[Cite as *State v. Hall*, 2010-Ohio-1665.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92952

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOAN HALL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-475449

BEFORE: Stewart, P.J., Celebrezze, J., and Jones, J.

RELEASED: April 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Appellant, Joan Hall, appeals the order of the Cuyahoga County Court of Common Pleas granting the state's petition for forfeiture. Following review of the record and applicable law, and for the reasons stated below, we affirm.

{¶ 2} On January 10, 2006, the state filed a 79-count indictment against appellant alleging that she conducted a massive retail-fraud scam against retailers T.J. Maxx, Marshalls, Sears, and Saks Fifth Avenue that spanned 29 states over more than 15 years. Appellant waived a jury trial. The trial court found appellant guilty of 74 counts of criminal activity that included engaging in a pattern of corrupt activity, forgery, tampering with records, possession of criminal tools, theft, trafficking in food stamps, and money laundering. The trial court sentenced appellant to an aggregate of seven years in prison and imposed financial sanctions in excess of $1,500,000. On appeal this court affirmed the convictions and financial sanctions, but remanded for the recalculation of fines. *State v. Hall*, 8th Dist. No. 90366, 2009-Ohio-462.

{¶ 3} Subsequent to sentencing, the trial court held a hearing on the state's petition for forfeiture of money, securities, jewelry, merchandise, and other personal property seized from appellant's home, safe deposit boxes, and bank accounts pursuant to search warrants and being held by law

enforcement. The court issued its ruling on February 9, 2009 by journal entry that stated:

{¶ 4} "Hearing held 9/12/07 on state's motion for forfeiture. Based upon evidence adduced at hearing the state's motion is granted in part and denied in part.

{¶ 5} "All US.S [sic] currency seized by law enforcement and investment accounts (presently liquidated) are subject to forfeiture. All other personal property held in storage in Richmond Heights and or [sic] with the prosecutor or its agents, as listed in state's motion for forfeiture are to be released to Joan Hall and/or her authorized agent.

{¶ 6} "All monies forfeited shall be distributed in accordance with this court's 8/16/07 judgment entry."

{¶ 7} Appellant timely appeals raising three errors for our review.

{¶ 8} In the first assignment of error, appellant argues that the trial court had no authority to order a forfeiture in her case and erred by refusing to grant her motion to dismiss the forfeiture petition. She contends that the pattern of corrupt activity count under R.C. 2923.32, Ohio's version of the federal racketeer influenced and corrupt organizations ("RICO") statute, was the "lynchpin and centerpiece" of the state's case against her, and therefore, R.C. 2923.32(B), in effect at the time of her indictment, provided the exclusive procedure for the state to obtain forfeiture against her.

{¶ 9} "A RICO forfeiture requires a finding of personal guilt in a criminal prosecution; it is in personam and is imposed as punishment. R.C. 2923.32." *State v. Thrower* (1989), 62 Ohio App.3d 359, 370, 575 N.E.2d 863. "In order for the sentence to include criminal forfeiture, the defendants must be given notice in the indictment that the state is seeking forfeiture. R.C. 2923.32(B)(4). Criminal forfeiture may be permitted only after a conviction of R.C. 2923.32. Moreover, the court orders forfeiture after the [fact-finder] determines whether forfeiture is permitted by means of a special verdict describing the extent of the interest or property subject to forfeiture. R.C. 2923.32(B)(4). These provisions provide property owners affected adversely by government action the right of notice and an opportunity to be heard." Id. at 371.

{¶ 10} Appellant argues that the exclusive nature of a RICO forfeiture is evident by the language in former R.C. 2933.43(F), which stated in pertinent part: "any property that is lawfully seized in relation to a violation of section 2923.32 of the Revised Code shall be subject to forfeiture and disposition in accordance with sections 2923.32 to 2923.36 of the Revised Code[.]"

{¶ 11} The state argues that the property was lawfully seized by law enforcement as contraband because of its relationship to the underlying theft offense. Therefore, the state maintains, it was not required to proceed under R.C. 2923.32, and could elect to proceed under R.C. 2933.43, the contraband

forfeiture statute. The state contends that it properly filed the forfeiture petition under R.C. 2933.43 and complied with all of the procedural requirements of that statute.

{¶ 12} Under the facts of this case, we find that the state was not precluded from pursuing forfeiture under R.C. 2933.43. In jointly tried criminal cases, both appellant and her daughter, co-defendant Lisa Hall, were charged with a violation of the pattern of corrupt activity statute and with theft. Both defendants were convicted of the pattern of corrupt activity offense, but only appellant was convicted of the theft offense. The state filed a forfeiture petition in both cases, however, the trial court dismissed the forfeiture petition as to Lisa Hall because she had not been convicted of the theft offense. It is apparent from the record that the trial court considered the property sought to be forfeited as being derived from or relating to the theft offense. As such, it could be subject to forfeiture under R.C. 2933.43.

{¶ 13} The state properly filed its petition under R.C. 2933.43, however that statute was repealed prior to the forfeiture hearing and replaced by R.C. 2981.01 through 2981.14. See 2006 Sub.H.B. No. 241. In *State v. Rosa*, 8th Dist. No. 90921, 2008-Ohio-5267, at fn. 1, this court explained:

{¶ 14} "The statute was repealed effective July 1, 2007. For forfeiture of contraband, see now R.C. 2981.01 et seq. The legislation accompanying R.C. 2981.01 to 2981.14, Section 4 of 2006 H 241 specifically provides as follows:

'Sections 1, 2, and 3 of this act shall take effect on July 1, 2007. If a criminal or civil forfeiture action relating to misconduct under Title XXIX of the Revised Code was or is commenced before July 1, 2007, and is still pending on that date, the court in which the case is pending shall, to the extent practical, apply the provisions of Chapter 2981 of the Revised Code in the case.' See *State v. Clark*, 173 Ohio App.3d 719, 2007-Ohio-6235, 880 N.E.2d 150."

{¶ 15} As this matter was commenced prior to July 1, 2007 and was still pending on that date, the trial court was required, to the extent practical, to apply the provisions of Chapter 2981 of the Revised Code in this case. As a result, the trial court was vested with the authority to consider the state's forfeiture petition under the new statute.

{¶ 16} Appellant's first assignment of error is overruled.

{¶ 17} In her second assignment of error, appellant argues that the trial court violated the constitutional prohibition against double jeopardy. She argues that the forfeiture order entered after the final order in the criminal case constituted multiple prosecutions and multiple punishments for the same crimes.

{¶ 18} Appellant relies upon the Ohio Supreme Court's decision in *State v. Casalicchio* (1991), 58 Ohio St.3d 178, 569 N.E.2d 916. In that case, the court held that the forfeiture of contraband pursuant to R.C. 2933.43 constitutes a separate criminal penalty in addition to the penalty the

defendant faces for conviction of the underlying felony. Id. at syllabus. The court stated: "Because the forfeiture of Casalicchio's automobile is an additional criminal penalty that the state failed to seek prior to sentencing, the forfeiture violates both the Ohio and the federal Constitutions." Id. at 183.

{¶ 19} The facts of the instant case distinguish it from *Casalicchio*. In *Casalicchio*, the state did not file its petition for forfeiture until three days after Casalicchio was sentenced. The court held that because the double jeopardy clauses of the Ohio and federal Constitutions bar the state from seeking a new penalty to a crime after a defendant has been sentenced for that crime, the state was barred from seeking forfeiture in the case. Id. In the instant case, the state did not seek a new penalty after sentencing. The state's petition was filed concurrent with the indictment, putting appellant on notice from the beginning of the criminal action that the state was seeking forfeiture. R.C. 2933.43 mandated that a hearing on a forfeiture petition be held no later than 45 days after conviction. Appellant was convicted on August 16, 2007. The forfeiture hearing was held on September 12, 2007, well within the 45-day limit provided by R.C. 2933.43(C).

{¶ 20} The second assignment of error is overruled.

{¶ 21} In her third assignment of error, appellant claims that the state failed to sustain its burden to prove that the cash seized was subject to

forfeiture. Appellant argues that the state failed to prove a sufficient nexus between the cash and the illegal conduct, and the state failed to prove by a preponderance of the evidence that the property was subject to forfeiture.

{¶ 22} In a forfeiture case, the state's burden of proof is by a preponderance of the evidence. See R.C. 2981.02; R.C. 2933.43(C). On review, an appellate court may not reverse the trial court's decision based on a preponderance of the evidence standard where there is "some competent, credible evidence going to all the essential elements of the case." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at syllabus.

{¶ 23} As determined above, the trial court was required to apply the provisions of Chapter 2981 to the extent practical. R.C. 2981.02(A)(2) provides that "proceeds derived from or acquired through the commission of an offense" are subject to forfeiture.

{¶ 24} R.C. 2981.01(A)(11)(a) defines the term "proceeds" as:

{¶ 25} "In cases involving unlawful goods, services, or activities, 'proceeds' means any property derived directly or indirectly from an offense. 'Proceeds' may include, but is not limited to, money or any other means of exchange. 'Proceeds' is not limited to the net gain or profit realized from the offense."

{¶ 26} In reviewing the former forfeiture statutes, the Ohio Supreme Court stated: "An item may be forfeited because the item itself is unlawful to

possess, or an item may be forfeited because of its connection to unlawful activity. The extent of the connection need not be great." *Casalicchio*, 58 Ohio St.3d at 180. In deciding whether to order forfeiture, the trial court considered the relationship of the seized items to the underlying theft and money laundering convictions.

{¶ 27} Appellant argues that the state failed to meet its burden of proving that the money seized was obtained through illegal activity. She claims that the evidence shows that the money was obtained through lawful means. Although she did not testify at trial, at the hearing appellant testified that she received money and gifts in the 1980's from Dr. Sanford Frumker, an author and friend. She testified that Dr. Frumker agreed to give her referral fees. She stated that, as a result of their personal relationship, Dr. Frumker gave her thousands of dollars worth of gifts and also allowed her to use his credit cards over the years. Appellant submitted documents purporting to show that Dr. Frumker gave her $300,000 in referral fees and an additional $300,000 in cash gifts.

{¶ 28} The state contested the authenticity of appellant's documents and the credibility of appellant's testimony based upon conflicting evidence admitted at trial. Appellant denied telling investigators that she had made millions of dollars over the years as a result of her refunding scheme. She accused the private investigator and police detective of lying at trial. She also

testified that there was $1.8 million in the safe deposit box when the contents were seized by the police, not the $1.3 million accounted for by the state, and suggested that "someone" stole $500,000 from the box.

{¶ 29} Prior to the forfeiture hearing, the trial court had presided over a six-week bench trial with more than 50 witnesses and more than 100 exhibits, and found appellant guilty of theft of an amount between $100,000 and $500,000, money laundering, and numerous other theft-related offenses. The state proved that Joan Hall, assisted by her co-defendants, perpetrated a massive retail fraud scam over a span of 15 years and accumulated more than a million dollars with no visible means of income and while on public assistance. As part of the investigation, police seized truckloads of retail merchandise, counterfeit receipts, price tickets, gift cards, blank tickets, jewelry, financial reports, and approximately $1,500,000 in cash. This record was incorporated into evidence at the forfeiture hearing.

{¶ 30} "The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. In this case, the trial court was the trier of facts at both the trial and the forfeiture hearing. As such, it was in the best position to judge the credibility of the witnesses.

{¶ 31} Upon review of the record, we find the trial court possessed competent, credible evidence that the cash and liquidated securities seized by

police were subject to forfeiture as proceeds derived directly or indirectly from appellant's offenses. Accordingly, appellant's third assignment of error is overruled.

{¶ 32} Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR