

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CURTIS FAUSTICH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER

11-cv-348-bbc

Plaintiff Curtis Faustich began this suit under Fed. R. Crim. P. 41(g) for the return of certain property seized from him on April 13, 2010 during the search of his house in Madison, Wisconsin. He alleged that he had a right to the items seized and that he had not been given proper notice of his right to contest forfeiture of the seized items. I advised him that he had to bring the action as a civil suit because his criminal case had been completed before he filed the motion. Apr. 13, 2011 Order, dkt. #64 (10-cr-86-bbc). He paid the filing fee for a civil suit and, in lieu of a complaint, submitted a two-page statement in which he acknowledged that he had received notice of the forfeiture and had turned the matter over to the lawyer representing him in his criminal case, who did nothing to help him contest the forfeiture. Because plaintiff has conceded that he had proper notice and an opportunity to

contest the seizure, his case must be dismissed.

UNDISPUTED FACTS

On April 13, 2010, law enforcement officers executed a search warrant at plaintiff's residence, 4701 Bellingrath Street, in Madison, Wisconsin, and found an indoor marijuana grow. (The house has a McFarland mailing address but is located within the city of Madison.) The officers seized a number of items connected with the grow, including marijuana, a digital scale, baggies, a glass bong and other smoking devices, receipts, a marijuana grinder, grow lights, filters, plastic tubs, documents, credit and debit cards, check books, passport, prescription bottles, an Apple iPod Touch and \$5000 in cash.

The \$5000 was turned over to the Drug Enforcement Administration for administrative forfeiture. The Apple iPod Touch was released to plaintiff's father on October 1, 2010. Law enforcement did not seize an additional \$2000 in cash, an iMac laptop computer or an LG flat screen television that plaintiff alleges were in the house.

Notice of the administrative forfeiture proceeding was sent by certified mail to plaintiff on May 4, 2010 at 4701 Bellingrath Street, McFarland, Wisconsin 53558. The certified mail receipt bears a signature, Curt Faustich, and a date, which appears to be May 6, 2010. *Aff. of E. Altman*, dkt. #68, at 2. The notice explained that plaintiff could contest the forfeiture by filing a claim with the Forfeiture Counsel before June 8, 2010 and it told

plaintiff where to file the claim, as well as what it should include (identification of the specific property being claimed and the claimant's interest in the property) and that it should be sworn to under oath, subject to penalty of perjury. It also warned plaintiff that failure to contest the forfeiture would terminate his interest in the asset and might preclude him from contesting the forfeiture in any judicial proceeding, civil or criminal, whether it was already in progress or to be filed in the future. Plaintiff never filed an administrative claim for the return of the \$5000 or any other items.

OPINION

Plaintiff cannot contest the forfeiture of items taken from his residence because he failed to take advantage of his opportunity to do so. Although he was in jail for at least part of the thirty days within which he could have contested the forfeiture, he has not shown why he could not have filed a claim for the return of the property. He says that he asked his trial counsel to take care of the matter but that his lawyer failed to do anything, but he could have filed a claim on his own; the requirements are straightforward and require no special research or knowledge of the law.

If plaintiff is correct when he says that his trial counsel failed to take care of the matter after being asked to do so, he *may* have a cause of action against the lawyer. I emphasize the tenuous prospects of such a cause of action, because it would require plaintiff

to prove that he had a viable claim to the \$5000. He says that he could show that the money was not money earned for selling marijuana but the proceeds of on-line gambling. The problem is that the fungibility of cash makes it difficult to prove that any particular sum came from one source rather than another. He would have a hard time challenging the taking of the other items he contends were seized (television, the laptop or the \$2000), since he has no proof that they were seized during the execution of the search warrant.

It is possible that plaintiff's counsel took into consideration the difficulty of proving that any of the items plaintiff wants returned to him were seized unlawfully or at all, and decided not to pursue a claim. Doing so might have subjected plaintiff to a civil fine for filing a frivolous claim. 18 U.S.C. § 983(a)(2)(C) (filing of frivolous claim may subject claimant to civil fine in amount of 10% of value of forfeited property but no more than \$5000).

If plaintiff did want to pursue a case against his trial counsel for failing to contest the seizure of the \$5000 and try to prove that the government had seized the other items he is missing, such an action would have to be pursued in a separate suit. In all likelihood, the suit would have to be brought in state court because this court would not have jurisdiction over an action for legal malpractice brought by a Wisconsin resident against a lawyer who is a Wisconsin resident.

Plaintiff seems to think his claim to the \$5000 was preserved because the Assistant

United States Attorney was aware that he wanted to contest the seizure. She denies that she knew this, saying that she would not have talked directly to plaintiff under any circumstances because he was represented by counsel, Aug. 11, 2011 ltr. from E. Altman, dkt. #13, but even if she did, her knowledge would not preserve plaintiff's claim. It had to be in writing.

ORDER

IT IS ORDERED that this case is DISMISSED for plaintiff Curtis Faustich's failure to show that he is entitled to the return of any items seized from his residence at 4701 Bellingrath Street, McFarland, Wisconsin 53558 on April 10, 2010.

Entered this 22nd day of September, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge