

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : :
 : :
 : :
 : :
KEVIN HERON : NO. 06-674-01

MEMORANDUM

Dalzell, J.

April 17, 2007

This case raises the issue of what effect, if any, the recent alterations to 28 U.S.C. § 2461, enacted on March 9, 2006 as part of the reauthorization of portions of the USA PATRIOT Act, have on our Court of Appeals's analysis in United States v. Vampire Nation, 451 F.3d 189 (3d Cir. 2006). Because we conclude that the amendments do not alter the result Vampire Nation reached, we will grant defendant's motion to strike only in part.

Facts

On December 7, 2006, Kevin Heron was arraigned on a four-count indictment charging him with insider trading in violation of 15 U.S.C. §§ 78j(b) & 78ff and 17 C.F.R. § 240.10b-5. The indictment charged that during 2003 and 2004, while Heron was general counsel and chief compliance officer of Amkor Technology, Inc., he repeatedly traded during company-imposed blackout periods when trading by employees was prohibited. At his arraignment, Heron pled not guilty to all counts. Included in the indictment was a notice of forfeiture pursuant to 28 U.S.C. § 2461(c).

On January 18, 2007, the Government filed a notice of lis pendens against Heron's home in Phoenixville, Pennsylvania. Heron and his wife purchased that property in October, 1994,

almost nine years prior to the earliest offense conduct alleged in this case.

On March 8, 2007, the Grand Jury issued a superseding indictment, further charging that Heron and Stephen Sands, a salesperson for Neoware, Inc., conspired to commit securities fraud by exchanging material, non-public information on their respective employers. Heron has pled not guilty to the additional charge in the superseding indictment.

Now before us is Heron's motion to strike both the notice of lis pendens and the notice of forfeiture.

Analysis

The Government asserts that it has agreed to remove the lis pendens on the Heron home. Because the Government does not object to that portion of Heron's motion but also does not appear to have lifted the lis pendens as promised, we will grant that portion of defendant's motion and order the lis pendens stricken.

Heron's motion to strike the notice of forfeiture itself is considerably more complex. The Government analogizes this case to Vampire Nation. In that case, which dealt with mail fraud, the Court began its analysis with the then-applicable words of 28 U.S.C. § 2461(c), which stated, in relevant part:

If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure....

Vampire Nation, 451 F.3d at 198.

The Court continued by looking at 18 U.S.C. § 981(a)(1)(C), which authorizes the civil forfeiture of any property "which constitutes or is derived from proceeds traceable to," among others, any violation that constitutes "specified unlawful activity," which is defined in 18 U.S.C. § 1957(c)(7). Among the offenses included in that definition are, with certain exceptions not relevant here, "any act constituting an offense listed in [18 U.S.C. § 1961(1)]." 18 U.S.C. § 1957 (c)(7)(A). Finally, among the crimes listed in Section 1961(1) are both mail fraud, the relevant offense in Vampire Nation, and "fraud in the sale of securities," 18 U.S.C. § 1961(1)(D), the offense at issue here.

This analysis would be directly on point and dispositive were it not for the fact that Congress has changed the wording of Section 2461(c) since Vampire Nation was decided.¹ As part of its March, 2006 reauthorization of parts of the USA PATRIOT Act, Congress rewrote 2461(c). Pub. L. 109-177, tit. IV, § 410, 120 Stat. 246. The new 2461(c), which was in effect at the time of Heron's indictment, reads in relevant part:

If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or

¹ To be precise, Section 2461(c) had already been amended when Vampire Nation was decided, see 451 F.3d at 198 n.8, but the case was decided under the wording that was in effect at the time of the indictment in that case.

information pursuant to the Federal Rules of Criminal Procedure.

Using this new language, Heron argues that, because the Securities Exchange Act of 1934 is not "an Act of Congress for which the civil or criminal forfeiture of property is authorized," Section 2461(c) does not apply to this case. Def. Reply at 6-7 (quoting 28 U.S.C. § 2461(c)). Heron argues, in effect, that the particular statute under which a defendant is indicted rather than the nature of the offense controls whether forfeiture is available under 2461(c).

At the very least, this change in the statutory text means we can no longer blindly rely on the analysis in Vampire Nation.² Though our Court of Appeals has referenced the change in statutory language, see Vampire Nation, 451 F.3d at 198 n.8; United States v. Croce, 2006 WL 3779752 (3d Cir. Dec. 22, 2006) (non-precedential), it has never opined on what effect, if any, the change has on the operation of the statute. Because we are aware of no other court that has directly faced the question of whether the old 2461 and the new 2461 operate similarly, we will undertake to do so here.

As always, questions of statutory interpretation must begin with the plain language of the text. In re Armstrong World Indus., Inc., 432 F.3d 507, 512 (3d Cir. 2005). Befitting its

² We find it disturbing that the Government based its argument almost entirely on this single case without pointing out that this change might call its validity into question. We can only assume that counsel failed to notice the alteration in the statutory language, despite the fact that Vampire Nation itself points out the change.

placement in Title 28 of the United States Code, we read the new Section 2461(c) as purely procedural: it authorizes the Government to effect either civil or criminal forfeiture by including a notice of forfeiture in the indictment or information.³ It has no substantive effect on the class of cases for which forfeiture is available. In effect, this reading reads the adjectival phrase "for which the civil or criminal forfeiture of property is authorized" as modifying the noun "violation," not the noun "Act of Congress." Attaching the phrase to the noun "Act of Congress," as Heron would have us do, would produce an untenable result: within the class of crimes for which forfeiture is available, the Government would be able to effect that forfeiture via the indictment only for those where the statute itself allows forfeiture; for the others, the Government would be required to file a separate civil suit. We therefore agree with our sister court in United States v. Russo, 2007 WL 505056 (S.D. Ala. Feb. 14, 2007) at *4, which found that "Section 2461(c) saves the parties the time and expense of litigating both a criminal and civil action, or re-litigating the same issues

³ Vampire Nation identified the earlier version of the statute as a "'bridge' or 'gap-filler' between civil and criminal forfeiture, in that it permits criminal forfeiture when no criminal forfeiture provision applies to the crime charged against a particular defendant but civil forfeiture for that charged crime is nonetheless authorized." 451 F.3d at 199. Similarly, the First Circuit referred to Section 2461(c) as "the bridging statute . . . allow[ing] [the Government] to rely upon the civil forfeiture provision in the criminal case." United States v. Edelkind, 467 F.3d 791, 799 (1st Cir. 2006). We find that the amendment leaves the fundamental purpose of the statute -- permitting civil forfeiture in the context of a criminal proceeding -- unchanged.

under the same standards." Heron provides no basis for the reading he advocates.

Though our analysis of this question is not comprehensive, we believe that our reading of the revised statute has the effect of leaving the operation of Section 2461 largely unchanged.⁴ Other courts that have applied the amended text of Section 2461 have noted no change in its operation. See United States v. Ali, 2006 WL 2038597 (N.D. Ill. Jul. 17, 2006) at *3; United States v. Graham, 2007 WL 895239 (S.D. W. Va. Mar 22, 2007) at *1 (applying Vampire Nation to the revised statute).

There can be no doubt that the crime of which Kevin Heron stands accused, securities fraud, permits the Government to seek civil forfeiture of the proceeds should he be convicted. That portion of the Court's analysis in Vampire Nation remains unchanged and 18 U.S.C. § 1961(1)(D) includes "fraud in the sale of securities," a description that plainly encompasses Heron's alleged criminal acts. The only question before us is whether the Government must file a separate civil action in order to effect that forfeiture or whether it can do so in the context of

⁴ The amendment does serve to clarify that, where a statute specifically authorizes criminal forfeiture only in certain circumstances, see, e.g., 18 U.S.C. § 982(a)(2)(A) (authorizing forfeiture in mail fraud cases that "affect[] a financial institution"), that does not limit the operation of Section 2461 in cases not covered by that particular statute. In this sense, the amendment codifies our Court of Appeals' reading in Vampire Nation and eliminates the ambiguity that previously existed. See United States v. Smairat, 2006 WL 1554412 (N.D. Ill. Jun. 1, 2006) at *8 (citing cases disagreeing about the proper function of Section 2461 in mail fraud cases not affecting a financial institution).

the criminal prosecution. We find that 28 U.S.C. § 2461(c) allows what it did here.

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : :
 : :
 : :
 : :
KEVIN HERON : NO. 06-674-01

ORDER

AND NOW, this 17th day of April, 2007, upon consideration of defendant's motion to strike notice of forfeiture and notice of lis pendens (docket entry # 26), the Government's response (docket entry # 27) and defendant's reply (docket entry # 28) and for the reasons articulated in the accompanying Memorandum of Law, it is hereby ORDERED that:

1. Defendant's motion is GRANTED IN PART to the extent of the next paragraph;
2. The Government's notice of lis pendens is STRICKEN; and
3. Defendant's motion is otherwise DENIED.

BY THE COURT:

/s/ Stewart Dalzell, J.