

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1996 SESSION

FILED
Dec. 12, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
) C.C.A. No. 02C01-9605-CR-00148
Appellant,)
) Shelby County
V.)
) Honorable Joseph B. Brown, Jr., Judge
)
DAVID J. MOORE,) (State Appeal)
)
Appellee.)

FOR THE APPELLANT:

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OPINION FILED: _____

REVERSED AND REMANDED; INDICTMENTS REINSTATED

PAUL G. SUMMERS,
Judge

OPINION

The appellee, David J. Moore, was indicted on one count of possession of a controlled substance with intent to sell and one count of possession of a controlled substance with intent to deliver. He filed a motion to dismiss both counts arguing that he had formerly been placed in jeopardy for the offenses by forfeiting \$1,000 that had been seized from his home at the time of his arrest. At a hearing, the trial court found that proceeding with criminal charges after the appellee had forfeited currency violated the appellee's constitutional right against double jeopardy. The charges were dismissed and the state has now appealed. The sole issue raised on this appeal is whether civil forfeiture of currency alleged to be drug proceeds constitutes former jeopardy so as to bar subsequent prosecution of the appellee. We reverse.

FACTS

On September 14, 1993, the Memphis Police Department searched the appellee's home. They seized 3.1 grams of methamphetamine, a variety of drug paraphernalia, a safe, and \$6,267 in U.S. currency. The appellee was arrested and transported to police headquarters. The appellee voluntarily gave a statement in which he claimed he had won the seized currency gambling at a casino in Tunica, Mississippi.

Thereafter, the Commissioner of the Tennessee Department of Safety commenced forfeiture proceedings against the appellee's seized property pursuant to Tennessee Code Annotated 53-11-451(a)(6)(A). Following settlement negotiations, the appellee entered into a compromise agreement under which the Department agreed to return all of the appellee's property except \$1,000, which the appellee agreed to forfeit to the Memphis Police Department. The Department of Safety never made a specific finding that the forfeited money was either drug proceeds or was used to facilitate the

commission of a drug offense. The appellee was, thereafter, indicted on the two criminal counts discussed above.

The state argues that the U.S. Supreme Court has recently held that civil forfeiture of drug proceeds or property used to facilitate drug transactions does not constitute punishment for purposes of the double jeopardy clause of the U.S. Constitution. U.S. v. Ursery, 116 S.Ct. 2135 (1996). Furthermore, the state contends that the statute under which the appellee's currency was seized is indistinguishable from the federal statute considered in Ursery. In support of its argument, the state cites State v. Simpson, No. 02C01-9508-CC-00239 (Tenn. Crim. App. Aug. 2, 1996), a recent opinion of this Court. In Simpson, we held that civil forfeiture under the Tennessee Drug Forfeiture Act did not constitute punishment and, therefore, did not bar subsequent prosecution. State v. Simpson, No. 02C01-9508-CC-00239, slip op. at 7-8, (Tenn. Crim. App. Aug. 2, 1996).

The appellee contends that the Department of Safety never conclusively determined that the forfeited currency was drug proceeds or in any way linked to drug transactions. The appellee argues that the state cannot prove that it was used to facilitate a violation of Tennessee's drug laws.¹ Therefore, the forfeiture of the \$1000 cannot be considered disgorgement of ill-gotten gains and must be punishment. As a result, double jeopardy is implicated and future prosecution barred.

At the hearing on the motion to dismiss the criminal charges, the trial judge apparently accepted the appellee's argument. The trial judge also felt that constitutional prohibitions against double jeopardy precluded the state from relying on the same facts, or conduct, to prove that the money was proceeds and to prove the pending charges. Based upon this reasoning, the trial court dismissed the two count indictment pending against the appellee.

¹The appellee claims that the currency seized from his home was gambling proceeds. He possesses a receipt from a Tunica casino in support of this claim.

This Court has previously held that civil forfeitures are neither punishment nor criminal for double jeopardy purposes. In Simpson, the appellee's currency was seized in a civil proceeding. Id. The appellee's position can only prevail if we find that civil forfeiture proceedings constitute punishment in the absence of a conclusive finding that seized property was drug proceeds. We reject this position.

The appellee knowingly entered into a compromise settlement with the Department of Safety. It was his prerogative to challenge the seizure and force the state to prove his currency was involved in a violation of the Tennessee Drug Control Act. If he had challenged the seizure and the state proved the currency was drug proceeds, he could have lost the entire \$6,267. His decision to settle was tactical. He cannot now use it to bar his criminal prosecution.

It is illogical to require the state to prove the nature of seized property in a civil forfeiture proceeding when the offender wishes to settle the matter. If the state were required to prove that seized property is drug proceeds in order to preserve its ability to prosecute in the future, there would be no incentive for the state to enter into compromise settlements. This would be a waste of the state's resources. This Court is not inclined to create such a requirement.

We hold that civil forfeiture of property does not implicate double jeopardy when the offender enters into a compromise settlement. Accordingly, the state does not have to prove that the forfeited property is drug proceeds in order to pursue subsequent criminal prosecution. Civil forfeiture is not punishment when an alleged offender forfeits property pursuant to a negotiated settlement agreement. Therefore, the judgment of the trial court should be reversed and the indictments reinstated. The case is remanded for further proceedings consistent with this decision.

PAUL G. SUMMERS, Judge

CONCUR:

JOHN H. PEAY, Judge

DAVID G. HAYES, Judge