ASSET FORFEITURE DECISIONS AUTHORED

BY JUDGE NEIL GORSUCH

FOR THE COURT OF APPEALS FOR THE TENTH CIRCUIT

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Judge Neil Gorsuch, nominated by the President to the Supreme Court of the United States, does not have an extensive record of written opinions on asset forfeiture issues. In his decade on the Tenth Circuit Court of Appeals, he has apparently authored only four opinions of note.

The most significant involved the application of the Double Jeopardy Clause to the Government's effort, when trying a criminal case for the second time, to forfeit property that the jury declined to forfeit in the defendant's first trial.

Another case concerned the calculation of the amount of money subject to a criminal forfeiture order and whether the trial judge had improperly shifted the burden of proof to the defendant on that issue.

Finally, the other two cases concerned civil lawsuits filed against law enforcement agents, their agencies, and a local municipality, alleging various violations of the plaintiffs' rights in the course of a civil forfeiture action.

In all of these cases, Judge Gorsuch's opinion resolved the matter in favor of the Government or the law enforcement agent or agency.

United States v. Wittig, **575 F.3d 1085 (10th Cir. 2009).**

> *The Tenth Circuit (Gorsuch, J.) held that the Double Jeopardy Clause does not bar the Government from seeking to forfeit property on retrial that the jury in the defendants' first trial declined to forfeit.*

Defendants were convicted of various offenses and asked that the jury determine what property was subject to forfeiture. The jury returned verdicts forfeiting some assets but not others.

Defendants successfully appealed their convictions, and the case was remanded for a new trial on certain surviving counts. The Government declared that it intended to seek forfeiture of the same property in the new trial, including the property that the jury had decided *not* to forfeit the first time around. Defendants objected that this violated the Double Jeopardy Clause, the doctrine of issue preclusion, and the law of the case doctrine. The district court overruled Defendants' objection and they filed an interlocutory appeal.

On appeal, the Tenth Circuit (Gorsuch, J.) held that because forfeiture is part of sentencing in a criminal case, and because "sentencing issues do not generally implicate double jeopardy," there was no constitutional bar to the Government's seeking forfeiture of the assets on retrial that the first jury did not find to be subject to forfeiture. Because this was an interlocutory appeal, however, the court was only able to resolve the double jeopardy issue; Defendants' other two objections were not ripe for review.

Accordingly, the court held that Defendants remained free to raise their issue preclusion and law of the case objections again in the district court and in any appeal they may take if they were convicted on retrial.

***United States v. Mullins,* 613 F.3d 1273 (10th Cir. 2010).**

> *The Tenth Circuit (Gorsuch, J.) held that if the defendant presents no evidence regarding the amount of money that should be subject to a criminal forfeiture order, the court may rely solely on the evidence presented by the Government to determine the amount of the forfeiture order.*

In the forfeiture phase of a criminal case, the district court noted that "in the absence of evidence to the contrary" it would accept the Government's calculation of the amount subject to forfeiture. On appeal, Defendant argued that the district court had impermissibly put the burden on him to come forward with evidence relating to the forfeiture, but the Tenth Circuit (Gorsuch, J.) found no error.

While Defendant was "under no obligation to provide evidence" regarding the forfeiture, the court said, "it can hardly surprise that the Government's forfeiture evidence may . . . constitute a preponderance of all evidence" relating to forfeiture if the defendant provides none.

***Shayesteh v. Raty,* 404 Fed. Appx. 298 (10th Cir. 2010)**

The Tenth Circuit (Gorsuch, J.) affirmed the entry of summary judgment against a federal prisoner who filed a Bivens action against the FBI agent who handled the civil forfeiture of his property, and a Federal Tort Claims action against the Government alleging that the agent had stolen some of his property.

Plaintiff was convicted on drug charges and sentenced to prison. While there, he learned that his bank had alerted federal law enforcement agents to the existence of a safe deposit box that turned out to contain $72,100 in currency.

The Government filed a civil forfeiture action against the currency which Plaintiff opposed, but his claim was later dismissed when he refused to respond to the Government's discovery requests.

Plaintiff then filed two lawsuits alleging, *inter alia,* that the safe deposit box had actually contained a larger sum of money and a quantity of diamonds that were not included in the forfeiture action. In the first case, he filed a *Bivens* action against the agents who were present when the box was opened, alleging that they had trespassed on his privacy rights and converted his property. In the second case, Plaintiff alleged that the same facts allowed him to sue the Government for damages under the Federal Tort Claims Act (FTCA).

The district court entered summary judgment against Defendant in both cases and he appealed.

On appeal, the Tenth Circuit (Gorsuch, J.) held that summary judgment was appropriate in the *Bivens* action because Plaintiff failed to produce any evidence that the FBI agent named as the defendant was involved in the safe-deposit box seizure. In may be, the court said, that the FBI was involved in the seizure, and it may be that the particular agent was involved in other aspects of Plaintiff's criminal case or the subsequent civil forfeiture action. But that does not mean that the particular agent was involved in the seizure of the contents of the safe deposit box, and Plaintiff offered no evidence that he was.

The court also affirmed the entry of summary judgment against Plaintiff in the FTCA case. In his criminal case, the court noted, Plaintiff had alleged that he was without assets to finance his appeal and was therefore allowed to proceed *in forma pauperis.* As it happened, at that time Plaintiff had over $72,000 in a safe deposit box (and if Plaintiff is to

be believed, a quantity of diamonds as well).

Given those facts, the panel held that the district court properly applied the doctrine of judicial estoppel to bar Plaintiff from making a FTCA claim that was inconsistent with his early assertion, in his *in forma pauperis* application, that he had no assets.

***Laidley v. City and County of Denver,* 477 Fed. Appx. 522 (10th Cir. 2012).**

The Tenth Circuit (Gorsuch, J.) held that the towing of a motorist's automobile and its subsequent forfeiture under state law, following the motorist's citation for driving without a valid license, did not violate the Fourth or Fourteenth Amendments.

Plaintiff filed a Section 1983 civil rights action against the City and County of Denver alleging that they violated his rights when police officers stopped him for driving without a valid license, towed his car, and forfeited it under state law. He alleged that the seizure of the car was unreasonable under the Fourth Amendment and that the forfeiture violated his due process rights under the Fourteenth Amendment because the State did not follow the procedures for forfeiture under state law.

The district court entered summary judgment in the defendants' favor and Plaintiff appealed.

The Tenth Circuit (Gorsuch, J.) held that towing Plaintiff's vehicle after he was cited for driving without a valid license was a valid exercise of the police officer's duty to remove the vehicle from the site of the traffic stop. Even if it were true, as Plaintiff alleged, that the police officer's motivation was to take custody of the car so that it could be forfeited rather than simply to remove it from the travel lane of the highway, the removal of the car was objectively reasonable in the circumstances. Thus, the court held that Plaintiff had no valid Fourth Amendment claim.

With respect to the due process claim, the court held that even if the forfeiture action did not comport in all respects with state forfeiture law, that did not mean that Plaintiff automatically had a valid due process claim under the Fourteenth Amendment. To the contrary, a due process claim requires a showing that the state action "shocks the conscience." Because Plaintiff failed to demonstrate that the state forfeiture action constituted a "conscience-shocking violation," the district court did not err in granting summary judgment for the defendants on the due process claim as well.