APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 19-5567

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 10, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
ABRAHAM A. AUGUSTIN,	)	TENNESSEE
	)	
Defendant-Appellant.	)	

ORDER

Before: BOGGS, WHITE, and MURPHY, Circuit Judges.

Abraham A. Augustin, a federal prisoner proceeding pro se, appeals the district court's order denying his "petition for the return of seized property," filed pursuant to Rules 32.2(a) and 41(e) or (g)[1] of the Federal Rules of Criminal Procedure. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

By way of background, in December 2009, Augustin agreed to pay $5100 to a man known only as "Hoss" in exchange for six ounces of cocaine. However, neither party to the illicit transaction honored their end of the bargain. Augustin tendered only $4200, and the cocaine turned out to be fake. To recoup his money, Augustin and Lorrance Dais kidnapped Robert Jordan, the middleman in the drug transaction, and held him for ransom. The Bradley County (Tennessee)

[1] Rule 41(g) was formerly under Rule 41(e) until it was redesignated without substantive change in 2002. *See Brown v. United States*, 692 F.3d 550, 552 (6th Cir. 2012).

Sheriff's Department arrested Augustin and Dais, at which time it seized, among other things, $15,640 in United States currency, a 2003 BMW 745LI vehicle, and a U-Haul rental truck containing personal property. Augustin and Dais were both charged in state court and released on bond. After being released, Augustin threatened Jordan over the telephone and sent a letter to Dais's girlfriend, in which he described how to hire a hitman to murder Jordan, Jordan's friend, and Jordan's mother. *United States v. Dais*, 559 F. App'x 438, 440 (6th Cir. 2014).

A federal grand jury subsequently indicted Augustin and Dais for the same conduct underlying their state charges. Pertinent to this appeal, no forfeiture allegations were included in the federal superseding indictment. In January 2010, at Augustin's request, the Bradley County Sheriff's Department released the contents of the U-Haul to a third party. The Bradley County Sheriff's Department also initiated state forfeiture proceedings against the seized currency and BMW. Those forfeiture proceedings were completed on May 5, 2010, and April 15, 2011, respectively.

In October 2010, a federal jury convicted Augustin of one count of kidnapping, one count of using and carrying a firearm during and in relation to a crime of violence, one count of being a felon in possession of a firearm, one count of using the mail with the intent to commit murder for hire, three counts of hiring a person to kill a witness with the intent to prevent the witness's attendance and testimony at trial, and one count of attempting to obstruct and influence and impede a trial by attempting to have witnesses killed. The district court sentenced Augustin to an aggregate 500-month term of imprisonment and we affirmed Augustin's convictions and sentence on direct appeal. *Id.*

In September 2015, Augustin filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, as well as a separate Rule 41(g) motion seeking the return of his seized property. The government opposed both motions, arguing with respect to the latter that the property at issue was not in the federal government's possession because it "was seized and disposed of by state and local authorities, in accordance with state procedures." The district court denied Augustin's § 2255 motion and this court declined to issue a certificate of appealability. *Augustin v. United States*, No. 18-6007 (6th Cir. Feb. 1, 2019) (order).

In November 2018, Augustin filed a motion for summary judgment, in which he restated the substance of his Rule 41(g) motion. He also filed a petition for a writ of mandamus, in which he asked this court to compel the district court to rule on his request for the return of his seized property. The government opposed Augustin's summary-judgment motion, reiterating its position that the federal government never possessed the property at issue. The district court denied Augustin's Rule 41(g) motion after determining that local law enforcement had seized the property at issue and that "the United States has never been in possession of the Properties."

Augustin advances several arguments on appeal. He first argues that the district court erred by not holding an evidentiary hearing on his Rule 41(g) motion. Second, he challenges the district court's determination that the federal government never actually or constructively possessed the property at issue. Third, he argues that his property was forfeited without due process of law. Finally, he contends that the district court should have allowed him to amend his Rule 41(g) motion in order to assert a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Augustin argues that he is entitled to relief under Rule 41(g). That rule provides that a "person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." "We review for abuse of discretion the denial of a Rule 41 motion for return of property[.]" *Savoy v. United States*, 604 F.3d 929, 932 (6th Cir. 2010). "A court abuses its discretion when it relies on clearly erroneous findings of fact or when it improperly applies the law or uses an erroneous legal standard." *United States v. Headley*, 50 F. App'x 266, 267 (6th Cir. 2002) (citing *Romstadt v. Allstate Ins.*, 59 F.3d 608, 615 (6th Cir. 1995)).

A Rule 41(g) motion that is filed after the conclusion of criminal proceedings is treated as a civil action in equity. *Savoy*, 604 F.3d at 932; *United States v. Oguaju*, 107 F. App'x 541, 542 (6th Cir. 2004). Generally, seized property other than contraband should be returned after criminal proceedings have concluded, provided that the person seeking the return of the property shows that he or she is lawfully entitled to possess it. *Savoy*, 604 F.3d at 932-33. However, prior to obtaining relief, the person seeking the return of property must carry "his burden of showing real or constructive possession of the property by the federal government." *United States v. Obi*, 100

F. App'x 498, 499 (6th Cir. 2004). "[I]f the Government no longer possess the property at issue, no relief is available under Rule 41(g)." *United States v. Stevens*, 500 F.3d 625, 628 (7th Cir. 2007) (citing *Okoro v. Callaghan*, 324 F.3d 488, 491 (7th Cir. 2003)); *see also Bailey v. United States*, 508 F.3d 736, 740 (5th Cir. 2007).

The district court did not abuse its discretion in denying Augustin's Rule 41(g) motion. Augustin presented no evidence showing that the property at issue was ever in the federal government's possession, let alone at the time that he filed his Rule 41(g) motion. *See Stevens*, 500 F.3d at 628. Rather, the record reflects that the Bradley County Sheriff's Department seized the property at issue at the time of Augustin's arrest. Wayne Jackson, a retired FBI special agent with personal knowledge of Augustin's case, averred that, "in January 2010, at the request of Abraham Augustin, the contents of the U-Haul were released to" a third party. Agent Jackson further averred that "[a]t no point did the Federal Bureau of Investigation, nor any other federal agency, exercise custody or control of the U-Haul or the contents of the U-Haul." With respect to the seized currency, Augustin was issued "notice[s] of property seizure and forfeiture of conveyances" clearly indicating that any claim for the return of property needed to be made with the Tennessee Department of Safety. On May 5, 2010; and April 15, 2011, respectively, the Tennessee Department of Safety ordered that the seized currency and BMW be forfeited to the Bradley County Sheriff's Department pursuant to Tennessee Code Annotated § 40-33-206(c) for disposition as provided by law. Considering the foregoing, Augustin has failed to carry his burden of showing that the federal government actually or constructively possessed the property at issue. Nor is there anything in the record indicating that state or local officials were acting under the direction of the federal government.

In his brief, Augustin cites *United States v. Fabela-Garcia*, 753 F. Supp. 326 (D. Utah 1989), *abrogation recognized by United States v. Copeman*, 458 F.3d 1070, 1072-73 (10th Cir. 2006), in support of his argument that "the United States [was] in constructive possession of the property since the BMW vehicle, cash, and U-Haul rental truck's contents were 'seized in connection with the criminal investigation of a case' prosecuted in federal court." In *Fabela-Garcia*, the district court exercised jurisdiction over property that was seized and held by the Utah

Highway Patrol because a state prosecutor "through his arrangement with the United States Attorney, deferred to the United States in *all* aspects of the prosecution," thus giving the federal government constructive possession of the property. *Fabela-Garcia*, 753 F. Supp. at 328. But even if *Fabela-Garcia* remains good law, *see United States v. Lee*, No. 94-3564, 1995 WL 456365, at *3 (6th Cir. Aug. 1, 1995) (per curiam), and *Copeman*, 458 F.3d at 1072-73, and had precedential effect on this court, that case is readily distinguishable from the present case. And even if the federal government did possess the property at issue at some point, Augustin is not entitled to relief under Rule 41(g) because it is undisputed that the federal government does not currently possess it. *See Stevens*, 500 F.3d at 628.

Augustin also attempts to offer "new evidence" on appeal by way of four exhibits that allegedly show that Agent Jackson had control over the property at issue once it was seized. But Augustin never presented this evidence to the district court or made it part of the record. He also failed to move to amend the record to add this evidence. *See* Fed. R. App. P. 10(e). Therefore, this evidence is not properly before us, and we decline to consider it for the first time on appeal. *See Lang v. Gundy*, 399 F. App'x 969, 977 (6th Cir. 2010) (citing *Adams v. Holland*, 330 F.3d 398, 406 (6th Cir. 2003)). In any event, even were we to consider this newly proffered evidence, Augustin would still not be entitled to relief because it remains that the federal government does not possess the property at issue. *See Stevens*, 500 F.3d at 628.

Augustin next argues that the manner of notice regarding the forfeiture proceedings did not comport with due process. However, because Tennessee was the sovereign that instituted forfeiture proceedings against the property at issue, Augustin's due-process claim against the federal government is without merit. *See United States v. Poe*, No. 99-5089, 2000 WL 190068, at *2 (6th Cir. Feb. 7, 2000) (citing *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972)).

Equally without merit is Augustin's argument that the district court erred by failing to hold an evidentiary hearing prior to denying his motion. An evidentiary hearing on a Rule 41(g) motion is required only if necessary to determine a disputed issue of fact necessary to the resolution of the motion. *See Peloro v. United States*, 488 F.3d 163, 177 (3d Cir. 2007). Because Augustin's motion

presented no factual disputes that required the development of additional evidence to resolve his motion, the district court was not required to hold a hearing on the matter.

Finally, Augustin argues that the district court should have given him an opportunity to amend his Rule 41(g) motion pursuant to Rule 15(a) of the Federal Rules of Civil Procedure so that he could assert a *Bivens* claim. Assuming that Augustin had the right to amend his Rule 41(g) motion under Rule 15(a), *see United States v. Norwood*, 602 F.3d 830, 837-38 (7th Cir. 2010) (citing *Peña v. United States*, 157 F.3d 984, 987 (5th Cir. 1998)), the district court did not err by not permitting Augustin to amend his motion prior to dismissal because any amendment would have been futile, *see Campbell v. BNSF Ry.*, 600 F.3d 667, 677 (6th Cir. 2010). Tennessee's one-year statute of limitations for *Bivens* claims would apply here. *See Zundel v. Holder*, 687 F.3d 271, 281 (6th Cir. 2012). Augustin's *Bivens* claim would have accrued no later than April 15, 2011, when Tennessee's Department of Safety ordered that the seized BMW be forfeited to the Bradley County Sheriff's Department. However, Augustin did not file his Rule 41(g) motion until September 2015, more than four years after the expiration of the one-year limitations period. *See Norwood*, 602 F.3d at 838 (citing *Peña*, 157 F.3d at 987) (holding that an amended pleading relates back to the original pleading, which in that case was the defendant's Rule 41 motion).

Accordingly, we **AFFIRM** the district court's order.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

ABRAHAM A. AUGUSTIN, *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent*.	)	Case No. 1:09-cr-187 Judge Travis R. McDonough Magistrate Judge Susan K. Lee

ORDER

Before the Court is Petitioner Abraham A. Augustin's "Petition Pursuant to F.R.C.P. 41(e) or (g) and 32.2(a) for the Return of Seized Property" (Docs. 139, 143).[1] The Government opposes Petitioner's motion, asserting that the properties Petitioner seeks return of are not in federal custody. (*See* Doc. 233.)

Under Federal Rule of Criminal Procedure 41(g), a person aggrieved "by the deprivation of property may move for the property's return." For example, "Rule 41(g) may be invoked . . . to seek the return of property that was seized but not forfeited," *Suggs v. United States*, 256 F. App'x 804, 806 (7th Cir. 2007), or "to recover evidence that the Government no longer needs," *United States v. Stevens*, 500 F.3d 625, 628 (7th Cir. 2007). However, "Rule 41(g) permits only the recovery of property in the possession of the Government. Therefore, if the Government no longer possesses the property at issue, no relief is available under Rule 41(g)." *Id.* (citations omitted).

[1] These docket entries appear to be identical and, accordingly, the Court will refer to them as one petition.

In ruling on Rule 41(g) motions, courts must "receive evidence to resolve factual disputes," such as "sworn affidavits or documents verifying the chain of custody of particular items." *Id.* (citing *United States v. Albinson*, 356 F.3d 278, 281–82 (3d Cir. 2004)). However, "an evidentiary hearing is not required to resolve every factual dispute, and sometimes 'affidavits or documentary evidence, such as chain of custody records, may be sufficient to support a fact finder's determination.'" *United States v. Kelley*, No. 1:08-CR-51-RLJ-SKL-1, 2018 WL 4677794, at *4 (E.D. Tenn. June 6, 2018), *report and recommendation adopted*, No. 1:08-CR-051, 2018 WL 3312993 (E.D. Tenn. July 5, 2018) (quoting *Pitts v. United States*, 228 F. Supp. 3d 412, 418–20 (E.D. Pa. 2017)).

In this case, Petitioner seeks return of "all property listed in Exhibits R: Petitioner's vehicle, cash, and truck[ ] contents." (Doc. 139, at 4; Doc. 143, at 4.) There is, however, no Exhibit R attached to the petition. Nevertheless, the exhibits attached to the petition show that, at the time of his arrests on December 3, 2009, and December 9, 2009, the following items were seized from Petitioner:

1. 2003 BMW 745 LI (VIN # WBAGN63463DR13857);
2. $847.00 United States Currency;
3. $9.850.00 United States Currency;
4. $4,943.00 United States Currency; and
5. Contents of a U-Haul truck driven by Justine Vanorden.

(collectively, "the Properties"). (*See* Doc. 139, at 6, 8–9; Doc. 143, at 6, 8–9; *accord* Doc. 152, at 2.) The Properties seized from Petitioner were not included in the superseding indictment in this case. (*See* Doc. 28.)

According to Petitioner, at the time of his arrests, the Properties were seized by the Bradley County Sheriff's Office. (Doc. 139, at 2; Doc. 143, at 2.) On May 5, 2010, and April 15, 2011, the currency and BMW were forfeited to the Bradley County Sheriff's Department, pursuant to Tennessee law. (Docs. 233-2, 233-3, 233-4, 233-5.) In January 2010, the contents of the U-Haul truck were released to Crystal Alford, at Petitioner's request. (Doc. 233-6.) As such, the United States asserts that it has never possessed the Properties and maintains that any complaints regarding forfeiture of the Properties must be made to the State of Tennessee and the Bradley County Sheriff's Department. (Doc. 233, at 4.)

There is no evidence of record to show that the Properties in question were ever in the possession of the federal government. Rather, Petitioner's vehicle was impounded by Bradley County officers, and the seizure of the cash and the contents of the U-Haul was conducted by Bradley County officers. (*See* Docs. 233-2, 233-3, 233-4, 233-5, 233-6.) Additionally, the notices of forfeiture clearly indicate that Petitioner should direct any claim for the return of property to the State of Tennessee. (*See, e.g.*, Doc. 233-2, at 8; Doc. 233-3, at 8.) Given this proof, there is no need for further discovery.[2] *See Kelley*, 2018 WL 4677794, at *4.

Because the United States was not in possession of the Properties at the time Petitioner filed this motion, and because the United States has never been in possession of the Properties, it is not the appropriate party from which to seek the Properties' return. *United States v. Solis*, 108 F.3d 722, 723 (7th Cir. 1997); *United States v. Obi*, 100 F. App'x 498, 499 (6th Cir. 2004). Accordingly, Augustin's "Petition Pursuant to F.R.C.P. 41(e) or (g) and 32.2(a) for the Return of Seized Property" (Docs. 139, 143) is **DENIED**.

[2] Accordingly, Petitioner's motions for discovery filed in connection with his Rule 41(g) petition (Docs. 169, 185, 187, 188, 189) will be **DENIED**.

SO ORDERED.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

APPENDIX C

No. 19-5567

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 04, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ABRAHAM A. AUGUSTIN,

Defendant-Appellant.

ORDER

BEFORE: BOGGS, WHITE, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Additional material from this filing is available in the Clerk's Office.