

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TWENTY FIVE THOUSAND FIVE HUNDRED
DOLLARS and ONE 1986 FORD,

Defendants,

and

ROBERT GARY ROBINSON,

Claimant,

and

CAREY ROBINSON, JR.,

Claimant-Appellant.

UNPUBLISHED

January 5, 2001

No. 216480

Wayne Circuit Court

LC No. 93-349267-CF

Before: Smolenski, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

Claimant Carey Robinson, Jr. appeals as of right from a December 4, 1998 order of Wayne Circuit Court forfeiting \$25,505 in United States currency found in claimant's basement ceiling. We affirm.

The trial court entered an order in 1994 forfeiting furniture, and the \$25,505 in U.S. currency now at issue, found by Romulus police officers in Carey Robinson's home at 8333 Warwick Street in Detroit and thereafter seized. The seized property was linked to claimant's son Robert Gary ("Gary") Robinson's drug-dealing activities. Claimant and his son appealed.

In *In re Forfeiture of \$25,505*, 220 Mich App 572, 575-576; 560 NW2d 341 (1996), this Court found that plaintiff had met its burden of proof with regard to establishing a nexus between

the cash found in the basement and Gary Robinson's drug trafficking; however, it also found that plaintiff had failed to establish any link between the furniture seized and the drug trafficking and reversed that aspect of the court's order. This Court further found that the officers had failed to tabulate the property in claimant's presence, in violation of MCL 780.655; MSA 28.1259(5), and held that the appropriate remedy for the violation was to remand to the trial court to apply a rebuttable presumption that the unpreserved, unaccounted for, evidence (the cash) would have been adverse to the police. *Id.* at 576-581. The police had deposited the cash into an account, thereby eliminating claimant's opportunity to use the cash as evidence in his challenge to the forfeiture proceeding. *Id.* at 577, 579-580. In this case, this Court's directive translated into a presumption that only claimant's fingerprints, and not the fingerprints of his son Gary, nor any traces of cocaine, would have been found on the cash. *Id.* at 580. This Court remanded this issue to the trial court so that the evidence could be reevaluated in light of this curative presumption. The trial court's task after remand was to consider all of the evidence presented, apply the presumption adversely to plaintiff, and to determine whether plaintiff had carried its burden to establish by a preponderance of the evidence that the cash was linked to Gary Robinson's drug-dealing activities and was thus appropriately forfeited under MCL 333.7521(1)(f); MSA 14.15(7521)(1)(f). *Id.* at 581.

On remand, the trial court considered the testimony of the police officers and of claimant and, after reviewing the record as a whole, determined that plaintiff had overcome the rebuttable presumption and had carried its burden for forfeiture.

In the instant appeal, most of claimant's arguments are based on his continued dissatisfaction with the grounds for issuance of the search warrant and the trial court's finding in the initial forfeiture proceeding that the testimony of the police officers was more credible than the testimony of claimant. To that extent, claimant's arguments have already been resolved by this Court and are not properly before this Court anew for two reasons.

First, the law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals as to that issue. *Grievance Administrator v Lopatin*, 462 Mich 235, 261; 612 NW2d 120 (2000). The decision of an appellate court is controlling at all subsequent stages of litigation, so long as it is unaffected by a higher court's opinion. *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995). Thus, we are precluded from reviewing anew the issues which were previously decided.

Second, this Court remanded this case in *In re Forfeiture of \$25,505, supra*, 220 Mich App at 581-585, solely "for consideration of the effect of the police violations of [section] 5 [of MCL 780.655; MSA 28.1259(5)] on this forfeiture in light of this opinion" and "otherwise affirm[ed] the order." Thus, the scope of the trial court's decision after remand, and this Court's review thereof, is necessarily limited by this Court's own previous directive, to the effect of the police violations, if any, on the forfeiture. "Issues outside the scope of a remand order will not be considered on appeal following remand." *People v Burks*, 128 Mich App 255, 257; 339 NW2d 734 (1983).

The only issue which is properly before this Court is whether the trial court complied with this Court's directive, which was in essence: to apply a rebuttable presumption that the untabulated seized cash had claimant's fingerprints on it and that neither Robert Robinson's

fingerprints nor traces of cocaine would have been found on it, and to reevaluate the evidence to determine whether plaintiff had carried its burden of proof by a preponderance of evidence showing that the seized property was linked to criminal activity in order to justify its forfeiture. *In re Forfeiture of \$25,505*, *supra*, 220 Mich App at 576-581.

A trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C). A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976). This Court reviews questions of law de novo. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). Furthermore, questions of intent and credibility are properly resolved by the trier of fact. *In re Forfeiture of \$25,505*, *supra*, 220 Mich App at 581.

MCL 333.7521(1)(f); MSA 14.15(7521)(1)(f) of the Controlled Substances Act provides that "[a]nything of value that is furnished or intended to be furnished in exchange for a controlled substance, . . . that is traceable to an exchange for a controlled substance, . . . or that is used or intended to be used to facilitate any violation of [the Controlled Substances Act]," is subject to forfeiture. Additionally, forfeiture proceedings are in rem civil proceedings and the government has the burden of proving its case by a preponderance of the evidence. *In re Forfeiture of \$15,232*, 183 Mich App 833, 836; 455 NW2d 428 (1990). Finally, "[p]ossession of [U.S. currency] is prima facie evidence of ownership and the burden of producing evidence regarding ownership rests upon the person disputing such ownership." *In re Forfeiture of \$19,250*, 209 Mich App 20, 27; 530 NW2d 759 (1995).

In *In re Forfeiture of \$25,505*, *supra*, 220 Mich App 572, this Court found that the police officers conducting the search had failed to tabulate the property before they seized it. MCL 780.655; MSA 28.1259(5) provides the following:

When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things so seized The property and things so seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence on any trial.

In this case the officers did not count the cash in claimant's presence or sequester it for trial. Instead, they merely deposited it an account. This Court held that the appropriate remedy for such a violation was to remand to the trial court to apply a rebuttable presumption that the unpreserved, unaccounted-for evidence would have been adverse to the police. As applied, this Court's directive translated into a presumption that only claimant's fingerprints, and not the fingerprints of his son Gary, nor any traces of cocaine, would have been found on the cash.

This Court remanded this issue to the trial court so that the evidence could be reevaluated in light of this curative presumption. The trial court's task after remand was to consider all of the evidence presented, apply the presumption adverse to plaintiff, and to determine whether,

notwithstanding the presumption, plaintiff had carried its burden to establish by a preponderance of the evidence that the cash was linked to Gary Robinson's drug-dealing activities and was thus appropriately forfeited under MCL 333.7521(1)(f); MSA 14.15(7521)(1)(f).

On remand, the trial court considered the testimony of the police officers and of claimant and, after reviewing the record as a whole, determined that plaintiff had overcome the rebuttable presumption and had carried its burden for forfeiture. In so doing, the court relied on Officer Greg Brandemihl's deposition testimony, which had been admitted as evidence at trial. From Brandemihl's testimony, the court gleaned the fact that Gary Robinson was involved in drug-trafficking, that Gary had a key to claimant's house, and that Gary had bragged to his girlfriend that the police had missed the money that he had stashed in claimant's home. Based on Brandemihl's testimony, the court also found that, when asked whether he had any money in his house, claimant told Brandemihl that he had a small amount of money in his wallet and money in his safe. According to Brandemihl, when the officers showed claimant the money, he appeared surprised and shocked.

The court also relied on the trial testimony of Sergeant Gerald Champagne. Champagne testified that claimant had indicated that the only money he had in the house was in the safe. Champagne testified further that claimant had told him that the guns found were his, but did not say anything about the money being his. According to Champagne, claimant denied that he had any money hidden in the basement and looked surprised when he was shown the money and said he had no idea that his son had that money, and even asked how much money had been found.

Furthermore, the court relied on the testimony of Sergeant Emmett Barnes. Barnes testified that he asked claimant if he had any money in the house and claimant responded that he had about \$60 in the safe. Barnes testified further that claimant was shocked when Barnes showed him the money and stated that the money was not his and that he had nothing to do with it.

The court also considered claimant's own testimony. Claimant testified that he is a certified banker, and that he has IRAs, 401(k) plans, stocks, savings accounts, and credit union accounts. Claimant also testified that he is a paralegal, a retired chief warrant officer from the United States Army, and has a master's degree in business administration. Claimant testified that the police had said that they found a lot of money and conceded that he had said at the time that he did not know his son had the money in his house. According to claimant's testimony, he did not discover that the money which he now claims is his was missing from the house until a few days after the search.

The court found it telling and nonsensical that a person with claimant's intelligence and background would stash a large amount of cash in his basement ceiling. The court also found it strange that claimant never told the police the money was his during the search, and did not claim to discover that his money was missing until days after the search.

The court concluded that the testimony of the police officers was more credible than claimant's, which simply did not make sense. The court further concluded that the evidence showing that the money was Gary Robinson's, and was thus proceeds from illegal drug sales, was overwhelming. In so doing, the trial court stated that it had read over the case "as if it were

tried in front of me” and concluded that plaintiff had overcome the presumption that the missing cash belonged to claimant. The court determined that “based on the record before me, [] the [p]rosecution prevails.”

The court did not err in applying the rebuttable presumption that the missing evidence was adverse to plaintiff and still concluding that plaintiff had carried its burden of showing that the cash was Gary Robinson’s. Although claimant makes much of the fact that the court reviewed the case “de novo,” it is unclear to us what error claimant attempts to assert. In accordance with this Court’s remand, the trial court had to reconsider all of the evidence at trial in light of the rebuttable presumption and determine whether the outcome was affected, i.e. whether the evidence remained sufficient to support a finding of forfeiture. This process necessarily involved reviewing the evidence, including testimony produced at trial, including the de bene esse deposition of Brandemihl, which became part of the record. We fail to understand claimant’s dissatisfaction with the lower court’s apparent de novo review of the evidence in light of his own position as explained to the trial court at the October 19, 1998 hearing:

And I would emphasize, once again, that you are not acting as an appellate court, that you are the trial court, and you have to evaluate the decision, the evidence again with the Court of Appeals’ instructions as if you were the trier of fact, which is what you are, you are the trier of fact.

There was ample evidence to support the court’s finding that cash belonged to Gary Robinson rather than claimant, even applying the presumption in a manner adverse to plaintiff. The court properly applied the presumption and did not err in concluding that the outcome of the forfeiture was unaffected.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage