IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1118

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

VIOLANDA DELGADO MOJICA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-320-G)

(August 4, 1994)

Before REYNALDO G. GARZA, SMITH, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Violanda Mojica appeals, on double jeopardy grounds, the institution of a criminal prosecution for possession of cocaine after the government's successful civil forfeiture proceeding. Concluding that the prosecution was not barred, we affirm.

I.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Agents of the Drug Enforcement Administration executed a search warrant at Mojica's home in Dallas and seized more than 500 grams of cocaine. The government filed a complaint for forfeiture in rem pursuant to 21 U.S.C. § 881(a)(6) and (7) against certain real and personal property belonging to Mojica. The complaint alleged that various items of personal property were utilized in drug trafficking or were proceeds from the sale of illegal drugs, in violation of § 881(a)(6). The complaint also alleged that the real property was used to facilitate the storage and distribution of illegal drugs, in violation of § 881(a)(7). Mojica did not contest the forfeiture, and the court did not state which provision the forfeiture was pursuant to.

Mojica received a one-count indictment for possession of cocaine with intent to distribute. She filed a plea in bar, asking the court to dismiss the criminal prosecution on the ground that an action subsequent to her civil forfeiture was a violation of the Double Jeopardy Clause. The district court denied the plea in bar, and Mojica pleaded guilty.

II.

Mojica claims that the criminal prosecution violated the Double Jeopardy Clause under United States v. Halper, 490 U.S. 435 (1989). We review this legal question de novo.

In Halper, 490 U.S. at 448-49, the Court held that a criminal conviction can bar a subsequent civil penalty for the same act when the amount of the civil fine bears no rational relation to the

government's loss and is therefore a second "punishment." A civil sanction constitutes criminal punishment only in the "rare case" in which the amount of the sanction is "overwhelmingly disproportionate" to the damages caused by the wrongful conduct and thus "bears no rational relation to the goal of compensating the government for its loss, but rather appears to qualify as `punishment' within the plain meaning of the word." Id. at 449.

This court has recognized that the Halper principle also applies when, as here, the civil penalty precedes the criminal conviction. United States v. Sanchez-Escareno, 950 F.2d 193, 200 (5th Cir. 1991), cert. denied, 113 S. Ct. 123 (1992). Therefore, Mojica argues, her prior civil forfeiture liability bars her criminal conviction for the same acts.

With regard to § 881(a)(6), we have rejected this same claim in United States v. Baxter, No. 92-8556 (5th Cir. Oct. 15, 1993) (unpublished), and United States v. Tilley, 18 F.3d 295 (5th Cir. 1994). In Baxter, we held that "the Halper principle does not apply to civil forfeitures of the instrumentalities of crime." Slip op. at 5 (citing United States v. McCaslin, 959 F.2d 786 (9th Cir.), cert. denied, 113 S. Ct. 382 (1992)). In Tilley, 18 F.3d at 300, the panel concluded that "forfeiture of the proceeds from illegal drug sales does not constitute punishment."

Mojica also argues that Austin v. United States, 113 S. Ct. 2801, 2812 (1993), supports her claim. In Austin, the Court held that forfeiture under § 881(a)(7) was a punishment and cannot be considered solely remedial. The Court remanded for consideration

of whether the civil forfeiture provision violated the Excessive Fines Clause. Id. The case did not implicate or discuss the Double Jeopardy Clause.

Mojica argues that Austin affords her relief. We disagree. First, Mojica does not claim that the forfeiture was excessive, so Austin does not directly apply. Second, Austin did not purport to overrule Halper. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484-85 (1989) (courts of appeals should not assume that the Supreme Court has overruled a prior decision sub silentio). Therefore, even if § 881(a)(7) is a punishment under Austin, we still must apply the Halper rational relation test. And third, the total forfeiture here, valued at approximately $34,000, was not "overwhelmingly disproportionate" to the governmental costs. See Tilley, 18 F.3d at 299 (finding $650,000 forfeiture not excessive in large-scale drug operation). Therefore, Mojica's argument is without merit.

AFFIRMED.