IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

WILLIE LEE PITTMAN, JR.,

Petitioner,

v. NO. 3:95CV78-S

UNITED STATES OF AMERICA,

Respondent.

OPINION

In this case, petitioner attacks his criminal conviction on double jeopardy grounds by filing a motion to dismiss, which the court interprets as a request for § 2255 relief. The government has responded to the motion, and the time for filing a rebuttal has passed without further argument. Therefore, having been fully apprised of the facts and the applicable case law, the court is prepared to issue its ruling.

BACKGROUND

On September 8, 1992, the petitioner, Willie Lee Pittman, Jr., was charged with conspiracy to distribute cocaine, possession of cocaine with intent to distribut, and using a telephone to facilitate a drug trafficking crime. On that same date, a civil complaint for forfeiture in rem was filed against a 1992 Ford Explorer alleging that the vehicle had been used in facilitating the sale of a controlled substance. See 21 U.S.C. § 881(a)(4).

The affidavit in support of the criminal complaint and the verified complaint for forfeiture stated the same facts as the bases for both actions: On August 28, 1992, petitioner, while in the Explorer, negotiated a sale of a quarter kilogram of cocaine for $9,000.00.

Arrest warrants for petitioner and the Explorer were issued and executed. Petitioner was subsequently indicted and, on January 14, 1993, petitioner, represented by retained counsel, executed and filed a plea agreement. He pled guilty a week later on January 21. On that same day, petitioner was personally served with process in the civil forfeiture action but made no claim to the vehicle or otherwise entered any appearance therein. On February 23, 1993, petitioner's father, Willie Lee Pittman, Sr., filed a claim and answer in the civil forfeiture action, maintaining that the Explorer was his exclusive property and that he was an innocent owner.

On April 15, 1993, petitioner, again represented by retained counsel, was sentenced to eighty-four months imprisonment. No appeal was taken from the judgment, and petitioner began serving his sentence approximately one month later.

In early November, 1993, Mr. Pittman, Sr., and the government executed and filed a settlement agreement in the civil forfeiture action. Mr. Pittman, Sr., also filed a waiver of any claim to the vehicle and a consent to its forfeiture and joined the government in filing a motion for judgment of forfeiture by consent. On

November 8, 1993, the court entered a judgment of forfeiture against the Explorer, finding that no one other than Mr. Pittman, Sr., had made any claim to the vehicle and forfeiting it to the government in accordance with the settlement agreement. No appeal of that judgment was taken by any person, and the vehicle was sold at public auction by the United States Marshal approximately one month later.

A year later, the petitioner filed a pro se motion for return of seized property, alleging that the Explorer was neither used in nor represented the proceeds of criminal activity. The court denied the motion, noting that the vehicle had been adjudged forfeited without appearance or objection by petitioner and that no appeal had been taken therefrom.

The instant motion, styled as a "Motion to Dismiss the Criminal Charges on the Grounds of the Double Jeopardy Clause," ensued. In this motion, petitioner argued that "the prior civil forfeiture of his father's vehicle and the seizure of $1,400.00 in U. S. Currency on his person...constitutes punishment for the crimes charged in the indictment and that the Double Jeopardy clause precludes a second punishment." As relief, he requested that the court "issue a writ, vacating and setting aside the judgment heretofore imposed...and declare Petitioner's conviction unconstitutionally obtained." Because of the nature of the relief sought, the court construed the motion as a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

DISCUSSION

Petitioner's claim that his criminal conviction should be vacated based on double jeopardy grounds is easily disposed of as "no question of double jeopardy arises unless jeopardy has first attached sometime prior to what the defendant seeks to characterize as the 'second' prosecution." Fransaw v. Lynaugh, 810 F.2d 518, 523 (5th Cir.), cert. denied, 483 U.S. 1008 (1987). In a plea bargaining context, jeopardy attaches with the court's acceptance of the guilty plea, Fransaw, 810 F.2d at 523, which occurred in this case on January 21, 1993. "Regardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar [only] the second sanction if both the first and second sanctions are deemed punishment." United States v. Tilley, 18 F.3d 295, 298 n.5 (5th Cir. 1994) (emphasis added).

In this case, the facts clearly show that the criminal conviction, not the civil forfeiture, was the first punishment exacted upon petitioner. His entire argument falls because of his failure to recognize this point. At that time, no judgment had been entered and no "punishment" had been imposed in the civil forfeiture proceeding which might bar the criminal conviction. See United States v. Sanchez-Escareno, 950 F.2d 193, 201, 203 (5th Cir. 1991), cert. denied, ____ U.S. ____, 113 S.Ct. 123, 121 L.Ed. 2d 78 (1992). Furthermore, there is no double jeopardy issue in the forfeiture action because petitioner did not make a claim for the Explorer even though he was served with process and advised of his

right to make such a claim. "As a result, he did not become a party to the forfeiture....[T]he [Explorer] was forfeited without trial, and jeopardy did not attach." United States v. Torres, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, ____ U.S. ____, 115 S.Ct. 669, 130 L.Ed. 2d 603 (1994). As the Torres court recognized, "You can't have double jeopardy without a former jeopardy. As a non-party, [petitioner] was not at risk in the forfeiture proceeding, and '[w]ithout risk of a determination of guilt, jeopardy does not attach....'" Torres, 28 F.3d at 1465 (citation omitted). Cf. United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489 (9th Cir. 1994) (subsequent civil forfeiture under § 881(a)(4) barred by Double Jeopardy Clause). Therefore, as there is no double jeopardy violation associated with petitioner's criminal conviction, his motion for § 2255 relief is not well taken and is denied.

An appropriate final judgment shall issue.

This _____ day of June, 1995.

_____
CHIEF JUDGE