

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
: :
v. : :
: :
JOHN NAPOLI : NO. 07-75-1

MEMORANDUM

Bartle, J.

July 17, 2015

Defendant John Napoli was tried by a jury and convicted of numerous crimes arising out of a scheme to distribute methamphetamine, including conspiracy to distribute controlled substances, violent crimes in aid of racketeering, collection of credit by extortionate means, and possession of a firearm by a convicted felon. He is presently serving a prison term of 432 months.

Now before the court is the motion of the Government seeking to forfeit preliminarily \$10,537.20 in defendant's inmate trust account pursuant to Rule 32.2(e)(1) of the Federal Rules of Criminal Procedure and 21 U.S.C. § 853(p).

On April 16, 2008 the court entered a judgment and preliminary order of forfeiture against defendant which covers certain tangible property associated with his illegal activity¹ and also includes a \$6,000,000 personal forfeiture money judgment. (Doc. # 282). A judgment and final order of

¹ The forfeiture order lists, among other things, several cars and motorcycles, seized United States currency, several firearms including a Sten submachine gun, and ammunition.

forfeiture was entered on September 20, 2010. (Doc. # 336). Since that time the Government has been able to locate and dispose of only a portion of the property originally subject to forfeiture. It has received \$258,500 to date as a result of the sale of that property. In March 2015, however, the United States Marshals Service learned that defendant possesses the \$10,537.20 in issue here.

Rule 32.2(e)(1) allows the entry or amendment of an order of forfeiture to include property that is "subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or ... is substitute property that qualifies for forfeiture under an applicable statute." Under 21 U.S.C. § 853(p) the Government is authorized to obtain the forfeiture of substitute property when the Government establishes that property constituting or derived from the proceeds of a criminal violation "cannot be located upon the exercise of due diligence" because of "any act or omission of the defendant." The Government may meet its burden under this provision by submitting an affidavit from investigating officials. See U.S. v. Gordon, 710 F.3d 1124, 1166-67 (10th Cir. 2013).

Defendant argues that forfeiture is not warranted because the Government has not demonstrated due diligence or an act or omission of concealment on his part under § 853(p). We

disagree. The Government has submitted an affidavit with its reply brief detailing the Marshals Service's investigation of defendant's assets. Defendant and members of his family were found to possess no substantial property related to a criminal scheme that earned him several million dollars. It is reasonable to infer in these circumstances that an act or omission of defendant shielded ill-gotten assets from the Government's reach. The Government has therefore met the requirements of § 853(p).

Even if the Government had supplied no affidavit, § 853(p) is of no moment when officials seek the forfeiture of money in satisfaction of a personal forfeiture money judgment. The Government seeks to recover the \$10,537.20 in defendant's inmate trust account to satisfy in part a \$6,000,000 money judgment against him. In this respect it is not a "substitute" for any specific, tangible property. It is therefore unnecessary for the Government to establish that the \$10,537.20 is substitute property under § 853(p). See U.S. v. Newman, 659 F.3d 1235, 1242-43 (9th Cir. 2011).

Accordingly, the motion of the Government will be granted.

court no later than thirty days after the last day of publication on the official internet Government forfeiture site;

(4) the notice shall state that any such petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title, or interest in each of the forfeited properties and any additional facts supporting the petitioner's claims, and the relief sought;

(5) to the extent practicable, the Government shall also provide direct written notice to persons known to have alleged an interest in the property that is subject to this order, or to their attorney, if they are represented, as a substitute for published notice as to those persons so notified. If direct written notice is provided, any person having or claiming a legal interest in any of the property subject to this order must file a petition with the court within 30 days after the notice is received;

(6) any person, other than defendant, asserting a legal interest in the subject property may, within the time periods described above for notice by publication and for direct written notice, petition the court for a hearing, without a jury, to adjudicate the validity of his or her alleged interest

in the subject property, and for an amendment of this order pursuant to 21 U.S.C. § 853(n) (6);

(7) any such petition shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title, or interest in each of the forfeited properties and any additional facts supporting the petitioner's claim, and the relief sought;

(8) after the disposition of any petition filed under Rule 32.2(c) (1) (A) of the Federal Rules of Criminal Procedure, and before a hearing on any petition, discovery may be conducted in accordance with the Federal Rules of Civil Procedure upon a showing that such discovery is necessary or desirable to resolve factual issues;

(9) following the disposition by the court of any third-party interests the Government shall have clear title to all subject property held by the court to be free from any such interest;

(10) the court shall retain jurisdiction to enforce this order, and to amend it as necessary, pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure;

(11) the Judgment and Preliminary Order of Forfeiture entered on April 16, 2008 (Doc. # 282) and the Judgment and Final Order of Forfeiture entered on September 20, 2010 (Doc. # 336) shall otherwise remain unmodified and in full effect; and

(12) the Clerk of the Court shall deliver a certified copy of this order to the United States Marshal's Service and counsel for the parties.

BY THE COURT:

/s/ Harvey Bartle III

J.