IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2277

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

4512 PECAN GROVE SUGARLAND TEXAS
FORT BEND COUNTRY, Real Property And Improvements,

Defendant,

JAMES DONALD COTHARN, SR.,

Claimant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-166)

(January 6, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

James Donald Cotharn, Sr., appeals the district court's entering summary judgment for the United States of America (the

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*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

government) and thus forfeiting his interest in real property to the government. We affirm the judgment of the district court.

I. BACKGROUND

On June 3, 1992, the government filed a verified complaint for forfeiture in rem of real property owned by James Donald Cotharn, Sr., and located at 4512 Pecan Grove, Sugarland, Texas. The government alleged that the property was subject to forfeiture pursuant to 21 U.S.C. §§ 881(a)(7) and/or 881(a)(6) because the property had been used to facilitate Cotharn's sale of $300,000 worth of marijuana. The government also alleged that the sale had taken place on the property, that more than 200 pounds of marijuana had been discovered in the trunk of a vehicle parked in Cotharn's garage, and that marijuana seeds and residue had been found inside of Cotharn's residence. Alfredo Christlieb, an undercover agent with the Drug Enforcement Administration, verified the allegations made in the complaint pursuant to 28 U.S.C. § 1746.

On January 19, 1993, the government moved for partial summary judgment, reiterating the allegations of the complaint. The government also asserted that Cotharn had been indicted and had pleaded guilty to conspiring to possess with intent to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. § 846. Further, the government stated that in addition to the marijuana which had been found in the garage, more than two kilograms of marijuana seeds and three revolvers had been

found inside the residence. Cotharn filed an affidavit in response to the government's motion, in which he admitted that he had pleaded guilty to the conspiracy charge. He also stated:

> The majority of the negotiations with the government agents occurred at my place of business in Richmond, Texas. No negotiations with the government were conducted at the defendant property. The decision was made to make the delivery of marijuana in a private rather than a public environment. . . . There was no substantial connection between the defendant property and my criminal activity.

On February 12, 1993, the district court granted the government's motion, concluding that Cotharn's affidavit failed to present any evidence to rebut the government's showing of probable cause or to establish any defense to forfeiture. Cotharn then filed a "motion for new trial in nonjury action," in which he maintained that the evidence was insufficient to support the forfeiture order.

In opposition to Cotharn's motion, the government submitted affidavits from Christlieb and Willie Trevino, Jr., Cotharn's co-defendant. Christlieb stated that he had been involved in the investigation and arrest of Cotharn and that he had contacted Cotharn at Cotharn's home telephone number several times to negotiate the drug deal. He further stated:

> Cotharn insisted that the drug sale take place at 4512 Pecan Grove, because his house is located in a secluded area . . . . Cotharn stated that he does his drug trafficking sales at his house and that he stores the marijuana prior to pick-up in his barn.

Trevino's affidavit corroborated Christlieb's.

Treating Cotharn's motion as a motion for reconsideration of the order granting the government's request for partial summary

judgment, the district court denied Cotharn's motion on March 17, 1993. Cotharn filed a notice of appeal on April 5, 1993, in which he appealed the denial of his motion for new trial without referencing the underlying summary judgment. On May 21, 1993, the district court entered its final order of forfeiture.

II. JURISDICTION AND STANDARD OF REVIEW

This court must examine the basis of its jurisdiction on its own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987); Thompson v. Betts, 754 F.2d 1243, 1245 (5th Cir. 1985). Cotharn filed his notice of appeal on April 5, 1993, before the district court entered its final order of forfeiture. This defect does not divest this court of jurisdiction over the appeal, however, because the district court's subsequent order disposed of all claims against the property. See Riley v. Wooten, 999 F.2d 802, 804-05 (5th Cir. 1993); Jetco Electric Indus., Inc. v. Gardner, 473 F.2d 1228, 1231 (5th Cir. 1973). Moreover, although Cotharn's notice of appeal states that he is appealing the denial of his "motion for new trial," he clearly intended to appeal the order granting the government's motion for summary judgment on Cotharn's claim to the property in question. Both the government and Cotharn have argued the case as such. Thus, we treat Cotharn's appeal as an appeal of the district court's grant of summary judgment. See Friou v. Phillips Petroleum Co., 948 F.2d 972, 974 (5th Cir. 1991).

We review the granting of summary judgment de novo, applying the criteria which the district court used in the first instance. Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). That is, we review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party. Dawson, 4 F.3d at 1306. Summary judgment is proper if the moving party established that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1118-19 (5th Cir. 1992). The party opposing a motion for summary judgment 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 (1986).

III. DISCUSSION

Cotharn contends that the district court erred in granting the government's motion for summary judgment. He argues that his affidavit was sufficient to raise an issue of material fact as to whether the property in question had been used in connection with the drug deal. We disagree.

The property in question is forfeitable if it had been "used . . . to facilitate the commission of[] a [drug] violation punishable by more than one year's imprisonment." 21 U.S.C. § 881(a)(7). Cotharn has conceded that he pleaded guilty to and

was convicted of a drug trafficking offense. His involvement in selling more than 200 pounds of marijuana is not in dispute in this appeal. Rather, the only issue concerns whether the property in question facilitated the sale of the marijuana.

In a forfeiture action brought pursuant to § 881(a)(7), the government bears the initial burden of establishing "probable cause to believe that the . . . [property subject to forfeiture] was used to distribute or store illegal drugs." United States v. Lot 9, Block 2 of Donnybrook Place, 919 F.2d 994, 997-98 (5th Cir. 1990); United States v. One 1986 Nissan Maxima GL, 895 F.2d 1063, 1064 (5th Cir. 1990). Probable cause must be supported by more than a mere suspicion but less than prima facie proof, United States v. $364,960, 661 F.2d 319, 323 (5th Cir. 1981), and may be proved with hearsay evidence, United States v. 1964 Beechcraft Baron Aircraft, 691 F.2d 725, 728 (5th Cir. 1982), cert. denied, 461 U.S. 914 (1983). To satisfy its burden, the government must thus provide a reasonable ground for believing that the property subject to forfeiture was used for illegal purposes. Lot 9, 919 F.2d at 998.

Once the government meets its initial burden, the burden shifts to the claimant, who must, by a preponderance of the evidence, rebut the probable cause or establish that a defense to the forfeiture applies. United States v. Land in the Name of Neff, 960 F.2d 561, 562 (5th Cir. 1992). If unrebutted, a showing of probable cause alone will support a forfeiture. United States v. 1988 Oldsmobile Supreme, 983 F.2d 670, 675 (5th

Cir. 1993); United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983).

The government's verified complaint, which is the same as an affidavit for summary judgment purposes, see Barker v. Norman, 651 F.2d 1107, 1115 (5th Cir. Unit A July 1981), sets forth facts sufficient to establish probable cause. According to the complaint, Cotharn negotiated a drug deal with the government which took place at 4512 Pecan Grove, property belonging to Cotharn. Government agents discovered more than 200 pounds of marijuana in the trunk of a car in the garage of the residence and marijuana seeds, residue, and weapons inside of the residence.

Cotharn's affidavit neither contradicted the government's complaint nor denied that Cotharn had engaged in drug-dealing from the residence. Rather, the affidavit simply stated that "there was no substantial connection between the defendant property" and Cotharn's criminal activity. This conclusory statement is insufficient to defeat the government's motion for summary judgment. See 1988 Oldsmobile Supreme, 983 F.2d at 675 (explaining that if facts supporting summary judgment are unrebutted, a showing of probable cause alone will support forfeiture); Lot 9, 919 F.2d at 998-99 (holding that a conclusory statement denying culpability which failed to controvert facts established by the government did not defeat the government's motion for summary judgment in a forfeiture action). Cotharn's motion for new trial similarly failed to set forth facts

sufficient to rebut the government's showing of probable cause. Cotharn's argument is therefore without merit.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.