STATE OF MICHIGAN

COURT OF APPEALS

STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CERTAIN REAL PROPERTY, EDWIN T. DEWS, BEVERLY J. DEWS, SHARON SHEA and ROCK-A-ROLLA RECORDS, INC.,

Defendants-Appellants.

UNPUBLISHED
October 30, 1998

No. 192693
Saginaw Circuit Court
LC No. 93-900203-CF

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Defendants appeal as of right from an order of forfeiture entered after a bench trial. The trial court also denied defendants' motion for "reconsideration" and, in the alternative, for a new trial. We affirm.

Defendants first claim that the forfeiture proceeding was procedurally defective. Defendants argue that, under MCL 333.7453(2); MSA 14.15(7453)(2), the prosecuting attorney was required to notify defendants at least two days before the execution of the 1993 search warrant that defendants possessed material determined by the prosecuting attorney to be drug paraphernalia. This argument lacks merit. By its express terms, subsection (2) applies only to potential criminal prosecutions, not civil forfeiture actions. For example, subsection (2) provides that notice be made "[b]efore a person is *arrested* for a *violation* of subsection (1)" and that, if the person "complies with the notice, no *arrest* will be made." (Emphasis added). Further, MCL 333.7453(3); MSA 14.15(7453)(3) provides that a person's compliance with the notice sent under subsection (2) is a complete defense "against a *prosecution* under section 7453." (Emphasis added). There is *nothing* in the controlled substances act to suggest that the notice requirement contained in § 7453 must be met before a civil forfeiture action may properly be commenced. Indeed, there is no need even to commence a criminal prosecution in

order for a civil forfeiture action to be brought. *In re Forfeiture of $53*, 178 Mich App 480, 496; 444 NW2d 182 (1989).[1]

Defendants next contend that the trial court did not have "subject matter jurisdiction" over property other than that found to be "drug paraphernalia" as that term is used in MCL 333.7521(1)(g); MSA 14.15(7521)(1)(g). We find no merit to this argument. We can discern no basis, statutory or otherwise, for defendants' claim that the trial court did not have authority to proceed under *any* of the forfeiture statute's provisions. To the contrary, as applied to this case, § 7521 broadly provides not only for the forfeiture of *any* property "which is used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance," MCL 333.7521(1)(b); MSA 14.15(7521)(1)(b), but also

> (1) property "which is used, or intended for use, as a container for property described in subdivision . . . [b]," MCL 333.7521(1)(c); MSA 14.15(7521)(1)(c);
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> (2) a conveyance "used or intended for use, to transport . . . for the purpose of sale or receipt of property described in subdivision . . . [b]," MCL 333.7521(1)(d); MSA 14.15(7521)(1)(d);
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> (3) "[a]ny thing of value . . . that is used or intended to be used to facilitate *any violation* of [the controlled substances act]," MCL 333.7521(1)(f); MSA 14.15(7521)(1)(f) (emphasis added); *and*
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> (4) "[a]ny *other* drug paraphernalia not described in subdivision (b) or (c)," MCL 333.7521(1)(g); MSA 14.15(7521)(g) (emphasis added).

We likewise reject as completely unfounded defendants' assertion "that the [L]egislature did not intend in the statutory scheme to allow forfeiture of either real or personal property premised on minor offenses with penalties of a year or less."

We next address defendant Edwin Dews' separate claim that, as applied to his interest in the property confiscated, the Double Jeopardy provisions of the United States Constitution, US Const Am V, and the Michigan Constitution, Const 1963, art 1, § 15 barred this civil forfeiture action because it followed defendant's criminal convictions in federal court arising out of the same alleged criminal transaction. There is a presumption that double jeopardy analysis does not apply when a criminal action is followed by an in rem civil forfeiture proceeding. That presumption can only be rebutted by the "clearest proof" indicating that the forfeiture is "so punitive in purpose or effect" that it is equivalent to a criminal proceeding. *United States v Ursery*, 518 US 267, 289 n 3; 116 S Ct 2135; 135 L Ed 2d 549 (1996); *People v Acoff*, 220 Mich App 396, 398-399; 559 NW2d 103 (1996). In the instant case, defendant Dews' double jeopardy claim fails because he has not shown that the civil forfeiture proceeding was so punitive in form or effect as to render it criminal. *Acoff*, *supra* at 399.

Defendants also argue that, because an earlier forfeiture proceeding brought in 1992 resulted in a consent judgment, the instant forfeiture action is barred by res judicata. This argument is without merit. Res judicata bars a subsequent action between the same parties when

the evidence or facts essential to the maintenance of the two actions are identical. *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997). "However, if the facts change, or new facts develop, res judicata will not apply." *Michigan Fraternal Order of Police v Detroit*, 207 Mich App 606, 608; 525 NW2d 509 (1994).

We are not persuaded by defendants' res judicata argument because new facts were present in the second forfeiture action that were not present in the first. Immediately after the first forfeiture action was settled, police officers discovered that defendants were continuing to offer for sale, at various Rock-A-Rolla locations, items that the prosecuting attorney considered to be drug paraphernalia. As a result, the prosecuting attorney filed a second forfeiture action that was broader in scope than the first. Defendants' continuing course of conduct constitutes a change in circumstance rendering res judicata inapplicable. Cf. *Fraternal Order of Police*, *supra*.[2]

We also reject the argument of defendants Beverly Dews and Sharon Shea that they are "innocent owners" and that their interests in the real and personal property are therefore not subject to forfeiture. See MCL 333.7521(1)(f); MSA 14.15(7521)(1)(f). The "innocent owner" defense is an affirmative defense. See *United States v One Parcel of Property Located at 121 Allen Place, Hartford, Connecticut*, 75 F3d 118, 121 (CA 2, 1996).[3] As such, it was required to have been raised in the responsive pleading or in a motion made before the filing of a responsive pleading. MCR 2.111(F)(2), (3). Because defendants failed to do so, the defense was waived. *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 311; 503 NW2d 758 (1993). Furthermore, the burden is on the owner to establish this defense. MCL 333.7521(1)(d)(ii) and (f); MSA 14.15(7521)(1)(d)(ii) and (f); *In re Forfeiture of $53*, *supra* at 486.[4] Having failed to cite any record evidence establishing their status as innocent owners, these defendants would not be entitled to relief on this issue in any event.

Defendants next argue that the trial court made findings that are "contrary to law and against the great weight of the evidence." A trial court's findings of fact when sitting without a jury will not be set aside on appeal unless they are clearly erroneous. *In re Forfeiture of $18,000*, 189 Mich App 1, 4; 471 NW2d 628 (1991). Defendants first argue that the trial court erred in finding that defendants' real property and records, accounts, and inventory of records, posters, T-shirts, etc. were subject to forfeiture. We disagree. The trial court found that the six parcels of real property were subject to forfeiture under §§ 7521(1)(c) and (f), and that the records, accounts, and inventory were subject to forfeiture under § 7521(f). Both subsections require proof by a preponderance of the evidence that property subject to forfeiture has a "substantial nexus" to some alleged criminal violation of the controlled substances act. *In re Forfeiture of $5,264*, 432 Mich 242, 260-262; 439 NW2d 246 (1989); *In re Forfeiture of 19203 Albany*, 210 Mich App 337, 342; 532 NW2d 915 (1995). The trial court found that the six parcels of real property and the records, accounts, and inventory were subject to forfeiture because they were substantially connected to the sale of drug paraphernalia in violation of MCL 333.7453; MSA 14.15(7453).

Defendants essentially contend that the trial court's analysis is faulty because the prosecution failed to provide sufficient proof that the defendants sold "drug paraphernalia" as that term is defined in MCL 333.7451; MSA 14.15(7451). That statutory provision defines "drug paraphernalia," in relevant part, as

> any equipment, product, material, or combination of equipment, products, or materials, which is *specifically designed* for use in . . . manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. [Emphasis added.]

Regardless whether the prosecution established by a preponderance of the evidence that the items in question were "specifically designed" for one or more of the proscribed uses, the record supports the trial court's order of forfeiture. The prosecution presented ample evidence from which the trial court could find by a preponderance of the evidence that defendants, through all five Rock-A-Rolla stores, sold literally thousands of products, ranging from test tubes and vials to scales, grinders, and cocaine cutting agents, that were then used by customers to either manufacture,[5] deliver, or consume controlled substances, all of which are violations of the controlled substances act. See MCL 333.7401; MSA 14.15(7405); MCL 333.7404; MSA 14.15(7404). Defendants' stores, in turn, certainly were "used or intended to be used to facilitate" such illicit activity. Furthermore, all excess inventory was stored in the warehouse and held for later distribution. There was more than a mere incidental or fortuitous connection between the real property and drug activity. Accordingly, we conclude, albeit under a slightly different analysis, that forfeiture of the real property was proper under § 7521(1)(f). *In re Forfeiture of $5,264*, *supra*. For the same reasons, and also because the evidence established most of the drug-related items (e.g., cutting agents, test tubes, scales) as having been "used, or intended for use, in manufacturing, compounding, processing, [or] delivering . . . a controlled substance," MCL 333.7521(1)(b); MSA 14.15(7521)(b), the real property was also subject to forfeiture under § 7521(1)(c) as a container. *In re Forfeiture of 19203 Albany*, *supra*.

With respect to defendants' records, accounts and inventory, we find no clear error in the trial court's finding that they were subject to forfeiture under § 7521(1)(f). This propety was an integral part of an ongoing enterprise largely involving the sale of drug-related items. Unquestionably, the records, accounts and inventory were "used or intended to be used" to facilitate violations of the controlled substances act. Defendants also briefly contend that forfeiture of the 1983 van was improper because "it is inconceivable that [the Legislature] did not intend forfeiture on the basis of what could potentially be a 90-day misdemeanor." As stated, we reject this argument as unfounded.

Finally, defendants argue that the trial court erred by ordering the sale of the real property at less than fair market value and in a manner contrary to a prior order. However, because we are affirming the trial court's order of forfeiture, defendants no longer have any legally protected interest in the outcome of the sales. Therefore, they lack standing to raise this issue. *People v Yeoman*, 218 Mich App 406, 420; 554 NW2d 577 (1996).

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.

[1] We further note that defendants' claim of unfair surprise is incredible in light of the fact that, in 1992, defendants were notified that the prosecuting attorney considered them to be in possession of drug paraphernalia and were requested "to refrain from selling" it.

[2] We further note that "[t]he doctrine of res judicata was judicially created in order to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" *Hackley v Hackley*, 426 Mich 582, 584; 395 NW2d 906 (1986) (citation omitted). Clearly, those concerns are not present here.

[3] Because Michigan's civil forfeiture statute essentially parallels the federal statute, Michigan courts find persuasive federal case law involving similar provisions. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 149; 486 NW2d 326 (1992).

[4] Because the burden was on them to plead and prove the defense, we reject as unfounded defendants' whimsical argument that, "as a result of the lack of evidence, they asserted positions equivalent to innocent owners."

[5] Under the controlled substances, "manufacture" means

> the production, preparation, propogation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. [MCL 333.7106(2); MSA 14.15(7106)(2).]

"Manufacture" also includes "the packaging or repackaging of the substance or labeling or relabeling of its container," *id.*, but does not include "[t]he preparation or compounding of a controlled substance by an individual *for his or her own use*." MCL 333.7106(2)(a); MSA 14.15(7106)(2)(a) (emphasis added).