

SCHEDULED FOR ORAL ARGUMENT: JANUARY 30, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5008

RICHARD SMALL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR THE AMICUS CURIAE
IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. The parties before the district court and this Court are plaintiff-appellant Richard Small and defendant-appellee the United States of America. No intervenors or amici appeared below. By order of this Court, the undersigned amicus curiae appears to present arguments in support of the appellant.

(B) Rulings Under Review. The ruling at issue in this Court is the order entered on November 26, 1996, by Judge Thomas F. Hogan, entering summary judgment for the government and dismissing plaintiff's complaint. The order and opinion appear at App. 56-62.

(C) Related Cases. To the knowledge of this amicus curiae, this case has not previously been before this Court and there are no related cases pending in this or any other court. In the court below, this case had the same name and was numbered Misc. No. 96-199.

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STATEMENT OF ISSUE

Whether the due process requirement of notice and an opportunity to be heard to contest a forfeiture of property is satisfied when the government sends written notice of administrative forfeiture proceedings to a prison inmate's last known residence and to the prison where he is incarcerated, but makes no further effort to deliver written notice after the letter sent to the prison is returned undelivered.

STATEMENT OF THE CASE

Pro se Appellant Richard Small was arrested for suspected narcotics offenses in Union Station in Washington, D.C., on January 29, 1993. Upon Small's arrest, agents from the Drug Enforcement Administration (DEA) and local police officers seized from him \$1,813.10 in United States currency. App. 56. Shortly thereafter, DEA forfeiture counsel initiated administrative proceedings to forfeit the currency under 21 U.S.C. § 881(a)(6), contending that the property was used or acquired as a result of a drug-related offense. App. 23.

On March 1, 1993, DEA forfeiture counsel attempted to send to Small, by certified mail, return receipt requested, two letters intended to provide him with notice of the administrative forfeiture proceedings. App. 23-24. The first letter was addressed to Small at the D.C. Jail, where Small was then an inmate. The letter was received at the jail, and the return receipt was signed, on March 3, 1993. However, the letter was not delivered to Small, but instead was returned to the DEA, stamped "Return to Sender." App. 23, 29. Although Small remained incarcerated at the D.C. Jail until June 10, 1993, DEA made no further effort to deliver the notice to him there. App. 44.

The second letter was addressed to Small at his last known home address, 602 Edgewood Street, N.E., Apt. 116, Washington, D.C. 20017. On March 9, 1993, an individual at that address accepted delivery and signed the receipt. The receipt was returned to the DEA. App. 23-24.

In addition to mailing the two letters, the DEA also published notice of the seizure and its intention to forfeit the currency in USA Today. The published notice appeared once a week, for three consecutive weeks, beginning on March 10, 1993. App. 10.

The government does not contend that Small received actual notice of the forfeiture proceedings, and in fact he received no such actual notice. App. 49. Accordingly, he did not raise any objections to the forfeiture. On April 16, 1993, the currency was administratively forfeited pursuant to 19 U.S.C. §§ 1607 and 1609 on the ground that no claims had been filed to contest the forfeiture of the property. App. 24, 42.

Small was subsequently convicted in the Western District of Virginia for various narcotics offenses. See United States v. Richard Small, Cr. No. 93-45-H (W.D. Va. 1994). Following the conclusion of his criminal case, on June 17, 1996, Small initiated the proceedings below by filing in the United States District Court for the District of Columbia a pro se “Motion for Return of Seized Property” under Fed. R. Crim. P. 41(e).¹ App. 4. Construing his pleadings liberally, the district court treated his motion as a civil complaint. App. 57. On June 25, 1996, the government filed a motion to dismiss or, in the alternative, for summary judgment, stating that the property had been

¹ A similar motion filed in the Western District of Virginia was denied on the ground that the property was seized in the District of Columbia and that the Rule 41(e) motion accordingly must be brought in the District of Columbia. App. 6.

properly forfeited through an administrative forfeiture proceeding and that the court therefore had no jurisdiction to consider a motion for its return. App. 7.²

In response to the government's motion, Small raised a due process challenge to the administrative forfeiture. App. 43. Small contended that he never received notice of the forfeiture proceedings, and in fact had no idea that his property had been forfeited until he read the government's motion. App. 49. The government did not contest Small's assertion that he had received no actual notice.

The district court entered summary judgment for the government. The court held that the government's actions satisfied the Due Process Clause of the Fourteenth Amendment because they were "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." App. 58 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)). Distinguishing a case in which notice sent to an incarcerated inmate's former residence was deemed inadequate to satisfy due process, the court stated:

[T]he DEA certainly know that [Small] was confined in the D.C. jail. * * * [T]he DEA sent notice to the jail in addition to sending notice to Mr. Small's previous address. By doing so, the DEA complied with the requirements of the Due Process Clause of the Fourteenth Amendment.

App. 60. The court also stated that "[i]t is clear that sending notice to an individual at an address where it is certain that that individual resides is completely reasonable and calculated to actually notify the party." App. 60.

² The government conceded that the district court would have jurisdiction to entertain a collateral due process challenge to the administrative forfeiture. App. 17-18.

Small appealed pro se, arguing that the district court had erred by finding notice adequate and by granting summary judgment against him. The United States filed a motion for summary affirmance. This Court denied the motion for summary affirmance and appointed undersigned counsel as amicus curiae to argue on behalf of appellant.

SUMMARY OF ARGUMENT

Due process requires the government to provide interested parties whose address is readily ascertainable with individual written notice of forfeiture proceedings. When an interested party is incarcerated, the government must accurately direct written notice to the party's place of incarceration. But the government's obligation to provide notice that is reasonable "under all the circumstances" does not end when a notice letter is dropped in the mail. When the government learns that a notice letter it has mailed to a prisoner has not been delivered, it must make further inquiry regarding the prisoner's location and make additional efforts to deliver the notice.

STANDARD OF REVIEW

This Court "review[s] a [district court's] grant of summary judgment de novo," applying the same substantive standard as the district court. Sellers v. Bureau of Prisons, 959 F.2d 307, 310 (D.C. Cir. 1992) (citing Nikoi v. Attorney General of U.S., 939 F.2d 1065, 1068 (D.C. Cir. 1991). "In reviewing such a decision, [the Court] must ensure that the district court did not overlook or improperly resolve any disputed issues of fact, and that it correctly applied the relevant law to the undisputed facts." Ibid. (citing Abourezk v. New York Airlines, Inc., 895 F.2d 1456, 1458 (D.C. Cir. 1990)).

ARGUMENT

The following question is at the core of this case: When the government is aware that its properly mailed notice of an administrative forfeiture has failed to reach the incarcerated person from whom the property to be forfeited was seized, need the government take any additional steps to provide notice to the inmate? According to the court below, once notice is mailed to an address where the interested party actually resides — even if that address is a prison — due process is satisfied, even if the government promptly learns that the notice never reached the inmate. But such pro forma efforts to reach an inmate in involuntary governmental custody cannot satisfy constitutional notice requirements. As several courts have already ruled, due process requires the government to take reasonable steps to follow up on information that its efforts to provide notice (particularly to incarcerated persons) have failed. Here, a simple phone call would have established that Small was still incarcerated at the D.C. Jail, and that a second effort to serve him notice there was necessary. Due process required at least such minimal additional efforts.

I. Due Process Required The Government To Follow Up On Information That Small Did Not Receive The Notice Mailed To D.C. Jail

In more than one recent forfeiture case under 21 U.S.C. § 881, the Supreme Court has reiterated the fundamental due process requirement of notice and an opportunity to be heard. “The right to prior notice and a hearing is central to the Constitution’s command of due process.” United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993). “In an ordinary case a citizen has a right to a hearing to contest the forfeiture of his property, a right secured by the Due Process Clause.” Degen v. United States, 116 S. Ct. 1777, 1780 (1996). This case concerns the adequacy of the government’s efforts to provide constitutionally adequate notice.

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane, 339 U.S. at 314 (emphasis added). Moreover, “process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” Id. at 315. Accordingly, when the government can reasonably ascertain the name and address of an interested party, it must send “[n]otice by mail or other means as certain to ensure actual notice.” Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983). “Due process protections ought to be diligently enforced, and by no means relaxed, when a party seeks the traditionally-disfavored remedy of forfeiture.” United States v. Borromeo, 945 F.2d 750, 752 (4th Cir. 1991).

Notice by mail may suffice to satisfy due process, even when the government seeks to forfeit property in which a prison inmate has an interest. United States v. Clark, 84 F.3d 378, 381 (10th Cir. 1996). The government, however, must meet a heightened standard of diligence in locating and properly directing mailed notice to prisoners. Because a prison inmate “resid[es] at a place of the government’s choosing, not his own,” a prisoner’s correct address is readily ascertainable to the government. Torres v. \$36,256.80 United States Currency, 25 F.3d 1154, 1161 (2d Cir. 1994). Thus, “[w]hen the government seeks forfeiture of property of a person who is at the time in government custody, the agency that initiates the forfeiture must find out in what government facility the person is being held and send the notice to the right place.” Ibid. When a person is incarcerated, a letter mailed anywhere else does not satisfy due process, because it cannot be “reasonably calculated” to provide notice. Robinson v. Hanrahan, 409 U.S. 38, 40 (1972) (per curiam) (notice

mailed to incarcerated person's home address was inadequate); see also Clark, 84 F.3d at 381 (“When the government is aware that an interested party is incarcerated, due process requires the government to make an attempt to serve him with notice in prison.”).

The district court acknowledged these principles, but held that DEA's obligation to provide written notice to Small was satisfied when a letter correctly addressed to his place of incarceration was placed in the mail. In the court's view, once DEA had taken that step, it was entitled to ignore even the clearest signs that the letter had not been delivered. But that approach imposes an artificial, and unsupportable, end point on the analysis of whether efforts to provide notice are reasonable “under all the circumstances.” If the government has the obligation to determine where a prisoner is housed, there is no reason why it should not also have the obligation to confirm that location, and reattempt delivery, when a letter to an inmate is returned by the institution.

Deciding a case involving facts indistinguishable from those here, the Fifth Circuit has ruled that due process imposes just such an obligation. In Armendariz- Mata v. United States Dep't of Justice, Drug Enforcement Admin., 82 F.3d 679 (5th Cir. 1996), Mata brought a due process challenge to the administrative forfeiture of currency seized at the time of his arrest on drug charges. Mata contended that DEA had not provided adequate notice of the forfeiture proceedings. The government had sent notices of forfeiture both to Mata's last known residence and to the Guadalupe County jail, where Mata was incarcerated. “For unknown reasons, that notice [to the jail] was returned to DEA marked ‘Attempted RLW - 5510 6/13/88’ and marked ‘Return to Sender.’” Id. at 681. Thereafter, the government published notice of the forfeiture proceedings in USA Today but made no other effort to notify Mata of the forfeiture.

The court ruled that the notice mailed to Mata at Guadalupe County jail failed to satisfy the requirements of due process, even though Mata was in fact incarcerated there, because the government had ignored information that the notice had nonetheless failed to reach him. The court stated:

This is not a case where DEA made the reasonable assumption that the notice sent to the jail had reached its destination; on the contrary, the notice to Mata was returned undelivered. DEA knew that its letter had not succeeded in notifying Mata, and made no additional efforts to inform Mata of the forfeiture proceeding. It is unreasonable for DEA to ignore information that reveals that a method of notice is inadequate to provide an interested party with notice, when that party is known to be in jail and can be easily located by DEA in the jail or determined to not be there. A letter to such a prisoner returned unclaimed is not enough. Some additional inquiry is required.

Id. at 683 (emphasis added). Stating that DEA’s conduct “cannot be condoned,” the court remanded the case with instructions to vacate DEA’s administrative forfeiture for lack of adequate notice.

In Torres, the Fourth Circuit also held that additional inquiry is required when notice mailed to a prison inmate is returned undelivered. In that case, Rafael Torres, the plaintiff’s husband, who had an acknowledged interest in the property at issue, was a convicted federal prisoner. In addition to its published notices, DEA sent a letter by certified mail to a county prison from which Rafael had, by then, been moved.³ The letter sent to the county prison was returned to the government stamped “Not at County Prison.” Nonetheless, DEA made no further effort to learn where Rafael, who was still incarcerated, had been transferred. The court held that DEA’s efforts did not satisfy due process.

The court stated:

[T]he DEA knew its letters had not succeeded in notifying Rafael. Furthermore, if the DEA had desired to give Rafael actual notification, a simple call to the Bureau of Prisons would have sufficed to reveal where Rafael was serving his sentence. The DEA’s assertion that “No other location of incarceration for Mr. Torres was known

³ The government also mailed notice to Torres’s last known home address; it was returned to the government undelivered.

to DEA” may have been true, but this was easily curable. Rafael was residing at a place of the government’s choosing, not his own.

Id. at 1161. See also Boero v. Drug Enforcement Admin., 111 F.3d 301, 303, 307 (2d Cir. 1997) (notices of forfeiture mailed to federal facility, which were sent back to the DEA stamped “Return to Sender,” were inadequate; “notice could easily have been given” to prisoner at the state facility to which he had been transferred).

In Torres and Boero, the DEA sent its notice to the wrong prison, whereas here the DEA sent its notice to the right prison. But that fact did nothing to aid Small, because the D.C. Jail returned the notice to DEA. As in Torres and Boero, a “simple phone call” would have established that Small was still at the D.C. Jail and that DEA needed to send a second notice there if its purpose was to provide Small with actual notice, rather than simply to go through the motions. There is no logical reason why a letter returned from a prison should trigger a duty of inquiry when the intended recipient has been transferred to another facility, but should trigger no such duty when the intended recipient is still at the prison. The government, after all, cannot know which situation prevails until after it makes the phone call.

Even in cases that do not involve prisoners, courts have recognized that the obligations imposed by due process do not magically end when a notice letter is dropped in the mail. In many circumstances, due process requires the government to follow up on information it has that its notice has been ineffective. For example, in Montgomery v. Scott, 802 F. Supp. 930, 936 (W.D.N.Y. 1992), the plaintiff sought return of currency that he claimed had been forfeited without adequate notice. The government had sent notice, via certified mail, to the apartment where the plaintiff had been arrested, but the notice was returned three weeks later. The government published notice in USA Today, but made no further effort to mail notice to the plaintiff. The court held that the DEA’s

efforts failed to satisfy due process. According to the court, “[t]he Government must use the information it possesses to determine whether to rely on a particular method of notice; it may not ignore information that reveals that a method of notice is inadequate to provide an interested party with notice.” Ibid. That obligation continued after notice was mailed:

The Government’s duty to act reasonably does not end when it drops the notice in the mail; it is simply unreasonable for the Government to rely on a notice it knows has failed to reach the intended recipient, for the same reason that it is unreasonable for the Government to rely on a notice sent to an address at which it know a party no longer resides.

Ibid. (emphasis added). Although the court noted that “the [g]overnment does not have to go to extraordinary lengths to notify an interested party,” the DEA’s efforts failed to satisfy due process because the agency “did not take any steps to provide plaintiff with notice after discovering that plaintiff had not received the June 2 notice.” Ibid.

Other courts have reached similar conclusions. See, e.g., United States v. Rodgers, 108 F.3d 1247, 1254 (10th Cir. 1997) (notice of administrative forfeiture did not satisfy due process when notice letters mailed to two previous addresses were returned and DEA thereafter failed to send notice to third address that it could have obtained from local authorities; “the government certainly knew the Trenton address was invalid when the letter was returned with the advisement that Rodgers had moved”); Olivo v. United States, 1997 WL 23181, *4 (S.D.N.Y. Jan. 22, 1997) (“[C]ourts have not hesitated to find that where the first attempted notice is unsuccessful, but a person’s correct address can be obtained by the government through minimal effort, the failure to attempt a second notice violates due process”); Gutt v. United States, 641 F. Supp. 603 (W.D. Va. 1986) (where notice sent to interested party was returned to DEA as unclaimed and where DEA knew the party was represented by counsel, DEA’s failure to send notice to the attorney deprived the party of due

process). See generally 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 9.03, at 9-51 (1997) (“In general, the courts have required seizing agencies and prosecutors to take reasonable steps to locate the owner of the property, and where their first attempt at personal notice does not succeed, to try again.”).

In keeping with this ample precedent, this Court should hold, simply, that the government must make additional inquiry after it receives information that a notice of forfeiture mailed to an incarcerated inmate has not been delivered. Such a rule would place little additional burden on the government, which would need to take only reasonable additional steps to attempt to locate, and deliver notice to, the interested party. Moreover, the rule would not render notice defective in those cases where the government has no reason to believe that notice it has properly mailed to an incarcerated inmate has not been received. See, e.g., Quinones- Ruiz v. United States, 864 F. Supp. 983, 985-986 (S.D. Cal. 1994) (notice mailed to prisoner who never received it deemed adequate where agency “never received a returned notice” and so “reasonably believed that notice to plaintiff was effective”); Hill v. United States, 830 F. Supp. 270, 273 (E. D. Pa. 1993) (government provided satisfactory notice to inmate when it mailed letter to prison where inmate was incarcerated, received a signed receipt, and “reasonably believed that the plaintiff had chosen not to contest the forfeiture proceeding”). To forfeit property that may or may not have been forfeitable if a hearing were held, simply to save the government the trouble of finding an incarcerated prisoner, “would be an excessive response to the concerns here advanced.” Degen, 116 S. Ct. at 1783.

When the government learns that a notice mailed to an incarcerated inmate has not been delivered, it must take further steps to confirm the prisoner’s location and must reattempt delivery. If the government fails to do so, its efforts to provide notice will be revealed as “a mere gesture.”

Mullane, 339 U.S. at 315. Due process cannot permit the government to forfeit property when it knows that an interested party whom it knows how to find has not received notice of the forfeiture.

II. The Notice Mailed To Small's Last Known Address Was Also Constitutionally Inadequate

In ruling that the government supplied adequate notice to Small, the district court relied primarily on the letter sent to the D.C. Jail, and gave little or no weight to the letter the government also mailed to Small at his last known home address. App. 60. The court's lack of reliance on that letter was wise, for the notice mailed to Small's residence does not cure the inadequacy of the notice mailed to the D.C. Jail.

As discussed above, the courts generally agree that the government is charged with knowledge of an incarcerated person's whereabouts. Accordingly, notice mailed to a prisoner's home address can never be reasonably calculated to provide adequate notice, because the government knows that the prisoner is not there to receive it. Robinson v. Hanrahan, 409 U. S. 38, 40 (1972).

In the Armendariz- Mata case, discussed above, the DEA had sent notice to Mata's home address as well as to the prison where he actually resided. The court held that the notice to send to Mata's home address also failed to satisfy due process. The court stated:

Given the government's knowledge of Mata's whereabouts, the notice sent to Mata's home residence was not adequate to apprise Mata of the pendency of the forfeiture proceedings. Mata "was residing at a place of the government's choosing, not his own."

82 F.3d at 683 (quoting Torres, 25 F.3d at 1161). See also, e.g., United States v. Giraldo, 45 F.3d 509, 511 (1st Cir. 1995) (notice sent to prisoner's home address was constitutionally inadequate; if claimant is in prison, government "must take steps to locate the claimant in order to satisfy due process"); Calabro v. United States, 830 F. Supp. 175, 179 (E.D.N.Y. 1993) (notice to prisoner's

home address was “constitutionally defective since D.E.A. knew or reasonably should have known that mailing a notice to Calabro’s residence was not reasonably calculated to give actual notice of the pending administrative proceedings”); Cepulonis v. United States, 543 F. Supp. 451, 453 (E.D.N.Y. 1982) (“Where plaintiff was in federal custody at all times subsequent to seizure of the vehicle, forfeiture after notice by publication and mail to his home address deprived plaintiff of property without due process of law”). Cf. Williams v. Drug Enforcement Admin., 51 F.3d 732, 735 (7th Cir. 1995) (DEA agent acted egregiously in failing to send notice to property owner in jail where he knew him to be confined following release from federal custody).

Thus, because the government knew, or could easily ascertain, that Small was not at his last known home address, the letter mailed there in no way satisfies due process.

CONCLUSION

The order of the district court should be reversed and the case remanded to the district court to allow Small to pursue the return of his property.

Respectfully submitted,

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