UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

February 20, 2018
BCO-047

No. 17-3697

UNITED STATES OF AMERICA

v.

LYNETTE GREGORY,
Appellant

(E.D. Pa. No. 2-13-cr-00592-001)

Present: RESTREPO, BIBAS and NYGAARD, Circuit Judges

1. Appellee's Motion to Enforce Appellate Waiver and for Summary Affirmance.

2. Response by Appellant in Opposition.

Respectfully,
Clerk/clw

ORDER

The foregoing motion to enforce appellate waiver and for summary affirmance is hereby granted.

By the Court,

s/ L. Felipe Restrepo
Circuit Judge

Dated: February 26, 2018
CLW/JK/cc: Tomika N.S. Patterson, Esq.
Anna M. Durbin, Esq.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL NO. 13-592**
	:	
LYNETTE GREGORY	:	

MEMORANDUM OPINION

Before the Court is the Government's Motion for Forfeiture Money Judgment. Defendant opposes the motion, asserting based on the Supreme Court's decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), that the Government lacks authority under the criminal forfeiture statute, 21 U.S.C. § 853, to seek a money judgment against her when she currently has no assets. Because the Court is not persuaded that *Honeycutt* abrogates clear Third Circuit case law construing § 853 to authorize money judgments against impecunious defendants, the Motion for Forfeiture Money Judgment will be granted.

I. Background

In 2013, Defendant was charged by information with twenty-seven counts of distributing oxycodone in violation of 21 U.S.C. § 841(a)(1) and eight counts of acquiring oxycodone by fraud in violation of 21 U.S.C. § 843(a)(3). The Information included a Notice of Forfeiture charging that Defendant shall forfeit, *inter alia*, any property "constituting proceeds obtained . . . from the commission of" the offenses charged, or if any such property has been transferred or sold, that the Government would seek forfeiture of "any other property" of the Defendant "up to the value of the above forfeitable property" pursuant to 21 U.S.C. § 853(p).

On April 22, 2015, Defendant pleaded guilty to all counts and consented to prosecution by information instead of by indictment. At Defendant's change of plea hearing, the parties

agreed to the Government's summary of the factual basis for the plea, which stated that Defendant received a total of approximately $8,000 in proceeds in exchange for filling prescriptions for oxycodone at various pharmacies and providing the pills to members of a drug trafficking organization. The plea agreement further provided that "Defendant agrees to forfeiture as provided in the notice of forfeiture."

Shortly before Defendant's sentencing hearing, the Government moved for a Forfeiture Money Judgment pursuant to 21 U.S.C. § 853, seeking forfeiture in the amount of $7,750. Defendant opposed the motion, asserting that money judgments are not authorized by § 853 when she has no present assets, and that accordingly such forfeiture would fall outside the scope of the forfeiture contemplated in the plea agreement. The Court heard arguments on the Government's motion during Defendant's sentencing hearing and took the matter under advisement, permitting further briefing from the parties. The Government and Defendant each submitted a brief in further support of their respective positions.

II. ANALYSIS

Section 853 mandates the forfeiture of property related to certain controlled substance offenses by a defendant convicted of such an offense.[1] Specifically, subsection 853(a)(1) mandates the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" a violation of a controlled substance offense. Subsection 853(p) further provides that when, "as a result of any act or omission of the defendant," property otherwise subject to forfeiture (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, the Court

[1] 21 U.S.C. § 853.

shall order the forfeiture of "any other property of the defendant up to the value of" the forfeitable property as "substitute property." The text of the § 853 does not specify whether any untainted substitute property must be property that is possessed by the defendant at the time of sentencing, or whether the statute authorizes an *in personam* money judgment that reaches any subsequently acquired assets.

Here, Defendant admitted as part of her plea that she was paid approximately $8,000 in proceeds as part of her participation in a drug trafficking organization between 2010 and 2012. She further admitted during sentencing that she used the proceeds she acquired from the conspiracy to purchase crack cocaine for her personal use and currently has no assets in her name. The Government contends that these admissions satisfy the prerequisites for forfeiture under §§ 853(a)(1) and 853(p), respectively, and that accordingly, the Government is entitled to seek forfeiture of § 7750 in the form of a money judgment as substitute property for the "proceeds" obtained by Defendant as the result of her crimes, regardless of whether she currently possesses those assets. Defendant contends that a money judgment for property she does not currently own exceeds the permissible scope of § 853.

The Government's position is consistent with Third Circuit precedent. In *United States v. Vampire Nation*,[2] the Court concluded that "[m]andatory forfeiture [pursuant to § 853] is concerned not with how much an individual has but with how much he received in connection with the commission of the crime."[3] Observing that "§ 853 does not contain any language limiting the amount of money available in a forfeiture order to the value of the assets a defendant possesses at the time the order is issued," the Court held that "*in personam* forfeiture judgment

[2] 451 F.3d 189, 202-203 (2006).

[3] *Id*. at 201 (internal citation omitted).

may be entered for the full amount of the criminal proceeds."[4] The Third Circuit's holding is consistent with the holdings of other circuits who have reached the question.[5]

Contrary to Defendant's contention, the Supreme Court's decision in *United States v. Honeycutt*[6] did not abrogate this reading of § 853. The question before the Court in *Honeycutt* was whether a member of a conspiracy can be held jointly and severally liable under § 853(a)(1) for property that a co-conspirator derived from the crime but that the defendant himself did not acquire. The Court held that § 853(a)(1) is limited to property the defendant himself actually acquired as a result of the crime.[7] The Court's opinion did not address whether § 853 authorizes an *in personam* money judgment against an impecunious defendant as substitute property for proceeds that the defendant personally obtained. Indeed, after *Honeycutt*, the Supreme Court has denied certiorari on the question of whether § 853 authorizes *in personam* money judgments against an impecunious defendant.[8]

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[4] *Id*. at 201-02.

[5] *See, e.g., United States v. Blackman*, 746 F.3d 137, 145 (4th Cir. 2014) ("It is well settled that nothing in the applicable forfeiture statutes suggests that money judgments are forbidden.) (internal quotation marks and citations omitted); *United States v. Hampton*, 732 F.3d 687, 691-692 (6th Cir. 2013) ("we join the consensus view and hold that entry of the forfeiture money judgment was authorized even though the amount of proceeds subject to forfeiture exceeded the value of the defendant's assets at the time of sentencing."); *United States v. Smith*, 656 F.3d 821, 827 (8th Cir. 2011) ("there is little doubt that 'any other property' extends to property acquired by the defendant after the imposition of sentence"); *United States v. Awad*, 598 F.3d 76, 79 (2d Cir. 2010) ("section 853 does not contain any language limiting the amount of money available in a forfeiture order to the value of the assets a defendant possesses at the time the order is issued."); *United States v. McGinty*, 610 F.3d 1242, 1246 (10th Cir. 2010) ("We agree with the reasoning of our sister circuits and conclude that *in personam* money judgments are appropriate under criminal forfeiture"); *United States v. Day*, 524 F.3d 1361, 1377 (D.C. Cir. 2008) ("Nothing in the relevant statutes suggests that money judgments are *forbidden*."); *United States v. Casey*, 444 F.3d 1071, 1077 (9th Cir. 2006) ("We conclude, following the First and Seventh Circuits, that money judgments are appropriate under § 853, even in cases of insolvent defendants"); *United States v. Candelaria-Silva*, 166 F.3d 19, 42 (1st Cir. 1999) ("it was not error for the district court to order the forfeiture of 'other property of the defendant,' § 853(p), up to the amount described in the money judgment").

[6] 137 S. Ct. 1626 (2017).

[7] *Id*. at 1635.

[8] *Lo v. United States*, --- S. Ct. ---, No. 16-8327, 2017 WL 1022651 (Oct. 16, 2017). However, in its briefing before the Supreme Court, the Government did concede, in light of *Honeycutt*, that it was not authorized to recover untainted property pursuant to a forfeiture money judgment without first satisfying § 853(p), a position that was in dispute during oral arguments *Honeycutt*. *See* Br. for the United States in Opp. at 17, No. 16-8327 (Sept. 21, 2017).

The Court acknowledges that the Supreme Court, in reaching its holding in *Honeycutt*, applied a strict reading of § 853(a)(1) that overturned a prevailing interpretation of the statute among the circuit courts of appeals. But the mere possibility that existing precedent may be overturned does not permit this Court to contravene binding circuit precedent in the absence of a decision by the Court of Appeals sitting *en banc*, or by the Supreme Court. Accordingly, this Court remains bound by the Third Circuit's holding in *Vampire Nation* that § 853 authorizes *in personam* money judgments against impecunious defendants, and Defendant's lack of assets does not prohibit a money judgment against her.[9]

To the extent Defendant objects that she did not receive sufficient notice, either in the Information or the plea agreement, of the Government's intent to seek a money judgment, that objection is also overruled. Pursuant to Federal Rule of Criminal Procedure 32.2, "the indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks," so long as the "indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute." Here, the Notice of Forfeiture included in the Information disclosed the Government's intent to seek forfeiture of proceeds received by the Defendant as a result of the crime as well as substitute property pursuant to § 853(p). Moreover, the Government's summary of the factual basis for Defendant's plea, to which the parties agreed, identified the value of the proceeds that the Government believed was subject to forfeiture. Accordingly, Defendant received adequate notice of the Government's intent to seek forfeiture of the proceeds she received as well as any substitute

[9] *Loftus v. Se. Pennsylvania Transp. Auth.*, 843 F. Supp. 981, 984 (E.D. Pa. 1994) ("This Court is obliged to follow Third Circuit precedent unless that precedent has been overruled by the court of appeals sitting in banc or by an opinion of the Supreme Court that overrules the precedent").

property for the value of the proceeds.[10]

For these reasons, Defendant's objections to the Government's Motion for Forfeiture Money Judgment are overruled, and the Government's motion is granted.

An appropriate order follows.

[10] *United States v. Plaskett*, 355 F. App'x 639, 644 (3d Cir. 2009) (finding that notice was sufficient when the indictment contained forfeiture allegations which explained that defendant would be required to forfeit any property constituting or derived from proceeds traceable to the offense or substitute property to recover the illicit proceeds).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL NO. 13-592**
	:	
LYNETTE GREGORY	:	

ORDER

AND NOW, this 28th day of November 2017, upon consideration of the Government's Motion for Forfeiture Money Judgment (Doc. No. 42), and the Opposition, Reply, and Surreply thereto, it is hereby **ORDERED** that the Motion is **GRANTED**.

It is **FURTHER ORDERED** as follows:

1. As a result of Defendant pleading guilty to Counts One through Thirty-Five of the Information, Defendant is required, pursuant to Title 21, United States Code, Section 853, to criminally forfeit her interest in any property, real or personal, which constitutes or is derived from proceeds traceable to the commission of such offenses.
2. The Court has determined, based upon the facts set forth at the defendant's change of plea hearing, that the following property is subject to forfeiture as a result of the defendant pleading guilty to Counts One through Thirty-Five of the Information, and that the government has established the requisite nexus between such property and such offenses: **The sum of $7,750.00 in United States Currency.**
3. The Court has further determined, based on Defendant's admission, that the above proceeds received by the Defendant has been transferred to third parties, and accordingly, a **Money Judgment in the Amount of $7,750.00 in United States Currency** is hereby entered against Defendant as substitute property to be forfeited.

4. Any property recovered from Defendant and forfeited by the Government shall reduce Defendant's outstanding liability on the personal forfeiture money judgment.
5. Upon entry of this Order, the United States is authorized to conduct any discovery necessary to identify and locate property subject to forfeiture, in accordance with Federal Rule of Criminal Procedure 32.2(b)(3).
6. Because the Government seeks only a money judgment and does not seek forfeiture of any specific asset at this time, advertisement of the judgment and third-party proceedings are not required. Federal Rule of Criminal Procedure 32.2(c)(1) (no ancillary proceedings to address third-party claims required where forfeiture consists of money judgment).
7. This Forfeiture Money Judgment is final and part of Defendant's sentence and is hereby incorporated in the judgment and commitment order (Doc. No. 51).
8. The Court shall retain jurisdiction to enforce this Forfeiture Money Judgment, and to amend it as necessary, pursuant to Federal Rule of Criminal Procedure 32.2(e).
9. The Clerk of the United States District Court for the Eastern District of Pennsylvania shall deliver a copy of this Forfeiture Money Judgment to the Drug Enforcement Administration ("DEA"), to the United States Marshals Service ("USMS"), and to counsel for the parties.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.