

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 10CA009793

Appellee

v.

BILLY L. MCSHEPARD

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE Nos. 04CR066836
 05CR067231

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 7, 2011

CARR, Judge.

{¶1} Appellant, Billy McShepard, appeals the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} On February 23, 2005, the Lorain County Grand Jury indicted McShepard in Case No. 04CR066836 on one count of felonious assault on a peace officer in violation of R.C. 2903.11(A)(2), a felony of the first degree; one count of attempted murder in violation of R.C. 2923.02(A)/2903.02(A)/(B), a felony of the first degree; one count of having weapons under disability in violation of R.C. 2923.13(A)(2)/(3), a felony of the third degree; and three counts of receiving stolen property in violation of R.C. 2913.51(A), felonies of the fourth degree. All of the counts in the indictment contained firearm specifications.

{¶3} In a separate indictment filed on February 23, 2005, the Lorain County Grand Jury indicted McShepard in Case No. 05CR067231 on one count of trafficking in marijuana in

violation of R.C.2925.03(A)(2), a felony of the fourth degree; one count of possession of cocaine in violation of R.C. 2925.11(A), a felony of the fifth degree; one count of permitting drug abuse in violation of R.C. 2925.13(B), a felony of the fifth degree; one count of possession of criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree; and one count of possession of drug abuse paraphernalia in violation of R.C. 2925.14(C)(1), a misdemeanor of the fourth degree. Several of the aforementioned counts contained firearm and forfeiture specifications.

{¶4} On January 6, 2006, the State filed a motion to consolidate Case No. 04CR066836 and Case No. 05CR067231. On February 3, 2006, the motion to consolidate was granted by the trial court. A jury trial commenced on September 11, 2006. McShepard was found guilty of felonious assault on a peace officer in violation of R.C. 2903.11(A)(2) and (D)(1), having weapons under disability in violation of R.C. 2923.13(A)(2)/(3), three counts of receiving stolen property in violation of R.C. 2913.51(A), trafficking in marijuana in violation R.C. 2925.03(A)(2), possession of cocaine in violation of R.C. 2925.11(A), possession of criminal tools in violation R.C. 2923.24(A), and possession of drug paraphernalia in violation of R.C. 2925.14(C)(1). Additionally, McShepard was found guilty of multiple firearm specifications, as well as a forfeiture specification relating to the trafficking in marijuana charge. In a separate hearing, the jury determined that approximately \$70,000 was subject to forfeiture. The jury determined that a bank account containing \$9,816.54 plus interest was not subject to forfeiture. This Court affirmed McShepard's convictions in *State v. McShepard*, 9th Dist. No. 06CA009024, 2008-Ohio-1460.

{¶5} The State had contemporaneously filed a complaint for civil forfeiture pursuant R.C. 2925.43 in Case No. 05CV141067. This Court set out the following procedural facts in

McShepard's appeal from the judgment in the civil proceeding in *State v. McShepard*, 9th Dist. No. 07CA009118, 2007-Ohio-6006:

"On February 8, 2005, the State filed a complaint for civil forfeiture pursuant to R.C. 2925.43. In its complaint, the State sought forfeiture of nearly \$80,000 in cash and McShepard's interest in two parcels of real estate. The forfeiture action was stayed during the pendency of a trial on the criminal charges brought against McShepard. As a result of his convictions in that matter which included a criminal forfeiture specification, McShepard forfeited roughly \$70,000 from numerous bank accounts. At the conclusion of McShepard's criminal case, this forfeiture action resumed and the State moved for summary judgment. One of the parcels partially owned by McShepard was foreclosed upon by the mortgage holding bank during the civil forfeiture proceeding. As a result, the State ultimately sought forfeiture of roughly \$10,000 in cash and McShepard's interest in the remaining real estate parcel.

"In support of its summary judgment motion, the State relied upon the affidavit of Sergeant Albert Rivera. In his affidavit, Rivera swore that he had investigated McShepard and could not find any legitimate source of income. Rivera stated that despite this fact, McShepard was arrested while in possession of a large sum of cash and had purchased real estate for cash while on probation from a prior conviction for drug abuse. McShepard submitted no evidence in response to the State's motion. On January 31, 2007, the trial court granted the State's motion and ordered that McShepard's remaining property be forfeited." *Id.* at ¶2-3.

This Court ultimately affirmed the judgment of the trial court in the civil forfeiture proceeding. *Id.* at ¶23. The Supreme Court of Ohio subsequently declined to review the matter. *State v. McShepard*, 117 Ohio St.3d 1460, 2008-Ohio-1635. The United States Supreme Court denied McShepard's petition for a writ of certiorari. *McShepard v. Ohio* (2008), 129 S.Ct. 225.

{¶6} On March 4, 2010, McShepard filed a pro se motion for return of property with the trial court in Case Nos. 04CR066836 and 05CR067231. McShepard argued that the trial court had failed to properly return \$9,816.54 with interest that the jury determined was not subject to forfeiture. McShepard argued that he was entitled to the money pursuant to R.C. 2981.01 et seq. The State filed a response to the motion on March 10, 2010. The trial court denied the motion in a journal entry issued on March 15, 2010. In denying the motion, the trial

court found that “[t]he property Defendant requests returned [was] forfeited in Case No. 05CV141067.” McShepard filed a notice of appeal on March 31, 2010.

{¶7} On appeal, McShepard raises two assignments of error.

II.

ASSIGNMENT OF ERROR I

“IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY THE DEFENDANT’S MOTION FOR RETURN OF PROPERTY, WHEN A JURY HAD DETERMINED THAT THE FUNDS IN ACCOUNT NO. 1563471224 WERE NOT CRIMINALLY FORFEITABLE IN CASE NUMBER 05CR067231, AS THE PROSECUTION HAS ADMITTED.”

ASSIGNMENT OF ERROR II

“THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN A MANNER AS TO VIOLATE THE DEFENDANT’S RIGHTS TO FINALITY IN A JURY VERDICT. THROUGH DECIET AND THE CONTEMPORANEOUS MOVING FOR CIVIL FORFEITURE AFTER HAVING THE JURY DETERMINE FORFEITURE AFTER CRIMINAL TRIAL DURING A SPECIAL PROCEEDING.” (sic)

{¶8} In his first assignment of error, McShepard argues that the trial court erred in denying his motion for return of property. In his second assignment of error, McShepard argues that the State committed prosecutorial misconduct by pursuing civil forfeiture claims when the jury in the criminal proceeding had previously decided the issue. This Court disagrees with both assertions.

{¶9} In support of his argument that the trial court erred in denying his motion for return of property, McShepard argues that he has a right to a bank account containing \$9,816 because the jury in the criminal case determined that those funds were not subject to forfeiture. In support of his second assignment of error, McShepard argues that the State committed prosecutorial misconduct by pursuing civil forfeiture of the bank account when the jury in the criminal case had already made a determination on that issue. The State argues that the claim

raised in McShepard's motion for return of property was barred by the doctrine of res judicata. The State notes that while the jury did not recommend forfeiture of the bank account in the criminal proceeding, the bank account was forfeited in the contemporaneous civil proceeding. The State further argues that it had a right to pursue civil forfeiture of the bank account and that McShepard is now barred from raising prosecutorial misconduct because he declined to raise that issue in his previous appeal from the civil forfeiture judgment. "A determination of whether the doctrine of res judicata bars an action is a question of law which this Court reviews de novo." *Brott v. Green*, 9th Dist. No. 21209, 2003-Ohio-1592, at ¶11, citing *Davis v. Coventry Twp. Bd. of Zoning Appeals* (Feb. 14, 2001), 9th Dist. No. 20085; *Payne v. Cartee* (1996), 111 Ohio App.3d 580, 586-587. When reviewing a matter de novo, this court does not give deference to the trial court's decision. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, at ¶11.

{¶10} Under the doctrine of res judicata, "[a] valid, final judgment rendered upon the merits bars all subsequent actions based on any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, syllabus. It is well-settled under Ohio law that "'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.'" *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62, quoting *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69.

{¶11} In this case, the trial court denied McShepard's motion for return of property on the basis that the property had been forfeited in Case No. 05CV141067. In discussing the scope of McShepard's appeal from the judgment in the civil forfeiture proceeding, this Court stated:

"The trial court ultimately ordered forfeiture of a bank account containing \$9,816 and forfeiture of McShepard's half-interest in property valued at \$35,000.

Accordingly, McShepard forfeited roughly \$27,316. While he forfeited additional property in the criminal case (roughly \$70,000), that forfeiture is not relevant to our review.” *McShepard*, 2007-Ohio-6006, at ¶20.

In his appeal from the civil forfeiture judgment, McShepard argued that the trial court erred in granting summary judgment to the State. This Court noted that in responding to the State’s motion for summary judgment, “McShepard provided no evidence, nor does his response contest the facts stated by [the State].” *Id.* at ¶11. This Court concluded that “McShepard, therefore, did not meet his reciprocal burden under Civ.R. 56.” *Id.*

{¶12} In his current appeal, McShepard argues the trial court erred in denying his motion for return of property because the jury in the criminal case found that the bank account containing \$9,816 was not subject to forfeiture. As noted above, the trial court ordered the forfeiture of that bank account containing \$9,816 in the contemporaneous civil proceeding. McShepard exercised his right to appeal in that matter and this Court affirmed the trial court’s judgment. Both the Supreme Court of Ohio and the United States Supreme Court declined to review the matter. Under the doctrine of *res judicata*, McShepard is barred from relitigating that issue in a subsequent action. See *Grava*, 73 Ohio St.3d at syllabus. Therefore, the trial court did not err in denying his motion for return of property on the basis that the issue had already been adjudicated. Furthermore, McShepard had the opportunity to raise the issue of prosecutorial misconduct in his previous appeal and he declined to do so. As he did not assign that issue as error in his previous appeal, he is also barred from raising that issue at this time. *Id.*

{¶13} McShepard’s first and second assignments of error are overruled.

III.

{¶14} McShepard’s assignments of error are overruled. The judgment of the Lorain

County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

DICKINSON, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

BILLY L. MCSHEPARD, pro se, Appellant.

DENNIS P. WILL, Prosecuting Attorney, and RICHARD A. GRONSKY, Assistant Prosecuting Attorney, for Appellee.