currency to criminal activity, and Angela Smith was the only claimant whose testimony of her ownership was ‘*uncontradicted*’ as the Court of Appeals so found. (Opinion, p. 6.)

CASE OVERVIEW

The core of this appeal is whether the State may seize and forfeit money in the complete absence of evidence connecting the money to criminal activity. At trial, the State never argued that Smith lacked standing to contest the forfeiture, but sought forfeiture merely arguing that Smith’s nephew, Dylan Williams’,

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failure to testify at trial proved the currency was tainted by criminal activity. The issue of Smith's standing was raised for the first time on appeal.

Smith contends the Court of Appeals opinion deviates from controlling precedent by allowing an argument to be raised for the first time on appeal. Moreover, the question of forfeiting money without a link to criminal activity by ignoring uncontradicted testimony concerning ownership appears to be a question of first impression. This opinion ratifies the State seizing and forfeiting property in the complete absence of a nexus to criminal activity.

This Court should grant transfer under Indiana Appellate Rule 57(H) (2) (4) & (6) because the opinion conflicts with controlling precedent and significantly departs from accepted law and practice.

BACKGROUND AND PRIOR TREATMENT OF ISSUES

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. (Appellant's *App. Vol. II p. 8, 9.*) The trial court never found that Smith 'lacked standing' but instead held that the "*State has met its burden of proof by a preponderance of the evidence that the currency should be seized.*" (Appellant's *App. Vol. II p. 9.*)

Smith's U.S. currency was seized by police from her nephew's residence. (Tr. Vol. II, p. 8, line 16, p. 9, lines 20-22) However, the nephew, *Dylan Williams*, never appeared in the litigation and never filed a claim to the currency.

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Further, Dylan Williams was never convicted of *Dealing* but merely possession of less than 5 grams of a controlled substance, a Level 6 felony¹. (*Exhibit Volume III, p. 4-7*)

Incredibly, the entire record of evidence to support this forfeiture consists of the following:

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

Detective Graber: 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)

The State's only argument at trial focused on the nephew's failure to testify but concurrently conceding that the money belonged to Angela Smith.

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 Court of Appeals issued its *Memorandum Opinion* on **July 24, 2023**, and affirmed the Trial Court relying exclusively on a standing argument raised by the State for the first time on appeal. (Opinion, p. 5.) (Docket)

FACTUAL BACKGROUND

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)

¹ Dylan's possession conviction does not create the presumption under I.C. 34-24-1-1(d).

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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'S 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 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,

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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)

On cross-examination, Graber admitted that no surveillance of Williams’ residence and no controlled buys ever occurred, no ledgers or firearms were located during the search, and no scales were found except on the person of an 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)

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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*)

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.

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(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) Smith's testimony was uncontradicted. (Opinion, p. 6.)

ARGUMENT I.

NO STATUTORY AUTHORITY EXISTS TO FORFEIT PROPERTY NOT LINKED TO CRIMINAL ACTIVITY

The authority to seize and forfeit property is statutory. Forfeitures of money are governed by Indiana Code Section **34-24-1-1(a)(2)**, which provides that the following are subject to forfeiture:

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;

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- (B) used to facilitate any violation of a criminal statute; or
- (C) traceable as proceeds of the violation of a criminal statute.

In the absence of criminal activity, the State has no authority to seize and forfeit property. The State never presented any evidence linking the money to criminal activity, and the Court of Appeals' opinion never held any nexus to criminal activity was proven. The Opinion's analysis is backwards.

The court must *first* determine that the money is subject to forfeiture pursuant to the statute. If the State fails to link the money to criminal activity, to whom the money is returned is the next issue. In this case, the Court of Appeals ignored the fact that the evidence was grossly insufficient to sustain the forfeiture in the first instance.

Instead, the opinion focused on Smith's standing to contest the forfeiture, an argument raised for the first time on appeal. The opinion held that the trial court was not required to accept Smith's evidence, and therefore she lacked standing, but clearly the trial court's order, *silent on standing*, erroneously held the money was tainted by criminal activity. The Order held the money was subject to seizure and forfeiture, a finding which required a nexus to criminal activity pursuant to I.C. 34-24-1-1:

"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."
(Appellant's *App. Vol. II p. 9.*)

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How could the currency be ‘*subject to forfeiture*’ in the complete absence of evidence linking the money to criminal activity? The State is not empowered to go around seizing money in the absence of statutory authority to do so, and then assert the sole claimant lacks standing to recover her money, without first establishing a nexus to criminal activity as required by the statute.

The evidence at trial demonstrated that Graber observed, while at Williams’ 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.

This evidence does not even establish a *prima facie* case for forfeiture let alone meet a preponderance standard. 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

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N.E.2d 388, 390 (Ind.App.1994.)

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.

ARGUMENT II.

SMITH’S LACK OF STANDING WAS RAISED FOR THE FIRST TIME ON APPEAL

This argument was 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)

Nevertheless, the Court of Appeals accepted the belated ‘*standing*’ argument despite the trial court’s order failing to even hint that standing was an issue after bench trial. Certainly, the State never made that argument at trial and appears to even concede Smith’s standing in their closing argument:

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.)

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The State never objected when Smith filed her petition to intervene 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.

SUMMATION

The State's authority to forfeit property is statutory. Without some evidence linking the currency to criminal activity as defined by the statute, the State is powerless to forfeit money. Whether that money is returned to Smith, or to Dylan Williams, or to some third party, certainly may be properly litigated.

However, in this case Smith was the only claimant and her testimony was uncontradicted. She did not rely on just her word but presented bank records showing the withdrawal of a substantial sum of currency prior to the seizure. The evidence at trial indicated that Detective Graber did not locate any paystubs or work uniforms or evidence of Williams being employed.

In the absence of evidence of criminal activity tainting the money, and the lack of evidence that Dylan Williams earned the money from employment, the currency must be returned to the only claimant who filed an answer seeking the replevin of her property.

Respectfully submitted,
/s/ Stephen Gerald Gray
Stephen Gerald Gray
Attorney at Law

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VERIFICATION OF WORD COUNT

I verify that this petition contains less than 4200 words.

/s/ Stephen Gerald Gray

Stephen Gerald Gray

CERTIFICATE OF SERVICE

I hereby affirm under penalties for perjury that a copy of Appellant's **Petition To Transfer** has been served on the 4th day of September, 2023, by the Indiana Electronic Filing System upon all parties of record including the Office of the Indiana Attorney General.

/s/ Stephen Gerald Gray

Stephen Gerald Gray