[Cite as *State v. Primm*, 2011-Ohio-328.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94630

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SAMSON PRIMM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-494960

BEFORE: Cooney, J., Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: January 27, 2011

ATTORNEY FOR APPELLANT

James R. Willis
323 W. Lakeside Avenue
420 Lakeside Place
Cleveland, Ohio 44113-1009

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Mary McGrath
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Samson Primm ("Primm"), appeals the trial court's denial of his motion for return of property and motion to show cause. We find no merit to the appeal and affirm.

{¶ 2} In May 2007, Primm was charged with drug trafficking, having a weapon under disability, and possessing criminal tools. A forfeiture petition was filed, seeking forfeiture of $26,318, a handgun, and two cell phones. The trial

court delayed ruling on the petition until the conclusion of the criminal case. In September 2007, Primm pled guilty to having a weapon under disability and agreed to forfeit the gun and the phones. The remaining counts were nolled. In October 2007, Primm was sentenced to a one-day community control sanction and 90 days of residential sanctions in county jail. The trial court also signed an order of forfeiture, based on the initial petition. No appeal was filed regarding this sentence and forfeiture.

{¶ 3} In June 2008, Primm filed a motion requesting return of the $26,318. The State filed an untimely response in which it informed the court that the federal government was in possession of the funds. The trial court ordered that the money be returned. The State filed a motion to reconsider and rescind, arguing that the trial court did not have jurisdiction over the funds because they had been transferred to the federal government.

{¶ 4} The State argues that the funds were listed on the forfeiture petition in error, and that the funds had already been transferred to the Drug Enforcement Agency at the time the petition was filed. The State conceded that the money was erroneously listed in the 2007 forfeiture petition and subsequently on the order of forfeiture in October 2007. The State produced a U.S. Department of Justice, “Declaration of Administrative Forfeiture” statement that indicated that the funds had been forfeited on April 4, 2007, pursuant to 21 U.S.C. 881. The statement also indicated that notice of the seizure and intent to forfeit had been

published on June 4, June 11, and June 18, 2007, to all interested parties. No claims were filed, and the funds were officially forfeited.

{¶ 5} Primm filed a motion to show cause in response to the State's motion to reconsider and rescind, and the trial court conducted hearings in October 2008 and December 2009. In January 2010, the trial court denied Primm's motion to show cause and granted the State's motion to reconsider and rescind, thereby vacating the 2008 order to return the money. It is from this judgment that Primm now appeals.

{¶ 6} Primm has filed a 41-page brief assigning five errors on appeal. The only sense we can make of his rambling arguments is that he maintains the court erred in failing to return the monies. He claims the State offered no evidence to show when the federal authorities asserted jurisdiction over this money.

{¶ 7} The record, however, reflects the State produced the Declaration of Forfeiture. Therefore, the trial court properly deferred to this declaration, thereby reinstating its 2007 forfeiture order. We note that Primm failed to appeal the 2007 forfeiture order when the common pleas court sentenced him.

{¶ 8} Accordingly, the judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY WITH SEPARATE OPINION ATTACHED;

PATRICIA ANN BLACKMON, J., DISSENTS WITH SEPARATE OPINION ATTACHED.

SEAN C. GALLAGHER, P.J., CONCURRING IN JUDGMENT ONLY:

{¶ 9} While I disagree with portions of the majority analysis, I agree with the outcome of the case, albeit for different reasons.

{¶ 10} In my view, appellant's brief properly raises novel and unique questions on forfeiture law, involving questions regarding conflicts between state and federal jurisdiction. Appellate counsel is a renowned criminal defense attorney who has over 50 years of direct experience in this area. He has practiced in both local and federal courts involving some of the biggest cases in that period. The brief is anything but a "rambling argument." Again, it raises an interesting and challenging issue.

{¶ 11} In my view, the forfeiture in this case is resolved by the applicable federal statutes. I see the trial court's actions as being irrelevant to the outcome of the forfeited money. By the time state charges were filed, what was done was done. The bell was rung.

{¶ 12} It can be discerned from the record that Primm was stopped for a traffic violation, and in addition to the $26,318 in cash, police also seized approximately 155 grams of marijuana and a 9 millimeter handgun. Primm was subsequently charged with drug trafficking, having a weapon under disability, and possessing criminal tools. He pled guilty only to the charge of having a weapon under disability.

{¶ 13} The record reflects that the police transferred the $26,318 pursuant to 18 U.S.C. 981(b)(2). The statute outlines three options for seizures, as follows:

> **"(2) Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if--**
>
> **"(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;**
>
> **"(B) there is probable cause to believe that the property is subject to forfeiture and--**
>
> **"(i) the seizure is made pursuant to a lawful arrest or search; or**

> **"(ii) another exception to the Fourth Amendment warrant requirement would apply; or**
>
> **"(C) the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency."**

{¶ 14} Here, no warrant was sought or issued and no complaint was filed in United States District Court. That leaves the remaining two methods for seizure. First, under subsection (B), a seizure may be made without a warrant if there is probable cause to believe the property was subject to forfeiture and either (i) the seizure was made pursuant to a lawful arrest, or (ii) another exception to the Fourth Amendment warrant requirement applies to justify the seizure. Second, under subsection (C), a forfeiture may be predicated on property that was "lawfully seized" by a state or local law enforcement agency and was transferred to a federal agency.

{¶ 15} The State asserts that under subsection (C), the money was "lawfully seized" by local law enforcement and transferred to a federal agency. Specifically, the State claims this was, in effect, an "adoptive" forfeiture by the federal authorities. The State does not indicate how the requirement that the cash was "lawfully seized" was established prior to forfeiture other than it was likely based on police observations of the facts and circumstances and their belief of criminal activity. In effect, the police did a preemptive "strike" and forfeited the money independent of judicial review.

{¶ 16} However, it is not for this court to determine whether there was a lawful seizure of the money. It is undisputed that the money was forfeited on April 10, 2007, when police transferred the money by check to the U.S. Marshals Service. At that point, further review by the state court on the issue was moot.

{¶ 17} Despite the claim that there was no probable cause or "lawfully seized" finding made by any judicial authority prior to the forfeiture, Primm's remedy does not lie with the state court system. 18 U.S.C. 983(e)(5) is clear and provides the following: "A motion filed under this subsection shall be the exclusive remedy for seeking to set aside declaration of forfeiture under a civil forfeiture statute."

{¶ 18} As stated in *State v. Scott* (Mar. 22, 2000), Mahoning App. No. 98 CA 174:

> **"However, what is equally undisputed is the fact that the money in question was turned over to federal authorities and forfeited pursuant to federal law, 21 U.S.C. Section 881(a). The Ohio Supreme Court has made it clear that, 'since the money was forfeited under federal law, it is immaterial what R.C. § 2933.43 states about its return. [Appellant's] claim, if any, is against the federal government.' *State, ex rel. Chandler v. Butler* (1991), 61 Ohio St.3d 592, 593.**
>
> **"* * *
>
> "* * * Appellant's failure to utilize the federal remedy provided to him * * * when he knew the seized money was in the possession of the federal authorities is fatal to his claim. *Simmons v. Dayton* (1992), 82 Ohio App.3d 385.**

> **"This Court notes that * * * the trial judge expressed serious misgivings concerning the legal loophole which effectively allows local law enforcement authorities to completely circumvent the procedural safeguards contained in the state forfeiture statute. This is accomplished by merely turning the seized property over to federal authorities pursuant to federal statute which does not require a defendant's conviction as a condition precedent to forfeiture proceedings. The trial court's misgivings are highlighted by the fact that there is an apparent financial incentive for a local police department to seek the implementation of federal forfeiture proceedings as opposed to its state law counterpart. The cumulative effect of this practice is to reduce Ohio's forfeiture statute to a functional nullity.**
>
> **"This Court shares the trial court's concern, but like the lower court we are bound to follow the Supremacy Clause codified in Article VI of the United States Constitution as well as the Ohio Supreme Court's holding in *State, ex rel. Chandler v. Butler*, supra."**

{¶ 19} Accordingly, if Primm has a remedy, it lies only with the federal court system.

PATRICIA ANN BLACKMON, J., DISSENTING:

{¶ 20} I respectfully dissent from the majority opinion. I believe the state assumed jurisdiction over the $26,318 on May 4, 2007 before the federal government assumed jurisdiction on August 10, 2007. In in rem jurisdiction cases, the court first assuming jurisdiction over the property maintains jurisdiction to the exclusion of all other courts. *Penn Gen. Cas. Co. v. Commonwealth of Pennsylvania, ex rel. Schnader* (1935), 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850. In this case, once the state forfeiture action was filed on May 4, 2007, the federal forfeiture claim in August 2007 was of no consequence.

{¶ 21} Furthermore, I do not believe that the officer's delivery of the money to the federal government on or about April 4, 2007 conferred in rem jurisdiction on the federal government over and above the state's jurisdiction.

{¶ 22} If the state had notified the defendant that the money was turned over to the federal government on or about April 4, 2007, then the defendant would have been on notice of the location of the $26,318; thus, the defendant had a right to conclude that the state had the money and assumed jurisdiction over it on May 4, 2007, the date of the state's indictment and forfeiture motion. Therefore, I believe in rem jurisdiction vested first with the state. See *Princess Lida of Thurn & Taxis v. Thompson* (1939), 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285.