

14-127-cr

United States of America v. Barry Cohan

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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5 August Term, 2014

6
7 (Argued: June 24, 2015

Decided: August 14, 2015)

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9 Docket No. 14-127-cr

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12
13 UNITED STATES OF AMERICA,

14
15 *Appellee,*

16
17 v.

18
19 BARRY COHAN,

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21 *Defendant-Appellant.*

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25 Before: CABRANES, POOLER, and DRONEY, *Circuit Judges.*

26
27 Appeal from two orders of the United States District Court for the Eastern
28 District of New York (Frederic Block, J.) entered December 23, 2013, granting the
29 government writs of garnishment directing that certain monies owned by Cohan,

1 but in the control of third parties, be transferred to the United States to satisfy
2 Cohan's restitution obligations. On appeal, Cohan argues that the attorney
3 representing him at the writ of garnishment hearing labored under a conflict of
4 interest in violation of his Sixth Amendment right to counsel, and that the district
5 court committed plain error in failing to inquire as to the alleged conflict. We
6 find there is no Sixth Amendment right to counsel at a writ of garnishment
7 hearing brought to satisfy forfeiture or restitution judgments, and the district
8 court thus did not have a duty to inquire.

9 Affirmed.

10
11 _____
12 CHARLES F. WILLSON, Nevins Law Group LLC, East
13 Hartford, CT, *for Defendant-Appellant Barry Cohan.*

14 CHARLES S. KLEINBERG, Assistant United States
15 Attorney (Peter A. Norling, Assistant United States
16 Attorney, *on the brief*), *for Kelly T. Currie, Acting United*
17 *States Attorney for the Eastern District of New York,*
18 *Brooklyn, NY, for Appellee United States of America.*

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20 POOLER, *Circuit Judge:*

21 Appeal from two orders of the United States District Court for the Eastern
22 District of New York (Frederic Block, J.) entered December 23, 2013, granting the

1 government writs of garnishment directing that certain monies owned by Cohan,
2 but in the control of third parties, be transferred to the United States to satisfy
3 Cohan's restitution obligations. On appeal, Cohan argues that the attorney
4 representing him at the writ of garnishment hearing labored under a conflict of
5 interest in violation of his Sixth Amendment right to counsel, and that the district
6 court committed plain error in failing to inquire as to the alleged conflict. We
7 find there is no Sixth Amendment right to counsel at a writ of garnishment
8 hearing brought to satisfy restitution or forfeiture judgments, and the district
9 court thus did not have a duty to inquire. While the imposition of restitution falls
10 within a defendant's criminal proceedings, a writ of garnishment is a civil
11 remedy falling outside the scope of the Sixth Amendment's protections.

12 **BACKGROUND**

13 On June 10, 2009, Cohan pleaded guilty to one count of healthcare fraud,
14 in violation of 18 U.S.C. § 1347, and one count of aggravated identity theft, in
15 violation of 18 U.S.C. § 1028A(a)(1). Briefly, the government alleged that Cohan,
16 a dentist, submitted false claims seeking reimbursement for dental treatments for
17 employees of the Port Authority of New York & New Jersey and their
18 dependents. Cohan entered his plea pursuant to an agreement with the

1 government that provided, in relevant part, (1) that he would be required to pay
2 restitution in an amount to be determined later; (2) that he consented to entry of
3 a forfeiture money judgment in the amount of \$600,000, and (3) that certain
4 identified accounts would be forfeited. The plea agreement also contained a
5 merger clause stating:

6 Apart from the written proffer agreement dated
7 November 21, 2006, no promises, agreements or
8 conditions have been entered into by the parties other
9 than those set forth in this agreement and none will be
10 entered into unless memorialized in writing and signed
11 by all parties. Apart from the written proffer agreement,
12 this agreement supersedes all prior promises,
13 agreements or conditions between the parties.

14
15 App'x at 44-45 ¶ 14.

16 During his plea negotiations and at sentencing, Cohan was represented by
17 both Ronald Russo and David Wikstrom. Cohan testified during his plea
18 colloquy that he consented to the entry of a forfeiture of money judgment in the
19 amount of \$600,000 and that he agreed to forfeit specific assets to the
20 government. Russo clarified the record on this point:

21 Your Honor, if I might just elucidate just a little?

22
23 The government has seized \$500,000. Because of the size
24 of the forfeiture, Dr. Cohan will be required to pay over

1 another \$100,000. I discussed with the prosecution that
2 he's not in a position to make that payment at this point.
3 The government will not consider it to be a breach of
4 any sort of agreement if he fails to pay, although
5 interest will run from today.

6
7 I think the government will acknowledge that's our
8 understanding and I would like it to be on the record.
9

10 Gov't App'x at 19. The district court noted that "[r]estitution, according to the
11 government is part of this and is to be determined." Gov't App'x at 17. Cohan
12 acknowledged this. Finally, Cohan agreed, in response to queries from the court,
13 that he was pleading guilty "voluntarily and of [his] own free will;" that no one
14 "threatened [him] or forced [him] to plead guilty;" and that "[o]ther than the
15 agreement with the government," no one "made any promises to [him] that
16 ha[d] caused [him] to plead guilty." Gov't App'x at 24-25.

17 Cohan's sentencing hearing took place on May 28, 2010. During
18 sentencing, the district court raised the issue of restitution. The district court
19 expressed concern that restitution would be made before monies were forfeited
20 to the government, given that there would be both a forfeiture order and a
21 restitution order:

1 The Court: . . . Is there any sense of how we should
2 manage this situation since obviously he's not going to
3 have any money left over to pay the victim? I'm just
4 curious as to what your take is on that and how you
5 think that that should be handled by me.

6
7 [Assistant U.S. Attorney Daniel] Brownell: Your
8 Honor, I don't have a definitive answer because I don't
9 work in the forfeiture unit but my understanding is that
10 the money will ultimately go to the Port Authority but I
11 will – unfortunately the forfeiture assistant isn't in the
12 office today but I will . . .

13
14 Gov't App'x at 38-39. Russo told the district court:

15 The reality is that I think the Government has agreed
16 that we have a single victim here, the Port Authority,
17 and getting the money back to the Port Authority is
18 certainly something that Dr. Cohan is anxious to do as
19 well. So if we can facilitate that in any way . . .

20
21 Gov't App'x at 39-40. The district court held the issue of restitution in abeyance
22 and proceeded to sentence Cohan principally to three years and one day
23 imprisonment.

24 The parties submitted post-sentencing letters to the district court
25 addressing the issue of restitution. Cohan acknowledged that restitution and
26 forfeiture may be imposed concurrently, but represented that he had “long
27 understood that the Government, in its discretion, intend[ed] to allocate the

1 funds it seized from [him] for forfeiture toward the restitution obligation,” which
2 he argued was “consistent with the applicable laws [and] DOJ regulations.” ECF
3 Docket No. 70 at 2 (June 15, 2010). The government denied entering into any such
4 agreement. On July 27, 2010, the district court entered a judgment of conviction
5 setting the amount of restitution at \$607,186. On the same day, the district court
6 entered a final order of forfeiture requiring Cohan to forfeit \$600,000.

7 Pursuant to the forfeiture order the government executed against Cohan’s
8 assets, seizing roughly \$222,000. In April 2013 the government moved for a writ
9 of garnishment, seeking to seize certain retirement accounts with assets of
10 roughly \$627,000. Cohan objected to the government’s collection efforts on the
11 ground that:

12 The record is clear that the government entered an
13 agreement, and the defendant relied upon it, that the
14 funds seized and forfeited in 2007, together with an
15 additional amount to equal six hundred thousand
16 (\$600,000) dollars would be turned over to the victim,
17 the Port Authority, as restitution. Accordingly, it is
18 overreaching and unjust for the government to now
19 claim that the funds seized were intended to be
20 forfeited to the government and that *an additional* six
21 hundred thousand (\$600,000) should now be paid over
22 to the Port Authority as restitution. That is simply not
23 the bargain the government struck and it should be
24 estopped from making such a claim.

1
2 ECF Docket. No. 98 September 15, 2013. The government again denied entering
3 into such an agreement.

4 The writ of garnishment hearing was held on October 9, 2013. During the
5 hearing, the district court explored the issue of whether the government had
6 agreed to pay over any monies collected pursuant to the forfeiture money
7 judgment to the victim and credit that amount as restitution. Both former
8 Assistant U.S. Attorney Brownell and Cohan's former co-counsel Wikstrom
9 testified. Wikstrom participated in the hearing as a witness, not as counsel, with
10 Russo representing Cohan. Brownell testified that he did not recall discussing
11 with Wikstrom the possibility of using the forfeiture money to pay restitution.
12 He also testified that he did not promise that any of the forfeiture money would
13 be used to pay restitution. Wikstrom testified that he had discussed the issue of
14 restitution with Brownell before the plea, and Brownell told him that the
15 forfeiture money "is given over to the victim internally." App'x at 89-90.
16 Wikstrom further testified that a client in an unrelated matter had pleaded guilty
17 to health-care fraud pursuant to a plea agreement that set forfeiture at \$1.2

1 million, and there he reached an agreement with the government to pay over
2 forfeited funds to the victims as restitution.

3 The district court rejected Cohan's arguments. *United States v. Cohan*, 988 F.
4 Supp. 2d 323 (E.D.N.Y. 2013). It noted that Cohan's plea agreement required him
5 to forfeit \$600,000, and "he did not demand any set-off for restitution, which the
6 plea agreement explicitly contemplated." *Id.* at 327. The district court also found
7 that the plea agreement's merger clause barred Cohan from asserting he entered
8 into any other agreements with the government. *Id.* Finally, the district court
9 concluded that:

10 Even if the merger clause did not bar Cohan's argument
11 outright, the Court would infer—based on the parties'
12 submissions and testimony adduced at the hearing—
13 that any statements that the forfeited funds would
14 eventually be turned over to the Port Authority were
15 premised on the assumption that Cohan lacked
16 sufficient assets to satisfy both his forfeiture and
17 restitution obligations. . . .

18
19 Subsequent events have shown that the assumption that
20 Cohan lacked the means to pay restitution was not well-
21 founded. . . . [t]he fact remains that Cohan has sufficient
22 assets to satisfy his restitution obligation. Accordingly,
23 the Court concludes that Cohan must satisfy his
24 restitution obligation separate and apart from any
25 forfeited funds; any understanding about what might

happen to funds forfeited by an impecunious defendant is irrelevant.

Id. at 327–28. The district court granted the writs of garnishment and issued an amended order of forfeiture allowing the government to seize the funds, but only after fully satisfying Cohan’s restitution obligations. This appeal followed.

DISCUSSION

Cohan argues that Russo, the attorney who represented him at the October 9, 2013 writ of garnishment hearing, labored under a conflict of interest, and the district court committed plain error in failing to investigate that conflict. Cohan alleges that Russo, having repeatedly made reference during sentencing to Cohan's agreement with the government that forfeited funds would be credited toward restitution, was a necessary witness at the hearing. Cohan further argues the district court's failure to inquire into the obvious conflict violated his Sixth Amendment right to counsel. The government responds that because the writ of garnishment hearing was civil in nature, Cohan had no Sixth Amendment right to counsel, and thus the district court had no obligation to inquire into the alleged conflict.

As Cohan raises this issue for the first time on appeal, we review his claim

1 for plain error. *See United States v. Stantini*, 85 F.3d 9, 14 (2d Cir. 1996). Plain error
2 allows an appellate court to “correct an error not raised at trial only where the
3 appellant demonstrates that (1) there is an error; (2) the error is clear or obvious,
4 rather than subject to reasonable dispute; (3) the error affected the appellant’s
5 substantial rights, which in the ordinary case means it affected the outcome of
6 the district court proceedings; and (4) the error seriously affects the fairness,
7 integrity or public reputation of judicial proceedings.” *United States v. Marcus*,
8 560 U.S. 258, 262 (2010) (internal quotation marks and brackets omitted).

9 It is well-established that “[a] defendant’s Sixth Amendment right to
10 effective assistance of counsel includes the right to representation by conflict-free
11 counsel.” *LoCascio v. United States*, 395 F.3d 51, 56 (2d Cir. 2005) (citation
12 omitted). “[A] defendant has suffered ineffective assistance of counsel in
13 violation of the Sixth Amendment if his attorney has (1) a potential conflict of
14 interest that resulted in prejudice to the defendant, or (2) an actual conflict of
15 interest that adversely affected the attorney’s performance.” *United States v. Levy*,
16 25 F.3d 146, 152 (2d Cir. 1994). “To ensure that this right to conflict-free counsel is
17 not abridged, a district court has two distinct obligations during criminal
18 proceedings: (1) to initiate an inquiry whenever it is sufficiently apprised of even

1 the possibility of a conflict of interest, and (2) to disqualify counsel or seek a
2 waiver from the defendant whenever the inquiry reveals that there is an actual or
3 potential conflict.” *United States v. Rogers*, 209 F.3d 139, 143 (2d Cir. 2000)
4 (internal quotation marks omitted). “These obligations, which stem from the
5 Sixth Amendment, arise whenever there is the possibility that a criminal
6 defendant’s attorney suffers from any sort of conflict of interest.” *Levy*, 25 F.3d at
7 153. It follows that the district court had a duty to inquire only if Cohan had a
8 right to counsel at the writ of garnishment hearing derived from the Sixth
9 Amendment.

10 The Mandatory Victims Restitution Act (“MVRA”) makes restitution
11 mandatory for certain crimes, including the ones at issue here. 18 U.S.C. §§ 1347,
12 1028A(a)(1), 3663A(a)(1), 3663A(c)(1)(A)(ii). The imposition of restitution is part
13 of a defendant’s criminal prosecution. *See Lyndonville Sav. Bank & Trust Co. v.*
14 *Lussier*, 211 F.3d 697, 702 (2d Cir. 2000) (“Congress intended to make restitution
15 an element of the criminal sentencing process and not an independent action
16 civil in nature.” (citation omitted)); *see also United States v. Timilty*, 148 F.3d 1, 3-4
17 (1st Cir. 1998) (restitution order does not need to be reduced first to a civil
18 judgment); *United States v. Satterfield*, 743 F.2d 827, 836 (11th Cir. 1984)

1 (“Congress made clear in both the language of the statute and its accompanying
2 legislative history that victim restitution would be imposed as a criminal, rather
3 than civil, penalty.”) (interpreting the Victim and Witness Protection Act, which
4 was amended by the MVRA).

5 However, a writ of garnishment seeks to enforce an already existing order
6 of restitution. It is not part of defendant’s criminal sentencing because it does not
7 implicate the imposition of restitution. Collecting the restitution owed is
8 decidedly civil in nature. The government may enforce restitution orders arising
9 from criminal convictions using the practices and procedures for the enforcement
10 of a civil judgment under federal or state law as set forth in the Federal Debt
11 Collection Procedures Act (“FDCPA”). 18 U.S.C. § 3613; 28 U.S.C. §§ 3001(a)(1),
12 3002(3)(B). FDCPA “provides the exclusive civil procedures for the United States
13 to . . . recover a judgment on a debt.” 28 U.S.C. § 3001. Thus, the government is
14 authorized to enforce any restitution order imposed as part of a criminal
15 sentence by using its authority under FDCPA. *See* 18 U.S.C. § 3664(m)(1)(A)
16 (2006); 18 U.S.C. § 3613(a), (f). FDCPA explicitly authorizes the government to
17 garnish property “in which the debtor has a substantial nonexempt interest and

1 which is in the possession, custody, or control of a person other than the debtor,
2 in order to satisfy the judgment against the debtor.” 28 U.S.C. § 3205(a).

3 Moreover, we agree with the Seventh Circuit that that “district courts may
4 entertain civil garnishment and other collection proceedings as postjudgment
5 remedies within an underlying criminal case; nothing precludes the government
6 from initiating a collection proceeding under an existing criminal docket number
7 in order to collect a fine or restitution ordered as part of the criminal sentence.”

8 *United States v. Kollintzas*, 501 F.3d 796, 800 (7th Cir. 2007); *see also United States v.*
9 *Mays*, 430 F.3d 963, 966 (9th Cir. 2005) (holding FDCPA procedures are available
10 as post-judgment remedies in criminal cases). Thus, the government is free to
11 pursue the civil remedy of garnishment under an existing criminal docket
12 number without transforming the proceeding into a criminal matter.

13 Cohan’s appeal is taken from an alleged error in how the writ of
14 garnishment hearing was conducted. He can no longer appeal from the
15 restitution order itself, which became final long ago. Because we conclude that a
16 writ of garnishment hearing is a civil proceeding collateral to the underlying
17 criminal conviction, Cohan did not possess a right to counsel derived from the
18 Sixth Amendment. *See McCleskey v. Zant*, 499 U.S. 467, 495 (1991) (defendant

1 lacks a Sixth Amendment right to counsel during collateral proceeding); *Bloomer*
2 *v. United States*, 162 F.3d 187, 191 n.1 (2d Cir. 1998) (same). Thus, the district court
3 was under no obligation to inquire as to a possible conflict of interest.

4 **CONCLUSION**

5 For the reasons given above, we affirm.