IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

02-CR-0105-C-01

v.

DAVID HAMPTON TEDDER,

Defendant.

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Pursuant to Fed. R. Crim. P. 29, defendant David Hampton Tedder has filed a motion for a judgment of acquittal on count seven of the indictment, in which the government seeks forfeiture of the amounts of money defendant laundered in violation of 18 U.S.C. § 1957. The jury hearing his case found him guilty of this count and found that the amount of money subject to forfeiture was $7,288,090.49. Defendant argues that a judgment of acquittal should be entered because (1) the government failed to provide notice in the indictment that it was seeking a personal money judgment; (2) the government failed to prove that defendant obtained any of the alleged proceeds of the conspiracy to launder money; (3) the government failed to prove that it was reasonably foreseeable to defendant that his co-conspirators would obtain $7,288,090.49 in forfeitable proceeds; (4) the

government failed to address the safe harbor language of 18 U.S.C. § 982(b)(2); and (5) the government failed to prove that the tainted property was rendered unavailable for forfeiture as a result of any act or omission of the defendant, as required by § 982(b)(1). In addition, defendant contends that even if each movement of funds constitutes a separate incident of money laundering, it would be impermissible double-counting for the government to add together all the money involved in each transaction when seeking forfeiture. In other words, if defendant moved the same $11,000 from one bank to another and then to another, the amount of money that could be forfeited could be no more than $11,000, plus any interest earned on the $11,000. According to defendant, the government could not seek $33,000 in forfeiture, simply because the initial $11,000 was involved in three money laundering transactions.

I conclude that defendant is not entitled to a judgment of acquittal but that the amount he must forfeit must be limited to the funds turned over to him by his co-conspirators. For forfeiture purposes, those funds cannot be multiplied to reflect the fact that he laundered the same money more than once.

1. Failure to allege intent to seek personal money judgment

The indictment charged defendant with one count of conspiracy to commit violations of the wire wagering act, 18 U.S.C. § 1084, one count of conspiracy to launder money in

violation of 18 U.S.C. § 1957 and four counts of the substantive offense of money laundering. In the last count, count seven, the government sought forfeiture of the property involved in the laundering offenses and any property traceable to such property, pursuant to 18 U.S.C. § 982(a)(1), which allows the government to seek forfeiture of property from any person convicted of an offense in violation of § 1957. Alternatively, the government sought forfeiture of any other property belonging to defendant up to the value of the forfeitable property, a course authorized under 21 U.S.C. § 853(p), if the property could not be located or had lost substantial value. The indictment does not say anything about seeking a money judgment against defendant personally for any portion of the laundered money. Defendant contends that this omission prevents the government from obtaining such a judgment against him.

The Court of Appeals for the Seventh Circuit has held that a criminal forfeiture order may take the form of a personal money judgment against a defendant, United States v. Baker, 227 F.3d 955, 970 (7th Cir. 2000); see also United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999) (criminal forfeiture order may take form of in personam judgment, forfeiture of assets or forfeiture of substitute assets); United States v. Voigt, 89 F.3d 1050, 1088 (3d Cir. 1996); United States v. $814,254.76 in U.S. Currency, 51 F.3d 207, 210 (9th Cir. 1995), so the only question is whether a defendant can be held liable personally for a money judgment when the indictment gives no explicit notice of such a

possibility. Defendant does not cite any case requiring such notice, whereas at least one court has held explicitly that the government is not required to advise the defendant in the indictment that he might be subject to a cash forfeiture if the assets subject to forfeiture cannot be found. United States v. Navarro-Ordas, 770 F.2d 959, 969 n.19 (11th Cir. 1985).

I conclude that so long as the defendant has a fair chance to contest the amount of loss, neither due process nor Fed. R. Crim. P. 7(c) requires the government to give specific notice of the possibility of a personal money judgment in the indictment. (Fed. R. Crim. P. 32.2 requires the government to give notice of the possibility of forfeiture in the indictment; defendant does not suggest that the government did not comply with this requirement.)

2. Proof that defendant handled property in course of offense

Under Fed. R. Crim. P. 32.2(b), the government must establish a nexus between the property to be forfeited and the offense. As I understand defendant's argument, he is not contending that the government's proof fell short in this respect, but rather that the government did not establish a sufficient nexus between him and the proceeds from the money laundering conspiracy to justify a forfeiture of his property. He argues that "[t]he government has not proffered sufficient evidence that Tedder obtained or owned any of the alleged proceeds of Gold Medal." Def.'s Rule 29 Mot., dkt. #140, at 4.

In support of this argument, defendant cites a district court opinion from the Eastern District of North Carolina, United States v. Barajas, 200 F. Supp. 2d 575 (E.D.N.C. 2002). Defendant contends that Barajas requires the government to prove that at some time he obtained or owned property involved in the forfeiture. Not only is this decision of no precedential value, it is based on different facts and a different kind of conspiracy. In Barajas, the government had sought to forfeit property derived from the defendant's involvement in a conspiracy to distribute marijuana; the district court held that the government had failed to adduce evidence connecting the defendant to any property used or intended to be used to commit a crime or to facilitate the commission of a crime or to show that he had obtained any illegal proceeds from the crime.

In this case, the government has produced substantial evidence to prove that defendant was involved directly in the laundering of money from the unlawful activity of offshore gaming, including money from Gold Medal Sports. He advised his co-conspirators where to "invest" their money and, through his so-called law firm made the arrangements for the money transfers. Not only that, he diverted millions of dollars belonging to his co-conspirators into private accounts that he used for payment of his personal, family and household expenses. This suffices to prove the requisite nexus between defendant and the proceeds of the conspiracy.

3. Foreseeability of amount of forfeitable proceeds

Citing United States v. Saccoccia, 823 F. Supp. 994, 1004-07 (D.R.I. 1993), aff'd, 58 F.3d 754 (1st Cir. 1995), defendant contends that the government is required to prove that it was reasonably foreseeable to him that his co-conspirators would obtain $7,288,090.49 in forfeitable proceeds. This argument requires little discussion. The government proved in considerable detail how closely defendant worked with his co-conspirators and how involved he was in investing their money and that of their companies. There is no question but that he was well aware of how much his co-conspirators were deriving from their illegal gaming operation.

4. Defendant's eligibility for safe harbor provision in 18 U.S.C. § 982(b)(2)

Defendant argues that he qualifies for the safe harbor provision in 18 U.S.C. § 982(b)(2), which prevents the government from seeking forfeiture of substitute assets in place of the actual laundered property from any defendant who acted merely as an intermediary and who handled property to be laundered but did not retain any of it. This provision does not apply if, in committing the charged offense, the defendant conducted three or more separate transactions involving a total of more than $100,000 in any twelve-month period. Defendant's retention of laundered funds for his own purposes shows that he did not act merely as an intermediary; his supervision and direction of his co-conspirators' investments

show that he conducted three or more separate transactions of more than $100,000.

5. Unavailability of tainted property

Defendant thinks that the government should have to show at this point that the tainted property has been made unavailable for forfeiture as a result of an act or omission of defendant. The procedures for forfeiture are set out in 21 U.S.C. § 853. They permit the forfeiture of substitute property if the government can show that because of an act or omission of the defendant, it has had difficulty locating the forfeitable property, if the property has been transferred or sold to a third party, placed beyond the court's jurisdiction, commingled with other property that cannot be divided without difficulty or has diminished substantially in value. It would be premature to require the government to make this showing before it has attempted to trace the tainted property and failed. However, it will have to make the showing before it can seize and retain substitute assets.

6. Double counting

The government maintains that it is entitled to consider as forfeitable the entire amount of money that was "involved" in the money laundering activity, so that it may count the same money more than once if it was involved in more than one transaction. 18 U.S.C.

§ 982 authorizes the forfeiture of property "involved in a transaction or attempted transaction," but I am not persuaded that this language permits the government to multiply the amounts to be forfeited by the number of transactions. It is legitimate for the government to take any profits earned on laundered money, United States v. Check No. 25128, 122 F.3d 1263 (9th Cir. 1997), commissions and fees paid to the launderer and any property used to facilitate the money laundering offense, including "clean" funds used to cover the deposit of dirty funds, Baker, 227 F.3d 955. It is another thing for the government to claim the right to funds calculated to reflect the number of times they were moved around.

If defendant moved $11,000 three times to three different bank accounts, he did not possess or handle a total of $33,000, any more than my transferring $10 from my wallet to my bank account means that I now possess $20 or that I "gained" an extra $10 through the transaction. The purpose of the forfeiture laws is to deprive the perpetrator of his ill-gotten gains. United States v. Genova, 333 F.3d 750, 761 (7th Cir. 2003) ("forfeiture is gain based"). In my hypothetical, the actual gain to defendant would not have amounted to $33,000. Defendant did not gain from the transfers other than by receiving commissions or fees for the transfers, which are properly included in calculating the amount for forfeiture, and he did not increase the amount of money he hid from creditors, including taxing authorities, simply because he facilitated its movement from one account to another.

It is significant that the government has been unable to find any case involving

forfeiture in which a court has counted the same money twice or more to reflect multiple transactions. Defendant has not found any holding to the contrary, but he has cited two cases, Baker, 227 F.3d 955, and United States v. Trost, 152 F.3d 715, 721 (7th Cir. 1998), in which the court of appeals noted that the district court had eliminated amounts it thought were double counted. Although the cases do not identify the nature of the deductions being made, they are worth noting because the court of appeals did not suggest that the district courts should not have eliminated double counted amounts.

Among the cases the government cites is United States v. Li, 973 F. Supp. 567 (E.D. Va. 1997), which concerned only the determination of the sentencing guideline level, and Check No. 25128, 122 F.3d 1263, a case in which the court of appeals upheld the forfeiture of a check representing a refund of money the city police had seized as drug proceeds during a search of the defendant's home. The defendant sued the state for suppression of the evidence seized in a search and won dismissal of the criminal case against him, whereupon he sued the city for a return of the funds. The city refused to return the money until ordered to do so by the state supreme court. At the cusp of victory, the defendant saw it snatched from him when the federal government seized the check for the returned funds on the ground that it was money traceable to the original drug proceeds. Id. at 1265.

Although the government says that Check No. 25128 is a case in which the defendant asserted "double-counting," there is no reference to double counting in the opinion. The case

was about tracing. Defendant objected to the seizure on the ground that the check no longer represented drug proceeds but comprised the proceeds of his successful action against the city for conversion. The court of appeals found that the drug proceeds did not change their nature just because they were returned as a result of a court order finding unlawful conversion, but remained the proceeds of illegal drug transactions.

The government is entitled to a judgment of forfeiture of all the money that Gold Medal, its associated companies or any of the individual co-conspirators turned over to defendant or to a financial institution or corporation at defendant's suggestion (plus fees and commissions paid to defendant plus any earnings on the invested money), but it is not entitled to an order permitting it to seize additional money reflecting subsequent transfers of the same money by defendant. To determine the amount that is subject to forfeiture, I will hold a hearing on August 4, 2003, at which it will be the government's burden to show how much of the jury's verdict reflected money that was not double counted. It was the government that insisted, over defendant's vigorous objections, that the law supported forfeiture of all amounts that had been laundered, even if it was the same money being laundered on several occasions. Now that the government cannot sustain its contention, it will have to prove how much of the jury's verdict of $7,288,090.49 is supportable.

7. Deduction of prior forfeitures

Defendant would like to have credit for Gold Medal's forfeiture of $3,247,859.75 but he has no basis for seeking the credit. Gold Medal pleaded guilty to a forfeiture under the Racketeer Influenced and Corrupt Organizations law, 18 U.S.C. § 1961-1968, and forfeited the funds as part of its plea agreement. It was never charged with conspiring with defendant to launder money. Therefore, it has no joint and several liability with defendant for illegally gained proceeds from money laundering.

Defendant cites the concurring opinion in United States v. Covey, 232 F.3d 641, 650 (8th Cir. 2000), to support his argument that he should be given credit for the money paid by Gold Medal Sports. In that case, the concurring judge suggested in dictum that the government should not be permitted to recover the same money twice from two wrongdoers, one of whom is convicted of drug dealing and the other of money laundering when the money launderer exchanges the drug proceeds for "clean" cash and the drug dealers invest it in a legitimate business. Not only is this dictum, but in Covey, the two wrongdoers were charged in the same case and the parties agreed that the co-conspirators were jointly and severally liable for forfeitures.

8. Excessive fines

Defendant has argued that the forfeiture verdict is excessive under the Eighth

Amendment. As the government points out, this argument is premature. No order of forfeiture has been entered and no final order will be entered until sentencing. However, I will note that defendant has almost no chance of prevailing on his argument. Permitting forfeiture of the amounts of money defendant handled is an appropriate response to his criminal conduct and not an excessive fine, particularly when the evidence at trial showed that defendant had invested more than $4,000,000 belonging to Duane Pede, Jeff D'Ambrosia and Gold Medal in his corporation, Challenge Realty, and had then taken more than $5,000,000 in distributions for personal use from this corporation in 2000 and 2001.

9. Jury instructions

Defendant challenges some of the jury instructions given in connection with the forfeiture count. First, he argues that it was improper to tell the jury that money might be involved in a money laundering violation if it was commingled with those proceeds at the time the financial transaction took place. Although the government may seize untainted funds commingled with dirty funds if it can prove that the clean funds were used to hide the dirty ones, the government will have to prove at the hearing the basis for its contention that it can seize clean funds. It will not be enough for it to show simply that the money has been commingled with dirty funds.

Second, defendant objects to the instruction that property is forfeitable as traceable

to property involved in money laundering even if some untainted funds were also used to purchase, improve or maintain the property. If the government seeks to forfeit traceable property, it will have to prove the source of the property and demonstrate how much is forfeitable as previously laundered.

Third, defendant argues that he should be entitled to deduct the costs of his criminal business. He cites Genova, 333 F.3d 750, for this proposition without acknowledging that in Genova, the court was addressing the deductibility of the legitimate costs of running a law firm from kickbacks that the senior partner of the firm paid to Genova. In defendant's case, however, the co-conspirators sent money to The Legal Advantage and to Challenge Realty for the sole purpose of laundering. Neither entity incurred any costs in connection with the charged crimes for any purpose other than facilitating the laundering. United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002), does not require a different conclusion. In that case, like this one, the defendants were charged with both gambling offenses and money laundering. The question was whether "proceeds" in the money laundering statute, § 1956, referred to the gross or net proceeds of gambling operations. The government argued that it referred to gross proceeds and covered amounts that the defendants paid to meet the expenses of their business, so that the defendants violated the money laundering statute every time it paid for the lease of a video poker machine or paid a percentage of the coins collected to the owners of the premises on which the machines stood. The court rejected this argument,

noting that if "proceeds" in § 1956(a)(1) did not mean net income, "the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." Id. "By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise." Id. at 477.

ORDER

IT IS ORDERED that defendant David Hampton Tedder's motion for judgment of acquittal on count seven of the indictment is DENIED. FURTHER, IT IS ORDERED that a hearing will be held on August 6, 2003, at 9:00 a.m. to determine the amount of money that is properly the subject of a forfeiture order. If the government wants to use this hearing as an opportunity to demonstrate why it is entitled to seek forfeiture of substitute assets, it should so advise the court and opposing counsel.

Entered this 28th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge