IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Petitioner/Appellee,	)	
	)	
	)	**Supreme Court Case No.**
v.	)	**E2011-02573-SC-R11-CV**
	)	
CHARLES D. SPRUNGER,	)	**Court of Appeals Case No.**
	)	**E2011-02573-COA-R3-CV**
Respondent/Appellant.	)	

REPLY BRIEF OF APPELLANT/RESPONDENT SPRUNGER

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Oral Argument Requested

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I. The Evidence Was Insufficient to Justify Forfeiture of Mr. Sprunger's House for Possession of Illegal Images

The crux of this issue is whether Mr. Sprunger necessarily "used" his real property "in the commission of" possessing electronic data stored in a computer at the property. The State has much to say about what "use" does *not* mean, but little about what it *does* mean. According to the State, this Court should not consider dictionary definitions, (State's Br. at 10), legislative history, (*id.* at 11), other kinds of forfeiture cases with more judicial history, (*id.* at 14), or even a balancing test, (*id.* at 15 n.7). This is because, according to the State, the plain language of the statute makes clear that "the legislature intended to allow for the forfeiture of real property where exploitive material is possessed." (State's Br. at 10, 11). However, the question is not *if* real property can be forfeited for a possession offense, but *under which circumstances*, or else forfeiture would be absolute and automatic. No easy answer to that question is found in the statutory text.

While the State's extreme position offers absolutely no limiting principal on its forfeiture powers, the State does warn that Mr. Sprunger's reasoned and defined application of "use" would "for all intents and purposes, completely preclude the forfeiture of real property where exploitive material is possessed in violation of section 1003." (State's Br. at 10; *see also id.* at 15 n.7). Certainly justifying forfeiture for possession offenses would be demanding upon the State, but this Court has made clear that forfeiture laws do not give the state *carte blanche* to convert the property of its citizens. *See Biggs v. State*, 341 S.W.2d 737, 740 (Tenn. 1960).

To the extent that the State attacks Mr. Sprunger for suggesting that "possession" is a "less-serious offense" than distribution and production, (State's Br. at 11-13), this is a policy judgment that has been made by the legislature by assigning those offenses different felony classifications.[1] Although forfeiture is certainly authorized by statute for each form of offense, it makes good sense for the State's difficulty in obtaining a forfeiture to be inversely proportional to the classification of offense the person has committed.

It is true that the legislature could have entirely eliminated forfeiture for mere possession of child pornography, (State's Br. at 11), but its decision against such a limitation does not overcome this Court's longstanding command that "confiscations are not favored and every statute purporting to authorize confiscation must be strictly construed and strictly pursued." *Biggs*, 341 S.W.2d at 740. The burden should be on the legislature to make clear what type of conduct renders a person's home subject to forfeiture, rather than on the citizen to anticipate that downloading materials in a house constitutes an illegal "use" of that house.

As explored more thoroughly in Mr. Sprunger's principal brief, our legislature has drafted other forfeiture statutes with far more specificity to encompass property with potentially tenuous connections to the offense. (Sprunger Br. at 14-16). For certain drug offenses, real property is subject to forfeiture if it is "used in any manner or part" to

[1] The same policy judgment via offense classification also defeats the State's assertion that "manufacturers" and "consumers" should be treated identically in forfeiture proceedings under a "marketplace" theory. (State's Br. at 12).

commit the crime. Tenn. Code Ann. § 53-11-452. The statute at issue in this case does not contain the "in any manner or part" qualification, suggesting the property must have a stronger connection to the property in the child pornography context. The legislature also provided a clear list of seven types of "use" in drug offenses that can result in forfeiture for non-real property, including use as a container and use for transportation. *Id.* § 53-11-451. Again, the legislature declined to similarly expand "use" in the child exploitation forfeiture statute.

The legislature also could have expressly included a "substantial connection" limitation, as did Congress by statute via 18 U.S.C. § 983(c)(3). (See State's Br. at 15). However, the federal law merely codified the majority rule among federal circuit courts, which necessarily was determined before the language was included in the statute. *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis. 97, 109 (2001). As discussed in Mr. Sprunger's principal brief, most states which have considered the issue have imposed the same or a similar limitation, even when such language has not been codified into law. (Sprunger Br. at 16-19).

Mr. Sprunger recognizes that many of the foreign cases he cited as persuasive authority are not directly on point with the question of first impression at hand. While the State ignores those cases or banishes them to footnotes, (State's Br. at 14), they are comparable examples of other courts attempting to apply common-sense limitations against government overreaching. Despite differences in statutory language, the same

policy concerns apply equally here, as does what it means to "use" real estate. *See Jones v. United States*, 529 U.S. 848, 855-57 (2000).

The principal authority from which the State justifies the forfeiture in Mr. Sprunger's case is a pair of federal cases, *United States v. 7046 Park Vista Rd.*, 331 F. App'x 406 (6th Cir. 2009) and *United States v. Hull*, 606 F.3d 524 (8th Cir. 2010). Both cases are immediately distinguishable because they involved offenses for "pandering" and "distribution of" child pornography, respectively, rather than merely possessing such material. Certainly the active conduct of distribution constitutes "use" far more than passive possession. Moreover, *7046 Park Vista Rd.* is an unpublished three-paragraph opinion which provides no discussion on the comparable issue in this case. The holding in *Hull* cited by the State has never been followed or considered by any other court.[2] Mr. Sprunger would urge that this Court not be persuaded by this "persuasive" authority and instead adopt a more reasoned standard.

From these cases, the State asks this Court to hold that Mr. Sprunger's house was "used" because it was a "receiving point and a repository" containing "electric and internet connections" which served to decrease his "risk of detection." (State's Br. at 18). This broad interpretation, which contains absolutely no limiting principal, essentially

[2] Only three cases have cited that opinion since its publication four years ago. *United States v. Noyes*, No. 13-1848, 2014 WL 407482 (3d Cir. Feb. 4, 2014) (cited for the proposition that "[t]here is nothing in the statute which indicates that only a portion of the 'property' can be forfeited"); *United States v. Burnett*, No. CR11-0085, 2011 WL 4829405 (N.D. Iowa Aug. 30, 2011) (cited for the proposition that "Defendant's property in Kentucky was used to facilitate the manufacture of marijuana"); *State v. Keck*, No. 09CA50, 2011 WL 1233196 (Ohio Ct. App. March 30, 2011) (cited to discuss due process proportionality review).

deeds to the State anything it decides to claim from a person accused[3] of a child exploitation offense, since the statute includes not only real property but *any* "conveyance or . . . personal property." Tenn. Code Ann. § 39-17-1008. Going down the alphabet, a person might use his *automobile* to get to his house (to which he earlier delivered a computer), his *breakfast* to sustain him while viewing illegal images, and his *contact lenses* to view the computer screen. If property used "to conceal his exploitive behavior" satisfies the State, (State's Br. at 18), it is a relief that Mr. Sprunger did not use a *dog* to guard his premises.

For the reasons discussed more thoroughly in his principal brief, Mr. Sprunger respectfully urges the Court to vacate the forfeiture order.

II. Procedural Deficiencies in the Forfeiture Warrant Proceedings Nullify the Forfeiture

A. Notice Requirement

The State contends that Mr. Sprunger waived his claim that the State failed to follow the notice provisions of Tenn. Code Ann. § 40-33-203(c)(5) by failing to raise them before the trial and intermediate courts. The State contends that Mr. Sprunger "states that he first raised the issue in his letter that was later construed as an answer to the complaint," (State's Br. at 19), as if stating a fact makes it untrue. In fact, Mr. Sprunger did first raise the issue in a letter to the trial court which was held to be an Answer. (T.R. Vol. I, Oct. 6, 2010 Letter, p. 22). The State points to no authority for the suggestion that a defense or claim contained in an Answer can be considered waived for

[3] No conviction is required to impose a forfeiture under the statute.

failure to re-assert that defense. *Cf. Pratcher v. Methodist Healthcare Memphis Hospitals*, 407 S.W.3d 727, 735 (Tenn. 2013) (affirmative defense waived if *not* raised in Answer).

Next, the State contends that "there is absolutely no factual basis" in the record for the claim that "No such instructions were provided" as required by statute, a point apparently emphasized by the lack of citation to the record in Mr. Sprunger's brief. (State's Br. at 20). Aside from obvious concerns with requiring someone to "prove a negative," the supposedly unsupported claim in Mr. Sprunger's brief is immediately preceded by a citation to the Notice of Property Seizure itself (Sprunger Br. at 25), which plainly contains no applicable instructions. (T.R. Vol. I, Notice, p. 10). To obviate any concerns that Mr. Sprunger is simply hiding any instructions he might have received, it should be noted that the copy of the Notice in the record was filed as an attachment to the Complaint for Judicial Forfeiture filed by the District Attorney General. (*Id.* at 2-10). Surely the General would have included such a crucial and required attachment if it existed.

Finally, the State contends that the issue was not properly presented to the intermediate court, even though the State concedes that Mr. Sprunger "did briefly mention" the issue in the argument section of his brief. (State's Br. at 21). This "brief mention" consisted of a full quotation of the statute and several sentences identifying the State's failure to follow that statute. (Sprunger Court of Appeals Br. at 11-12). Little else need be said to fairly present the issue, especially by a pro se litigant.

Assuming *arguendo* that the Notice did not technically comply with the statute, the State contends that Mr. Sprunger is not entitled to relief because he was not prejudiced by the deficiency. (State's Br. at 22). Despite the State's reliance on "more modern decisions," this Court's decision in *Wells v. McCanless*, 198 S.W.2d 641 (Tenn. 1947), that improper procedure voids forfeiture *ab initio* has not been overruled, and was relied upon as recently as 2003. (Sprunger Br. at 27). Mr. Sprunger urges this Court to rely on its earlier holding for the reasons explained in that opinion.

B. Recording Requirement

The State again contends the failure to record the ex parte proceedings is "merely a technical violation of the procedural statute." (State's Br. 24). Should the Court reach this issue, Mr. Sprunger again urges adherence to this Court's decision in *Wells*.

III. The Forfeiture Constitutes an Excessive Fine

Mr. Sprunger relies on the arguments advanced in his principal brief. (Sprunger Br. at 32-33).

Conclusion

For the above reasons, Mr. Sprunger respectfully requests that this Court vacate the Forfeiture Order issued by the trial court and remand so that the proceeds from the sale of his house may be provided to him. Additionally, Mr. Sprunger asserts that he is entitled to statutory interest from the date of the initial ex parte forfeiture order because he has been wrongly deprived of his property (and its proceeds) from that day forward, and that the trial court should be ordered to impose such interest on remand. Tenn. Code Ann. §§ 47-14-121, -122.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail to Kyle Hixson, Assistant State Attorney General, Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee 37202-4015 on this the 6th day of May, 2014, which is the date of the filing of this Brief.

Benjamin K. Raybin