

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8224
Summary Calendar

UNITED STATES OF AMERICA,

Petitioner-Appellee,

versus

\$70,594.00 U.S. CURRENCY,

Respondent,

FRANK IVY,

Claimant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-90-CA-918)

(July 29, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

The district court determined on summary judgment that there was probable cause that \$70,594 in cash seized from appellant Ivy's person, his apartment and at a storage place he rented, were eligible for forfeiture under 21 U.S.C. § 881. The district court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

relied upon the evidence and the finding of probable cause to support a criminal forfeiture under § 853 in Ivy's previous criminal trial to establish probable cause in this proceeding under § 881, the civil forfeiture statute. The court held that the doctrine of collateral estoppel applied and that the Government had met its burden of demonstrating probable cause for belief that a substantial connection existed between the property to be forfeited and a controlled substance crime. Ivy appeals on numerous grounds.

Ivy argues first that the Government's summary judgment evidence was insufficient, that there are arguable issues of fact, and that collateral estoppel should not prevent him from challenging the Government's showing of probable cause under § 881.

This court reviews a grant of summary judgment de novo using the same standards as the district court, whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); United States v. Lot 9, Block 2 of Donnybrook Place, Harris County, Texas, 919 F.2d 994, 997 (5th Cir. 1990).

21 U.S.C. § 881(a)(6) provides for the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter" In a civil forfeiture action under § 881(a)(6), the government bears

the initial burden of demonstrating probable cause for belief that a substantial connection exists between the property to be forfeited and the exchange of a controlled substance. Probable cause is defined as reasonable ground for belief of guilt, supported by less than prima facie proof, but more than mere suspicion. United States v. \$364,960.00 in U.S. Currency, 661 F.2d 319, 323 (5th Cir. 1981). After the government establishes probable cause, the burden shifts to the claimant to show by a preponderance of the evidence that the property was not used for illegal activity or came from an independent, non-drug related source. United States v. Land, Property Currently Recorded in Name of Neff, 960 F.2d 561, 563 (5th Cir. 1992); United States v. One 1980 Rolls Royce, VIN No. SRL 39955, 905 F.2d 89, 90 (5th Cir. 1990).

First, this court must determine de novo if the Government established probable cause for forfeiture of the currency. In this case, this must be done by determining if the previous determination of probable cause in the § 853 proceeding precludes Ivy from relitigating this issue in this § 881 proceeding according to the doctrine of collateral estoppel.

In United States v. MONKEY, 725 F.2d 1007, 1010-11 (5th Cir. 1984), this court applied collateral estoppel in a forfeiture action under 21 U.S.C. § 881(a)(4), 19 U.S.C. § 1595a, and 49 U.S.C. § 782, holding that the claimant's judgment of conviction for transporting marijuana on the vessel the MONKEY had collateral estoppel effect on his challenge to the forfeiture. This court

listed the three prerequisites to collateral estoppel under federal law: (1) that the issue at stake be identical to the one involved in the prior litigation; (2) that the issue has been actually litigated in the prior litigation; and (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment in that earlier action. Id. at 1010.

These requirements are met in this case. The issue in this § 881 proceeding mirrors that in the prior § 853 proceeding i.e. whether there was probable cause to believe that the currency was used to facilitate a controlled substance offense or was derived from such an offense. See 21 U.S.C. §§ 853(a)(1) or (2) and 881(a)(6). Normally, § 853 is a criminal forfeiture proceeding subject to the reasonable doubt standard, and § 881 is a civil proceeding requiring only a showing of probable cause. See United States v. D.K.G. Appaloosas, 829 F.2d 532, 543-44 (5th Cir. 1987), cert. denied, 485 U.S. 976 (1988); United States v. Dunn, 802 F.2d 646, 647 (2nd Cir. 1986). However, in this case, the § 853 proceeding was not a final hearing on the forfeitability of the funds, but was a preliminary hearing to determine whether the funds could be retained by the Government pending trial pursuant to Monsanto, which requires a showing of probable cause that the property is forfeitable. 924 F.2d at 1203. The determination of probable cause was a critical and necessary part of the judgment in the earlier proceeding.

This issue was actually litigated in the prior proceeding. Ivy was represented by counsel at a hearing before a magistrate judge, counsel cross-examined the Government's witness, Ivy testified in his own behalf in an attempt to show that the funds were legitimately derived, and Ivy's counsel presented argument on the issue.

All of the requirements of collateral estoppel are present. Consequently, the previous determination of probable cause of forfeitability, affirmed by this court in Ivy, 973 F.2d at 1189, precluded Ivy from challenging probable cause in this § 881 proceeding.

Ivy argues that he should have been allowed to challenge the use of evidence used to establish probable cause because it was illegally seized in violation of Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). He also argues that he should have been allowed to use additional evidence, not available at the suppression hearing which preceded his trial, to challenge the determination of probable cause.

Ivy did not raise this issue in the district court. His verified complaint made only general assertions of Fourth Amendment violations. He did not respond to the Government's motion for summary judgment at all. The issue is waived. In Re Goff, 812 F.2d 931, 933 (5th Cir. 1987).

Ivy argues that he was entitled to appointed counsel to assist him in investigating evidence of his legitimate income from car sales. He also argues that the district court abused its

discretion in releasing his appointed counsel without appointing a substitute. Forfeiture proceedings under § 881 are, however, civil in nature. D.K.G. Appaloosas, 829 F.2d at 543. There is no automatic right to appointment of counsel in a civil case. The district court has considerable discretion in deciding whether to appoint counsel. Salmon v. Corpus Christi Independent School District, 911 F.2d 1165, 1166 (5th Cir. 1990). Counsel will be appointed in civil cases only in exceptional circumstances. Richardson v. Henry, 902 F.2d 414, 417 (5th Cir. 1990), cert. denied, 498 U.S. 901, 1069 (1991).

The district court did not abuse its discretion in allowing Orr to withdraw based on Ivy's representations that he was dissatisfied with Orr's representation in his criminal proceedings and was contemplating legal action against him. Matter of Wynn v. Erickson, 889 F.2d 644, 646 (5th Cir. 1989). Further, Ivy was not entitled to appointed counsel because there were no exceptional circumstances warranting appointment of counsel.

Ivy finally argues that the district court should have supplied this court with the entire record of his criminal case because the magistrate judge based his decision on the entire criminal court record. The district court's decision was based on the parts of Ivy's criminal court record relating to the pretrial probable cause hearing, attached to the Government's motion for summary judgment, which is part of the record on appeal. The record is sufficient for this court to adequately review all relevant issues.

For these reasons, the district court's judgment is
AFFIRMED.