ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 10-1014
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Cuyahoga County Court of Appeals Eighth Appellate District
JOAN HALL,	:	
Defendant-Appellant.	:	Cuyahoga County Court of Appeals Case No. 92952

MEMORANDUM IN SUPPORT OF JURISDICTION OF JOAN HALL

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SUPREME COURT OF OHIO

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EXPLANATION OF WHY LEAVE TO APPEAL SHOULD BE GRANTED

Ms. Hall's case is a felony case of great general interest because it presents important issues this Court has never resolved regarding forfeiture procedures in RICO prosecutions:

- Was former R.C. 2923.32(B) the exclusive means for seeking forfeiture when an indictment charges a RICO violation?
- When an indictment is issued before the effective date of R.C. 2981.01, et seq., but the forfeiture hearing is conducted after that date, should the court apply former R.C. 2923.32(B) or R.C. 2981.04?
    - How does a court determine to what extent it is "practical" to apply R.C. 2981.04, as directed by section 4 of House Bill 241?[1]
- May the State evade the General Assembly's expressed intent that a Grand Jury must identify the property subject to forfeiture in cases involving RICO violations simply by arguing on appeal that the property subject to forfeiture was seized as contraband derived from the predicate offenses rather than as proceeds from the RICO violation?

This Court's guidance on these issues will assist both the trial and appellate courts in implementing the General Assembly's intention in enacting both former R.C. 2923.32(B)(4) and R.C. 2981.04.

The superseding indictment, which included a RICO count based on predicate offenses that spanned a 15-year period, was filed on January 10, 2006, but the forfeiture hear-

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[1] Section 4 of House Bill 241, which created Chapter 2981, provides:

> 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.

ing was conducted in August and September, 2007, i.e., after the effective date of R.C. 2981.01, et seq. The newly created Chapter 2981 amalgamated and standardized the civil and criminal forfeiture provisions that had previously been scattered through the code.

The Court of Appeals decision eviscerates the protections that the General Assembly included in the RICO forfeiture statute, protections that safeguard the property rights Ohio citizens from abuse that could otherwise result from overzealous prosecutions under the broad reach of RICO liability. Those protections include the requirement that: the forfeiture must be included in the indictment so the Grand Jury can identify the extent of property subject to forfeiture (see R.C. 2981.04(A)(1) and former R.C. 2923.32(B)(4)); the finder of fact must render a special verdict identifying the property subject to forfeiture (see R.C. 2981.04(B) and former 2923.32(B)(4)), and that the forfeiture be included in the sentencing entry (see R.C. 2981.04(C) and former R.C. 2923.32(B)(3) and (4)). The General Assembly considered those protections so important that it made them applicable to *all* criminal forfeitures when it repealed former R.C. 2923.32(B) and enacted R.C. 2981.04.

The court below concluded that the trial court was entitled to apply R.C. 2981.04, as "practical," to the State's forfeiture petition.[2] However, the court's analysis stopped there. It failed to address whether the State had satisfied any of the requirements of R.C. 2981.04 and, if not, whether it was "practical" to hold the State to those requirements. The court ignored these questions, failed to determine the validity of the forfeiture, and overruled Ms. Hall's assignment of error.

Had the court conducted the proper analysis, it would necessarily have concluded that the State failed to satisfy R.C. 2981.04. The forfeiture was not included in the indictment.

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[2] *State v. Hall*, Cuyahoga App. No. 92952, 2010-Ohio-1665, ¶15 (April 26, 2010).

The court made no special verdict regarding the property subject to forfeiture. And the sentencing entry did not include the forfeiture judgment.

Had the court of appeals analyzed the issue, it would have been entirely "practical" to apply all of the requirements of R.C. 2981.04 to the State's forfeiture petition. This is because the State was required to pursue the RICO forfeiture under former R.C. 2923.32(B) in the first place. The State originally elected to pursue the forfeiture as a contraband forfeiture; the prosecutors affirmatively confirmed that at trial and on appeal. However, the contraband forfeiture statute, former R.C. 2933.43(F) made it clear at the time the superseding indictment was filed that, "[n]otwithstanding any provisions of this section to the contrary, any property . . . seized in relation to a violation of section 2923.32 [the RICO statute] . . . shall be subject to forfeiture . . . in accordance with sections 2923.32 to 2932.36 of the Revised Code." The failure of the trial court and the court of appeals to enforce this provision frustrated the General Assembly's expressed intention to treat property that is derived from the predicate acts that form the basis of a RICO violation as having been seized in relation to the RICO violation, thus rendering them subject to the more rigorous RICO forfeiture process. Granting review will clarify the law on this point and enforce the legislative intent.

Accepting review of this case will also help protect against overzealous prosecutions in RICO cases. In this case, the State shifted its position throughout the forfeiture proceedings, arguing that it should be able to have its cake and eat it too. It originally brought the forfeiture as a contraband forfeiture. However, the RICO forfeiture statute, R.C. 2923.32(B), was the exclusive forfeiture procedure for cases involving RICO violations. Because the State failed to include the required forfeiture language in the indictment, the

State's forfeiture petition was ripe for dismissal. To avoid the consequences of its mistaken strategy, the State attempted to exploit the fact that the General Assembly amended R.C. 2923.32(B), effective July 1, 2007, and enacted R.C. Chapter 2981.

The State sought to distract the court's attention from the mandates of the RICO forfeiture statute by focusing on the provision in R.C. § 2981.04 that also requires the forfeiture language to be included in the indictment. Relying on Section 4 of H.B. 241, the State argued it should be excused from the indictment requirement of R.C. § 2981.04. The justification was that it was not possible to comply with that aspect of R.C. 2981.04, because the forfeiture was initiated before its effective date.[3] Perhaps by this sleight of hand, so the State hoped, it could distract the court from the error in initiating the forfeiture.

The State's tactic succeeded. The trial court's February 9, 2009 entry does not indicate whether the court proceeded under the contraband forfeiture statute or under R.C. Chapter 2981. However, the fact that the court granted forfeiture of approximately $3,000,000 in cash, but not the personal property, strongly suggests that the court applied Chapter 2981, because cash is not, in itself, contraband. "Mere possession of cash is not unlawful. . . . [T]he state must demonstrate that it is more probable than not . . . that the defendant used [the money] in the commission of a criminal offense."[4] Thus, the trial court most likely proceeded under R.C. 2981.04, which allows forfeiture of proceeds of criminal activity in addition to forfeiture of contraband. After all, the State repeatedly argued that the cash was forfeitable because it represented proceeds of the RICO violation.

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[3] Tr. pp. 6061, 6100

[4] *State v Golston* (1990), 66 Ohio App.3d 423, 431-32, 584 N.E.2d 1336.

However, on appeal, the State reverted to its position that its petition sought only forfeiture of contraband. It argued in its brief that "the State seized all property as a result [sic] Appellant's underlying theft offense." This contradicts the State's repeated arguments at the forfeiture hearing that the State was entitled to forfeiture of all of the contested property because it constituted "ill gotten gain," not just from the theft, but also from the money-laundering and RICO counts. "And the state's position is that these funds came by way of ill-gotten gains, that did result in [sic] laundering money and/or related to the RICO counts . . . that this defendant was found guilty of[.]"[5] This is undeniable in light of his further argument that, "[w]e think in the context of the broad scheme of this operation, the finding of laundering money and the finding of RICO and the finding of all of the counts of theft and forgery and criminal tools in the context of her house, the only reasonable conclusion that can be reached, and that the state has reached its burden, that that money is ill-gotten gains."[6] The court of appeals condoned the State's shifting of positions and pursuit of contradictory theories; the State got its cake and ate it too. Enforcing the requirement that the State must include the RICO forfeiture in the indictment would have prevented this kind of abuse.

Finally, this case presents the unanswered question whether *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, applies to entries granting forfeiture. The court of appeals ordered supplemental briefing on this issue. Ms. Hall responded that a judgment of forfeiture is part of the criminal sentence, under both R.C. 2981.04 and former R.C. 2923.32(B)(4)(a). Therefore, the requirements of *Baker* do apply to the forfeiture entry. The forfeiture entry in this case is incomplete because it does not include the entire judgment. The final sentence

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[5] Tr. p. 6117.
[6] Tr. p. 6125.

of the entry provides, "[a]ll monies forfeited shall be distributed in accordance with this court's 8/16/07 judgment." Thus, anyone relying on or enforcing that entry must look at a second entry to determine how to proceed. It therefore fails to comply with Criminal Rule 32(C) and *Baker*. The court of appeals did not address this issue in its decision.

STATEMENT OF THE CASE AND FACTS

The January 10, 2006 secret, superseding indictment did not include language alleging the nature of any property subject to forfeiture. Neither did it include a specific count regarding forfeiture. The indictment was entirely silent as to forfeiture, even though Count One of the indictment charged a RICO violation.

On the same day the State unsealed the superseding indictment, it served its "Petition for Forfeiture of Seized Contraband to the Seizing Law Enforcement Agency." The petition specifically states that it is filed "pursuant to Revised Code Section 2933.43." The petition identified the material to be forfeited as "contraband" consisting of "money, jewelry, merchandise and securities (see attachments)." The attachments merely consisted of inventory receipts showing all the property seized in the execution of certain search warrants.

After a bench trial, the court found Joan Hall guilty of the RICO count, among others. The court sentenced her to a term of seven years on that count and imposed the financial penalties described above. The court did not include any matter regarding forfeiture in the sentencing entry. The court imposed the following financial sanctions:

- Total restitution under R.C. 2929.18(A)(1), $258,941.34;
- Total costs of prosecution under R.C. 2923.32(B)(2), $179,039.27;
- Total RICO fines under R.C. 2923.32(B), $776,824.02;
- Total conventional fines under R.C. 2929.18, $355,000.00.

The court also imposed court costs.

The court conducted a hearing on the defendants' new trial motions and on the State's forfeiture petition on August 13, September 12, and September 13, 2007. At the hearing, the court overruled Ms. Hall's objections to the petition on several grounds, including: the forfeiture proceedings were required to have been completed before sentencing was completed; the trial court no longer had jurisdiction to entertain the petition because notices of appeal had been filed from the judgments of conviction; the State was required to use the forfeiture procedure for RICO violations; the State failed to properly specify the property subject to forfeiture; and, the RICO statute requires the Grand Jury to pass on forfeiture.

The State argued that it was not required to proceed under the RICO forfeiture statute and had decided to proceed under the contraband statute instead. The State argued that it "has the discretion to go on each one. We didn't have to go under the RICO statute for forfeiture. We decided to go under what was commonly known as the contraband statute."[7] The State then argued that the court should apply the newly adopted forfeiture statute, R.C. 2981.01, et seq.

In her case, Ms. Hall called the lead detective, Detective Duffy. The thrust of his testimony was that he could not link any of the property subject to forfeiture to any specific offense. Joan Hall also testified, focusing on the legitimate sources of substantial sums of cash and the use of Dr. Frumker's credit cards over the years, as well as on authenticating numerous exhibits to the same effect.

On February 9, 2009, the trial court issued its forfeiture ruling. In a Solomon-like gesture, it simply divided Joan Hall's remaining assets into cash and goods, giving the State

[7] Tr. p. 6093.

approximately $3,000,000 in cash and allowing Ms. Hall to retain the personal property. The court did so without explanation and without identifying which forfeiture statute it applied. The entry merely ordered that "all . . . currency seized by law enforcement and investment accounts (presently liquidated) are subject to forfeiture. All other personal property held in storage . . . as listed in State's motion for forfeiture are to be released to Joan Hall and/or her authorized agent."

The court of appeals rejected Ms. Hall's contention that the State was required to bring its forfeiture under the RICO forfeiture provision. It adopted the State's argument that it was entitled to proceed under the former contraband statute. The court also stated that "the trial court was vested with the authority to consider the state's forfeiture petition under the new statute. [R.C. 2981.04]"[8]

However, the court of appeals did not pursue the next step in the analysis – to what extent was it "practical" to apply R.C. 2981.04 retroactively? The superseding indictment failed to include the forfeiture specification and information required by R.C. 2981.04(A)(1) and former R.C. 2923.32(B)(4). The trial court made no verdict of forfeiture as required by R.C. 2981.04(B) and former 2923.32(B)(4). Finally, the trial court also failed to include the forfeiture in the sentencing entry, as required by R.C. 2981.04(C) and former R.C. 2923.32(B)(3) and (4). The court of appeals concluded its analysis without addressing these issues.

The court of appeals ordered supplemental briefing on whether the forfeiture entry is a final appealable order under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. Ms. Hall responded that the requirements of *Baker* do apply because a judgment of forfeiture is part of

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[8] *State v. Hall*, 2010-Ohio-1665, ¶15.

the criminal sentence. She further argued that the forfeiture entry is incomplete because it does not include the entire judgment. Although it raised this issue sua sponte, the court of appeals did not address this issue in its decision.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: In a RICO prosecution initiated before the enactment of R.C. 2981.04, the trial court has no authority to order forfeiture if the State fails to include in the indictment the forfeiture language required by former R.C. 2923.32(B) and by R.C. 2981.04.

When the indictment and superseding indictment were filed in this case, there were a number of forfeiture provisions scattered through the Ohio criminal code. Two of those provisions are implicated in this case: the RICO forfeiture provision, former R.C. 2923.32, and the contraband forfeiture provision, former R.C. 2933.43. In 2007, the General Assembly enacted H.B. 241, which amalgamated the various criminal and civil forfeiture provisions and standardized the forfeiture process in Chapter R.C. 2981. The criminal forfeiture process in R.C. 2981.04 incorporates the protections that first appeared in the RICO forfeiture statute, former R.C. 2923.32(B), i.e., the requirement that the forfeiture be included in the indictment so the Grand Jury can identify the property subject to forfeiture, the requirement for a verdict of forfeiture, and the requirement that the forfeiture be included in the sentencing entry.

The former contraband forfeiture statute, former R.C. 2933.43, made it clear that before the enactment of H.B. 241, the RICO forfeiture provision was the *exclusive* means for seeking forfeiture where the property "is lawfully seized in relation to a [RICO] violation[.]" In addition, the RICO forfeiture statute mandated forfeiture in RICO cases, as part of the sentence, of property that was used in the RICO violation, was derived from the violation or

was proceeds from the violation.[9] Thus, it cannot be gainsaid that the RICO forfeiture provisions were the exclusive means of obtaining forfeiture of property seized in relation to a RICO violation.

The issue becomes whether the $3,000,000 in cash was seized in relation to the RICO violation of which Ms. Hall was convicted. The State argued on appeal that it merely sought forfeiture under the former contraband statute and that the $3,000,000 in cash was seized only as contraband derived from the thefts of which Ms. Hall was convicted. The court of appeals unreasonably rejected Ms. Hall's contention that the cash was seized in relation to the RICO violation. It held the cash was seized in relation to the theft offenses, and denied relief.

This conclusion is unsupported by the record. The property subject to forfeiture was not seized solely as contraband. As the prosecutor argued to the trial court, the "cash we've established . . . that it arises out of unlawful activity and arising out of specifically the theft occurrences . . . as well as RICO and money laundering[.]"[10] The State further argued that it "believes that it is overwhelming, given the broad nature of this activity covering years, and . . . over a long period of time involving laundering and involving RICO, that we have a lot of money and we have admissions and we have cash being squirreled away in [a] safety deposit box, that in itself is a connection that is reasonable and sufficient nexus under the old statute and even clearly under the new statute with proceeds, which is either directly or indirectly arising out of unlawful conduct."[11]

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[9] Former R.C. 2923.32(B)(3).
[10] Tr. p. 6135.

[11] Tr. p. 6139.

More importantly, in a RICO prosecution, there are no proceeds from the RICO violation per se. By definition, all the proceeds of that violation are the proceeds from the predicate offenses constituting the pattern of corrupt activity, as noted in Proposition of Law No. II, below. The reasoning of the Court of Appeals ignores this reality. It allows the State to evade the protections the General Assembly provided in former R.C. 2923.32(B)(4) and incorporated into R.C. 2981.04, simply by engaging in the charade that the proceeds of the predicate offenses are not related to the RICO violation.

Even if, as the State argued, R.C. 2981.04 should be applied to this case, the State would still have been required to submit the forfeiture as a specification in the indictment for the Grand Jury to determine the extent of the property to be forfeited. R.C. 2981.04 includes the protections that were included in former R.C. 2923.32(B). It requires the forfeiture to be included as a specification in the indictment for the Grand Jury to determine the extent of the property subject to forfeiture, it requires a special verdict from the fact-finder as to the extent of the property subject to forfeiture, and it requires the forfeiture to be included in the sentence.[12] Courts have consistently held that forfeitures are that "[f]orfeitures are not favored in law or in equity. Therefore, statutes providing for a forfeiture of property must be strictly construed."[13]

Here, the State elected to pursue forfeiture under the contraband statute rather than the RICO statute. Because the State did not include the forfeiture in the indictment, as required by former R.C. 2923.32(B) and R.C. 2981.04, the court had no authority to entertain the forfeiture petition.

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[12] R.C. 2981.04(A)(1), (B), and (C).

[13] *State v. Conley*, Preble App. No. CA90-11-023, 1991 Ohio App. LEXIS 3343, *14 (July 15, 1991), citing *State* v. *Abboud* (1985), 27 Ohio App.3d 209, 210.

Proposition of Law No. II: Under former R.C. 2933.43(F), the forfeiture of property seized in relation to a RICO violation is controlled by former R.C. 2923.32(B)(3) and (B)(4) and by R.C. 2981.04. Property seized as contraband used in the commission of one of the predicate felonies upon which a RICO violation is based constitutes "property that is lawfully seized in relation to" the RICO violation for the purposes of former R.C. 2933.43(F) and R.C. 2981.04.

The RICO statutes criminalize participation in an enterprise's pattern of corrupt activity. R.C. 2923.32(A)(1). Therefore, a conviction for engaging in a pattern of corrupt activity is based upon the convictions for the underlying predicate offenses constituting that pattern. This means that the property subject to forfeiture under the RICO statute, i.e., "property . . . that was used in the course of . . . a violation of this section, or that was derived from . . . conduct in violation of this section[,]" must necessarily include the proceeds derived from thefts, fraud, and money-laundering offenses that were part of the pattern of corrupt activities in this case.

In other words, property that is seized as contraband under R.C. 2933.43 constitutes property seized in relation to RICO violation under R.C. 2923.32 if the property was used in or derived from a predicate offense. By definition, all property subject to forfeiture in a RICO prosecution was used in or derived from the illegal acts that constitute the pattern of corrupt activity.

Former R.C. 2933.43(F), the contraband forfeiture statute, provides that "[n]otwithstanding any provisions of this section to the contrary, any property . . . seized in relation to a violation of section 2923.32 [the RICO statute] . . . shall be subject to forfeiture . . . in accordance with sections 2923.32 to 2932.36 of the revised code." That is, the General Assembly expressed its intention to treat property that is derived from the predicate acts that form the basis of the RICO violation as having been seized in relation to the RICO violation, thus rendering them subject to the more rigorous RICO forfeiture process.

Proposition of Law No. III: In a case involving a criminal forfeiture that began before the enactment of H.B. 241 and was still pending on its effective date of July 1, 2007, the court must determine whether it is "practical" to apply R.C. 2981.04 as provided in Section 4 of Sub. H.B. 241. In those circumstances when R.C. 2981.04 incorporates the requirements of the former forfeiture statute, it is "practical" to apply R.C. 2981.04.

The trial court erred when it applied R.C. 2981, the new forfeiture statute, in a piecemeal fashion. R.C. 2981 is a consolidation of several preexisting forfeiture provisions that had previously been scattered throughout the criminal code. The forfeiture amendment "significantly changed" the "surrounding forfeiture sections," which were "repealed and replaced by R.C. Chapter 2981 effective July 1, 2007."[14] In passing H.B. 241, the General Assembly indicated that courts should apply R.C. 2981 to pending forfeiture cases to the extent that it is "practical" to do so.[15]

Although the General Assembly did not clarify the meaning of the phrase "to the extent practical,"[16] the Seventh District Court of Appeals recently considered whether to apply the amendment to a pending case, there in the context of a felony drug offense.[17] The court held application to be practical only upon finding that "[the defendant's] indictment included a forfeiture specification pursuant to R.C. 2925.42."[18] This approach is eminently reasonable, because the requirements of the old statute are the same as the new one.

The facts are different here. Ms. Hall's indictment did not include any references to forfeiture and did not identify the property subject to forfeiture. The court of appeals, however, unreasonably allowed the forfeiture to stand under R.C. 2981.04 without enforcing the indictment requirement. That requirement was in both the former provision and R.C.

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[14] *State v. Watkins*, 2008 Ohio 6634; 2008 Ohio App. LEXIS 5539, ¶ 30.
[15] 2006 Sub. H.B. 241, section 4.
[16] Id.
[17] See *Watkins*, 2008 Ohio 6634 at ¶ 31.
[18] Id.

2981.04. It was, therefore, unreasonable to fail to apply that indictment requirement – that is, application of R.C. 2981.04 was "practical."

Proposition of Law No. IV: *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, applies to entries granting forfeitures in criminal cases.

State v. Baker, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, applies to entries granting forfeiture. The court of appeals ordered supplemental briefing on this issue. Ms. Hall responded that a judgment of forfeiture is part of the criminal sentence, under both R.C. 2981.04 and former R.C. 2923.32(B)(4)(a). Therefore, the requirements of *Baker* do apply to the forfeiture entry. The forfeiture entry in this case is incomplete because it does not include the entire judgment. The final sentence of the entry provides, "[a]ll monies forfeited shall be distributed in accordance with this court's 8/16/07 judgment." Thus, anyone relying on or enforcing that entry must look at a second entry to determine how to proceed. It therefore fails to comply with Criminal Rule 32(C) and *Baker*. The court of appeals did not address this issue in its decision.

CONCLUSION

Therefore, Ms. Hall respectfully asks this Court to accept jurisdiction over her case as it involves a felony and presents questions of great general interest.

Respectfully submitted,

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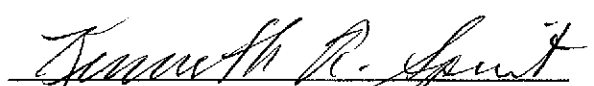
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF JOAN HALL has been served upon William D. Mason, Cuyahoga County Prosecutor, 9th Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 10th day of June, 2010.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No.
Plaintiff-Appellee,	:	
		On Appeal from the Cuyahoga
v.	:	County Court of Appeals
		Eighth Appellate District
JOAN HALL,	:	
		Cuyahoga County Court of Appeals
Defendant-Appellant.	:	Case No. 92952

APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION OF JOAN HALL

APR 30 2010

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

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FILED AND JOURNALIZED
PER APP.R. 22(C)

APR 26 2010

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ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED

APR 15 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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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).

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MELODY J. STEWART, P.J.:

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.

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.

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:

"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.

"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.

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

Appellant timely appeals raising three errors for our review.

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.

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"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.

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[.]"

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.

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.

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:

"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.

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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."

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.

Appellant's first assignment of error is overruled.

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.

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

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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.

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).

The second assignment of error is overruled.

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.

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.

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.

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

"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."

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.

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.

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.

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.

"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

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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.

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.

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

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