UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 02 CR 1050-3
v.	)	
	)	Judge James B. Zagel
FRANK CALABRESE, *et al.*	)	

GOVERNMENT'S RESPONSE TO DEFENDANT JOSEPH LOMBARDO'S MOTION FOR AN EVIDENTIARY HEARING

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully files the following Government's Response to Defendant Joseph Lombardo's Motion for an Evidentiary Hearing [Doc. #935, Doc. #937]. For the reasons set forth below, Lombardo's request for a hearing must be denied.

I. LOMBARDO'S WAIVER CLAIM

Lombardo's Factual Argument

The crux of Lombardo's claim is that he never knowingly and intentionally waived his right to have the jury determine what, if any, forfeiture he is responsible for. *See* Doc. #935 at 4; *see also* Doc. #937 at 4. More specifically, Lombardo's lead counsel, Rick Halprin, concedes he (Halprin) in open court and on the record advised the government, his co-defendants, and the Court that Lombardo affirmatively wished to waive his "right" to a jury determination on forfeiture.[1] *See* Doc. #935 at 2; *see also* Tr. 7194 (Attorney Halprin bringing issue of jury determination of forfeiture to Court's attention); Tr. 8352 (Attorney Halprin: "[W]e have an agreement to waive the jury forfeiture"). Attorney Halprin, however, now admits he, at no point during or prior to the trial, advised Lombardo of his right to a forfeiture jury, and, moreover, that he failed to obtain Lombardo's waiver of such a determination. Doc. #935 at 3 ("At no time did Halprin discuss with Lombardo his

[1] "Right" is placed in quotes for the reasons discussed in Section II, *infra*.

right to have a jury hear the government's forfeiture case against him."). Lombardo also states he was not admonished by the Court concerning the waiver. Doc. #937 at 1.

According to Lombardo, moreover, his presence in court during his counsel's waiver on Lombardo's behalf matters little. Lombardo of course concedes that which he cannot deny, namely, that his counsel in open court, and with Lombardo present, on the record discussed Lombardo's forfeiture jury waiver. Nevertheless, Lombardo implies he either was not paying attention or, perhaps relatedly, suffered from a "hearing impairment" which, in attorney Halprin's opinion, prevented him (Lombardo) from understanding what was occurring and/or from objecting to his counsel's waiver. Doc. #935 at 4.

Rounding out Lombardo's factual assertions, Lombardo indicates that, if called to the stand, he would testify that neither attorney Halprin nor co-counsel Susan Shatz advised him of his right to a forfeiture jury.[2] Doc. #937 at 4.

Lombardo's Legal Argument

Based on the above facts, Lombardo contends that he, as a matter of law, did not knowingly and intelligently waive his right to a forfeiture jury. Doc. #935 at 4; Doc. 937 at 4. Lombardo's legal analysis is tethered exclusively to the 1993 case of *United States v. Robinson*, 8 F.3d 418 (7th Cir. 1993). As Lombardo accurately summarizes, *Robinson* concerned a colloquy between counsel and the trial court in which counsel *implied* that the defendant agreed to have the court resolve issues connected with forfeiture. *Id.* at 423-24. The *Robinson* Court ruled that this discussion failed to conclusively reveal that defendant knowingly and intelligently waived his right to a forfeiture jury. *Id.* at 423. Of particular concern to the *Robinson* Court was that defendant's counsel did not

[2]The government notes that Lombardo in his motion conspicuously fails to state that, had he been informed of his "right" to a jury trial, he would in fact have exercised it.

explicitly inform the court that he (counsel) had discussed the matter of defendant's right to a forfeiture jury with his client. *Id.* at 423-24. Lombardo contends that the facts of his case, considered in light of *Robinson*, compel the conclusion that his waiver was not knowing and intelligent, and that a hearing to confirm his factual claims is mandated.

II. ANALYSIS

For the following reasons Lombardo's claims must fail, and his request for a hearing must be denied.

Forfeiture Jury Rule Amended Since Robinson

The first infirmity in Lombardo's *Robinson* analysis is that old Federal Rule of Criminal Procedure 31(e), which gave rise to *Robinson's* "right" to a jury determination, was re-written and incorporated within Rule 32.2 in light of the Supreme Court's 1995 opinion in *Libretti v. United States*, 516 U.S. 29 (1995).[3] *Libretti* held that criminal forfeiture simply constituted an aspect of the sentence imposed in a criminal case, and that defendants therefore did not enjoy a right to have the jury determine any part of the forfeiture. *Id.* at 48-49. The Rule now reads as follows:

> **Jury Determination.** Upon a *party's request* in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite *nexus* between the *property* and the *offense* committed by the defendant.

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[3]Federal Rule of Criminal Procedure 31(e), which no longer exists, provided:

> **Criminal Forfeiture**. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a *special verdict shall be returned* as to the extent of the interest or property subject to forfeiture, if any.

(Emphasis added). Rule 31(e) thus mandated a forfeiture jury in all cases; moreover, the old rule did not limit the jury's inquiry to whether there was a nexus between the property being forfeited and the offense of conviction.

Fed. R. Crim. Proc. 32.2(b)(4) (emphasis added). As a result of this change, a defendant is now required to affirmatively *request* a forfeiture jury. *See, e.g., United States v. Betancourt*, 422 F.3d 240, 251 (5th Cir. 2005) (noting that defendant was on notice that forfeiture was an issue and that defendant requested a forfeiture jury). "Waiver," in contrast, presupposes that a defendant has an existing *right* – whether statutory or constitutional – to a forfeiture jury (which, as we now know, he does not). Lombardo's waiver argument thus fails on its face, for Lombardo at no point alleges he requested a forfeiture jury, even though he and his counsel for years had been on notice that forfeiture was an issue in the case.[4] *See generally United States v. Lester*, 2008 WL 2152055, at *1 (D. Kan. May 21, 2008) ("The indictment and other pre-sentence proceedings gave defendant notice of the United States's intent to seek forfeiture of property. Defendant did not request a jury determination regarding forfeiture.").

Lombardo In Any Event Has No Right to Forfeiture Jury Under Rule 32.2(b)(4)

A careful reading of Rule 32.2(b)(4) reveals an even more fundamental flaw in Lombardo's waiver argument. Put simply, Lombardo and his co-defendants as a matter of law were not entitled to a forfeiture jury in the first place. This conclusion is compelled because, under Rule 32.2(b)(4), there was simply no need for the jury to determine whether there existed a nexus between any *specific* property and the offense(s) of conviction; there was no specific property that was alleged to be subject to forfeiture. *See* Fed. R. Crim. Proc. 32.2(b)(4).

More specifically, there can be no dispute that the only forfeiture question here is whether

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[4]Lombardo's motion reads as follows: "At no time did Halprin discuss with Lombardo his right to have a jury hear the government's forfeiture case against him." Doc. #935 at 3 (Mentioning also that attorney Shatz did not discuss with him (Lombardo) his "right to have a jury determine the government's forfeiture case against him"). While the government has no reason to doubt attorney Halprin's representation, for the reasons discussed below, Lombardo had no "right" to a forfeiture jury that would have required such a waiver discussion with his counsel.

the government is entitled to a money judgment against Lombardo, and, if so, for what amount. Put another way, no Lombardo-owned bank accounts, cars, restaurants, etc. were seized and are now subject to forfeiture as instrumentalities of, or proceeds derived from, the charged criminal enterprise. Instead, the question before the Court is the dollar value of the illegal proceeds "earned" by the Outfit during the time Lombardo was part of the conspiracy. Under these circumstances a forfeiture jury is not appropriate.

As the Seventh Circuit held in *Tedder*, where forfeiture concerns only such an *in personam* money judgment, as opposed to the forfeiture of specific property, a defendant has no right to a jury determination because there at bottom can be no particular "nexus" between the funds and the crime. *United States v. Tedder*, 403 F.3d 836, 840-41 (7th Cir. 2005) (holding that Sixth Amendment right to jury trial does not apply to forfeitures, and finding that Rule 32.2(b)(4) is limited to the nexus between the funds and the crime; rule does not entitle the accused to a jury's decision on the *amount* of the forfeiture), *cited in United States v. Galestro*, 2008 WL 2783360 at *11 (E.D.N.Y. Jul. 15, 2008) ("[I]f the government does not seek specific property, but rather a personal money judgment, the court itself determines the amount of money that the defendant will be ordered to pay.").

Rule 32.2's Advisory Committee Notes put it this way:

> The only issue for the jury [is] whether the government has established the requisite nexus between the property and the offense. For example, if the defendant disputes the government's allegation that a parcel of real property is traceable to the offense, the defendant would have the right to request that the jury hear evidence on that issue, and return a special verdict, in a bifurcated proceeding that would occur after the jury returns the guilty verdict. . . . A money judgment is an *in personam* judgment against the defendant and not an order directed at specific assets in which any third party could have any interest.

Fed. R. Crim. Proc. 32.2(b)(4) Advisory Notes; *see also United States v. Delgado*, 2006 WL 2460656, at *1 (M.D. Fla. Aug. 23, 2006) ("The Court agrees that because the Government is now

seeking only a money judgment against Delgado, and not forfeiture of real property, or a car or bank accounts, no nexus determination needs to be made and he does not have a right to a jury determination on the forfeiture."); *United States v. Reiner*, 393 F. Supp.2d 52, 56-57 (D. Me. 2005) ("[W]ith no nexus determination to be made, there is no jury role . . . . "In [defendant's] case, the government is not requesting forfeiture of identifiable property, like a specific bank account or its traceable proceeds, or a car or jewelry. Instead, the government has specified that it seeks only an in personam money judgment against [defendant]. I conclude, therefore, that Rule 32.2(b)(4) recognizes no jury role in determining what the amount of this in personam money judgment should be."). Since Lombardo had no right to a forfeiture jury, the circumstances of his "waiver" are rendered irrelevant.

III. CONCLUSION

Because Lombardo did not, as a matter of law, have a right to a forfeiture jury, there is no justification for holding an evidentiary hearing to determine whether his "waiver" was knowing and intelligent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

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was served on October 17, 2008, in accordance with FED. R. CIV. P. 5, LR5.5, and the General Order on Electronic Case Filing pursuant to the district court's Electronic Case Filing (ECF) system as to ECF filers.

Respectfully submitted,

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