IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 65,551

LAWSON L. LAMAR, SHERIFF OF
ORANGE COUNTY, FLORIDA,

Appellant,

vs.

UNIVERSAL SUPPLY COMPANY,
INC.,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
OF THE STATE OF FLORIDA

INITIAL BRIEF FOR THE APPELLANT

Peggy M. Morris
Attorney for the Appellant
Sheriff of Orange County
2400 West 33rd Street
Orlando, Florida 32809
(305)420-3062

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STATEMENT OF FACTS AND CASE

On or about July 22, 1983, by authority of the Florida Contraband Forfeiture Act (Florida Statutes 932.701-704), the Sheriff of Orange County seized one 1980 white Oldsmobile 2-door, VIN 3X37NAM179969, from Lloyd J. and Geraldine F. Lisco, as the vehicle was used by Lloyd J. Lisco to facilitate the commission of a felony, to-wit: aggravated assault. The above-described vehicle is registered to and owned by Universal Supply Company, Inc. Lloyd J. and Geraldine F. Lisco are the sole officers, directors and shareholders of Universal Supply Company, Inc.

On July 29, 1984, only seven days after seizure, Universal Supply Company, Inc. (hereinafter referred to as "Universal") filed a Complaint for Rule to Show Cause and for Final Order Granting a Writ of Replevin (Appendix 1-3). These proceedings were brought in the Ninth Judicial Circuit, and the case was assigned to the Honorable Frank N. Kaney, Judge of the Circuit Court.

On August 3, 1983, the Sheriff of Orange County filed a Motion to Dismiss the Complaint for Replevin and Order to Show Cause and further filed a Motion for Attorney's Fees and Costs (Appendix 4-8).

On August 26, 1983, after a preliminary hearing on the matter, the trial court granted Universal's Rule to Show Cause and denied the Sheriff's Motions to Dismiss and for Attorney's Fees and Costs. The court further stated that a Writ of

Replevin in favor of Universal would issue if the Sheriff did not file the forfeiture action within seven days.

On August 29, 1983, the Honorable Frank N. Kaney signed an Order returning the vehicle, effective September 3, 1983 (Appendix 9). The Sheriff of Orange County filed a Notice of Appeal of Non-Final Order, as amended, on September 6, 1983 (Appendix 10), the same day the Sheriff was served with the Order of August 29, 1983.

The Fifth District Court of Appeal, on June 7, 1984, filed its Opinion, wherein it held that a portion of Florida Statute 932.703(1) is unconstitutional. The court further held that Universal Supply Company, Inc. was not required to comply with the mandatory language of Florida Statute Chapter 78 due to the fact that the Defendant in the replevin action was a sheriff.

From this Opinion, declaring a portion of a statute unconstitutional, the Sheriff of Orange County appeals.

QUESTIONS PRESENTED

1. IS FLORIDA STATUTE 932.703(1), WHEREIN IT STATES, "NEITHER REPLEVIN NOR ANY OTHER ACTION TO RECOVER ANY INTEREST IN SUCH PROPERTY SHALL BE MAINTAINED IN ANY COURT, EXCEPT AS PROVIDED BY THIS ACT," UNCONSTITUTIONAL AS BEING VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT?

2. IS A PLAINTIFF IN A REPLEVIN ACTION REQUIRED TO COMPLY WITH FLORIDA STATUTE 78.067 WHERE THE PARTY DEFENDANT IS THE SHERIFF OF THE COUNTY?

ARGUMENT

FLORIDA STATUTE 932.703(1), WHEREIN IT STATES, "NEITHER REPLEVIN NOR ANY OTHER ACTION TO RECOVER ANY INTEREST IN SUCH PROPERTY SHALL BE MAINTAINED IN ANY COURT, EXCEPT AS PROVIDED BY THIS ACT," IS NOT VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT.

Florida Statute 932.703(1) states that:

> Neither replevin nor any other action to recover any interest in such property shall be maintained in any court, except as provided by this Act.

The trial court, however, in the case below, issued an Order to Return Property (purported to be a Writ of Replevin) in favor of the claimant despite the fact that the subject vehicle was seized pursuant to the forfeiture statute. The rationale of the lower court, in granting the Writ, was that no forfeiture proceeding existed since the Sheriff had not yet filed a petition for forfeiture, pursuant to Florida Statute 932.704.

Florida Statute 932.703(1) makes no mention of "proceeding". It merely states, unambiguously, that when property is seized pursuant to the Florida Contraband Forfeiture Act, no action shall be maintained except as provided by the Act. There is no statutory requirement, expressed or implied, that a petition for forfeiture must be filed before the clause is operative.

Nonetheless, the 5th District Court of Appeal affirmed the trial court. The appellate court, however, took the lower

court's rationale one step further and found the above-cited clause of Florida Statute 932.703 unconstitutional as violative of the due process clause of the 14th Amendment.

Appellant, relying on the 5th District Court of Appeal's Opinion in Sandidge v. State ex rel. City of Oviedo, 424 So.2d 152 (Fla. 5th DCA 1982), argued below that due process is met provided that the claimant is afforded a prompt hearing, as required by Florida Statute 932.704.

In Sandidge, the court, while hesitating to set forth a hard and fast rule, held that a 6-month delay between seizure and filing the forfeiture action was not an unreasonable delay.[1]

The 5th District, however, in the Opinion from which this appeal emanated, distinguished the issue in Sandidge from the instant appeal due to Universal's raising of the due process issue prior to the Sheriff's filing a forfeiture action, whereas, in Sandidge, the issue of promptness was raised after the fact. By the court's own argument in Sandidge, no such distinction can be supported.

Due process is due process, whether before or after the fact. The 5th District Court of Appeal, in the Opinion below,

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1 (It is interesting to note that in Sandidge, supra., the 5th District Court of Appeal did not even consider the time between the seizure and the resolution of the criminal case "to be a part of the formula for determining promptness". Sandidge, supra., at 153, in view of the case law providing that the criminal proceeding is irrelevant and inadmissible in the forfeiture action. Wille v. Karrh, 423 So.2d 963 (Fla. 4th DCA 1983); In Re: Forfeiture of One Yellow 1979 Fiat 2-Door Sedan, 414 So.2d 1100 (Fla. 1st DCA 1982); In Re: Forfeiture of Alcoholic Beverages Seized from Saul's Elks Club, 440 So.2d 65 (Fla. 1st DCA 1983).

seems to have made the distinction based upon semantics; due process versus promptness. Yet, in their analysis of the Sandidge issue, the court stated, "We are hesitant to announce a hard and fast rule defining 'promptly'. Whether a particular delay is of such a nature to violate due process is to be determined on a case-by-case basis."

The Sandidge court, in analyzing the promptness issue as a due process issue (even though it was raised "after the fact"), stated:

> [T]here are numerous federal decisions construing similar language in federal forfeiture acts. These federal cases establish the principle that due process requires reasonably prompt forfeiture actions. See United States v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1st Cir. 1975); United States v. One 1978 Cadillac Sedan DeVille, 490 F. Supp. 725 (S.D.N.Y. 1980); United States v. One 1973 Ford LTD, 409 F. Supp. 741 (Nev. 1976).

As the 5th District Court of Appeal found in Sandidge, by analogyzing to federal law, due process is met provided that a claimant is afforded a reasonably prompt hearing after seizure of his property. The Florida Contraband Forfeiture Act provides for a prompt hearing. See Florida Statute 932.704(1). Certainly, the due process provided for by the United States Constitution cannot be any different for a citizen who asserts his constitutional right defensively as opposed to the citizen who asserts it offensively.

The federal courts, in a long string of cases, have upheld the constitutionality of the promptness requirement in the

federal forfeiture statute, as noted by the 5th District Court of Appeal in Sandidge, supra. "[Fuentes v. Shevin, 407 US 67 (1972)] reaffirmed, however, that, in limited circumstances, immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible." Calero-Toledo v. Pearson Yacht Leasing Co., 416 US 663 (1974).

In finding that seizure of property pursuant to a forfeiture statute constitutes "extraordinary" situations in which postponement of notice and hearing until after seizure does not deny due process, the United States Supreme Court explained:

> Seizure permits [the governmental entity] to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized...will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given. And finally, unlike the situation in Fuentes, seizure is not initiated by self-interested private parties...

Calero-Toledo v. Pearson Yacht Leasing Co., supra.

The court, in United States v. One Motor Yacht Named Mercury, supra., held that a reasonable time for investigation and processing may permissibly delay the initiation of proceedings. Whether the delay is reasonable is a question of fact to be determined on a case-by-case basis.

It is important to note that in the instant case, Universal

filed its replevin action only seven days after seizure of the property. Certainly, in view of the cases which have held that three and six month delays are reasonable, see Sandidge, supra., seven days cannot be considered unreasonable. (The 5th District Court of Appeal, however, never examined the individual circumstances presented to them in the brief below.)

Appellant cited Golding v. Director of Public Safety, 400 So.2d 990 (Fla. 3rd DCA 1981) and Sawyer v. Gable, 400 So.2d 992 (Fla. 3rd DCA 1981) to the 5th District Court of Appeal as persuasive case law. Admittedly, these cases do "not deal with the 1980 amendment to Chapter 943, which purports to prohibit replevin", as noted by the 5th District Court of Appeal. However, by footnote, the 3rd District Court of Appeal assumed, while not actually deciding, that under the current forfeiture statute, an action in replevin would not lie.

The 5th District Court of Appeal summarily dismissed the two above-cited cases as not on point; yet, the court relied upon cases which predate the forfeiture statute for the proposition that the seizure of the property and any criminal charges arising therefrom are inextricably related, giving the criminal division concurrent jurisdiction to entertain a Motion to Return Property in the criminal case. The court explained that "[t]he state could assert its forfeiture rights in response to a motion for return of property." See Lawson L. Lamar v. Universal Supply Co., Inc., Case No. 83-1296 (Fla. 5th DCA June 7, 1984)[9 FLW 1276 at 1277-78] wherein the court cites Harvey v. Drake, 40

So.2d 214 (Fla. 1949); Garmire v. Red Lake, 265 So.2d 2 (Fla. 1972); Adams v. Burns, 172 So. 75 (Fla. 1936).

By allowing claimants to move for the return of property in the criminal court or for replevin in an independent civil action, a claimant can circumvent the forfeiture statute, and the harsh results obviously intended by the legislature.

Other district courts have apparently realized that the forfeiture statute supersedes the above-cited case law with regard to forfeitures. The current trend in forfeiture law is that a forfeiture action is civil in nature and that the criminal proceeding is irrelevant and inadmissible in the forfeiture action. Wille v. Karrh, supra.; In Re: Forfeiture of One Yellow 1979 Fiat 2-Door Sedan, supra.; In Re: Forfeiture of Alcoholic Beverages Seized from Saul's Elks Club, supra. Obviously, the courts and legislature intended that neither the claimants nor the government should have the criminal proceeding, or any aspects thereof, to use persuasively in the forfeiture action, or to circumvent the forfeiture proceeding.

Furthermore, if the replevin prohibition was not included in the forfeiture statute, a replevin action would be permissible even after a petition for forfeiture is filed. It would then become a race between the parties to obtain an earlier hearing date in their respective division, ultimately determining which procedure and burden of proof would govern the final hearing.

There are several unique and practical aspects involved in a forfeiture action which, apparently, were taken into

consideration by the legislature, and should not now be overlooked.

By allowing an action to recover property seized pursuant to the Florida Contraband Forfeiture Act, the claimant will be permitted to force the seizing agency to either file an action immediately, or lose control over the property. In effect, the seizing agency will be forced into court before a reasoned decision to forfeit the property or adequate preparation to ethically file the case has been made.

The Model Code of Professional Responsibility, DR6-101(A)(2), states that a lawyer shall not (emphasis added): "Handle a legal matter without preparation adequate in the circumstances." Handling litigation without adequate preparation warrants reprimand. The Florida Bar v. Brennan, 377 So.2d 1181 (Fla. 1979).

Counsel for the seizing agency has an ethical duty to adequately investigate the circumstances surrounding the seizure of property prior to filing a forfeiture action, so as not to file frivolous lawsuits. And, as discussed in an earlier portion of this brief, the Sheriff has a statutory obligation pursuant to Florida Statute 932.704(1), to proceed with a forfeiture promptly, thereby, protecting a claimant's due process right to a prompt hearing. As the court held in United States v. One Motor Yacht Named Mercury, supra., reasonable delays caused by administrative procedures are constitutionally permissible.

Further, by permitting an action in replevin, the trial and appellate courts in the case below have completely disregarded Florida Statute 932.703(1), wherein it states:

> All rights and interest in and title to contraband articles...shall immediately vest in the State upon seizure by a law enforcement agency... (emphasis added).

Indeed, a claimant is not entitled to a Writ of Replevin, as he/she is no longer the owner of the property and, consequently, no longer the rightful possessor; rather, the State is the owner, subject to perfection in accordance with Florida Statutes 932.701-704.

This argument was rejected by the 5th District Court of Appeal in finding a denial of due process. However, as previously discussed, the 5th District Court of Appeal has contradicted its own arguments with regard to due process.

Appellant also argued below that an action for replevin is improper when the subject matter of the action is contraband. Ethiopian Zion Coptic Church v. City of Miami Beach, 376 So.2d 925 (Fla. 3rd DCA 1979). The court reasoned that if the property sought in the replevin action is contraband, the claimant cannot justifiably claim that the property is being wrongfully detained, as is required by Florida Statute 78.055.

The 5th District Court of Appeal also rejected this argument, agreeing with Universal's distinction between contraband and contraband per se. Ethiopian, supra., makes no such distinction. The court, there, held that contraband is not

the proper subject for replevin. The Florida Contraband Forfeiture Act states that any personal property that is used in the commission of or as an instrumentality in the commission of a felony is a contraband article (Florida Statute 932.702). Hence, in the instant case, the vehicle was never the proper subject of a replevin action.

A WRIT OF REPLEVIN MUST ISSUE FROM THE CLERK OF THE COURT WHERE A SHERIFF IS THE PARTY DEFENDANT.

Assuming, solely for argument's sake, that this court affirms the 5th District Court of Appeal's finding that the replevin prohibition of Florida Statute 932.703(1) is unconstitutional, the 5th District's Opinion must be reversed on procedural grounds as Universal failed to comply with the procedural requirements of Florida Statute Chapter 78.

Florida Statute 78.067 states:

> If the court determines that the plaintiff is entitled to take possession of the claimed property, it shall issue an order directing the clerk of the court to issue a writ of replevin.

The language of the statute is mandatory, not discretionary, in setting forth the procedures by which a Writ of Replevin may be obtained. It is incumbent upon a plaintiff, then, to obtain an order from the court directed to the clerk of the court, before a valid and enforceable Writ of Replevin can be issued.

The Order from which Appellant appeals, however, was not issued from the clerk of the court. It was not even issued on September 3, 1983, the date by which the Appellant was to file his complaint or return the property. The Order was signed by the lower court on August 29, 1983 (filed on August 31, 1983), and directed the Appellant in some future conduct.

The 5th District Court of Appeal agreed "that the procedure ordering the Sheriff to return the vehicle on a certain date is not in accordance with the aforesaid statute." Lawson L. Lamar

v. Universal Supply Co., Inc., supra., at 1276. The court, however, upheld Universal's procedure solely on the ground that the defendant in the action was a sheriff, and, therefore, the Sheriff would have to then serve himself with the writ. "The statute does not contemplate a situation where the sheriff, to whom the clerk normally would issue the writ, is the party defendant." Id. at 1276.

The 5th District, in reaching such a decision, ignored the very basic concepts of due process which it then went on to espouse throughout the remainder of its Opinion. A sheriff should be entitled to the same due process considerations afforded any other defendant in possession of property which another claims is wrongfully detained.

Florida Statutes 78.067(2) and 78.13 provide that once the writ has been issued, the Sheriff shall hold the property for three days to give the defendant an opportunity to post a bond with surety with the clerk in an amount equal to the value of the property to retain possession of the property pending a final determination by the court.

In finding that a defendant need not comply with Florida Statute Chapter 78, where the defendant is a sheriff, the 5th District has essentially held that a sheriff is not entitled to the three-day period in which to post a bond. Had the Sheriff been served with a proper writ below, he could have safely assumed that he had the statutory three days in which to deliver the property or post a bond. Instead, he was subject to being

held in contempt of court for failure to deliver the property on September 3, 1983, as ordered by the trial court.[2]

The 5th District is of the opinion that the statute did not contemplate a situation where a sheriff is a party defendant. Appellant respectfully argues that, with regard to this issue, the legislature has shown more wisdom than the 5th District Court of Appeal.

Florida Statute 30.22 indicates that the legislature has, in fact, considered the possibililty that a sheriff may be sued at one time or another. The legislature even went so far as to prohibit collection of fees by a sheriff for service of process upon himself. However, pursuant to Florida Statute 30.231, the legislature did not deem it necessary to preclude the collection of fees for service of writs, subpoenaes, and executions where a sheriff might be the party defendant.

If the rationale of the 5th District Court of Appeal is followed, it can lead to ludicrous results. The 5th District is of the opinion that a sheriff should not be required to serve himself. If such were the case, a sheriff would not need to be served with process at all to initiate a lawsuit against the sheriff. Mail service (which, as a practical matter, is delivered to a mail room in some obscure part of a sheriff's

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2 An Affidavit of Non-Filing and Petition for Rule to Show Cause for contempt of court was filed by Universal Supply Co., Inc. against the Sheriff of Orange County. The trial court, at the time of hearing, stayed any further action with regard to the contempt of court pending the Sheriff's appeal of its Nonfinal Order.

office) would be sufficient. After all, the sheriff is authorized by statute to serve process. No deputy of the sheriff could require a subpoena to command his presence at a trial or deposition. A telephone call from the litigant should suffice. After all, the sheriff is authorized by statute to serve subpoenaes. Such absurd results certainly follow the reasoning of the 5th District Court of Appeal's Opinion below.

To obtain a proper and enforceable Writ, Universal should have obtained an Order from the lower court on September 3, 1983 (the date the Sheriff's seven days lapsed), directing the clerk of the court to issue a Writ of Replevin.

The language in Florida Statute 78.067 is clear and unambiguous. It applies regardless of whether the defendant is a sheriff or a private citizen. However, the Fifth District Court of Appeal held that the trial court can issue the writ itself since it can direct the clerk of the court to do so.

The appellate court has exceeded its authority by promulgating a procedure in conflict with that set forth by the legislature in Florida Statute Chapter 78. In effect, the Fifth District Court of Appeal has usurped the power to adopt rules and procedures given solely to the Supreme Court by the Florida Constitution, Article V, Section 2. Since the replevin is a statutory proceeding, Florida Rule of Civil Procedure 1.010 mandates that the procedure in all special statutory proceedings shall be prescribed by the statute governing the proceeding.

Yet, Universal failed to comply with the statutory

procedures set forth in Florida Statute Chapter 78. The purported Writ of Replevin dated August 29, 1983, should, therefore, be declared null and void.

CONCLUSION

Florida Statute 932.703(1), wherein it states, "Neither replevin nor any other action to recover any interest in such property shall be maintained in any court, except as provided by this Act" is constitutional. The United States Supreme Court, followed by a long string of federal cases, has held that forfeiture statutes constitute "extraordinary" situations in which postponement of notice and hearing until after seizure does not deny due process. Calero-Toledo v. Pearson Yacht Leasing Co., supra. A reasonable time for investigation and processing may permissibly delay the initiation of proceedings. United States v. One Motor Yacht Named Mercury, supra.

Even in the event that the above-cited clause of Florida Statute 932.703(1) is declared unconstitutional, the Order of the trial court from which this appeal emanated is null and void as it is not in compliance with the strict procedural requirements of Florida Statute Chapter 78.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 23rd day of August, 1984, to Hal Roen, Esquire, 512 East Washington Street, Orlando, Florida 32801.

Peggy M. Morris

Peggy M. Morris
Attorney for the Appellant
Sheriff of Orange County
2400 West 33rd Street
Orlando, Florida 32809
(305)420-3062