

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROSAIRE M. DUBRULE,)
)
 Movant,)
)
 vs.) Cr. No. 06-mc-00001-BV
)
 UNITED STATES OF AMERICA,)
)
 Respondent.)

ORDER DENYING MOVANT'S MOTION FOR RETURN OF PROPERTY

Before the court is the motion of movant Rosaire M. DuBrule ("DuBrule") requesting the return of seized property, filed February 1, 2006, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. The motion was referred to the United States Magistrate Judge for determination. For the reasons stated below, the motion is denied.

In August of 2004, law enforcement agents executed several search warrants as part of a criminal investigation of allegations that DuBrule was illegally prescribing controlled substances in violation of the Controlled Substances Act, 21 U.S.C. § 801, et. seq. (Resp't's Supplemental Resp. Movant's Mot. Return Property 1.) Pursuant to the warrants, law enforcement agents seized several items including medical records, patient files, firearms, sports memorabilia, and gold and silver coins. (*Id.* at 2.) On

August 15, 2007, a grand jury returned an indictment charging DuBrule with conspiracy to distribute controlled substances and with distributing Schedule II and III controlled substances. (Indictment, *United States v. DuBrule*, Crim. Case No. 07-20246-B (W.D. Tenn. Aug. 15, 2007).) The last count of the indictment seeks the forfeiture of \$4,000,000.00 in proceeds of DuBrule's allegedly illegal activity or the forfeiture of substitute assets, specifically the coins and memorabilia previously seized, pursuant to 21 U.S.C. § 853. (*Id.* at 9-10.)

In the present motion, DuBrule contends that the property seized subject to the search warrants should be returned to him because he has not been indicted, he has received no notice of any criminal or administrative forfeiture of his seized property, and that the property seized is not contraband. (Movant's Mem. Supp. Mot. Return Property 1-2.) During a hearing before this court on October 17, 2007, DuBrule, having since been indicted and given notice of the forfeiture of property, filed a supplemental memorandum requesting the return of only nine items of property so that he may hire a private attorney. (Movant's Supplemental Mem. 1.) The government argues, and this court agrees, that DuBrule's arguments involving the lack of an indictment and notice of forfeiture are now moot. (Resp't's Resp. Movant's Mot. Return Property 3.) The government further contends that any assets

seized should not be returned to DuBrule because they constitute proceeds of DuBrule's allegedly illegal activity and/or potential substitute assets and that DuBrule does not have a right to forfeitable assets in order to retain counsel of his own choosing. (Resp't's Supplemental Resp. Movant's Mot. Return Property 3, 5.)

The criminal forfeiture provision of the Controlled Substances Act provides in part that:

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation

21 U.S.C. § 853(a) (2007). The property that may be forfeited includes all "tangible and intangible personal property." *Id.* § 853(b)(2). An interest in the property "vests in the United States upon commission of the act giving rise to forfeiture." *Id.* § 853(c). If the proceeds from the illegal activity cannot be located, the government is entitled to substitute other personal assets up to the value of the proceeds that cannot be located. *Id.* § 853(p). The statute provides, in relevant part that:

(1) In general
Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant--
(A) cannot be located upon the exercise of due diligence;
(B) has been transferred or sold to, or deposited with,

a third party;
(C) has been placed beyond the jurisdiction of the court;
(D) has been substantially diminished in value; or
(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

Id. § 853(p)(1)-(2).

In the present case, the indictment contains a forfeiture count seeking \$4,000,000.00 in U.S. currency as a result of DuBrule's alleged illegal activity. The property seized by the government, such as the memorabilia and coins, is certainly tangible personal property for purposes of 21 U.S.C. § 853(a). If the \$4,000,000.00 in U.S. currency cannot be located, then the seized property properly becomes forfeitable under the substitution provision in 21 U.S.C. § 853(p). Once an asset is forfeitable, the strong governmental interest in obtaining full recovery of all forfeitable assets "overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 631 (1989). Accordingly, the government's interest in the forfeitable assets under the substitution provision outweighs DuBrule's interest in using the assets to pay for a private

attorney of his own choosing. "Permitting a defendant to use assets for his private purposes that . . . will become the property of the United States if a conviction occurs cannot be sanctioned." *United States v. Monsanto*, 491 U.S. 600, 613 (1989).

For the reasons set forth above, the movant's motion to return property is denied.

IT IS SO ORDERED this 1st day of November, 2007.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE