IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1996 SESSION

FILED

September 18, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9511-CC-00346**
Appellant,	)	
	)	**SULLIVAN COUNTY**
VS.	)	
	)	**HON. R. JERRY BECK,**
CHARLES DAVID WAGNER,	)	**JUDGE**
	)	
Appellee.	)	(State Appeal)

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OPINION FILED:_____

REVERSED AND REMANDED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for selling LSD, a schedule I controlled substance. Prior to the indictment, the police had seized the defendant's car under Tennessee's forfeiture statute, T.C.A. § 53-11-451. Proceedings for forfeiture were then commenced pursuant to T.C.A. § 53-11-201 and the defendant eventually entered into a compromise agreement with the State whereby he could keep his vehicle upon payment of three hundred fifty dollars ($350.00).

Subsequently, the defendant moved to dismiss the indictment on the grounds of double jeopardy. The parties stipulated that the seized vehicle did not constitute "drug proceeds" and that "the offense of selling LSD [as specified in the indictment] . . . was the basis for the seizure of the automobile." The trial court granted the defendant's motion. The State has now appealed as of right. The only issue raised is whether the defendant's criminal prosecution is barred by the double jeopardy prohibition of either the United States or Tennessee Constitutions[1] where his property has previously been forfeited under T.C.A. §§ 53-11-451 and 53-11-201. Under the recent United States Supreme Court's decision in U.S. v. Ursery, ___ U.S. ___, (1996), we reverse the ruling below and remand this matter for trial.

In Ursery, the Supreme Court considered two separate federal forfeiture proceedings, one of which[2] had been instituted against Ursery's house under U.S.C.

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[1]The Double Jeopardy Clause of the United States Constitution provides "[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amdt. 5. Similarly, the Tennessee Constitution provides "[t]hat no person shall, for the same offense, be twice put in jeopardy of life or limb." Tenn. Const., Art. I, § 10.

[2]The other forfeiture proceeding involved property seized and allegedly subject to forfeiture under 18 U.S.C. § 981(a)(1)(A) because it was involved in money laundering and under 21 U.S.C. § 881(a)(6) as the proceeds of a felonious drug transaction. The Supreme Court issued the same holding on this second forfeiture proceeding: that it was not barred by the federal Double Jeopardy Clause.

§ 881(a)(7) because it had been used "to facilitate the unlawful processing and distribution of a controlled substance." ___ U.S. at ___. Shortly before the defendant and the federal government consummated a settlement of this forfeiture proceeding, the defendant was indicted for manufacturing marijuana, a federal crime. He was found guilty, and the United States Court of Appeals for the Sixth Circuit overturned his conviction on the basis that it violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. United States v. Ursery, 59 F. 3d 568 (6th Cir. 1995).

After first acknowledging that the Double Jeopardy Clause protects criminal defendants from being punished twice for the same offense, the Supreme Court framed the issue as whether a civil forfeiture constituted punishment for double jeopardy purposes. In determining that the civil forfeiture accomplished pursuant to U.S.C. § 881(a)(7) did not constitute punishment, and therefore did not bar subsequent criminal prosecution on double jeopardy grounds, the Supreme Court utilized a two-prong test. The first prong requires a determination of whether the legislature intended the proceedings under the relevant forfeiture statute to be civil or criminal. In Ursery, the federal statute in question provided for the forfeiture of "[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a federal drug felony. 21 U.S.C. § 881(a)(7). Subsection 881(d) further provided that the laws "relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws . . . shall apply to seizures and forfeitures incurred" under Section 881. The Supreme Court determined that there was "little doubt that Congress intended these forfeitures to be civil proceedings[,]" pointing to the procedural mechanisms for enforcing the forfeitures. Ursery, __ U.S. at __. These procedural mechanisms treated the forfeitures as proceedings in rem, not as proceedings

in personam. The Court found that "Congress specifically structured these forfeitures to be impersonal by targeting the property itself. 'In contrast to the in personam nature of criminal actions, actions in rem have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object.'" Ursery, ___ U.S. at ___, quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354 at 363 (1984).

Additional factors which bolstered the Court's finding that Congress intended the proceedings to be civil were that actual notice of the impending forfeiture was unnecessary where the Government could not identify any party with an interest in the seized item; the provision of a summary administrative procedure for forfeiture where no party files a claim to the property; and the shifting of the burden of proof to the claimant upon the Government's having shown probable cause that the property is subject to forfeiture. The Supreme Court described all of these mechanisms as "distinctly civil procedures" and concluded that, by creating them, Congress had clearly indicated its intent to impose a civil rather than a criminal sanction through forfeiture. Ursery, ___ U.S. at ___.

The second prong of the two-prong test requires a determination of whether the proceedings are so punitive in form and effect as to render them criminal in spite of the legislature's contrary intent. Ursery, ___ U.S. at ___. A determination that the proceedings are so punitive requires the "clearest proof." Id. In order to make this determination, the Court first considered whether the forfeiture statute at issue served "important nonpunitive goals." Id. In Ursery's case, the statute provided for the forfeiture of "[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a federal drug felony. The Court found that "[r]equiring the forfeiture of property used to commit federal narcotics violations

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." Ursery, ___ U.S. at ___. This is an important nonpunitive goal, according to the Court.

The Court found four additional factors weighing against a determination that the statutes were "so punitive in form and effect as to render them criminal":

> [First,] in rem civil forfeiture has not historically been regarded as punishment, as we have understood that term under the Double Jeopardy Clause. Second, there is no requirement in the statutes that we currently review that the Government demonstrate scienter in order to establish that the property is subject to forfeiture[.] . . . Third, though both statutes may fairly be said to serve the purpose of deterrence, we long have held that this purpose may serve civil as well as criminal goals. . . . Finally, though both statutes are tied to criminal activity, . . . this fact is insufficient to render the statutes punitive.

Ursery, ___ U.S. at ___. Accordingly, the Court held "that these in rem civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." Id. at ___.

The Tennessee statute at issue here provides that "[a]ll conveyances, including aircraft, vehicles or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale or receipt" of certain controlled substances, including LSD, are subject to forfeiture. T.C.A. § 53-11-451(a)(4). This statute also provides that "[p]roperty subject to forfeiture under [this statute] may be seized by the director of the Tennessee bureau of investigation or the director's authorized representative, agent or employee, the commissioner of safety or the commissioner's authorized representative, agent or employee, or a sheriff, deputy sheriff, municipal law enforcement officer or constable upon process issued by any circuit or criminal court having jurisdiction over the property." T.C.A. § 53-11-451(b) (emphasis

added). The procedural provisions for confiscation include the following:

> Any person claiming any property so seized as contraband goods may, within thirty (30) days after receipt of notification of seizure, file with the commissioner at Nashville a claim in writing, requesting a hearing and stating such person's interest in the articles seized.
> . . .
> Within thirty (30) days from the day the claim is filed, the commissioner [of safety] shall establish a hearing date and set such case on the docket.
> . . .
> At each such hearing, the state shall have 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 under the provisions of this chapter, and failure to carry the burden of proof shall operate as a bar to any forfeiture hereunder.
> . . .
> The commissioner may make, and/or publish, such other and further procedural rules and regulations, not inconsistent with this section, as the commissioner deems proper, governing any hearing provided herein.
>
> If a law enforcement agency seizes a motor vehicle as the result of a violation of the drug control law, the agency may elect whether to go forward with the forfeiture proceeding through either an administrative agency or through a court having civil jurisdiction in the county where the seizure occurred.

T.C.A. §53-11-201(c)(1), (d)(1)(A), (d)(2), (j) and (k) (1995 Supp.) (emphasis added). Additionally, T.C.A. § 53-11-203 provides that "If no claim is interposed, such . . . property shall be forfeited without further proceedings and the same shall be sold or disposed of as herein provided."

Applying the first prong of the Ursery test to these statutes, it is clear that the Tennessee legislature intended these forfeiture proceedings to be civil rather than criminal. Like the federal statute considered in Ursery, our procedural mechanisms for handling forfeitures treat the forfeitures as proceedings in rem, not as proceedings in personam: the property which is the subject of the forfeiture may be seized "upon process issued by any circuit or criminal court having jurisdiction over the property." T.C.A. § 53-

11-451(b) (emphasis added). Thus, it is the property itself which is targeted, not the owner(s) of the property.

Another indication that our legislature intended our forfeiture proceedings to be civil in nature is the initial burden of proof imposed upon the government. At the hearing necessitated upon the property owner's filing a claim, the State need only prove by a preponderance of the evidence that the property was properly the subject of a seizure. Of course, criminal proceedings require proof "beyond a reasonable doubt." Additionally, as was the case with the federal statute in Ursery, our confiscation procedures do not require actual notice of the impending forfeiture where no party in interest has been identified, and a summary forfeiture procedure is permitted where no claim is made.

Finally, where the property seized is a motor vehicle, as it is here, and the seizure resulted from a violation of the drug control law, as it did here, the law enforcement agency is permitted the choice of pursuing the forfeiture proceeding through "either an administrative agency or through a court having civil jurisdiction in the county where the seizure occurred." T.C.A. § 53-11-201(k) (1995 Supp.). Clearly, this provision demonstrates the legislature's intent that these proceedings be civil in nature. Accordingly, the first prong of the Ursery test is satisfied.

The second prong requires us to analyze whether our forfeiture proceedings are so punitive in form and effect as to overcome our legislature's intent and render the proceedings criminal. Following the Supreme Court's guidance, we first consider whether our forfeiture statutes serve important nonpunitive goals. Like the federal statute at issue in Ursery, our forfeiture statute provides for the forfeiture of vehicles which are used, or

are intended to be used, "to transport, or in any manner to facilitate the transportation, sale or receipt" of illegal drugs. T.C.A. § 53-11-451(a)(4). Thus, we are justified in concluding, as did the Supreme Court, that our statute "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." Ursery, ___ U.S. at ___. Likewise, we are justified in concluding, as did the Supreme Court, that this is an important nonpunitive goal.

Furthermore, as discussed above, we have concluded that our forfeiture proceedings are in rem in nature. Under Ursery, this supports the conclusion that this forfeiture is not punishment in the context of the Double Jeopardy Clause. Also, our proceedings present the same additional three factors that the Supreme Court cited in Ursery as contrary to a finding that they are punitive in form and effect:

> a) the government is not required to prove scienter in order to establish that the property is subject to forfeiture;
>
> b) that our statutes may have the effect of deterrence serves civil as well as criminal goals; and
>
> c) that our statutes are tied to criminal activity is insufficient to render them punitive.

Under the Supreme Court's ruling in Ursery, then, we hold that Tennessee's forfeiture statutes, T.C.A. §§ 53-11-451 and 53-11-201, are in the nature of civil in rem proceedings, and are neither punishment nor criminal for purposes of the federal Double Jeopardy Clause.

The defendant also challenged his indictment on the grounds of Tennessee's double jeopardy clause. Our Supreme Court has not yet extended the protection afforded by our double jeopardy clause beyond that given by the United States Constitution. See Lavon v. State, 586 S.W.2d 112, 114 (Tenn. 1979). See also State

v. Harris, 919 S.W.2d 323, 327 (Tenn. 1996); State v. Maupin, 859 S.W.2d 313, 315 (Tenn. 1993). We decline to do so in this instance.

For the reasons set forth above, the ruling below is reversed and this case is remanded for further proceedings in accordance with this opinion.

_____
JOHN H. PEAY, Judge

CONCUR:

_____
JERRY L. SMITH, Judge

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JOHN K. BYERS, Senior Judge