

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50656
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

APPROXIMATELY 478.91 ACRES
IN THE WILLIAM C. JONES SURVEY
FREESTONE COUNTY, which is part
of 531 acres of land locally
known as the Cullum Farm and
is located East of FM 2570
and South of FM 3285 ET AL.,

Defendants,

LARRY J. CULLUM,

Claimant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. W-87-CV-237
- - - - -
(December 21, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

Larry Joseph Cullum's motion to proceed in forma pauperis (IFP) on appeal is DENIED. Cullum argues that the district court's judgment forfeiting his property to the United States is

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

void because his property was seized without notice and a hearing.

"Motions under Rule 60(b) are directed to the sound discretion of the district court, and its denial of relief upon such motion will be set aside on appeal only for abuse of that discretion." Carimi v. Royal Caribbean Cruise Line, Inc., 959 F.2d 1344, 1345 (5th Cir. 1992) (internal quotations and citations omitted). "When however, the motion is based on a void judgment under Rule 60(b)(4), the district court has no discretion -- the judgment is either void or it is not." Id. at 1345 (citation omitted). "A judgment is not void simply because it is erroneous, but only where the Court rendering it lacked jurisdiction over the subject matter or the parties, or if it acted in a manner inconsistent with due process of law." United States v. 119.67 Acres of Land, 663 F.2d 1328, 1331 (5th Cir. Unit A Dec. 1981).

The seizure of real property under 21 U.S.C. § 881(a)(7) violates due process if the property owner is not afforded notice and a hearing prior to the seizure. United States v. James Daniel Good Real Property, ___ U.S. ___, 114 S. Ct. 492, 500-05, 126 L. Ed. 2d 490 (1993). There is no indication in the record that Cullum was afforded notice and a hearing prior to the seizure of the property. Thus, the seizure of Cullum's property may have been a due process violation based on the rule announced in Good.

However, Good was not decided until more than two years after the district court entered its judgment forfeiting Cullum's

property to the United States. If the Supreme Court applies a rule of law retroactively to the litigants in the case before it, "it must do so with respect to all others not barred by procedural requirements or res judicata." See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991). Good retroactively applied the rule that due process requires preseizure notice and hearing to the claimant in that case. See 114 S. Ct. 505; United States v. One Parcel of Real Property, Located at 9638 Chicago Heights, St. Louis, Mo., 27 F.3d 327, 329 (8th Cir. 1994).

However, a new rule of law is not to be applied retroactively to cases in which a final judgment has been entered. Beam, 501 U.S. at 542. The district court entered the order of forfeiture in April 1991, and Cullum did not file an appeal from that order. The district court's order constitutes the final judgment in the case. Because Cullum's case was not pending at the time of the Good decision in December 1993, the rule announced in Good cannot be retroactively applied in this case. Beam, 501 U.S. at 542. The district court did not abuse its discretion in denying Cullum's motion because the judgment of forfeiture cannot be invalidated on the basis of Good. Thus, Cullum has not raised a nonfrivolous issue on appeal. Because Cullum has failed to raise a nonfrivolous issue on appeal, the appeal is DISMISSED. See 5th Cir. R. 42.2.