UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1876

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

$7,000.00 IN UNITED STATES CURRENCY, ET AL.,

Defendants,

DWIGHT LYNN HARRILL,

Claimant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-0137-G)

(November 30, 1993)

Before JOLLY, WIENER, AND EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

The government, following Dwight Lynn Harrill's conviction of attempting to manufacture methamphetamine, brought a civil forfeiture proceeding, seeking to confiscate certain property that Harrill either purchased with the proceeds of sales of controlled substances or used to facilitate violations of the Controlled

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Substances Act.

Although Harrill denied the government's allegations and supplied counter-affidavits to the government's motion for summary judgment, the district court granted the summary judgment and ordered the forfeiture of the property. Harrill now appeals, arguing that: (1) the government did not demonstrate as a matter of law that each forfeited asset had a substantial connection to Harrill's drug activities; (2) the government's complaint was not sufficiently particular under Rule E(2)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and (3) the affidavits underlying the search warrants used by the government to seize the property did not establish probable cause for seizure. We affirm in part, and reverse and remand in part.

I

Pursuant to search warrants, Drug Enforcement Administration ("DEA") agents seized certain property from Harrill's office and a rented storage facility, including laboratory chemicals and equipment (valued at $50,000); $7,000 in cash; one facsimile machine (valued at $2,400); one cellular telephone (valued at $1,700); and one computer and its accessories (valued at $2,500). In its motion for summary judgment, the government filed the affidavit of DEA Special Agent Mark Juvrud, who asserted that Harrill utilized the seized property to manufacture methamphetamine. Conversely, Harrill filed counter-affidavits to support his contention that the items seized by the government were used legitimately in his painting business.

II

Under 21 U.S.C. § 881(a)(6)(1988), parties forfeit to the United States "all moneys . . . or other things of value furnished or intended to be furnished in exchange for a controlled substance . . ., all proceeds traceable to such an exchange, and all moneys . . . used or intended to be used to facilitate any violation of this subchapter." In a suit under this section, the government must "show probable cause for [its] belief that a substantial connection exists between the property to be forfeited and a crime under Title 21." *United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990) (citations omitted). Probable cause is a "reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir. 1980) (per curiam).

The government can establish probable cause with credible evidence, including circumstantial and hearsay evidence, demonstrating that the money or property is related to drug trafficking. *One 1987 Mercedes*, 919 F.2d at 331. Once the government establishes probable cause, "the burden shifts to the claimant to demonstrate by a preponderance of the evidence that factual predicates for forfeiture have not been met or that a defense to the forfeiture applies." *United States v. 1988 Oldsmobile Cutlass Supreme 2 Door*, 983 F.2d 670, 674 (5th Cir. 1993) (footnotes omitted); *see also United States v. One 1980 Rolls Royce*, 905 F.2d 89, 90 (5th Cir. 1990) (holding that the portion of

property purchased with legitimate funds is not subject to forfeiture); *United States v. $364,960.00 in United States Currency*, 661 F.2d 319, 325 (5th Cir. Unit B 1981) (noting that the claimant can rebut government's evidence by showing that the money seized was not used to facilitate a narcotics transaction). The claimant's failure to refute the government's showing of probable cause results in forfeiture. *One 1987 Mercedes*, 919 F.2d at 331.

Because this case is an appeal from the district court's grant of summary judgment for the government, we review the record *de novo*. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 82, 121 L. Ed. 2d 46 (1992). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id*. at 324-25, 106 S. Ct. at 2553-54. While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Ins. Co.*, 784 F.2d 577, 578

(5th Cir. 1986), that party must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

A

Harrill initially contends that the government failed to establish, as a matter of law, probable cause for the forfeiture of the $7,000 seized at his office on February 12, 1991. Harrill argues that the money seized was derived not from illegal activities, but from the sale of painting equipment through classified newspaper advertisements. As corroboration, Harrill points to the affidavit of Roy Frazier who testified that he paid Harrill $5,500 in cash for an air compressor in November 1990.[1] However, the summary judgment record demonstrates a substantial connection between the $7,000 seized and Harrill's drug activities. Receipts and computer records seized from Harrill's office indicate that Harrill had received over $50,000 in drug-related proceeds between January 27 and February 10, 1991.

We find that the summary judgment evidence, including Harrill's own records, established probable cause for forfeiture by

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[1] Without any summary judgment evidence, Harrill stated in his reply to the government's motion for summary judgment that he kept this cash at his office in order to buy and restore painting equipment, and that this money constituted a portion of the $7,000 seized by DEA officials. Despite filing two counter-affidavits in response to the government's motion for summary judgment, Harrill, a *pro se* litigant, failed to verify his own reply. Therefore, we do not consider the unsupported contentions in his reply or appellate brief as summary judgment evidence on appeal. *See* Fed. R. Civ. P. 56(c) (limiting summary judgment record to pleadings, depositions, answers to interrogatories, and admissions on file, along with affidavits); *Topalian*, 954 F.2d at 1131 & n.10 (noting that appellate court considers only the summary judgment record before the trial court, thereby precluding parties from advancing new theories or issues on appeal).

demonstrating a substantial connection between the $7,000 seized and illegal drug activities. *See United States v. One 1986 Nissan Maxima GL*, 895 F.2d 1063, 1065 (5th Cir. 1990) (finding probable cause established at trial from government agents' testimony and bank records). Nevertheless, because the summary judgment record contained some evidence indicating that the seized funds constitute the proceeds of legitimate activities, a genuine issue of material fact exists as to the forfeiture of the entire $7,000. *See One 1980 Rolls Royce*, 905 F.2d at 90 (finding that legitimate portions of seized property are not subject to forfeiture). Therefore, we reverse this part of the summary judgment.

B

Harrill additionally contends that the government failed to show a substantial connection between the seized office equipment and illegal drug activities. Harrill argues that he used the facsimile machine, computer, and telephone in relation to his legitimate painting business. According to the affidavit of his brother, Gary Harrill, Harrill purchased the computer in 1986 and used it daily for payroll, purchasing, and general bookkeeping for his painting business.[2] The summary judgment record, however, connects Harrill's illegal drug manufacturing and sales activities to each forfeited asset. Facsimile cover sheets seized from

[2] Harrill also argues that he kept accounting, inventory and sales information in the computer to track his legitimate, ongoing sales of painting equipment and ephedrine tablets. He also maintains that any calls made on his cellular phone related to legitimate activities, such as contacting his plumber, Troy Compton, who has fifteen prior drug arrests and who the DEA suspected of buying methamphetamine from Harrill. However, the summary judgment record failed to support these contentions. *See supra* note 1.

Harrill's business confirm that Harrill used the facsimile machine to request, order and obtain chemicals used to manufacture methamphetamine. Furthermore, Harrill used the computer to record illegal drug transactions.[3] The computer records verified one such transaction with Troy Compton. Moreover, according to telephone records, Harrill called individuals suspected by the DEA to be recipients of methamphetamine from Harrill, including Compton.

The summary judgment record thus established probable cause for forfeiture by linking Harrill's use of the telephone, facsimile machine and computer to his illegal drug activities. *See One 1978 Chevrolet Impala*, 614 F.2d at 984-85 (finding that probable cause for forfeiture established with evidence that a vehicle transported chemicals used to manufacture methamphetamine). No fact issue exists because the summary judgment evidence failed to demonstrate that the equipment was not used in conjunction with the manufacture of methamphetamine. *See United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 998 (5th Cir. 1990) (finding that the defendant must contradict the government's summary judgment evidence of an illegal activity to create a genuine issue of fact for trial). Therefore, the district court's summary judgment as to these assets is affirmed.

C

Harrill further contends that the chemicals and equipment seized from his office and storage facility should not be forfeited

[3] Harrill stored the buyers's names, purchase prices, and quantities of controlled substances distributed in his computer's files.

because the government has not shown probable cause for the forfeiture.[4] The summary judgment record, however, supports probable cause for the forfeiture of the chemicals and equipment seized. DEA laboratory tests confirmed that Harrill was using the chemicals and equipment to facilitate the manufacture of methamphetamine.[5] DEA agents later seized additional chemicals and equipment from a storage unit rented to Harrill. DEA laboratory tests of the chemicals indicated that they were similar to those seized at Harrill's office. Additionally, DEA agents found ethyl ether, which is an essential chemical to manufacturing methamphetamine.[6] *See* 21 U.S.C. 802(35)(D) (listing ethyl ether as a chemical used as a solvent, reagent, or catalyst in manufacturing a controlled substance in violation of Title 21).

Because the summary judgment evidence linked the seized chemicals to the manufacture of methamphetamine and failed to demonstrate the existence of a genuine issue of material fact

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[4] Despite this contention, Harrill does not offer any summary judgment evidence demonstrating that the chemicals and equipment were not used to manufacture methamphetamine. *See supra* note 1.

[5] The tests showed that at the time of the seizure, Harrill was utilizing the chemicals and equipment to extract ephedrine, which is a precursor chemical used in the manufacture of methamphetamine. *See* 21 U.S.C. 802(34)(c) (stating that ephedrine, its salts, optical isomers, and salts of optical isomers are listed precursor chemicals to be used in the manufacture of controlled substances in violation of Title 21).

[6] The Texas Department of Safety allowed Harrill, doing business as "Southwest Coatings," to legally purchase chemicals and glassware based on his affirmation that he planned neither to resale nor buy chemicals or glassware from out-of-state companies. However, Harrill placed orders for chemicals and glassware using several business names and was receiving large amounts of chemicals and glassware from out-of-state companies.

regarding such use, the district court properly ordered the forfeiture of the chemicals. *See One 1978 Chevrolet Impala*, 614 F.2d at 984.

III

Harrill next contends that the allegations in the government's complaint regarding the seized property lacked specificity, thus making him unable to respond adequately to the government's complaint.

A complaint for the forfeiture of property under 21 U.S.C. § 881 is subject to the particularity requirement of Rule E(2)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims. *See* 21 U.S.C. § 881(b). Rule E(2)(a) provides:

> In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

Thus, the rule imposes a more stringent standard than the simple notice pleading required by the Federal Rules of Civil Procedure. *See In re Ramu Corp.*, 903 F.2d 312, 317 n.7 (5th Cir. 1990); *United States v. 2323 Charms Rd.*, 946 F.2d 437, 441 (6th Cir. 1991). The particularity requirement

> assures that the forfeiture complaint will apprise potential claimants of sufficient factual particulars to support a reasonable belief that the government, at trial, can demonstrate probable cause that the defendant property is traceable as proceeds from an exchange of controlled substances, thereby enabling claimants "to commence an investigation of the facts and to frame a responsive pleading."

United States v. One Parcel of Real Property, 921 F.2d 370, 377

(1st Cir. 1990) (citations omitted).[7] However, the government need not demonstrate probable cause for forfeiture in its complaint. *See 2323 Charms Rd.*, 946 F.2d at 441 (finding that the government does not have to carry its trial burden during the pleading stage).

Harrill failed to make any Rule E(2)(a) objection by moving for either dismissal or a more definite statement prior to answering the government's complaint. *Cf*. Fed. R. Civ. P. E(2)(a) (requiring such particularity in the complaint that a motion for a more definitive statement is unnecessary). Second, Rule E(2)(a) mandates only that the complaint be sufficiently particular so that a claimant is able "to commence an investigation of the facts and to frame a responsive pleading." Presumably, Harrill was able to commence an investigation of the facts based on the government's complaint since he answered the complaint, specifically denying each of the government's allegations. Harrill first raised his Rule E(2)(a) objection in his response to the government's motion for summary judgment. Because he already had answered the complaint, we find that Harrill waived his Rule E(2)(a) objection by not raising it either before or in his answer.

Nevertheless, assuming *arguendo* that Harrill did not waive his objection, "whether the complaint contained sufficient allegations to comply with the particularity requirement . . . is an issue of

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[7] We review both the forfeiture complaint and any attached affidavits in determining whether the particularity requirement of Rule E(2)(a) has been satisfied. *United States v. Parcels of Land*, 903 F.2d 36, 48 (1st Cir.), *cert. denied*, 498 U.S. 916, 111 S. Ct. 289, 112 L. Ed. 2d 243 (1990); *United States v. 4492 South Livonia Rd.*, 889 F.2d 1258, 1266 (2d Cir. 1989).

law subject to plenary review." *United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1554 (11th Cir. 1991); *2323 Charms Rd.*, 946 F.2d at 442. The government's complaint and Juvrud's affidavit described: the controlled substance))methamphetamine))that Harrill attempted to manufacture; the location and value of each seized asset at the time of seizure; how Harrill used each asset to facilitate illegal drug activities or, alternatively, how the asset was a proceed of Harrill's illegal drug activities; Harrill's conviction for possession or distribution of ephedrine with knowledge that it would be used to manufacture methamphetamine; and Harrill's own records confirming illegal drug transactions. Therefore, the government's complaint was sufficiently particular to allow Harrill to both "commence an investigation" and "frame a responsive pleading."

IV

Finally, Harrill challenges the validity of the search warrants used by the DEA agents to seize the properties at issue. Harrill asserts that because the supporting affidavits omitted material facts, the search warrants were defective. The government contends that Harrill is barred from litigating this issue because we upheld the validity of the search warrants when Harrill appealed his criminal conviction. *See United States v. Harrill*, No. 91-7352, slip op. at 2-5 (5th Cir. Nov. 19, 1992).[8] "[A]n issue

[8] In *Harrill*, we stated:

> In sum, the material omissions exception to the good-faith rule does not apply. The warrant established that the agents acted in good faith in conducting the search, and their good-faith reliance

resolved in favor of the United States in a criminal prosecution may not be contested by the same defendants in a civil suit brought by the Government." *Tomlinson v. Lefkowitz*, 334 F.2d 262, 264 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S. Ct. 650, 13 L. Ed. 2d 556 (1965). Because Harrill has raised the identical issue in both his civil and criminal appeals, our decision in *Harrill* controls. Harrill thus is collaterally estopped from reasserting his claim concerning the validity of the search warrants. *United States v. "MONKEY"*, 725 F.2d 1007, 1010 (5th Cir. 1984).

V

Accordingly, we AFFIRM IN PART and REVERSE AND REMAND IN PART the decision of the district court.

> was objectively reasonable. We do not reach the issue of probable cause. Because the first search of the premises was legal, evidence seized pursuant to the second search warrant obtained after the first search began is not inadmissible.

Slip op. at 4-5 (citations omitted).