



Is Possession of Cash Evidence of a Crime?

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Although possession of a large sum of cash may suggest criminal activity, police discovery of a substantial amount of currency is not enough alone to justify the government's confiscation of the money. Thus, on August 10, 2022, a divided panel of the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) *overturned* a district court order of summary judgment regarding the confiscation of cash discovered at the scene of a car crash. “[T]he [g]overnment *argue[d]* that lawful citizens do not carry around large amounts of cash” and consequently that the cash was forfeitable as the proceeds of drug trafficking. Yet, when the government comes upon cash and seeks to confiscate it, the government bears the burden of proving that the cash is forfeitable by virtue of its connection to some forfeiture-triggering crime. In *United States v. McClellan*, the Fourth Circuit *held* that the government had failed to satisfy its burden.

Background

As recounted by the Fourth Circuit, in January 2019, Dereck McClellan *crashed* his car at a service station. At the time, he lived with Yvonne Silver and their three children in a mortgage-free home he had inherited. He had also inherited \$110,000, some of which he used as “seed money” for Silver’s consumer products business. McClellan “*had a long criminal record*” as well—a 2002 conviction for unlawfully carrying a weapon, another conviction in 2007 for cocaine trafficking, a third in 2008 for assault and battery and receiving stolen property, and a fourth in 2013 for possession of marijuana with intent to distribute.

When police *arrived* at the scene of the crash, they found McClellan passed out in the car with an empty bottle of Hennessey beside him and a marijuana blunt in the ash tray. Bundles of cash, totaling close to \$70,000, were scattered throughout the car. McClellan had two medical marijuana identity cards on him and admitted he had been smoking marijuana.

Local police arrested McClellan at the scene, seized the cash, and charged him with public drunkenness and driving in violation of the state’s “open bottle” law. The U.S. Department of Homeland Security (DHS) *conducted* ion scans on the currency, which tested positive for cocaine and an explosive substance. DHS initiated civil confiscation proceedings. McClellan and Silver filed claims for the cash, which they described as proceeds from Silver’s business. The district court *granted* the government’s motion for summary judgment, concluding there was no dispute that the seized cash currently constituted the proceeds of drug trafficking.

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The Declaration of Independence
The Constitution of the United States
The Bill of Rights
Amendments XI–XXVII
Gettysburg Address



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Legal Context

Although forfeiture ordinarily begins with a confiscation-triggering criminal offense, federal law classifies forfeitures as civil or criminal according to the nature of proceedings by which confiscation is accomplished. Criminal forfeiture occurs in conjunction with the criminal prosecution of the accused property owner.

Federal civil forfeiture proceedings treat crime-tainted property as the defendant and begin with a seizure of the property. The federal agency with custody of the property notifies owners and others with an interest in the property of their right to insist on judicial forfeiture proceedings. If no one comes forward, the agency may confiscate the property administratively. When claimants challenge the proposed forfeiture, the government files a civil complaint against the property in federal district court and bears the burden of establishing that the property at issue is forfeitable by virtue of relationship to a forfeiture-triggering offense such as drug trafficking.

Fourth Circuit Decision

In *McClellan*, DHS obtained an arrest warrant for the cash and notified McClellan and Silver of its intent to confiscate. When they challenged the proposed forfeiture, the government filed a civil complaint in district court naming the cash as defendant. After an exchange of interrogatories (civil discovery), the government moved for summary judgment. A district court must deny a motion for summary judgment if no jury could reasonably fail to find that the moving party had proven his or her case. The *McClellan* district court granted the government's motion, and McClellan and Silver appealed.

A majority of the Fourth Circuit panel reversed, concluding that a reasonable jury could interpret the evidence to support either party. From the majority's perspective, McClellan's criminal record might suggest a propensity to engage in drug trafficking, but the Federal Rules of Evidence precluded such an inference. According to the majority, cash not infrequently tests positive for cocaine without affording any necessary inference of where, when, or how the money acquired the taint. The medical marijuana cards might also just as easily be seen to imply personal use rather than trafficking, the majority reasoned. Finally, although the court indicated that McClellan and Silver's tax records looked "fishy," the records did not raise a necessary inference the couple was drug dealing. McClellan and Silver offered evidence of legitimate sources of income that a jury might have found creditable, in the appellate court's view—McClellan's inheritance of \$110,000 in addition to Silver's insurance payout, sales of two cars, and employment at a bar.

The majority also rejected the government's attempt to invoke the *res ipsa loquitur* legal doctrine. Under that doctrine, arising in tort, "when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence in the absence of explanation, that the injury arose from the defendant's want to care." By the same token, the government argued that "lawful citizens do not carry around large amounts of cash that are rubber-banded and bundled, so the Claimants must explain the source of the cash, or the [g]overnment is entitled to summary judgment." The court pointed out, however, that even if McClellan and Silver offered no explanation, "the jury could still conclude that, given the dearth of direct evidence of drug dealing, the cash does not constitute drug proceeds."

A dissenting member of the Fourth Circuit panel felt that the government "presented ample evidence that McClellan was transporting drug money and that the cash in his car was subject to forfeiture."

The decision confirms that possession of even a large amount of cash does not justify confiscation of the money without further evidence of wrongdoing.

Author Information

Charles Doyle
Senior Specialist in American Public Law

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