

THE ETHICS OF ASSET FORFEITURE PROGRAMS

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Topic Coverage

- Trust and confidence of community in administration and enforcement of law
- Asset Forfeiture
 - Public interest in prosecution
 - Police agency interest in seizing/forfeiting valuable assets
- Principles to be applied in objective, neutral administration of law



He avoided drug charge; cops got his Mercedes

Posted: Jan. 13, 2007



Eugene Kane

It sounds like "Miami Vice," with tales of drug deals, secret informants and an expensive sports car. But this is a case of "Milwaukee Vice."

The Milwaukee Police Department is accused of taking possession of a Mercedes-Benz convertible from a drug-addicted local businessman in return for agreeing not to prosecute him for cocaine possession.

The businessman, Jordan M. Beck, was president of Mill Valley Recycling, a scrap metal business on the south side. Beck died at 42 from a drug overdose five months after his June 2005 arrest.

Now Beck's family is trying to get the car back, arguing that he was pressured into making the deal and that he might be alive today if police had treated him as an ordinary drug offender.

In one of his last actions as Milwaukee County district attorney, E. Michael McCann wrote last month to Police Chief Nannette Hegerty that the deal appeared not to pass the smell test.

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"Last summer, representatives of the Beck family complained to this office that in lieu of not being charged with a misdemeanor possession offense, Mr. Beck signed over to your department a Mercedes-Benz SL55, reportedly worth approximately \$100,000," McCann wrote to Hegerty on Dec. 22. The letter does not identify the officers involved.

"In brief, the family claims Beck did this only because it was threatened that the fact he had been

State of Fla. v. LeVin

- 2/13/2009 – after a night of drinking, Ryan LeVin was racing his Porsche 911 Turbo against a BMW, down Ft. Lauderdale Beach, at more than 100 mph
- Veers onto sidewalk, hits two British pharmaceutical representatives, knocking them 50 feet

Two pedestrians killed

Police say two pedestrians were hit and killed early Friday along State Road A1A in Fort Lauderdale by a speeding car.



Source: Fort Lauderdale Police Department

Belinda Long-Ivey SUN SENTINEL



State of Fla. v. LeVin

- LeVin leaves scene of accident; abandons his car on I-595
- Denied driving the car, claiming it was a drinking buddy who was driving the Porsche
- On probation in Illinois for high speed chase that injured two motorists and a policeman
- String of traffic violations in Illinois, Texas, and Florida; cocaine possession conviction

State of Fla. v. LeVin

- LeVin charged with two counts of vehicular homicide and leaving scene of accident
- June 2011: pleads guilty
- Settlement reached with survivors of two victims
- Prosecution asks for ten years' confinement
- Sentenced to two years' house arrest
 - Judge finds need for restitution outweighs need for prison

Threatening Criminal Charges in Civil Litigation

- America Bar Ass'n Code of Professional Responsibility DR-7-105(A)
 - A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter
- Unethical to threaten to bring criminal charges in order to gain leverage in a civil matter

Ethical Obligations in Civil Litigation

- Subversion of criminal justice system, which is designed to protect society as a whole, to permit its use to advance interests of private litigants
- ABA Model Rules of Prof. Conduct, first promulgated in August 1983, did not include a similar provision

Ethical Obligations in Civil Litigation

- ABA Formal Opinion 92-363 (Jul. 6, 1992):
Omission was on purpose because the drafters believed other provisions in the MRPC achieved the same result
- MRPC does not prohibit a lawyer from using the possibility of presenting criminal charges if:
 - The criminal matter is related to the civil claim

Global Settlements – Civil Litigator's Ethical Obligations

- The lawyer has a well-founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts; and
- The lawyer does not attempt to exert or suggest improper influence over the criminal process

Ethical Obligations in Criminal Litigation

- Release-Dismissal Agreements: in exchange for a release from civil liability, prosecutor agrees to dismiss criminal charges
- Such agreements are not per se unlawful
- *Town of Newton v. Rumery*, 480 U.S. 386 (1987)

Town of Newton v. Rumery

- Temptation to prosecutors to lodge meritless charges in reaction to a potential civil rights claim by the defendant, or dismiss meritorious charges to protect government officials
- Leave deprivations of constitutional rights unremedied

Town of Newton v. Rumery

- Supreme Court upholds district court's enforcement of release-dismissal agreement
 - Great majority of prosecutors are faithful to their public trust and exercise independent judgment
 - Agreement was voluntary

Town of Newton v. Rumery

- Prosecutor had legitimate reason for making the agreement: protect complaining witness in sexual assault case
- Reason was independent of discretion to bring criminal charges and directly related to prosecutorial responsibilities

Compromise of Civil and Criminal Liability – Ethical Considerations

- Compromising criminal charges in exchange for forfeiture of assets
- Risk of undermining faith in the fairness of those who administer the criminal process
- Public criminal justice interests are explicitly traded against the private financial interests of the individuals involved in the arrest and prosecution

Compromise of Criminal and Civil Liability – DOJ Standards

- U.S. Attorney's Manual § 9-113.100
- “The critical principle that must be applied to all settlements is that civil forfeiture, either judicial or administrative, should not be used to gain an advantage in a criminal case.”

Plea Bargaining – Ethical Considerations

- USAM § 9-113.106 – Settlement of Forfeiture in Conjunction with Plea Bargaining
- Gov't may conclude a civil forfeiture action in conjunction with the criminal charges against the defendant which provided the cause of action against the property

USAM § 9-113.106

- Gov't should not agree to
 - Releasing property subject to forfeiture (civil or criminal) in order to coerce a guilty plea on the substantive charges; nor
 - Agree to dismiss criminal charges in order to coerce a forfeiture settlement

DOJ Policy – USAM § 9-113.106

- “In all cases, agreements must be based upon facts which support forfeiture. The Department does not release property which is otherwise subject to forfeiture to encourage guilty pleas; nor does it permit defendants to submit property which is otherwise not subject to forfeiture in order to lighten the potential incarceration component of the punishment.”

Financial Incentives of Government

- *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 56 n.2 (1993)
- “The extent of the Government’s financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice’s annual budget target”

Create and Apply Ethical Standards

- Create written guidelines for handling seized/forfeited assets
- Develop standards for how asset forfeiture cases are to be compromised
- Enforce the standards/guidelines that are created

Guiding Principles

- Act for the benefit of the public
 - Just punishment for the criminals
- Avoid appearance of impropriety or loss of impartiality
 - Releasing assets subject to forfeiture in exchange for dismissing charges
 - Releasing assets subject to forfeiture in order to encourage guilty pleas

Guiding Principles

- Ensure there is a factual basis for every decision made
- Ensure factual basis is well documented
- Ensure the rationale for each decision is based upon factors directly related to law enforcement or prosecutorial functions

QUESTIONS?



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