IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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L.C. GRAVES,

OPINION AND ORDER

Plaintiff,

13-cv-131-bbc

v.

UNITED STATES OF AMERICA,

Defendant.

- -

This is an action for return of property seized by the Drug Enforcement Agency from L.C. Graves in connection with his arrest in 2007 for distribution of cocaine. Initially, Graves attempted to bring his motion in his closed criminal case, 07-cr-165, but because his motion is civil in nature, it was treated as a civil action. Graves is a prisoner, so his suit is subject to the limitations imposed on actions by the Prison Litigation Reform Act, 28 U.S.C. § 1915, including payment of all or part of the filing fee). United States v. Howell, 354 F.3d 693 (7th Cir. 2004) (person seeking return of property seized by government may proceed by means of civil action based on federal question jurisdiction of federal courts; if moving party is prisoner, his suit is subject to limitations of Prisoner Litigation Reform Act). Graves has paid the initial partial filing fee assessed against him. The motion is now fully briefed and ready for decision.

I conclude that the motion must be dismissed because Graves has not shown that the

DEA did not take reasonable steps to notify him of its intention to forfeit the currency it had seized from him. Graves has asked for appointment of counsel, but that motion will be denied because he has shown himself capable of representing himself up to this point and because his motion will be dismissed.

BACKGROUND

Plaintiff L.C. Graves was arrested on June 15, 2007 after law enforcement obtained information that he had been selling cocaine on a regular basis. In connection with the arrest, the arresting agents seized United States currency and jewelry. The jewelry was later returned to Graves's mother on February 21, 2013 (or February 21, 2012; Graves uses both dates in his filings), but the currency was forfeited in 2007. Graves is seeking return of the currency, on the ground that the DEA never notified him of the proposed forfeiture, in violation of their duty under the law.

When Graves was arrested he told a member of the Central Wisconsin Drug Task Force, Joshua Ostrowski, that he wanted to speak to his counsel, Ron Benavides. That same day, Benavides was present when Graves met with Ostrowski and a state narcotics agent, Ronald Glaman, for an interview.

On July 27, 2007, a little more than a month after Graves's arrest, the Drug Enforcement Administration sent a written notice of forfeiture action by certified mail to him at 1501 Martin Street, Apt. #104, Unit #2, Madison, WI 53713. This notice was returned to the DEA with a notation that service had been attempted, [addressee] "not

known." The DEA sent a certified mail notice to Graves's girlfriend, Brande Guilmette, at the same address; it was signed and accepted by someone on August 22, 2007. In addition, the DEA sent a notice by certified mail on July 27, 2007, to L.C. Graves c/o Ronald Benavides. On July 31, 2007, an individual signing in the signature block accepted delivery of this notice. Dkt. #7, exh. 4.

In September 2007, the DEA learned of a new address for Graves and sent a certified letter to him at 3341 W. Warren Blvd., Chicago, IL. That notice was returned on October 10, 2007, marked "Return to sender, unclaimed, unable to forward." The DEA sent the same notice to the same address by first class mail. On August 13, 2007 and again on August 20 and August 2, 2007, the DEA published notice of the proposed forfeiture in the Wall Street Journal.

Not having received a properly executed claim to the currency, the DEA forfeited $14,100 in currency administratively on October 23, 2007. The property is no longer in the possession of the government.

On December 5, 2007, Graves was indicted on four counts of drug possession, drug distribution and possessing possessing firearms in furtherance of a drug trafficking crime. He was represented at first by the federal defender, but on January 3, 2008, Ron Benavides entered his appearance as Graves's retained counsel. In February, Graves signed a plea agreement with the government, in which he agreed to plead guilty to two counts of the indictment. He was sentenced to prison; he appealed to the Court of Appeals for the Seventh Circuit, which denied the appeal.

In his reply brief, which he signed under penalty of perjury, Graves denied that he or his girlfriend ever received any of the mailed notices. Dkt. #14 at 3. He denied that he ever lived at the Martin Street address and he contended that the agents were aware that he lived on Cottage Grove Road because they had searched his residence at that address and seized allegedly dangerous weapons. Id. at 3-4. He said also that the agents would have known that he worked at a business on Odana Road in Madison. Id. at 4. He denied ever seeing the notice that was mailed to Ron Benavides and denied that Benavides was representing him at that time on anything other than a traffic incident or as a "post-indictment negotiator." Id. at 4. He denied that he ever saw the notice mailed to the Chicago address and would not have because the conditions of his pretrial release prohibited him from traveling to Chicago. He said that the DEA knew he was not permitted to stay at the Martin Street address. Finally, he swore that Benavides was not officially retained to represent him in the related criminal matter until five months after the notice was sent to Graves in care of Benavides, id. at 5, and that Benavides never told him he had received a notice of forfeiture from the government. Id. He does not deny that the government published the notice. Id.

OPINION

18 U.S.C. § § 981 and 983 set out the general rules governing civil forfeiture. Section 981 identifies the property subject to forfeiture to the United States, including property derived from or traceable to the distribution of controlled substances. Section 983(a)

prescribes the process for forfeiture, such as the notice, the claim and the complaint. Graves brings his claim under subsection (e) of § 983, which allows suits to be brought in federal court by persons who did not receive notice of forfeiture actions although they were entitled to such notice.

Two preliminary matters require attention. First, § 983(2)(B)(3) provides that no motion may be filed under § 983(e)(1) more than five years after the date of final publication of notice of seizure of the property. The government has not moved to dismiss the case under this provision, despite the fact that Graves did not file his motion until February 4, 2013, which was more than five years after the final publication of the notice of forfeiture on August 27, 2007. The government's failure to raise this issue waives the statute of limitations defense.

Second, the government pointed out in its responsive brief that Graves had never said that he had not received notice of the forfeiture, which was true at the time. However, when Graves filed his reply brief, he said then that he had never received notice of the administrative forfeiture. Ordinarily, a reply brief is not the proper place to raise new arguments or allege new facts, because the other side has no opportunity to respond, but in instance, I will assume that Graves did not receive notice. The assumption will not change the outcome of his motion.

To prevail on his motion to set aside the forfeiture, Graves must show both (1) that the government failed to take reasonable steps to provide him notice and (2) that he did not know or have reason to know of the seizure within sufficient time to file a claim. On the

first showing, § 983(e)(1)(A) and (B)(Rule G(4)(b)(iii)(A) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, which took effect on December 1, 2006, says that notice must be sent "by means reasonably calculated to reach the potential claimant." This comports with the holding in Mullane v. Central Honover Bank & Trust Co., 339 U.S. 306, 314 (1950) that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Subsection (B) of Rule G(4)(b)(iii) says that "notice may be sent to the potential claimant or to the attorney representing the potential claimant with respect to the seizure of the property or in a related investigation, administrative forfeiture proceeding, or criminal case." Implicitly, notice to either one is reasonable. In this case, the DEA sent the notice to two residential addresses and to the office of Ron Benavides, the lawyer who had represented Graves immediately after he was arrested in June 2007.

Graves says that the DEA did not act reasonably because it never attempted to notify him of the forfeiture either at his residence on Cottage Grove Road (although its agents knew of that address from their surveillance of him and had talked to the property manager there) or at his place of employment on Odana Road. Even if he is correct, it remains the fact that the agency sent him a notice in care of Ron Benavides. Graves says this was inadequate because at the time Benavides was representing him only on a traffic incident, not on cocaine charges. He does not deny, however, that when he met with state agents

Glaman and Ostrowski after his arrest on June 15, 2007, Benavides was present to represent him. Graves may have good reasons for criticizing the DEA's decision to send notices to the other addresses, but he has none when it comes to the notice to Benavides. That mailing met the requirements of the statute and demonstrated the agency's good faith in trying to reach Graves.

It is irrelevant whether Benavides told Graves about the forfeiture notice; the DEA's responsibility is to make sure that notice is sent to the potential claimant's attorney, not to insure that the lawyer passes on the information. The agency fulfilled its responsibility under § 983(e)(1)(A) to take reasonable steps to provide notice to Graves, by sending him notice through his counsel, as set out in Rule G(4)(b)(iii)(A) of the supplemental rules.

Whether Graves can prove he did not know or have reason to know of the proposed forfeiture is immaterial if he cannot make the first part of the showing required under § 983(e)(1). Because he cannot make that showing, he cannot succeed on his motion to set aside the 2007 forfeiture.

ORDER

IT IS ORDERED that plaintiff L.C. Graves's motion to set aside the forfeiture of the currency seized from him on June 15, 2007, dkt. #1, is DENIED. FURTHER, IT IS ORDERED that plaintiff's motion for appointment of counsel, dkt. #13, is DENIED as well.

The clerk of court is directed to enter judgment for defendant United States of America.

Entered this 25th day of June, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge