

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, : CIVIL ACTION
: :
Plaintiff, : :
: :
v. : :
: :
TWO HUNDRED AND SIXTY-SEVEN : :
THOUSAND, FIVE HUNDRED AND TWENTY- : :
TWO DOLLARS, IN UNITED STATES : :
CURRENCY, : NO. 90-5773
: :
Defendant, : :
: :
VINCENT O. EZEIRUAKU, : :
: :
Claimant. :

FINDINGS OF FACT AND CONCLUSIONS OF LAW

R.F. Kelly, J.

August 27, 1998

INTRODUCTION

This is a forfeiture action which resulted from the seizure of \$267,522.00 in United States currency from Vincent O. Ezeiruaku as he was leaving the United States for a trip to Belgium. The seizure occurred on April 18, 1990. On April 24, 1995, this Court entered an Order forfeiting the currency that is the subject of this action. Almost nineteen (19) months later, Ezeiruaku, acting pro se, filed a motion for relief from the judgment of forfeiture. He alleged that his attorney abandoned his claim to the impounded cash without his consent. See Fed. R. Civ. P. 60(b)(6).

My denial of that claim was appealed to the Third Circuit Court of Appeals which reversed and remanded. In its Opinion, the Appellate Court stated:

Findings are required to determine whether, in fact, counsel's conduct was unauthorized, and whether his conduct was sufficiently egregious to warrant relief under Rule 60(b)(6).

On remand, after giving the parties time to depose witnesses, a hearing was held on June 12, 1998. Upon the completion of the hearing, the parties were given two (2) weeks after the preparation of the transcript to submit suggested findings of fact and conclusions of law. From the testimony and documents submitted at that hearing, I make the following:

FINDINGS OF FACT

1. Vincent O. Ezeiruaku was born in Nigeria, moved to the United States in 1982 and became a naturalized United States citizen. (N.T. 4-5). In May 1986, he graduated with a Bachelor of Science degree from Temple University with a major in Civil Engineering. (N.T. 4-5). He has resided here most of his adult life where he operated two businesses, a gas station and Sones Industry an import-export business which had been in operation for five years prior to the seizure of the currency. (N.T. 16). Ezeiruaku comes from a business background, his family having an industrial enterprise in Nigeria. (N.T. 6).

2. Mr. Ezeiruaku acknowledged that he had a checking account and that in the past he has made electronic funds transfers. (N.T. 15-16). He has experience traveling abroad, he has been involved in civil litigation in this country as well as criminal litigation. (N.T. 33).

3. Ezeiruaku testified that he was in route to Europe

with over a quarter of a million dollars in cash packed in a suitcase for the purpose of buying vehicles in Brussels. He testified that an individual by the name of Garry Johnson with whom he had no prior dealings entrusted him with the money. He characterized Johnson as a prominent businessman. He testified that Johnson learned of Ezeiruaku's import business through Ezeiruaku's family in Nigeria and that he knew that Johnson would be coming to see him sometime in February. Ezeiruaku testified that without having an appointment, Johnson called him from the train station for their initial meeting and that Johnson arrived with \$300,000.00 in cash. (N.T. 11-12, 32). Johnson allegedly stated that he had a contract with the Nigerian government to purchase Mercedes vehicles including trucks and that he wanted Ezeiruaku's help in making those purchases. (N.T. 12, 30).

4. According to Ezeiruaku, Johnson and Ezeiruaku went out looking for trucks the day after Johnson's arrival but they were not happy with the prices. It was decided that Ezeiruaku would go to Brussels to purchase the trucks and Johnson would entrust the currency to him. Despite the fact that Ezeiruaku maintained a business bank account, Ezeiruaku kept the currency in his house from February until his departure for Europe in April. Despite the fact that no contract existed between Ezeiruaku and Johnson, Johnson allegedly entrusted Ezeiruaku with the \$300,000.00 in United States currency which Johnson had supposedly raised through sources in Nigeria. Johnson then returned to Nigeria and was not heard from again by anyone connected with this case other

than Mr. Ezeiruaku. (N.T. 10-15, 30-32, 43).

5. When Ezeiruaku was arrested on April 18, 1990, by United States Customs Officials at the Philadelphia International Airport, he was on route to Brussels. The currency was in small bills, twenties, fifties and hundreds, packed in a suitcase which he checked at the airport rather than keeping it in a carry on bag. (N.T. 7-12, 14). Ezeiruaku admitted that when asked by the Customs agent about cash, he denied that he was carrying more than \$10,000.00. (N.T. 8). At the hearing, Mr. Ezeiruaku explained his answer by saying, "I didn't have it on me.'" They asked me if I had the money -- have more than \$10,000.00 on me. I assumed in my person. I said no." (N.T. 8).

6. On May 15, 1990, an indictment was filed in United States v. Vincent Ezeiruaku, Criminal Number 90-230-01, Eastern District of Pennsylvania alleging that Ezeiruaku knowingly and willfully attempted to cause the transportation of currency in excess of ten thousand dollars to various points outside of the United States without filing the required United States Customs currency report in violation of 31 U.S.C. §§ 5316(a)(1)(a) and 5322(a).

7. On September 6, 1990, the United States filed a complaint for forfeiture of \$267,522.00 for violation of 31 U.S.C. § 5317(c). On September 8, 1990, Attorney Eliot Moskowitz entered an appearance in the criminal case.

8. On September 18, 1990, a claim for the return of the property was filed by attorney Moskowitz on behalf of Vincent

Ezeiruaku and Gary Johnson signed by Mr. Moskowitz. (Exhibit 1). Attached to the claim is what purports to be a verification by Mr. Ezeiruaku. The claim states that Mr. Ezeiruaku is holding the funds in question for Gary Johnson, the true owner of the money. An affidavit purporting to be that of Mr. Johnson also supports the claim and asserts that he gave the money to Mr. Ezeiruaku to purchase vehicles for him. During the hearing, Mr. Ezeiruaku stated that he called his parents so that they could break the news to Johnson of the seizure of the currency because he did not want to do it directly. Later Mr. Ezeiruaku admitted that he did not have a phone number for Mr. Johnson in Nigeria. That testimony was as follows:

Q Haven't you previously testified that you didn't have a phone number for Mr. Johnson?

A Yes. That's why I contacted my parents.

Q So he's entrusted you with \$300,000. You have no contract, and you have no phone number for him.

A Yes.

(N.T. 18).

9. Attorney Arthur Kyriazis was asked by Moskowitz to enter an appearance in the criminal CRT case. (N.T. 36). Kyriazis entered an appearance on February 14, 1991 on behalf of the claimants in the civil forfeiture case. (Docket entry 9). On February 15, 1991, Attorney Moskowitz withdrew his appearance in the civil forfeiture case. (Docket entry 8). Ultimately, on October 28, 1991, Mr. Ezeiruaku entered a plea of guilty to the

charge of failure to file a Customs Currency Report. (Criminal Docket, Entry 40). On February 12, 1992, a sentence was imposed on the criminal case and judgment on that case was entered February 14, 1992. (Criminal Docket, Entry 43, N.T. 37-38).

10. While the criminal case was pending, the forfeiture case was first stayed and later placed in suspense. (Docket entries 10 and 11). At some point, Ezeiruaku returned to Nigeria to visit. He was still there when discovery became active in the forfeiture case in the fall of 1993. (N.T. 40). Attorney Kyriazis sent Ezeiruaku a letter dated September 26, 1993 and mailed to his home address indicating that it was imperative that Ezeiruaku contact counsel immediately due to pending discovery. Although Ezeiruaku stated that his brother shares the same address as he and saves his mail for him when he travels, he claims to have never seen the letter. (N.T. 23 and Ex 8). Attorney Kyriazis recalls Ezeiruaku calling him from Nigeria at which point Kyriazis explained the need for him to return. He testified that Ezeiruaku offered several reasons why he could not do so. (N.T. 42).

11. On February 4, 1994, Ezeiruaku returned from Nigeria through Kennedy International Airport. (N.T. 23). He was arrested for conspiracy to distribute 15 grams of heroin. The indictment was returned in the United States District Court for the District of New Jersey. (N.T. 23-24). He contacted Attorney Kyriazis and asked him to represent him and Kyriazis agreed to do so. Ezeiruaku admits that Kyriazis advised him that he was facing a substantial sentence if convicted. (N.T. 24).

12. Kyriazis represented Ezeiruaku throughout the protracted course of the drug conspiracy action in New Jersey, obtaining first a hung jury and then a mistrial before Ezeiruaku eventually pled guilty to a lesser charge on which he served no time. When the conspiracy indictment was first handed down, the forfeiture case currently before this Court was still pending and the government was seeking discovery. (N.T. 42-45). Ezeiruaku was not sentenced until March of 1997 on the charges in New Jersey. He indicated that he pled guilty on October 8, 1996. Ezeiruaku admits that he met with Kyriazis to prepare for each trial on the New Jersey indictment and that the status of the forfeiture case was discussed. Ezeiruaku admits that Kyriazis said that Ezeiruaku and Johnson had a conflict of interest and that Johnson needed his own attorney to continue the forfeiture action. (N.T. 27-28).

13. Kyriazis testified that he believed that Ezeiruaku should discontinue the forfeiture case. He was concerned about Ezeiruaku's testifying in the civil forfeiture case while the drug conspiracy charges were pending in New Jersey. Kyriazis states that the government was seeking discovery with respect to the source of the money, as well as Ezeiruaku's tax returns, his travel and his business activities. (N.T. 47-48). Kyriazis was afraid that the prosecutor in New Jersey would have access to the deposition transcript. Kyriazis was also concerned about additional indictments. Kyriazis felt that Johnson's presence was needed in order to prevail on the forfeiture claim; the money was Johnson's not Ezeiruaku's, and that Ezeiruaku's chances of prevailing in the

forfeiture claim were limited by his guilty plea on the CTR charges. (N.T. 48-49).

14. Kyriazis testified that these reasons were reviewed with Ezeiruaku who agreed with them. He noted that Ezeiruaku had a high level of trust in him due to the favorable results obtained in the criminal case on the currency transaction report violations. (N.T. 49-50).

15. Kyriazis initially tried to withdraw the forfeiture case by stipulation. A proposed stipulation and cover letter discussing the dismissal of the forfeiture action were sent to the attorney for the government who was then handling the forfeiture case. The letter states, "As per our discussion, and as per our conference with J. Kelly on or about September 16, 1994, our office is in agreement that the claim petition should be dismissed unless Mr. Johnson obtains his own counsel and is active in the prosecution of his own case." Ezeiruaku is copied on this correspondence, but denies having received it. (N.T. 50 and Exhibit 2). The government and Mr. Kyriazis were unable to agree on a stipulation and on December 9, 1994, Kyriazis filed the aforementioned Motion for Voluntary Dismissal. To the best of Kyriazis recollection, this took place after the first trial but before the second trial on the drug conspiracy indictment pending in New Jersey. According to Kyriazis, the motion was reviewed with Ezeiruaku before it was filed and it was filed at a time when Ezeiruaku and Kyriazis were in frequent contact due to the impending retrial of the criminal drug case in New Jersey. (N.T.

52-54).

16. The motion to dismiss the claim states that Ezeiruaku pled guilty to the currency transaction report violations charged in the criminal case brought in the Eastern District of Pennsylvania, and that counsel had been unable to reach the purported owner of the currency, Mr. Johnson. (Ex. 3, ¶ 9). Counsel went on to state:

[D]espite repeated efforts to contact Mr. Jonson by telephone and letter, counsel for Claimants has been utterly unable to contact Mr. Johnson; nor has Mr. Johnson ever called or written counsel for Claimants to inquire into the status of the case, or to cooperate in discovery, prosecution and handling of this matter.

(Id. ¶ 16).

17. It is undisputed that Mr. Johnson never returned to the United States to assist in the prosecution of the forfeiture action.¹ The affidavit in support of the claim for the return of seized property was obtained by Ezeiruaku. Johnson never had an attorney enter an appearance on his behalf. He never called Kyriazis or the prior attorney, Moskowitz. (N.T. 20-21, 43). The certified letter sent to him by Kyriazis was returned unclaimed. (N.T. 44). Indeed, Ezeiruaku suggested to Kyriazis that Ezeiruaku state that the money was his and not Johnson's leaving Kyriazis to doubt the existence of Mr. Johnson. (N.T. 19-21).

18. When Ezeiruaku was asked how the government could contact Mr. Johnson in Nigeria, Ezeiruaku stated that he had no

¹Ezeiruaku testified that he could not get a visa. (N.T. 20).

permanent address:

[T]hey have what they call, they have a section where they sell their cars. People can move from that section and move to different -- maybe a different state altogether. It's only when you have to bump into somebody that knows him. That's usually, that's how, I mean, because is not like in a permanent building or something. They move from one point to the other.

(N.T. 32).

DISCUSSION

Mr. Ezeiruaku contends that his attorney Mr. Kyriazis abandoned his claim to the impounded cash without his consent. Mr. Kyriazis contends that his actions were done with the knowledge and consent of Mr. Ezeiruaku. I must decide which of the two is telling the truth. I find that Ezeiruaku's credibility has been severely damaged by the many implausible statements he has made during these proceedings. In deciding whether to believe Ezeiruaku or Kyriazis, these implausible statements cast doubt on all of Mr. Ezeiruaku's testimony.

Mr. Ezeiruaku asked this Court to believe that a man by the name Garry Johnson, with whom he had no prior dealings, arrived unannounced with \$300,000.00 dollars in cash. That Johnson entrusted him with the \$300,000.00 dollars in cash without so much as a contract to protect Johnson from the loss of his cash. Mr. Ezeiruaku asks this Court to believe that Mr. Johnson left \$300,000.00 dollars with him but did not leave his phone number or a permanent address at which he could be reached.

Mr. Ezeiruaku also asks this Court to believe that he kept this currency in his house from February until April despite the fact that he has bank accounts into which he could have deposited it. Although he had checking accounts and had used electronic fund transfers in the past, he chose to attempt to take this huge amount of cash out of the United States in a suitcase.

On the other hand, Mr. Kyriazis testified in a convincing manner as to the agreement of Mr. Ezeiruaku to the withdrawal of the claim for the impounded cash and he gave the strategic reasons for the withdrawal of the claim. Mr. Kyriazis was concerned about Mr. Ezeiruaku's testifying in the civil forfeiture case while the drug conspiracy charges were pending in New Jersey. Kyriazis stated that the government was seeking discovery with respect to the source of the impounded money, as well as Ezeiruaku's tax returns, his travel and his business activities. Mr. Kyriazis was concerned that the prosecutor in New Jersey would have access to the deposition testimony. Mr. Kyriazis was also concerned about the possibility of additional indictments. He felt that Johnson's presence was needed in order to prevail in the forfeiture claim; the money was Johnson's not Ezeiruaku's, and that Ezeiruaku's chances of prevailing in the forfeiture claim were limited by his guilty plea in the CTR charges.

Mr. Kyriazis testified that these reasons were reviewed with Ezeiruaku who agreed with them. He also noted that Ezeiruaku had a high level of trust in him due to the favorable results he had obtained in the criminal case on the currency transaction

report violations.

On December 9, 1994, Mr. Kyriazis filed the Motion for Voluntary Dismissal which is in question. According to Mr. Kyriazis the motion was reviewed with Ezeiruaku before it was filed and that it was filed at a time when Ezeiruaku and Kyriazis were in frequent contact due to the impending retrial of the criminal drug case in New Jersey. I find it significant that Ezeiruaku made no attempt to reopen the judgment in the currency forfeiture action until after his guilty plea on October 8, 1996, on the drug case in New Jersey.

For these reasons, I find that Mr. Kyriazis testimony was credible and that he advised Mr. Ezeiruaku of the risks posed by continuing with the forfeiture claim and I find that Mr. Ezeiruaku concurred in the dismissal of that claim.

In a post-hearing memorandum, Mr. Ezeiruaku has raised the recent Supreme Court of the United States' decision in United States v. Bajakajian, 118 S.Ct. 2028 (1998). There the court held that the full forfeiture of respondent's \$357,000,144 under 18 U.S.C. § 982 (a)(1) would violate the Excessive Fines Clause of the Eighth Amendment. Normally, decisions are not retroactive as to judgments which are final without substantial justification and without a showing that nonretroactive application would clearly result in egregious injustice. U.S. v. Woods, 986 F.2d 669 (3rd Cir. 1993); In re Fine Paper Antitrust Litigation, 840 F.2d 188 (3rd Cir. 1988). The Third Circuit has noted the general rule that, "a civil judgment, once final, will not be reopened because

of a change in the law." United States v. Pivorotto, 986 F.2d 669 (3rd Cir. 1993) cert denied, 114 S.Ct. 90 (1993). Even a change in the laws pedicated on consitutional principles does not necessarily mandate relief pursuant to rule 60(b)(6). Travelers Indem. Co. v. Sarkisian, 794 F.2d 754, 757 (2d Cir. 1986) cert. den. 479 U.S. 885 (1986), Collins v. City of Wichita, 254 F.2d 837, 839 (10th Cir. 1958); United States v. 3947 Locke Avenue, et al., 164 F.R.D. 496, 500 (C.D. Calif. 1995) affirmed 97 F.3d 1462 (9th Cir. 1996).

It is to be noted that the Supreme Court in Bajakajian gave no indication that it intended for its decision to be retroactively applied and I find that the decision has no inpact on the present litigation.

I therefore enter the following Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TWO HUNDRED AND SIXTY-SEVEN	:	
THOUSAND, FIVE HUNDRED AND TWENTY-	:	
TWO DOLLARS, IN UNITED STATES	:	
CURRENCY,	:	NO. 90-5773
	:	
Defendant,	:	
	:	
VINCENT O. EZEIRUAKU,	:	
	:	
Claimant	:	

O R D E R

AND NOW, this 27th day of August, 1998, the "Motion For Summary Vacatur of Order of Forfeiture, and Imposition of Pre-Judgment and Post-Judgment Interest on the Withheld Money" filed by Vincent O. Ezeiruaku, pro se, is hereby DENIED.

BY THE COURT:

Robert F. Kelly,

J.