IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1996 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee	)	C.C.A. NO. 03C01-9510-CC-0318
	)	
vs.	)	Monroe Criminal
	)	
JAMES C. BRADLEY and MICKEY ELLER,	)	Honorable R. Steven Bebb
	)	
	)	(TRAP 9 Appeal - Double Jeopardy)
Appellants	)	

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OPINION FILED_____

AFFIRMED

WILLIAM M. DENDER, SPECIAL JUDGE

OPINION

Pursuant to an order of this Court, these were the consolidated appeals of the defendants from orders denying defendants' motions to dismiss the prosecutions against them, as violations of the double jeopardy clauses of the Constitution of the United States and the Constitution of the State of Tennessee. Defendant James C. Bradley died on July 7, 1996, and his appeal has been dismissed. The appeal of Mickey Eller is the subject of this opinion.

The issue presented for review is "Whether the Double Jeopardy Clause of the Fifth Amendment to the United States' Constitution and /or Article 1, Section 10 of the Tennessee Constitution bars a criminal proceeding when a prior separate civil forfeiture proceeding against said defendant was predicated on the same conduct which is the basis for the criminal offense with which the defendant is charged."

We find that neither constitution bars the criminal proceedings in this case, and the court below is affirmed.

FACTS

On October 27, 1994, Mike Finley, Special Agent, Drug Enforcement Unit of the Tennessee Bureau of Investigation, seized $3,299.00 currency and assorted drugs from a house owned by the Defendant, Mickey Eller, pursuant to T.C.A. § 53-11-201-204 and T.C.A. § 53-11-451.

On November 3, 1994, defendant was served with an original Notice of Property Seizure and Forfeiture of Conveyances; and the conduct on which the State based its civil seizure warrant

and forfeiture proceedings was manufacture and possession of marijuana for resale and three counts of possession of schedule II drugs for resale on October 27, 1994.

On November 11, 1994, defendant filed a Petition for Hearing pursuant to T.C.A.§ 40-33-201-204, requesting a hearing on $1,140.00 of said currency seized on October 27, 1994. On April 25, 1995, Administrative Law Judge David E. Thompson convened a forfeiture hearing for the Tennessee Department of Safety at which defendant appeared and actively pursued his claim. On August 17, 1995, the Tennessee Department of Safety issued an Initial Order which held the $1,140.00 forfeited to the State pursuant to T.C.A. § 53-11-451(a)(6)(A). On August 28, 1995, a Notice of an Initial Order Becoming a Final Order was issued.

On March 9, 1995, the Monroe County grand jury indicted the defendant and charged him with manufacture and possession of marijuana for resale and with three counts of possession of schedule II drugs for resale on October 27, 1994. The conduct with which said indictment charges the defendant is the same conduct on which the forfeiture proceeding was based.

As stated in appellant's brief, "The civil forfeiture proceeding and the criminal prosecution are separate proceedings, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different judges and resolved by separate judgments."

ANALYSIS AND HOLDING

As far the U.S. Constitution and the federal courts are concerned, the United States Supreme Court has clearly decided the case opposite to the position of the appellant. In United States, Petitioner v. Guy Jerome Ursery, No. 95-345, decided June 24, 1996, the Court discussed

the cases of Various Items of Personal Property v. United States, 282 U.S. 577 (1931), One Lot Emerald Cut Stones v . United States, 409 U.S. 232 (1972), and United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); and the Court said:

> Our cases reviewing civil forfeitures under the Double Jeopardy Clause adhere to a remarkably consistent theme. Though the two-part analytical construct employed in 89 Firearms was more refined, perhaps, than that we had used over 50 years earlier in Various Items, the conclusion was the same in each case: in rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause. See Gore v. United States, 357 U.S. 386, 392 (1958) (-In applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept . . . a long course of adjudication in this Court carries impressive authority-).

In Ursery, supra, the Court further discussed the cases of United States v. Halper, 490 U.S. 435 (1989), Montana Dept. Of Revenue v. Kurth Ranch, 511 U.S. _____, and Austin v. United States, 509 U.S. 602 (1993), as follows:

> In sum, nothing in Halper, Kurth Ranch, or Austin, purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause.
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> . . .
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> Halper dealt with in personam civil penalties under the Double Jeopardy Clause; Kurth Ranch with a tax proceeding under the Double Jeopardy Clause; and Austin with civil forfeitures under the Excessive Fines Clause. None of those cases dealt with the subject of this case: in rem civil forfeitures for purposes of the Double Jeopardy Clause.
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> . . .
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> Because it provides a useful analytical tool, we conduct our inquiry within the framework of the two-part test used in 89 Fireworks. First, we ask whether Congress intended proceedings under 21 U.S.C. 881, and 18 U.S.C. 981, to be criminal or civil. Second, we turn to consider whether the proceedings are so punitive in fact as to -persuade us that the forfeiture proceeding [s] may not legitimately be viewed as civil in nature,- despite Congress' intent. 89 Firearms, 465 U.S., at 366.
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> . . .
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> We hold that these in rem civil forfeitures are neither -punishment- nor criminal for purposes of the Double Jeopardy Clause.

Appellant asks this Court to hold that the Constitution of the State of Tennessee affords defendant more protection than the U.S. Constitution. We cannot agree with that position. No substantial difference in the U.S. Constitution and the Tennessee Constitution double jeopardy clauses has been pointed out to us. We are of the opinion that our state constitution provides no greater protection than that afforded by the United States Constitution. See State of Tennessee v. Grapel Simpson, C.C.A. No. 02C01-9508-CC-00239, at Jackson, decided August 2, 1996.

Appellant further contends that the common law of Tennessee and the legislative history of forfeitures under The Tennessee Drug Control Act of 1971, as amended, might well afford appellant more protection that the Tennessee Constitution. We find no substantial support for this contention, and we hold it to be without merit.

In deciding this case, we feel it is proper for us to use the analysis used in Ursery, supra. First, we will seek to determine whether the Tennessee Legislature intended forfeiture proceedings under T.C.A. § 53-11-201-204 and T.C.A. § 53-11-451 to be criminal or civil. Second, we will consider whether the proceedings are so punitive in fact as to "-persuade us that the forfeiture proceedings may not legitimately be viewed as civil in nature-" despite the intent of the legislature.

In our inquiry concerning the intent of the legislature, we conclude that the Tennessee Legislature designed forfeiture under T.C.A. § 53-11-201-204 and T.C.A. § 53-11-451 as a remedial civil sanction. This conclusion was based upon several findings. T.C.A. § 53-11-403 states: "Any penalty imposed for violation of parts 3 and 4 of this chapter or title 39, chapter 6, part 4 [repealed] is in addition to, and not in lieu of, any civil or administrative penalty or sanction otherwise authorized by law." The forfeiture provisions of the Tennessee Drug Control Act, with slight modifications are modeled upon the Uniform Controlled Substances Act. In rem

actions have traditionally been viewed as civil proceedings, with jurisdiction dependent upon the seizure of a physical object. 89 Firearms, id., at 363. The forfeiture provision in the Tennessee statute reaches objects "used, or intended for use" in violating the Tennessee Drug Control Act, and reaches a broader range of conduct than its criminal analogue. These forfeiture statutes further broad remedial aims, including, among others, preventing the use of forfeited objects in further criminal acts and preventing criminals from enjoying the fruits of criminal behavior. If a claim is filed, the state has the burden of proving "by a preponderance of the evidence that the seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture . . . ." This clearly is the standard of proof required in civil cases. Also, the hearing is an administrative type hearing.

In our inquiry concerning whether the proceedings are so punitive in fact as to "-persuade us that the forfeiture proceedings may not legitimately be viewed as civil in nature-" despite the intent of the legislature, we conclude that forfeiture proceedings under T.C.A. § 53-11-201-204 and T.C.A. § 53-11-451 are not so punitive in form and effect as to render them criminal despite the legislative intent to the contrary. In arriving at that conclusion we again look to the holding in Ursery, supra, and there the Court pointed out many nonpunitive goals served by forfeiture of property used, or intended to be used, to violate federal narcotics laws. Examples of such goals set forth by the Court are: (1) encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes, (2) prevents further illicit use of property, (3) removes from circulation property that has been used, or intended for use, illegally, (4) prevents forbidden property from circulation, (5) prevents persons from profiting from their illegal acts, and (6) serves a deterrent purpose distinct from any punitive purpose. We find that these and other nonpunitive goals are served by forfeitures under T.C.A. § 53-11-201-204 and T.C.A. § 53-11-451, and that such forfeitures are not so punitive in form and effect as to render them criminal.

In Ursery, supra, the Court further held "the fact that a forfeiture statute has some connection to a criminal violation is far from the -clearest proof- necessary to show that a proceeding is criminal." We feel there is ample evidence to support the decision that forfeitures under T.C.A. § 53-11-201-204 and T.C.A. § 53-11-451 are civil, and that they should not be classified as criminal simply because they are a part of the Tennessee Drug Control Act.

We hold that the forfeiture of $3,299.00, including the $1,140.00 upon which defendant requested a hearing, was a civil forfeiture; and that the civil forfeiture is not a bar to criminal prosecution for crimes arising out of the same conduct.

For the reasons stated herein, the trial court is affirmed, and the case is remanded to the trial court for all necessary proceedings not inconsistent with this opinion.

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William M. Dender, Special Judge

CONCUR:

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Joseph B. Jones, Presiding Judge

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David G. Hayes, Judge