

11-3474-cr
United States v. Roy Ageloff

1
2 UNITED STATES COURT OF APPEALS

3
4 FOR THE SECOND CIRCUIT

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8 August Term, 2012

9
10 (Argued: September 14, 2012 Decided: October 10, 2012)

11
12 Docket No. 11-3474-cr

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15
16 UNITED STATES OF AMERICA,

17
18 *Appellee,*

19
20 -v.-

21
22 ROBERT CATOGGIO, DONALD MESSINGER, BARRY MIELE, ALAN KOOP,
23 MARCELO QUINTERO, MICHAEL TROCCHIO, DOMINICK FRONCILLO,
24 STEPHEN AGNESE, ARTHUR ALONZO, JOHN ASARO, RANDY ASHENFARB,
25 ROCCO BASILE, WILLIAM JOSEPH BATTISTA, MICHAEL A. BENGEN,
26 JOHN BESARANY, NICHOLAS BOSCO, FABIO BORGOGNONE, NEIL
27 BRAUNER, NICHOLAS BRIGANTI, RONALD CATAGGIO, ANTHONY
28 CAVICCHIO, JOHN CLAUDINO, DAMON GERARD COHEN, WILLIAM
29 COSIDENTE, RONALD CROPPER, JR., JOSEPH DIBELLA, DAVID
30 DUNHAM, JONATHAN DURINDA, RUI REIS FIGUEIREDO, ROBERT
31 FIGUEROA, VITO GILI, VALERY GOLDBERG, GREGORY GROELLER,
32 THOMAS GUCCIARDO, JOHN LEMBO, III, RICO LOCASCIO, BRENT
33 CALDERONE LONGO, MARK MANCINO, PAUL MEDAGLIA, CHRISTOPHER L.
34 MIANO, VINCENT MINERVA, CHRISTOPHER MORMANDO, JAIME SCOTT
35 MORRILL, JOEL NAZARENO, VITO PADULO, MICHAEL PERRINE, SCOTT
36 PICCININNI, AKA SCOTT PALMER, AKA SCOOTER, FRANK J.
37 PIZZOLATO, AKA FRANKIE THE FISH, THOMAS PLAMENCO, JOSEPH
38 ROSETTI, KEITH RUFFLER, KIRK RUFFLER, MICHAEL SCARAMELLINO,
39 JOSEPH SCARFONE, JR., RICHARD SCARSELLA, PAUL TAHAN, JEFFREY
40 VAN BLARCOM, VICTOR VERNACI,

41
42 *Defendants,*
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44

ROY AGELOFF,

Defendant - Appellant.

Before:

POOLER, WESLEY, LOHIER, *Circuit Judges.*

Appeal from the August 19, 2011 Memorandum and Order of Restitution from the United States District Court for the Eastern District of New York (Dearie, J.) resentencing Defendant-Appellant Roy Ageloff to pay \$190 million in restitution to the victims of a massive fraud scheme perpetrated by Ageloff and his co-conspirators. Ageloff challenges this order on four grounds: (1) the district court erred by not holding an evidentiary hearing prior to resentencing; (2) the eight-year delay in resentencing violated Ageloff's constitutional and statutory rights; (3) the district court should have released some or all of the \$536,000 of Ageloff's money held by the court from the time of his initial sentencing; and (4) Ageloff was entitled to CJA funding for expert services. Should we remand, Ageloff requests that the case be reassigned and CJA counsel relieved. We affirm and hold that the district court properly exercised its authority under the All Writs Act to restrain Ageloff's funds in anticipation of resentencing.

AFFIRMED.

SCOTT L. FENSTERMAKER, Law Office of Scott L. Fenstermaker, P.C., New York, NY, *for Defendant-Appellant.*

DANIEL A. SPECTOR, Assistant United States Attorney (David C. James, Assistant United States Attorney, *on the brief*), *for* Loretta E.

1 Lynch, United States Attorney for the Eastern
2 District of New York, New York, NY, *for*
3 *Appellee*.
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9 PER CURIAM:

10 Defendant-Appellant Roy Ageloff appeals from the August
11 19, 2011 Memorandum and Order of Restitution by the United
12 States District Court for the Eastern District of New York
13 (Dearie, J.) resentencing Ageloff to pay \$190,339,436.65 in
14 restitution to the victims of a massive fraud scheme he and
15 his co-conspirators designed and executed. Ageloff
16 contends, *inter alia*, that the district court should have
17 released some or all of the \$536,000 of Ageloff's money held
18 by the court pending his resentencing. Whether a district
19 court may exercise its authority under the All Writs Act to
20 restrain a convicted defendant's funds in anticipation of
21 sentencing is a question of first impression in this
22 Circuit. We answer it in the affirmative and affirm the
23 district court's restitution order.

24
25 **Background**

26 Ageloff and his partner, Robert Catoggio, were the
27 leaders of a massive "pump-and-dump" securities fraud

1 scheme. From 1991 to 1998, Ageloff and Catoggio owned and
2 controlled four brokerage firms through which they defrauded
3 the firms' customers in connection with the purchase and
4 sale of different "House Stocks." Ageloff and Catoggio
5 acquired these securities cheaply and then sold their shares
6 at a substantial profit after creating artificial market
7 demand by offering incentives to brokers to aggressively
8 market the House Stocks. After this scheme unraveled,
9 Ageloff pled guilty to one count of racketeering and
10 stipulated to a sentence enhancement of eighteen levels for
11 fraud that amounted to losses exceeding \$80 million.¹

12 The district court sentenced Ageloff to 96 months'
13 imprisonment, three years' supervised release and \$80
14 million in restitution pursuant to the Mandatory Victims
15 Restitution Act ("MVRA"), 18 U.S.C. § 3663A. At the time of
16 his initial sentencing, Ageloff deposited approximately
17 \$536,000 with the clerk of the court for the purpose of
18 paying restitution. Ageloff subsequently appealed the

¹At the time Ageloff pled guilty, \$80 million was the highest possible loss bracket under the 1997 Federal Sentencing Guidelines Manual. See U.S.S.G. § 2F1.1(b)(1)(S); *United States v. Catoggio*, 326 F.3d 323, 325 (2d Cir. 2003). The highest possible loss bracket under the 2011 Federal Sentencing Guidelines Manual is \$400 million. See U.S.S.G. § 2B1.1(b)(1)(P).

1 district court's 2001 restitution order to this Court,
2 arguing, among other things, that the district court could
3 not order restitution without first identifying the victims
4 and their losses. See *United States v. Catoggio*, 326 F.3d
5 323, 324 (2d Cir. 2003). We agreed and remanded to the
6 district court for the limited purpose of resentencing in
7 accordance with the MVRA. *Id.* at 330; 18 U.S.C. §
8 3664(f)(1)(A).

9 On remand, the government submitted a report prepared
10 by the National Association of Securities Dealers ("NASD
11 Report") that synthesized trade-sheet data to identify and
12 tabulate the estimated \$190 million in losses suffered by
13 more than 9,000 victims. Although armed with the NASD
14 Report, eight years elapsed before the district court
15 resentenced Ageloff. The delay is partly traceable to
16 Ageloff's 2008 Florida prosecution for conspiracy to commit
17 money laundering in connection with the conviction at issue
18 here, as well as to a stay issued while Ageloff's petition
19 for a writ of certiorari was pending before the Supreme
20 Court. However, as the district court noted, the eight-year
21 delay on remand is not solely attributable to Ageloff. Over
22 the years, there were several changes of counsel on both
23 sides. And, indeed, the district court recognized that

1 responsibility "ultimately lies, as it must, with the
2 Court." See *United States v. Ageloff*, 809 F. Supp. 2d 89,
3 107 n.17 (E.D.N.Y. 2011).

4 In 2011, after reviewing Ageloff's objections to the
5 NASD Report, the district court incorporated the loss
6 information into its restitution order and sentenced Ageloff
7 to pay just over \$190 million. *Id.* at 97-98, 112. In its
8 order, the court also affirmed its prior rejection of
9 Ageloff's request to access some of his money held by the
10 court. *Id.* at 106. On appeal, Ageloff argues that the
11 district court improperly refused to release any of his
12 funds and consequently denied him the right to secure
13 counsel of his choice.

14 **Discussion²**

15
16 The All Writs Act enables federal courts to "issue all
17 writs necessary or appropriate in aid of their respective
18 jurisdictions and agreeable to the usages and principles of
19 law." 28 U.S.C. § 1651(a). The broad power conferred by

² Whether 28 U.S.C. § 1651 authorizes post-conviction, pre-sentencing restraint of a defendant's property is a legal issue. We therefore engage in *de novo* review. See, e.g., *United States v. Razmilovic*, 419 F.3d 134, 136 (2d Cir. 2005).

1 the All Writs Act is aimed at achieving "the rational ends
2 of law.'" *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172
3 (1977) (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)).
4 Thus, courts have significant flexibility in exercising
5 their authority under the Act. See *id.* at 173.

6 Although this Court has never addressed whether the All
7 Writs Act enables a court to restrain a convicted
8 defendant's property in anticipation of ordering
9 restitution, courts in this Circuit and beyond have
10 uniformly answered this question in the affirmative. See
11 *United States v. Hatfield*, No. 06-CR-0550, 2010 WL 4235815,
12 at *1 (E.D.N.Y. Sept. 27, 2010); *United States v. Numisgroup*
13 *Int'l Corp.*, 169 F. Supp. 2d 133, 138-39 (E.D.N.Y. 2001);
14 *United States v. Ross*, No. 92-CR-1001, 1993 WL 427415, at *1
15 (S.D.N.Y. Oct. 15, 1993); see also *United States v.*
16 *Sullivan*, No. 5:09-CR-302-FL-1, 2010 WL 5437243, at *5-*7
17 (E.D.N.C. Nov. 17, 2010); *United States v. Simmons*, No. 07-
18 CR-30, 2008 WL 336824, at *1 (E.D. Wis. Feb. 5, 2008);
19 *United States v. Runnells*, 335 F. Supp. 2d 724, 725-26 (E.D.
20 Va. 2004); *United States v. Abdelhadi*, 327 F. Supp. 2d 587,
21 598-601 (E.D. Va. 2004).

22

1 In reaching this conclusion, courts explain that a
2 sentencing court may use the All Writs Act to prevent the
3 defendant from frustrating collection of the restitution
4 debt. For instance, in *Ross*, a district court for the
5 Southern District of New York issued an order restraining
6 the convicted defendant's assets pending sentencing pursuant
7 to the All Writs Act. 1993 WL 427415, at *1. The
8 restraining order furthered the court's exercise of its
9 jurisdiction over sentencing by ensuring that the defendant
10 would have some assets available to satisfy the pending
11 restitution order. See *id.* at *1. Even though the exact
12 amount of restitution to be ordered was unclear, the
13 district court determined that there was "a real question as
14 to whether or not [the defendant] currently has sufficient
15 liquid assets to satisfy any judgment of restitution ordered
16 by the Court," and it therefore "seem[ed] totally
17 appropriate to restrain [the defendant] from dissipating his
18 assets prior" to sentencing. *Id.* (emphasis added).

19 Relying on *Ross*, the Eastern District of New York used
20 the All Writs Act to restrain the defendants' 26,600 coins
21 (valued somewhere between \$430,000 and \$860,000) in
22 anticipation of sentencing. *Numisgroup Int'l Corp.*, 169 F.
23 Supp. 2d at 136-38. The court reasoned that "[t]here is no

1 logic to the position that the Court is powerless to enter a
2 restraining order after a jury has found a defendant guilty
3 of participating in a large-scale fraud simply because
4 sentencing has been delayed.'" *Id.* at 138 (quoting *Ross*,
5 1993 WL 427415, at *1). In explaining its order, the court
6 also expressed concern over one defendant's lack of assets
7 available to satisfy the court's future order of
8 restitution. *See id.* at 138.

9 Similarly, in *Sullivan*, the Eastern District of North
10 Carolina determined that a restraining order was warranted
11 pursuant to the All Writs Act because the defendant, who had
12 previously pled guilty to eleven counts of manufacturing
13 child pornography and one count of possession of child
14 pornography, was attempting to dispose of his assets prior
15 to sentencing and a probable order of restitution. 2010 WL
16 5437243, at *1, *7. The court explained that it would be
17 "'without any meaningful ability to impose a proper
18 sentence'" if it could not issue an order stopping a
19 convicted defendant awaiting sentencing from disposing of
20 assets in an effort to avoid paying restitution or other
21 fines and court costs. *Id.* at *6 (quoting *United States v.*
22 *Gates*, 777 F. Supp. 1294, 1296 n.7 (E.D. Va. 1991)).

23

1 The Eighth Circuit recently issued a set of decisions
2 that strongly suggest it takes a similar position regarding
3 a sentencing court's ability to restrain a defendant's funds
4 pursuant to the All Writs Act. *See United States v.*
5 *Yielding*, 657 F.3d 688 (8th Cir. 2011) ("*Yielding I*"); *see*
6 *also United States v. Yielding*, 657 F.3d 722 (8th Cir. 2011)
7 ("*Yielding II*"). In *Yielding I*, the Eighth Circuit vacated
8 and remanded the district court's approximately \$1 million
9 restitution order after finding that the court below erred
10 in presuming that restitution was mandatory. *See* 657 F.3d
11 at 718-19. In *Yielding II*, decided on the same day, the
12 court affirmed the district court's issuance of a TRO to
13 prevent the defendant from spending or transferring any of
14 the \$160,000 he was likely to receive as a settlement in an
15 unrelated civil case. 657 F.3d at 727-28. The Eighth
16 Circuit confirmed the district court's authority to issue
17 the TRO pursuant to the All Writs Act because the
18 restraining order was appropriate in aid of the court's
19 exercise of jurisdiction to ensure that the defendant's
20 assets were available for paying restitution. *See id.* at
21 726-28. "We agree that a sentencing court has jurisdiction
22 to enforce its restitution order and may use the All Writs
23 Act, when necessary and appropriate, to prevent the

1 restitution debtor from frustrating collection of the
2 restitution debt." *Id.* at 727. Because the Eighth Circuit
3 vacated the restitution order itself on the same day it
4 affirmed the TRO, the court effectively held that the All
5 Writs Act gave the district court the power to issue a
6 restraining order for the purpose of ensuring that
7 sufficient funds would be available to satisfy any future
8 order of restitution.

9 Aided by the relevant case law, we conclude that the
10 district court properly exercised its authority under the
11 All Writs Act to restrain Ageloff's assets in anticipation
12 of resentencing.³ Ageloff pled guilty to committing a crime
13 for which restitution is mandatory under the MVRA. *See* 18
14 U.S.C. § 3663A(c)(1)(A)(ii). Given that Ageloff agreed to a
15 sentencing enhancement for fraud causing losses of \$80
16 million or more, the eventual restitution order was certain
17 to exceed \$536,000. *See Catoggio*, 326 F.3d at 329.
18 Although we believe that this circumstance alone would be
19 sufficient to justify the district court's exercise of its

³ That the district court did not cite to the All Writs Act in reaching its decision is of no consequence; we are free to affirm on any legal basis for which there is sufficient support in the record. *See, e.g., Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987).

1 power under the All Writs Act, other facts highlight the
2 need to ensure compliance with the district court's
3 anticipated order of restitution: specifically, Ageloff's
4 2008 conviction for conspiring to launder millions of
5 dollars in proceeds from this fraud scheme.

6 Moreover, Ageloff's argument that the district court's
7 refusal to release any of his money denied him the right to
8 counsel of his choice in violation of the Sixth Amendment is
9 without merit. In *United States v. Monsanto*, the Supreme
10 Court held that a pretrial restraining order freezing the
11 defendant's assets did "not 'arbitrarily' interfere with a
12 defendant's 'fair opportunity' to retain counsel." 491 U.S.
13 600, 616 (1989) (quoting *Powell v. Alabama*, 287 U.S. 45, 69,
14 53 (1932)). This reasoning applies with "even greater
15 force" here because Ageloff had already pled guilty to both
16 the underlying fraud scheme and later to attempting to
17 launder its proceeds from his prison cell. See *Numisgroup*
18 *Int'l Corp.*, 169 F. Supp. 2d at 139. In any event, Ageloff
19 was ably represented by CJA counsel at the time of
20 resentencing and for purposes of this appeal.

21 Ageloff's remaining arguments on appeal are without
22 merit. For example, contrary to Ageloff's assertions, the
23 district court was not required to hold an evidentiary

1 hearing prior to resentencing provided that Ageloff was
2 afforded sufficient opportunity to be heard. *See United*
3 *States v. Slevin*, 106 F.3d 1086, 1091 (2d Cir. 1996). He
4 was. Finally, Ageloff cannot make out any constitutional or
5 statutory claim based on the eight-year delay in
6 resentencing because he did not suffer prejudice. *Cf.*
7 *United States v. Ray*, 578 F.3d 184, 202 (2d Cir. 2009).

8

9

Conclusion

10 For the foregoing reasons, the order of the district
11 court is hereby **AFFIRMED**.