APPENDIX A

942 F.3d 550
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
James BROME, aka Trouble,
aka B, Defendant-Appellant. *

Docket Nos. 18-858-cr(L), 18-1199-cr(CON)
|
August Term, 2018
|
Argued: April 12, 2019
|
Decided: November 7, 2019

Synopsis
Background: After conviction of conspiracy to possess with intent to distribute, and to distribute, cocaine, prisoner filed petition for return of his property that was seized by police officers when he was pulled over for traffic violation several weeks prior to his arrest on crimes of conviction. The United States District Court for the Western District of New York, Siragusa, J., denied petition. Prisoner appealed. The Court of Appeals, 646 Fed.Appx. 70, vacated and remanded to determine whether forfeiture notices were adequate. On remand, the District Court determined notice was adequate and denied motion. Prisoner appealed.

[Holding:] The Court of Appeals held that notice of forfeiture of $21,019 in cash was reasonably calculated to apprise prisoner of pendency of forfeiture.

Affirmed.

See also, 2019 WL 5842905.

West Headnotes (7)

[1] **Forfeitures**
Grounds and Defenses
The right to seek to set aside the forfeiture under the Civil Asset Forfeiture Reform Act (CAFRA) is limited to claims of lack of adequate notice. 18 U.S.C.A. § 983.

1 Cases that cite this headnote

[2] **Constitutional Law**
Forfeitures and proceedings therefor
The overriding constitutional question when determining whether to set aside a civil forfeiture under the Civil Asset Forfeiture Reform Act (CAFRA) is whether notice of the forfeiture comports with the Due Process Clause of the Fifth Amendment, which requires that the government provide notice that is reasonably calculated under all the circumstances to apprise the prisoner of both the pendency of the cash forfeiture and the prisoner's right to contest it. U.S. Const. Amend. 5; 18 U.S.C.A. § 983.

1 Cases that cite this headnote

[3] **Forfeitures**
Notice and process
The government does not need to provide actual notice for a civil forfeiture; it is enough that it attempt to provide actual notice. U.S. Const. Amend. 5; 18 U.S.C.A. § 983.

[4] **Constitutional Law**
Forfeitures and proceedings therefor
Forfeitures
Notice and process
To comport with due process and the Civil Asset Forfeiture Reform Act (CAFRA), the government generally must demonstrate the existence of procedures reasonably calculated to ensure that a prisoner receives notice of the forfeiture action; the government is not obliged to prove actual notice, such as a signed receipt from the served prisoner, and it needs only to attempt to provide such notice. U.S. Const. Amend. 5; 18 U.S.C.A. § 983.

[5] **Forfeitures**
Notice and process

The government is not required to engage in any heroic efforts to notify a prisoner about a forfeiture proceeding; it will ordinarily suffice if the government demonstrates that it sent notice by certified return receipt to the correctional facility where the prisoner is detained and that the facility's mail distribution procedures are reasonably calculated to deliver the mail to the prisoner. 18 U.S.C.A. § 983.

[6] **Forfeitures**
Notice and process

Whether a particular method of notice of civil forfeiture is reasonable depends on the particular circumstances. 18 U.S.C.A. § 983.

[7] **Constitutional Law**
Forfeitures and proceedings therefor

Forfeitures
Notice and process

Notice to prisoner of administrative forfeiture of $21,019 in cash found upon arrest was reasonably calculated under all the circumstances to apprise prisoner of the pendency of the cash forfeiture, and thus did not violate prisoner's due process rights or Civil Asset Forfeiture Reform Act (CAFRA); notice was sent by certified mail, return receipt requested, to prisoner at county jail, mail was accepted for delivery by an employee at the jail, who signed for it, and written notice was also sent by first class mail, received at the facility, and entered into the incoming mail log. U.S. Const. Amend. 5; 18 U.S.C.A. § 983.

***551** Appeal from the United States District Court for the Western District of New York (Siragusa, *J.*)

Attorneys and Law Firms

Steven Y. Yurowitz, Newman & Greenberg LLP, New York, NY, for Defendant-Appellant James Brome.

Sean C. Eldridge, Assistant United States Attorney (Mary C. Baumgarten, Assistant United States Attorney, on the brief), for James P. Kennedy, Jr., United States Attorney for the Western District of New York, Rochester, NY, for Appellee United States of America.

Before: CALABRESI, LIVINGSTON, and LOHIER, Circuit Judges.

Opinion

Per Curiam:

James Brome appeals from an order of the United States District Court for the Western District of New York (Siragusa, J.) denying his challenge to the administrative forfeiture of $21,019 found in his pocket upon arrest. In this opinion, we address and reject Brome's argument that the Drug Enforcement Administration (DEA) failed to provide him with adequate notice of the administrative forfeiture action while he was in prison, in violation of the Due Process Clause of the Fifth Amendment. We hold that the Government generally must demonstrate the existence of procedures reasonably calculated to ensure that a prisoner receives notice of the forfeiture action. In a separate summary order filed simultaneously with this opinion, we dispose of Brome's remaining challenge to the District Court's denial of his motion to reduce his sentence under 18 U.S.C. § 3582(c)(2).

BACKGROUND

Shortly after midnight on September 12, 2010, a police officer with the Lyons Police Department in Wayne County, New York stopped a car driven by Brome's common-law wife with Brome in the passenger seat. After running identification checks, the officer learned that neither Brome nor his wife had a valid driver's license and that Brome was on parole for a felony weapons conviction. Both Brome and his wife were asked to step out of the car and were patted down for weapons. The officer seized $21,019 in cash from Brome's pockets.

For reasons not relevant here, the local district attorney's office declined to proceed with a state forfeiture action relating to the seized cash, and on October 7, 2010, the DEA adopted the seizure and proceeded with a federal forfeiture action under ***552** 18 U.S.C. § 983 and 19 U.S.C. § 1607. Consistent with these statutory provisions, the DEA attempted to send notice of its forfeiture to Brome. On

November 3, 2010, the DEA mailed notice to Brome's last known home address, but the mail was returned unopened. Notice of the cash seizure was also published in the *Wall Street Journal* three times in three consecutive weeks that same month.

On November 30, 2010, the DEA arrested Brome on state narcotics charges, and he was detained in the Wayne County jail facility. That same day, the DEA sent notice of the forfeiture again to Brome's home address. On December 27, 2010, it sent notice by certified mail and first class mail to Brome in the Wayne County jail where he was actually located. The notice mailed to the jail incorrectly listed the date of seizure as October 7, 2010, rather than the actual seizure date of September 12, 2010.

By February 22, 2011, Brome had not filed a claim for the seized cash, so the DEA administratively forfeited it under federal law. In May 2011 a federal grand jury indicted Brome for conspiring to possess with intent to distribute cocaine and cocaine base, and the state charges against him were dropped.

Over two years later, on September 16, 2013, Brome, proceeding pro se, moved in the District Court pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure for the return of the seized cash. The District Court denied the motion, and Brome appealed. Construing Brome's motion as a challenge to the sufficiency of the DEA's notice, a panel of this Court vacated the District Court's denial and instructed it on remand to determine in the first instance whether the notices had been adequate. See United States v. Brome, 646 F. App'x 70, 73 (2d Cir. 2016).

On remand, the Government submitted an affidavit from an officer employed at the Wayne County jail where Brome was detained. The affidavit described the inmate mail logging and distribution system in operation there at the time the DEA attempted to send notice to Brome and explained that an officer would distribute the mail by calling the name of each inmate who received mail on a particular day. Def. App'x 74–75. Attached to the affidavit was a printout of the mail log for December 29, 2010, showing that the Wayne County jail had received two envelopes from the DEA addressed to Brome that day. Def. App'x 77.

Relying on the Government's affidavit and citing Dusenbery v. United States, 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002), the District Court found that the DEA's notice to Brome at the Wayne County jail "was reasonably calculated to apprise Brome of the administrative forfeiture." Def. App'x 86. It therefore denied Brome's Rule 41(g) motion, and this appeal followed.

DISCUSSION

[1] [2] [3] The relevant section of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983, provides "the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute." Id. § 983(e)(5). The right to seek to set aside the forfeiture is limited to claims of lack of adequate notice. Lucas v. United States, 775 F.3d 544, 547 (2d Cir. 2015). The overriding constitutional question, of course, is whether notice of the forfeiture comports with the Due Process Clause of the Fifth Amendment, which requires that the Government provide notice that is "reasonably calculated under all the circumstances" to apprise the prisoner of both the "pendency of the cash forfeiture" and the prisoner's right to contest it. ***553** Dusenbery, 534 U.S. at 168, 122 S.Ct. 694. Although we previously held that the Government needed to provide "actual" notice, see Yeung Mung Weng v. United States, 137 F.3d 709, 715 (2d Cir. 1998), we have since recognized that Dusenbery abrogated that holding, see Yeung Mung Weng v. United States, 29 F. App'x 731, 732 n.2 (2d Cir. 2002). Today, we hold, consistent with Dusenbery, that the Government does not need to "provide actual notice"; it is enough that it "attempt to provide actual notice." Dusenbery, 534 U.S. at 170, 122 S.Ct. 694.

But that does not end our inquiry. Even after Dusenbery, a split persists among the courts of appeals regarding what constitutes adequate notice to prisoners. In particular, there is no "single view" about whether a presumption exists "that notice sent by mail to the institution in which the addressee-prisoner is housed" is reasonably calculated to apprise an incarcerated petitioner of the forfeiture action. Nunley v. Dep't of Justice, 425 F.3d 1132, 1137–38 (8th Cir. 2005). The First, Sixth, Seventh and Tenth Circuits have held that such a presumption exists when the notice is by certified mail to the proper prison facility. See Chairez v. United States, 355 F.3d 1099, 1101–02 (7th Cir. 2004); Whiting v. United States, 231 F.3d 70, 76–77 (1st Cir. 2000); United States v. Real Property ("Tree Top"), 129 F.3d 1266 (Table), at *2 (6th Cir. 1997); United States v. Clark, 84 F.3d 378, 381 (10th Cir. 1996). The Third and Fourth Circuits have declined to apply any presumption. Instead, they place the onus squarely on the Government to show that the correctional facility's internal procedures for delivering mail are reasonably calculated to notify the prisoner. See United States v. Minor, 228 F.3d 352, 358 (4th Cir. 2000); United States v. One Toshiba Color Television, 213 F.3d 147, 155 (3d Cir. 2000) (en banc). The Eighth Circuit, meanwhile, has charted a somewhat different course. It rejects the concept of an "irrebuttable presumption" that a prison's mail delivery procedures are adequate, and instead places the burden on the prisoner to demonstrate the inadequacy of the procedures. See Nunley, 425 F.3d at 1137–38.

[4] **[5]** **[6]** Joining the Third and Fourth Circuits, we hold that the Government generally must demonstrate the existence of procedures reasonably calculated to ensure that a prisoner receives notice of the forfeiture action. To be clear, the Government is not obliged to prove actual notice, such as a signed receipt from the served prisoner, One Toshiba Color Television, 213 F.3d at 155, and it needs only to attempt to provide such notice, Dusenbery, 534 U.S. at 170, 122 S.Ct. 694. Nor do we require the Government to engage in any "heroic efforts" to notify a prisoner about a forfeiture proceeding. Id. It will ordinarily suffice if the Government demonstrates that it sent notice by certified return receipt to the correctional facility where the prisoner is detained and that the facility's mail distribution procedures are reasonably calculated to deliver the mail to the prisoner. Id. But the point is that we will not simply presume that the Government satisfies its burden by representing that it sent notice by direct mail. Instead, we agree with the Third Circuit that "whether a particular method of notice is reasonable depends on the particular circumstances." One Toshiba Color Television, 213 F.3d at 153 (quoting Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 484, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)).

[7] With these principles in mind, we agree with the District Court that the Government showed that its notice to the Wayne County jail where Brome was detained was "reasonably calculated under all the circumstances" to apprise Brome "of the pendency of the cash forfeiture." ***554** Dusenbery, 534 U.S. at 168, 122 S.Ct. 694. We note that the mail procedures at the jail, including its use of a mailroom "logbook" and the distribution of mail during a mail call, are similar in every relevant way to those approved in Dusenbery. See id. at 169, 122 S.Ct. 694. The December 27, 2010 notice was sent by certified mail, return receipt requested, to James S. Brome, Prisoner ID No. 101700, Wayne County Jail, 7368 New York 31, Lyons, NY, 14489. And the mail was accepted for delivery by an employee at the jail, who signed for it. Written notice was also sent by first class mail, received at the facility, and entered into the incoming mail log. We therefore agree with the District Court that notice here was "reasonably calculated to apprise Brome of the administrative forfeiture action." [1] Def. App'x 86.

Brome disputes that sending the notice to the jail was "reasonably calculated" to apprise him of the forfeiture action. First, he argues that the DEA was required to know at the time it sent notice that the mail distribution procedures at the Wayne County jail were adequate. This cannot be right since the Supreme Court in Dusenbery itself relied on after-the-fact testimony of a corrections officer, not any federal official's subjective knowledge of the prison's notice procedures, to determine in that case that notice satisfied due process. See 534 U.S. at 165–66, 169, 122 S.Ct. 694. So long as the Government has the burden of showing that its methods were "reasonably calculated" to inform the prisoner of the forfeiture, imposing such a knowledge requirement is unnecessary. Second, Brome argues that the notices were not "reasonably calculated" to apprise him of the forfeiture action because they incorrectly listed the funds' "seizure date" as October 7, 2010, the date the DEA adopted the seizure from local authorities. We disagree. The notices included enough other identifying information, such as the exact amount of money at issue and the place where it was seized, that we easily conclude that due process was not offended by the minor error. Despite the error, Brome was fully able to understand the "pendency of the cash forfeiture." See id. at 168, 122 S.Ct. 694. We therefore affirm the District Court's dismissal of Brome's challenge to the adequacy of the Government's notice.

CONCLUSION

For the foregoing reasons and those set forth in the accompanying summary order, we AFFIRM the order of the District Court.

All Citations

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Footnotes

* The Clerk of Court is directed to amend the official caption to conform with the above.

1 It therefore goes almost without saying that we would consider the notice here adequate under any of the rules announced by our sister circuits.

APPENDIX B

783 Fed.Appx. 100 (Mem)
This case was not selected for publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
James BROME, aka Trouble, aka B, Defendant-Appellant. *

No. 18-858-cr(L); No. 18-1199-cr(CON)
|
November 7, 2019

Appeal from the order of the United States District Court for the Western District of New York (Charles J. Siragusa, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is AFFIRMED.

Attorneys and Law Firms

FOR DEFENDANT-APPELLANT: Steven Y. Yurowitz, Newman & Greenberg LLP, New York, NY.

FOR APPELLEE: Sean C. Eldridge, Assistant United States Attorney (Mary C. Baumgarten, Assistant United States Attorney, on the brief), for James P. Kennedy, Jr., United States Attorney for the Western District of New York, Rochester, NY.

PRESENT: GUIDO CALABRESI, DEBRA ANN LIVINGSTON, RAYMOND J. LOHIER, JR., Circuit Judges.

SUMMARY ORDER

James Brome appeals from an order of the District Court (Siragusa, J.) denying his motion to reduce his sentence under 18 U.S.C. § 3582(c)(2). In this summary order, we address whether the District Court abused its discretion in denying Brome's motion to reduce his sentence. In a separate opinion filed simultaneously with this summary order, we affirm the District Court's order denying Brome's motion under 18 U.S.C. § 983 for the return of cash that the Drug Enforcement Administration seized from him and later forfeited. With respect to the issues that are the subject of this summary order, we assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

Brome pleaded guilty to one count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, pursuant to a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement in which the parties agreed to a term of imprisonment of 204 months. At sentencing, the District Court adopted the presentence investigation report's calculation of a Guidelines range for Brome of 235 to 293 months, which was higher than the plea agreement's calculation of 188 to 235 months. The District Court nevertheless accepted Brome's Rule 11(c)(1)(C) plea, sentencing him principally to 204 months' imprisonment.

In 2015 Brome moved for a sentence reduction under 18 U.S.C. § 3582(c)(2) based on the retroactive application of Guidelines Amendment 782, which reduced the base offense level for his narcotics conspiracy offense by two levels. See U.S. SENTENCING GUIDELINES MANUAL app. C., amend. 782 (U.S. SENTENCING COMM'N 2014). The District Court denied Brome's motion, but in a prior appeal we vacated that decision because it did not "sufficiently illuminate [its] reasoning so as to permit this Court to review the district court's exercise of discretion." United States v. Brome, 665 F. App'x 89, 91 (2d Cir. 2016). On remand, the District Court reconsidered and again denied Brome's § 3582(c) motion.

When, as here, a defendant is eligible for a sentencing reduction under § 3582(c), we review a district court's denial for ***102** abuse of discretion. United States v. Christie, 736 F.3d 191, 195 (2d Cir. 2013). Here, as it was required to do, the District Court considered the relevant factors under 18

U.S.C. § 3553(a), including the need for Brome's sentence to reflect the seriousness of his offense and his personal history and characteristics. The District Court focused in particular on Brome's past behavior, including his numerous parole violations. For these reasons, we conclude that the District Court did not abuse its discretion in declining to reduce Brome's sentence under the circumstances presented here. That Brome's sentence of 204 months fell within the applicable amended Guidelines range reinforces our conclusion.

Brome also argues that the District Court did not give him enough of an opportunity to defend his § 3582(c) motion on remand, in violation of his due process rights. We are not persuaded. Section 3582 authorizes "only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." Dillon v. United States, 560 U.S. 817, 826, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010); see U.S.S.G. § 1B1.10(a)(3). A defendant is accordingly not guaranteed the same procedural protections as in the sentencing context. Christie, 736 F.3d at 195. Here, Brome was aware of our decision to vacate the District Court's original decision regarding his § 3582(c) motion, and there is no evidence that he attempted to submit anything in connection with the District Court's reconsideration of that motion, or that he was denied the opportunity to do so. Accordingly, Brome's due process argument is without merit.

We have considered all of Brome's remaining arguments that are not the subject of the accompanying opinion and conclude that they are without merit. For the foregoing reasons, the order of the District Court is AFFIRMED.

All Citations

783 Fed.Appx. 100 (Mem)

Footnotes

* The Clerk of Court is directed to amend the official caption as shown above.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of March, two thousand twenty.

United States of America,

Appellee,

v.

James Brome, AKA Trouble, AKA B,

Defendant - Appellant

ORDER

Docket No: 18-858, 18-1199

Appellant James Brome, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk