

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 8, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARLO TOOMBS,

Defendant - Appellant.

No. 22-3191
(D.C. No. 2:10-CR-20009-JAR-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH, KELLY**, and **MORITZ**, Circuit Judges.**

Petitioner-Appellant Marlo Toombs, an inmate proceeding pro se, appeals from the denial of his motion under Federal Rule of Criminal Procedure 41(g) for return of currency and a computer hard drive seized upon his 2006 arrest. I R. 649–54. He asks this court to reverse or, alternatively, remand with instructions to hold an evidentiary hearing to assess the value of the items seized. Pet. Br. at 3.4.

Exercising jurisdiction under 28 U.S.C. § 1291, we remand to the district court to

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

enter an order dismissing the motion for lack of jurisdiction.

Background

In October 2005, the Leavenworth, Kansas police department executed a search warrant at a Leavenworth residence with which Mr. Toombs had substantial connections. United States v. Toombs, 713 F.3d 1273, 1276–77 (10th Cir. 2013). The search uncovered a grenade, firearms, and various drugs. These items formed the basis of a federal indictment in the District of Kansas. I R. 26–31. The search also resulted in a seizure by the Kansas Department of Revenue (KDOR) of various electronics and currency in the home to satisfy a \$221,029 drug tax assessed against Mr. Toombs and his codefendant. Id. 650–51. Among these items was the hard drive Mr. Toombs seeks. Id. 602.

On May 1, 2006, Kansas City, Missouri officers arrested Mr. Toombs as he was leaving his home. Id. 607, 635. The officers seized \$4,481 found in Mr. Toombs’s vehicle. According to the police report, special Agent Nelson of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), who was at the scene, asked that the cash be held. Id. 635–36. The funds were deposited by Kansas City law enforcement on May 5, 2006, and sometime later, escheated to Missouri. Id. 637.

A jury convicted Mr. Toombs on various counts of possessing with intent to distribute crack cocaine and cocaine, being a felon in possession of a firearm, and possessing an unregistered firearm. We remanded, finding Speedy Trial Act violations. United States v. Toombs, 574 F.3d 1262, 1273–74 (10th Cir. 2009). The

case was retried, Mr. Toombs was found guilty on six charges and was sentenced to thirty years' imprisonment. Toombs, 713 F.3d at 1278. Upon the government's motion, the district court amended the final judgment to include forfeiture of the grenade, firearms, and ammunition seized during the execution of the search warrant. I R. 34–45. We affirmed on direct appeal. Toombs, 713 F.3d at 1281.

In 2019, Mr. Toombs filed a Rule 41(g) motion in the District of Kansas requesting the return of the \$4,481, along with a computer hard drive and other hardware allegedly containing digital audio files connected to a legitimate business Mr. Toombs owned.¹ I R. 601–04. The district court denied the motion, finding that given the currency was seized in Missouri, the District of Kansas was an improper venue. Although concededly the motion (as concerning the currency) could have been dismissed on that basis alone, the court also held that the government never constructively possessed the currency. Id. 653. The court also denied relief as to the hard drive, finding that the record lacked evidence the computer had been actually or constructively held by the federal government. Specifically, the KDOR had never directed the federal government to seize the computer and “neither the computer nor any information stored on the computer was introduced into evidence at either of Toombs’ jury trials.” Id. 654.

We review questions of law de novo while evaluating the district court's

¹ In his reply brief, Mr. Toombs explains that these files contained audio recordings of noted music artists which were converted to a different digital format. Reply Br. at 4. He maintains these files possessed artistic value. Id.

denial of relief under Rule 41(g) for abuse of discretion. United States v. Shigemura, 664 F.3d 310, 312 (10th Cir. 2011). Given Mr. Toombs is unrepresented by counsel, we construe his pleadings liberally. Trackwell v. United States Gov't, 472 F.3d 1242, 1243 (10th Cir. 2007).

Discussion

Rule 41(g) allows “[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property” to move for the return of the property. In certain limited circumstances, the rule may provide relief for individuals whose property was seized initially by state authorities but later comes into possession of the federal government. United States v. Copeman, 458 F.3d 1070, 1071 (10th Cir. 2006). We have found the following circumstances to constitute such possession: where the federal government (i) actually possessed the property, (ii) constructively possessed the property “where the property was considered evidence in the federal prosecution,” or (iii) where state officials seize the property “at the direction of federal authorities in an agency capacity.” Clymore v. United States, 164 F.3d 569, 571 (10th Cir. 1999). However, when the federal government does not currently possess the items sought, it is entitled to sovereign immunity, thereby depriving the district court of subject matter jurisdiction and precluding relief under the rule. Clymore v. United States, 415 F.3d 1113, 1120 (10th Cir. 2005).²

² Clymore addressed a former version of the rule which was codified under 41(e) but the new rule, recodified as 41(g) in 2002, is substantively the same for this

A. The \$4,481

The district court found that the District of Kansas was an improper venue for Mr. Toombs's motion as it concerned the currency. Indeed, Rule 41(g) provides that a motion for return of seized property, "must be filed in the district where the property was seized." See Fed. R. Crim. P. 41(g). Venue in the district of seizure is thus mandatory. Mr. Toombs does not dispute that the \$4,481 was in fact seized upon his arrest in Missouri. Pet. Br. at 3.2. Therefore, venue does not lie in the District of Kansas.

But though we agree venue was improper, given the lack of evidence that the federal government currently possesses the currency in question, the court lacked subject matter jurisdiction to consider the motion. See Image Software, Inc. v. Reynolds & Reynolds Co., 459 F.3d 1044, 1048 (10th Cir. 2006) ("Federal courts 'have an independent obligation to determine whether subject-matter jurisdiction exists.'" (quoting Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006))). We grant that Agent Nelson instructed Kansas City officers to hold onto the currency and that that fact may in itself result in constructive possession by the federal government. Pet. Br. at 3.2; Clymore, 164 F.3d at 571. But even so, the record confirms — and Mr.

purpose, and we continue to apply our precedent interpreting the former rule. See United States v. Bacon, 900 F.3d 1234, 1237 (10th Cir. 2018); Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 690 n.1 and accompanying text. Although in Clymore, we addressed the more specific question of whether a movant could obtain monetary damages based on property outside the government's possession, 415 F.3d at 1118, the same principle, i.e., the government's immunity, applies equally to the matter of whether any form of relief may be obtained under Rule 41(g).

Toombs appears to concede — that the currency escheated to Missouri shortly after its brief hold by the Kansas City police department. I R. 637. As it is beyond dispute that the federal government no longer has control over the funds, dismissal was warranted for lack of subject matter jurisdiction.

B. The Hard Drive

Given the hard drive was seized pursuant to the Leavenworth search warrant, we agree with the district court that venue lay in the District of Kansas. See Fed. R. Crim. P. 41(g). However, as with the currency, the record lacks evidence that the hard drive — which was seized to satisfy a state drug tax obligation — is within the federal government’s possession.

For Mr. Toombs’s part, he asserts that the federal government orchestrated scientific testing of electronics seized by state authorities at one time. Pet. Br. at 3.4. Assuming that as fact, one could speculate that at one point, the federal government employed some of the electronics, including the hard drive, found at the Kansas residence for evidentiary purposes. See Copeman, 458 F.3d at 1072 (explaining that constructive possession may lie where the government holds the item “for potential use as evidence in a federal prosecution”). But, even so, the mere possibility of the federal government’s prior possession does not support an inference that it currently has actual or constructive control over the hard drive. Accordingly, the district court lacked jurisdiction over this claim.

C. Evidentiary Hearing

Mr. Toombs otherwise requests an evidentiary hearing to ascertain possible

monetary damages based on the value of the items sought. Pet. Br. at 3.4. It is not apparent this request was ever raised before the district court; but, in any event, given our disposition, the issue is moot. Because the written record confirms that the property sought is not presently in the federal government's possession, no evidentiary hearing is warranted. See Clymore, 415 F.3d at 1120 (barring monetary relief based on property outside the government's possession); United States v. Tucker, 438 F. App'x 663, 665 (10th Cir. 2011) (unpublished) (declining to remand for further proceedings where the record conclusively showed the government no longer possessed the funds in question).

We REMAND to the district court with instructions to vacate its previous order and enter an order DISMISSING the motion for lack of subject matter jurisdiction. Mr. Toombs's motion for leave to proceed in forma pauperis is GRANTED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge