

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1597
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NOTE AND ANY INTEREST THEREON
PAYABLE TO AACRE, INC., AND/OR
TO MILTON EUGENE ROBINS ON PROPERTY,
ALL APPURTENANCES AND IMPROVEMENTS
LOCATED AT 4801 DELL, GREENVILLE,
HUNT COUNTY, TEXAS, ET AL.,

Defendants,

AACRE, INC. and MILTON EUGENE ROBINS,

Claimants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas
(3:92-CV-0507-G)

(July 22, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:¹

Appellants Aacre, Inc., and Milton Eugene Robins (Robins)
appeal the forfeiture of two real estate notes. We affirm.

BACKGROUND

¹ Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The Government filed a complaint seeking forfeiture of two promissory notes and interest thereon, on March 17, 1992. Both notes were payable to Aacre, Inc. and/or Milton Eugene Robins. The first note was secured by "Property, All Appurtenances, and Improvements Located at 4801 Dell, Greenville, Hunt County, Texas." The second note was secured by "Property, All Appurtenances, and Improvements Located on 18 Acres of Land in Hunt County, Texas." The Government alleged that "Defendant properties should be seized, arrested, and possessed because they were purchased with proceeds from the sale of illegal drugs and are traceable to such an exchange/exchanges ...in violation of 21 U.S.C. §§ 881(a)(6) and 881(a)(7)."

Aacre, Inc. filed a claim for the notes, alleging that the notes were owned by Aacre, Inc., were lawfully obtained, were not purchased with proceeds from the sale of illegal drugs, and were not traceable to such exchanges. Aacre, Inc. is owned by Appellant Robins and was used by Robins to buy and sell real estate and launder proceeds from drug sales. No other claims were filed. On January 6, 1993, the Government filed Plaintiff's Motion for Summary Judgment, accompanied by a memorandum brief and supporting affidavits. The affidavit of United States Drug Enforcement Administration Special Agent Sandy Soule detailed a two year investigation of criminal conspiracy which had imported multi-ton quantities of marijuana and which was led by Robins. Robins was subsequently found guilty of conspiracy to distribute marijuana and was sentenced to four hundred eighty months in federal prison. The

property securing the second note had originally been owned by Robins or Aacre, Inc. When Robins sold the property to Massey, one of his co-conspirators, Robins supplied Massey with a cash down payment and cash with which to make the mortgage payments. This "straw purchase" allowed Robins to launder money received from the illegal sale of marijuana. Agent Soule also stated that the property securing the first note was purchased by Robins through his corporation, Aacre, Inc. using drug proceeds. The record is not clear concerning how Aacre, Inc. converted the property into the first note which was seized by the Government. The affidavit also establishes that both properties were used to facilitate Robins' marijuana operation.

More than two months after the motion for summary judgment was filed, Robins moved for a twelve day extension of time within which to respond to the motion. One month later, the district court denied Robins' motion. No response to the summary judgment was filed in the interim.

The district court granted the motion for summary judgment, finding that the Government had shown probable cause to believe that each property was either purchased with proceeds from drug transactions or was an integral part of Robins' scheme to carry on and/or conceal his illegal activities. As a result, the burden shifted to the claimant to rebut the Government's evidence, which burden claimant did not carry. The court therefore entered a final judgment of forfeiture.

DID THE FORFEITURE VIOLATE THE EXCESSIVE FINES CLAUSE?

Robins and Aacre, Inc. appeal, alleging that the forfeiture ordered by the district court violates the Excessive Fines Clause of the Eighth Amendment to the Constitution of the United States, as construed in *Austin v. United States*, ___U.S.___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). In *Austin*, which was decided after the court issued its opinion in this case, the Supreme Court held that the Excessive Fines Clause applied to proceedings for forfeiture of real property and conveyances pursuant to 21 U.S.C. §§ 881(a)(4) and 881(a)(7). *Austin*, 113 S.Ct. at 2812. The Supreme Court in *Austin* declined to establish a test for determining whether a forfeiture is constitutionally excessive, opting instead to allow the lower courts to consider that question in the first instance. *Austin*, 113 S.Ct., at 2812. Appellants invite us to develop a set of factors for determining the constitutionality of the § 881(a)(7) forfeiture in this case.

The Government argues that the rule in *Austin* is inapplicable here because the complaint sought forfeiture of property obtained with proceeds of the drug-trafficking enterprise pursuant to 21 U.S.C. § 881(a)(6). That is correct.

In *Austin*, the Court noted:

[I]t appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures under §§ 881(a)(4) and (a)(7) or only to those that cannot be characterized as purely remedial. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

113 S.Ct. at 2812 n. 14. This Court recently held that § 881(a)(6) forfeitures are remedial in nature:

Unlike the real estate forfeiture statute that can result in the confiscation of the most modest mobile home or the stateliest mansion, the forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold. The more drugs sold, the more proceeds that will be forfeited. As we have held, these proceeds are roughly proportional to the harm inflicted upon government and society by the drug sale. Thus, the logic of *Austin* is inapplicable to § 881 (a)(6) -- the forfeiture of drug proceeds.

United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994).

In relying on § 881(a)(6), the Government must establish probable cause to believe that the notes were obtained with moneys traceable to an exchange or exchanges for a controlled substance. Then the burden shifts to the claimant to prove by a preponderance of the evidence that the money in question came from an independent, non-drug-related source. *United States v. One 1986 Nissan Maxima GL*, 895 F.2d 1063, 1064-65 (5th Cir. 1990). The Government presented evidence establishing probable cause to believe that the promissory notes were obtained with proceeds of Robins' drug trafficking business. Appellants did not present any evidence to rebut this showing. We therefore hold that the district court's finding that forfeiture was appropriate under § 881(a)(6) was correct. Consequently, it is unnecessary in this case to fashion standards by which to adjudicate whether § 881(a)(7) forfeitures are constitutionally excessive. AFFIRM.