

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 188392

LONNIE LEE FINNEY,

Midland Circuit Court

LC No. 94-007157-FH

Defendant-Appellant.

Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

MICHAEL J.KELLY, J. (dissenting).

Because I find it necessary to remand this matter to the trial court to determine whether, in light of the civil forfeiture, defendant's criminal conviction was actually a second punishment for double jeopardy purposes, I respectfully dissent.

I acknowledge that in rem civil forfeiture is not considered punishment for double jeopardy purposes. *United States v Usery*, 518 US ____; 116 S Ct 2135, 2149; 135 L Ed 2d 549 (1996); *People v Acoff*, 220 Mich App 396, 559 NW2d 103 (1996). However, the mere label given to a confiscation that appears to be an in rem disgorgement of the fruits of criminal activity does not answer the question whether the forfeiture is actually an in rem civil matter, or an in personam punishment. Rather, that question is answered by applying a two-prong analysis to the facts of the case, which asks (1) whether the Legislature intended proceedings under the civil forfeiture statutory scheme to be criminal or civil, and (2) whether the civil forfeiture proceedings are so punitive in fact as to persuade this Court that the forfeiture proceedings may not legitimately be viewed as civil in nature. *Ursery*, *supra* at 116 S Ct 2147.

The majority states that the instant forfeiture was not so excessive or punitive that it cannot be legitimately viewed as civil. Defendant submitted an affidavit to this Court in which he avers:

The [S]tate forfeited [sic] a piece of property that is not contiguous to my homestead at 1820 Currie Parkway [the property from which defendant sold drugs]. This second parcel is noted in the Default Judgment . . . as Tax ID No[.] 14-18-40-262, with a legal description distinct from Tax ID No[.] and description associated with

my homestead. I bought this separate parcel on a land contract with Mark and Renda Edmonds and I paid the \$4,000 plus interest entirely from my lawful earnings as a union labor[er] from 1978 to 1987. I never used this parcel or improvements thereon to conduct any drug sales or purchases, to store drugs, or to facilitate in any other way any drug transaction. I am prepared to so testify at my hearing.

If, as he states in his affidavit, defendant were able to establish that the State confiscated property that was entirely unrelated to his drug activities, I believe this Court should be persuaded that the civil forfeiture was so punitive in fact that it constituted an in personam punishment. Thus, the instant conviction would constitute the second punishment for defendant's drug offense, and therefore be untenable under the Double Jeopardy Clauses of the federal and state constitutions. US Const, Am 5; Const 1963, art 1, § 15; *People v Duranseau*, 221 Mich App 204, 206; 561 NW2d 111 (1997). In the absence of a factual record, I cannot agree with the majority's conclusion that the instant civil forfeiture was indeed civil.

I would retain jurisdiction and remand for an evidentiary hearing to determine the true nature of the civil forfeiture.

/s/ Michael J. Kelly