

STATE OF MICHIGAN
COURT OF APPEALS

STATE OF MICHIGAN,

Plaintiff–Appellee

v

\$5,556.00 U.S. CURRENCY,

Defendant,

and

CHERYL KYSER,

Claimant- Appellee.

UNPUBLISHED

July 16, 1996

No. 179867

LC No. 94-449087

Before: Gribbs, P.J., and Saad and J. P. Adair,* JJ.

PER CURIAM.

Claimant appeals as of right from an order directing the forfeiture of defendant currency under MCL 333.7521(1)(f); MSA 14.15(7521)(1)(f). Claimant argues that the trial court erred in finding the money subject to forfeiture and that evidence used in the forfeiture proceeding was seized pursuant to an invalid search warrant. We affirm.

The trial court found that the money was subject to forfeiture because it was either the proceeds of a drug transaction or it was used to facilitate drug trafficking and there was a “substantial connection” between the money and the criminal activity. See *In re Forfeiture of \$5,264*, 432 Mich 242, 260; 439 NW2d 246 (1992); *In re Forfeiture of \$18,000*, 189 Mich App 1, 4; 471 NW2d 628 (1991). Claimant argues that the trial court erred in finding a substantial connection between the money and the drugs and drug paraphernalia seized from her home. However, the trial court’s findings of fact are supported by the scent of narcotics on and the denomination of the money, the presence throughout claimant’s home of items used to prepare drugs for sale, and the trial court’s assessment of claimant’s

* Circuit judge, sitting on the Court of Appeals by assignment.

credibility. The trial court's findings are not clearly erroneous and will not be set aside. *In re forfeiture of \$19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995).

Claimant also argues that evidence was seized from her home pursuant to an invalid search warrant. She seeks a remand to raise this issue before the trial court. Claimant voluntarily withdrew her pre-trial motion to quash the search warrant. Although a voluntarily dismissed claim is not preserved, *Albright v Portage*, 188 Mich App 342, 353; 470 NW2d 657 (1991), we will review this issue because claimant alleges a deprivation of a constitutional right, see *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994).

Collateral estoppel does not bar claimant from relitigating the validity of the search warrant. Collateral estoppel bars the relitigation of issues which have been actually litigated in a prior case between the same or substantially similar parties. *Wilcox v Sealey*, 132 Mich App 38, 46-47; 346 NW2d 889 (1984). Although claimant's husband raised this issue in a related criminal trial and the presiding court decided the issue in its written orders, claimant was not a party or privy to that litigation. Under an exception to the mutuality requirement, parties who were not represented in prior actions may be allowed to use collateral estoppel defensively. See *Alterman v Provizer, Eisenberg, Lichtenstein & Perlman, PC*, 195 Mich App 422, 427; 491 NW2d 868 (1992); *Knoblauch v Kenyon*, 163 Mich App 712, 725; 415 NW2d 286 (1987).

The lower court record provides adequate information to permit review of the search warrant without remand. See *People v Alexander*, 188 Mich App 96, 105; 469 NW2d 10 (1991). The lower court record indicates that police observed claimant's husband at a residence frequented by drug dealers; that the telephone in that residence was registered to claimant; that claimant's husband was seen engaging in behavior consistent with arranging a drug transaction; and that police found heroin residue and marijuana in claimant's garbage. Based on this evidence, we find that there was probable cause to issue the search warrant. *People v Lucas*, 188 Mich App 554, 567 (1991).

Affirmed.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ James P. Adair