STATE OF MICHIGAN

COURT OF APPEALS

INGHAM COUNTY PROSECUTOR,

Plaintiff-Appellee,

v

UNITED STATES CURRENCY and ONE 1981 FORD FAIRMONT,

Defendants,

and

JOSEPH EMILE SISSLER,

Claimant-Appellant.

UNPUBLISHED
August 22, 1997

No. 177766
Ingham Circuit Court
LC No. 90-065348-CZ

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Claimant-appellant appeals as of right from the trial court order which (1) denied his motion to quash the search warrant that resulted in the discovery of the seized property, and (2) granted summary disposition to plaintiff in this *in rem* forfeiture action. We affirm.

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, sec 15; *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996). These guarantees are substantially identical and protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *Torres, supra* at 64.

The United States Supreme Court recently held "civil forfeitures generally . . . do not constitute 'punishment' for purposes of the Double Jeopardy Clause." *United States v Ursery*, ___ US ___; 116 S Ct 2135; 135 L Ed 2d 549, 557 (1996). The civil forfeiture case is distinct from the civil penalty case, which may be subject to a balancing test. "[T]he case-by-case balancing test…, in which a court

must compare the harm suffered by the government against the size of the penalty imposed, is inapplicable to civil forfeiture." *Id.*, 135 L Ed 2d at 565-566. The Court in *Ursery* employed a two-part test originally adopted in *United States v One Assortment of 89 Firearms*, 465 US 354; 104 S Ct 1099; 79 L Ed 2d 361 (1984): First, determine whether the Congress intended the proceedings to be considered criminal or civil; second, consider whether the proceedings are in fact so punitive as to persuade the Court that the proceedings may not legitimately be viewed as civil in nature. *Ursery, supra*, 135 L Ed 2d at 568.

The property in the instant case was seized pursuant to MCL 333.7521(1)(f); MSA 14.15(7521)(1)(f). That statute is modeled after its federal counterpart, 21 USC 881, the very statute at issue in *Ursery*. *People v Acoff*, 220 Mich App 396, 398 n 1; 559 NW2d 103 (1996). Since forfeitures under the Michigan statute are civil *in rem* proceedings, the *Acoff* Court presumed that the double jeopardy analysis was inapplicable. *Acoff, supra,*, 220 Mich App at 399. That presumption can be overcome only by the clearest proof of a punitive purpose or effect. *Id.*

The instant case was briefed prior to the release of *Ursery* and *Acoff*. Claimant therefore makes no effort to show the forfeitures of his cash and car were punitive. However, if he were to do so, the argument would fail. Claimant admitted at the time of his arrest that the currency was "roll-over" money (i.e., profit from earlier drug sales). Claimant also admitted his intent was to use the cash to purchase more marijuana. Clearly, the currency and automobile are precisely the property the Legislature had in mind in drafting the statute. MCL 333.7521(1)(d) and (f); MSA 14.15(7521)(1)(d) and (f). Plaintiff in this case must prove only by a preponderance of the evidence that the items of value are traceable to an exchange for a controlled substance, or were used or intended to be used to facilitate a violation of the controlled substances act. *In re Forfeiture of $25,505*, 220 Mich App 572, 576; 560 N.W.2d 341 (1996). Given the broad language of the statute, the admissions of claimant, and the burden of proof borne by plaintiff, claimant could not show the instant forfeiture is punitive.

We also find claimant lacks standing to assert the defense of entrapment because the informant's activities were directed at a third party and not complainant. *People v Matthews*, 143 Mich App 45, 54-55; 371 NW2d 887 (1985); *People v Soltis*, 104 Mich App 53, 55; 304 NW2d 811 (1981). Claimant's attempt to align himself with the defendants in cases finding entrapment is unavailing. See, e.g. *People v Weatherford*, 129 Mich App 359; 341 NW2d 119 (1983). Claimant's appearance on the scene was entirely by chance. The police did not affect his decision to drive to Michigan to buy marijuana. Similarly, the provision of a controlled substance to the informant did not impermissibly taint the underlying evidence. *People v Williams*, 196 Mich App 656; 493 NW2d 507 (1992). Since we find claimant lacks standing to assert entrapment, we need not decide, as urged by plaintiff, whether entrapment is a viable defense in a forfeiture proceeding.

We do, however, find claimant has standing to challenge the search of the third party's home, in which he was an overnight houseguest. *Minnesota v Olson*, 495 US 91; 110 S Ct 1684; 109 L Ed 2d 85 (1990). Claimant argues the police conduct during the execution of the search warrant was so egregious as to vitiate the warrant. Unlawful seizure of items outside a warrant does not render the

whole search invalid and require suppression of all evidence seized unless the court finds a flagrant disregard for the limitations of the warrant. *United States v Lambert*, 771 F2d 83, 93 (CA 6, 1985). Absent flagrant misconduct, however, the items covered by the warrant will be admissible. *Id.* Although certain items outside the scope of the warrant were seized by police, that seizure was not the outrageous conduct needed to support the conclusion that police flagrantly disregarded the warrant. *United States v Medlin* 842 F2d 1194 (CA 10, 1988); *United States v Rettig*, 589 F2d 418 (CA 9, 1978). The trial court properly denied claimant's motion to quash the search warrant.

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.