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High Court Puts An End To Unfair Asset Forfeiture

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Asset forfeiture has long been a potent weapon in the government's arsenal for recovering property acquired through a criminal enterprise. Due to its efficacy in clawing back illicit gains, forfeiture has been used increasingly — and arguably overused. In recent years, the government has endeavored to broaden the scope of forfeiture liability by imposing joint and several liability for forfeiture of the conspiracy proceeds on each co-conspirator, irrespective of how much she benefited personally. As a consequence, when one defendant cannot satisfy the entirety of a forfeiture judgment against her, prosecutors and courts frequently have looked to co-defendants to make up the balance. Using an in personam judgment against a co-defendant, the government can satisfy the order of forfeiture with property that was neither owned by the less culpable defendant nor connected to the crime in any way.

In a unanimous decision issued on June 5, 2017, Honeycutt v. United States, No. 16-142, the U.S. Supreme Court held that the practice of imposing joint and several forfeiture liability is a step too far. The court recognized that the federal asset-forfeiture statute pertaining to drug crimes, 21 U.S.C. § 853, restricts a defendant's forfeiture liability to property she herself actually acquired as a result of the crime. In so concluding, the court endorsed what had been the minority view among federal courts of appeals, siding with the D.C. Circuit and disagreeing with the Second, Third, Fourth, Sixth and Eighth Circuits.[1] The opinion places an important limitation on § 853 liability, affirming the need for asset forfeiture to be tied to individual culpability.

Background

Defendant Terry Michael Honeycutt managed inventory and sales for a hardware store owned by his brother, Tony. The local police department informed Terry that Polar Pure, an iodine-based water purification product sold by the hardware store, was being purchased by consumers because its iodine crystal component was being used to manufacture methamphetamine. Notwithstanding that warning, the store sold massive quantities of Polar Pure, grossing over $400,000 from sales of more than 20,000 bottles over a three-year period.

A grand jury indicted both Terry and Tony for various federal crimes arising from selling iodine that they knew or reasonably should have known would be used to manufacture methamphetamine. Pursuant to §

853(a)(1), the government sought forfeiture judgments against each brother for $269,751.98, the full amount of the store's profits from sales of Polar Pure. Tony pleaded guilty and agreed to pay $200,000; Terry proceeded to trial and was found guilty on three counts. At Terry's sentencing, the district court denied the government's motion to enter a forfeiture judgment for the balance of the conspiracy proceeds, reasoning that Terry was a salaried employee who personally received no profits from the sales. On appeal, the Sixth Circuit — noting the split of authority among its sister circuits — reversed in relevant part, holding that co-conspirators like Terry and Tony are jointly and severally liable for the entire forfeiture amount.

The Supreme Court Deems 21 U.S.C. § 853(a) Inconsistent with Joint and Several Liability

In an 8-0 decision authored by Justice Sonia Sotomayor, [2] the Supreme Court reversed the Sixth Circuit's judgment. Examining the text, surrounding statutory context, and history of § 853(a), the court found that the statute does not provide for joint and several forfeiture liability.

The court began its analysis with the plain language of § 853(a), which, in three subsections, defines what property may be subject to forfeiture: (1) "property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of" the crime; (2) "any of the person's property used, or intended to be used ... to commit, or to facilitate commission of," the crime; and (3) for a continuing criminal enterprise, the two aforementioned categories of property and "any of [the person's] interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise."[3]

Each of these provisions, the court concluded, restricts forfeiture to "tainted property; that is, property flowing from (§ 853(a)(1)), or used in (§ 853(a)(2)), the crime itself."[4] Moreover, § 853(a) identifies property subject to forfeiture "solely in terms of personal possession or use" — i.e., (1) property the defendant "obtained" through the enterprise, (2) "the [defendant's] property" used to facilitate the crime or (3) "[the defendant's] interest" in the enterprise.[5] Joint and several liability, however, is at odds with the narrow statutory definition of forfeitable property. This is because joint and several liability would authorize the forfeiture of "untainted assets" that the defendant did not use or acquire in connection with the crime.[6]

To buttress its interpretation of § 853(a), the court pointed to several other provisions of the assert-forfeiture statute that are irreconcilable with joint and several liability. First, § 853(c) states that "[a]ll right, title, and interest in property described in [§ 853(a)] vests in the United States" when the underlying crime is committed,[7] and the court held last year that § 853(c) applies only to tainted property.[8] Second, § 853(e) permits pretrial orders "to preserve the availability of property described in [§ 853(a)] for forfeiture,"[9] but such restraints are only available upon a showing that "the property at issue has the requisite connection to the crime."[10] Third, § 853(d) creates a rebuttable presumption of forfeitability if the government establishes the property was acquired by the defendant "during the period of" the criminal enterprise and "there was no likely source for such property other than" the enterprise.[11] This presumption would be unnecessary if untainted property were subject to forfeiture.[12] Finally, and perhaps most significantly, joint and several liability would obviate § 853(p), which authorizes forfeiture of untainted (i.e., "substituted") property only in very limited circumstances: i.e., if the property cannot reasonably be located or has been transferred to a third party, placed beyond the court's jurisdiction, substantially diminished in value, or inextricably commingled with other property.[13] Requiring "other co-conspirators to turn over untainted substitute property" in other cases "would allow the government to circumvent Congress' carefully constructed statutory scheme, which permits forfeiture of substitute property only when the requirements of §§ 853(p) and (a) are satisfied."[14]

Lastly, the court addressed, and swiftly disposed of, the government's argument that § 853 incorporated the background principle of conspiracy liability that "conspirators are legally responsible for each other's foreseeable actions in furtherance of their common plan."[15] That contention, the court explained, is vitiated by the specific procedure outlined in § 853(p) for forfeiture of substitute property and, more broadly, by the common law precursor to § 853.[16] Forfeiture originated as an in rem proceeding — separate and apart from the in personal criminal proceeding — in which "the offence [was] attached primarily to the thing."[17] As the legislative history reflects, by enacting § 853, Congress essentially combined those two proceedings, but it did not intend a "significant expansion of the scope of property subject to forfeiture."[18]

Based on the foregoing analysis, the court determined that because Terry Honeycutt did not personally profit from the Polar Pure sales, his property was not subject to forfeiture under § 853.[19]

Takeaway

The Honeycutt decision signals the court's willingness to police the bounds of forfeiture to ensure that individual culpability exists, rather than to allow the government to grab the property of anyone who is connected to the crime. Prior to Honeycutt, a court could issue an order of forfeiture against a defendant, seeking to recover assets that were obtained by a co-defendant but that the defendant himself never obtained by virtue of the crime. Then, the order of forfeiture could be satisfied by taking from the defendant assets that were neither connected to the crime nor a substitute for any property received by the defendant as part of the crime.[20]

This decision puts an end to this unfair procedure. This is a welcome development given the potential for government overreach that forfeiture presents. As the court observed over a quarter-century ago, "[f]orfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly."[21] With Honeycutt and last year's Luis decision — in which the court halted a pretrial freeze of untainted assets under § 853(c) as violative of the Sixth Amendment[22] — the court has shown that it will be proactive in monitoring the just deployment of § 853. Going forward, lower courts should follow the rule of Honeycutt not only when asset forfeiture is initiated under § 853, but also when forfeiture is sought under 18 U.S.C. § 982, which is often invoked in white collar cases to forfeit allegedly ill-gotten gains.

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[1] Compare United States v. Cano-Flores, 796 F.3d 83, 91 (D.C. Cir 2015), with United States v. Benevento, 836 F. 2d 129, 130 (2d Cir. 1988) (affirming a decision by Judge Weinfeld); United States v. Pitt, 193 F.3d 751, 765 (3d Cir. 1999); United States v. McHan, 101 F.3d 1027, 1043 (4th Cir. 1996); United States v. Honeycutt, 816 F.3d 362, 380 (6th Cir. 2016); and United States v. Nguyen, 602 F.3d 886, 904 (8th Cir. 2010).

[2] Justice Gorsuch did not participate in the consideration or decision of the appeal, as he had not yet

become a member of the Court when the case was argued.

[3] 21 U.S.C. § 853(a)(1)-(3) (emphases added).

[4] Honeycuttv. United States, No. 16-142 (U.S. Jun. 5, 2017), slip op. at 5.

[5] Id. at 5-7.

[6] Id. at 5.

[7] Id. at 7 (quoting 21 U.S.C. § 853(c)).

[8] Id. (citing Luis v. United States, 578 U.S. ___, 136 S. Ct. 1083, 1092 (2016)). See also Sandick , Ruzumna & Cole, "Supreme Court: Defendants Can Use Their Own Funds To Hire Counsel," Bloomberg BNA Criminal Law Reporter (May 4, 2016).

[9] Honeycutt, No. 16-142, slip op. at 7 (quoting 21 U.S.C. § 853(e))

[10] Id. (quoting Kaley v. United States, 571 U.S. ___, 134 S. Ct. 1090, 1095 (2014)).

[11] Id. at 8 (quoting 21 U.S.C. § 853(d)).

[12] Id.

[13] Id. (citing 21 U.S.C. § 853(e)).

[14] Id. at 9 (citing, inter alia, Pinkerton v. United States, 328 U.S. 640 (1946)).

[15] Honeycutt, No. 16-142, slip op. at 9.

[16] Id. at 9-10.

[17] Id. at 10 (quoting The Palmyra, 12 Wheat. 1, 14 (1827)).

[18] Id. (quoting S. Rep. No. 98-225, p. 192 (1983) (Senate Report accompanying the Comprehensive Forfeiture Act of 1984, which included the provisions codified at 21 U.S.C. § 853)).

[19] Id. at 11.

[20] See United States v. Benevento, 663 F. Supp. 1115, 1118 (S.D.N.Y. 1987) (Weinfeld, J.) (holding that joint and several liability exists and then permitting the entry of an in personam judgment against the defendant, allowing the government to satisfy the order of forfeiture "from other properties owned by him and held for his benefit"), aff'd, 836 F.2d 129, 130 (2d Cir. 1988).

[21] Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 634 (1989).

[22] Luis, 578 U.S. ___, 136 S. Ct. at 1096.