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 APPELLEE

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STATEMENT OF THE CASE

The appellee would adopt the statement of the case as presented by the appellant.

ISSUE I

IS IT A DENIAL OF DUE PROCESS NOT TO PERMIT A CLAIMANT TO CONTEST THE HOLDING OF ITS PROPERTY WHERE THE PROPERTY HAS BEEN SEIZED BY A LAW ENFORCEMENT AGENCY PURSUANT TO THE FLORIDA CONTRABAND FORFEITURE STATUTE PRIOR TO THE INITIATION OF THE FORFEITURE ACTION BY THE SEIZING AGENCY?

ISSUE II

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

IT IS A DENIAL OF DUE PROCESS NOT TO PERMIT A CLAIMANT TO CONTEST THE HOLDING OF ITS PROPERTY WHERE THE PROPERTY HAS BEEN SEIZED BY A LAW ENFORCEMENT AGENCY PURSUANT TO THE FLORIDA CONTRABAND FORFEITURE STATUTE PRIOR TO THE INITIATION OF THE FORFEITURE ACTION BY THE SEIZING AGENCY.

The issue is access to the Courts. Access to a judicial forum. Where there is a controversy concerning property, freedom, or the pursuit of happiness, is the one who denies your freedom or takes your property or restricts your happiness able to determine when the substantive matter shall be presented to the judiciary for a full, conscientious and thorough determination? To this the appellee answers loudly, vigorously and vociferously. . . NO!

Florida Statute 932.703 (1) specifically 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.

But when does this provision of the statute become applicable? The appellant would argue that by notifying a claimant of their future <u>intent</u> to forfeit one's property by filing a forfeiture action that the claimant is then precluded from contesting the holding or even going forward with any legal proceedings to contest same. They are to wait patiently until the law enforcement agency formally initiates

the forfeiture action. Any contestment or argument that they may have must be used as affirmative defenses or only in defense of the action. The appellee again reiterates and argues strongly against such a proposition.

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law... U.S. Constitution, Amendment 14, Section 1.
>
> "Fundamental rights" which are necessarily implicit in the concept of ordered liberty include the right to vote, the right of association, the right to access to Courts,...Sotto v. Wainwright 601 F.2d 184 (1979). (Emphasis added)
>
> All Courts in this State shall be open, so that every person for any injury done his in his lands, goods, person or representative shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.
>
> Constitution of 1885 State of Florida Sec. 4. (Emphasis added)

The appellant argues that since the Statute is silent as to when effects and thrust of the Statute shall apply or take affect, it can be interpreted as the appellant has done, that they are invoked and applicable merely by the taking possession by the forfeiting agency and the subsequent announcement by the agency of their future intent to forfeit.

It is the position of the appellee that until the "legal formality" of filing the appropriate pleadings are enacted, the agency can not rely on the benefit of the statute to the detriment of the claimant.

To deny the claimant his property and then to further summarily prohibit the claimant an arena, a forum to contest and formally litigate controversies between litigants directly contravenes some of the basic premises of the American history of jurisprudence.

Allowing the law enforcement agency to continue in this type of conduct necessarily elevates the executive branch of the government above the others. This is accomplished by the taking possession of the property, and the blatant refusal to be held necessarily accountable to any other branch of the government for their action until it suits them.

In the case at issue the appellee is legally indicating as openly and hostily as is permitted that the continued denial of the appellee's property is contested, against its wishes and is prejudicing the appellee. How else, and what more can the appellee do to demonstrate the legal abuse imposed and levied against the appellee which continues even to this day?

The property of the appellee has been taken from it and its return by the appellant has been refused. The taking and the subsequent and continued holding by the appellant is wrongful. All that the appellee has attempted to do is have this issue determined by the Courts.

For any person whose property is wrongfully detained by any other person or officer may have a writ of replevin to recover said personal property...Fla. Stat. 78.01. This Statute does make specific provisions when a replevin action will not lie. (Fla. Stat. 78.02) None of these exceptions mention Fla. Stat. 932.701 - 932.704.

The appellant, while investigating the possibilities of filing a forfeiture action against the property of the appellee, has deprived appellee of the property without the first inkling of due process.

Attempts by the appellee to contest the appellants holding of said property are argued by the appellant that the vehicle is to be forfeited under Fla. Stat. 932.701 - 932.704. And no contesting, via replevin or any other proceeding will lie, regardless of the fact that no forfeiture proceeding has been formally initiated.

Not only does the appellee lose the use and benefit of its property, the appellant can potentially use and/or dispose of said property pending its investigation and preparation of the filing of the forfeiture action. While this is happening the appellee is not to utter a word in opposition.

The activities and use of the vehicle can continue for months before the "prompt filing" provision of 932.704 (1) is initiated. And what is "prompt filing" has not been

determined by any hard and fast rules rather each case is decided on an individual basis. See: 1975 Chevrolet Corvette Two Door Automobile, Sandidge v. State ex rel. City of Oveido 424 So.2d 152 (5th DCA 1982).

The appellee has in fact contested the use by the appellant of the property from appellee's possession.

To demonstrate the sincerity of the appellee's position and to put the appellant affirmatively on notice of same, the complaint for the issuance of a Writ of Replevin was initiated. The appellant however, would want the appellee to patiently wait until formal forfeiture proceedings are initiated and then litigate on that issue. (Which would be done at some undetermined time in the future at the descretion of the appellant.)

The appellant states that "by allowing a claimant 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. (Appellant's brief page 6.) Accordingly, the appellant argues that the appellee not be permitted to maintain replevin action or contest their conduct.

Somehow and somewhere, there has to be an acceptance of responsibility by the seizing agency. If the

agency is willing to take and hold property they should be prepared to immediately defend their action rather than delay indefinitely.

When this same appellant arrests an individual, that initiates a time clock running wherein the arrestee is guaranteed of a day in Court, provided he or she does nothing to cause a delay, within ninety (90) or one hundred eighty (180) days of arrest depending on whether the offense be misdemeanor or felony.

Is the Sheriff's Department telling us that because it is loss of personal property and not a loss of personal freedom, the time constraints have evaporated to a non-existant protection? This argument is specious.

The subtlies of this position would not have such a chilling affect if the appellant were reasonable and allowed the owner to retain the property while they investigate and try to reach a "reasoned decision to forfeit the property or adequate preparation to ethically file the case has been made". (Appellant's brief page 7.)

Even if the claimant were required to post some bond or other assurances with the department that the property in question would be made available by the owner upon reasonable notice, both sides would be protected.

Appellant has specifically drawn attention to the ethical responsibility that they and any other advocate is

charged with pursuant to the Cannons of Ethics in bringing a law suit in good faith and after a case has been thoroughly investigated. (See appellant's brief page 7.)

Appellee feels compelled to comment on this statement. Appellee agrees with the Cannons of Ethics yet questions the appropriateness of appellants logic here. If it is unethical to file an action before a reassured decision to forfeit has been made on one hand, how can appellant argue that title has already vested in appellant at the time of taking physical possession of the property? (See appellant's brief pages 7, 8 and Fla. Stat. 932.703 (1).)

Are they saying that the reasoned decision was made by the police officer at the scene when the claimants property was taken from him then, and now they (appellant) need time to justify the taking and to perfect title in the future.

Appellee's position is the ethical consideration evaluation and investigation ought to take place <u>prior</u> to the depriving claimant of their property. Necessarily if this procedure is followed, after an examination or investigation there can be a reasoned decision as to whether or not a forfeiture action is warranted. If one is, it should be filed. This is a pipe dream and a procedure the appellee is aware would not occur.

The District Court has determined that an owner who does nothing may not be heard to complain of a three (3) month delay by the seizing agency in bringing a forfeiture proceeding. See: 1975 Chevrolet Corvette Two Door Automobile, Sandidge v. State es rel. City of Oveido 424 So.2d 152 5th DCA (1982).

In United States v. Eight Thousand Eight Hundred and Fifty Dollars 103 S. Ct 2005 (1983), the United State's Supreme Court has spoken directly on the point and its words are more than probative rather compelling.

"While the value of allowing the government time to pursue its investigation applies to the civil forfeiture situation as well as the criminal proceeding, a major distinction exists. A suspect who has not been indicted retains his liberty; a claimant whose property has been seized, however, has been entirely deprived of the use of the property."

"In Barker v. Wingo, 407 U.S. 514, 92 SCT. 2182 33 L Ed 2d 101 (1972), we developed a test to determine when government delay has abridged the right to a speedy trial. The Barker test involves a weighing of four (4) factors: .... (3) the defendant's assertion of his rights, ..."

"Of course, Barker dealt with the Sixth Amendment right to a speedy trial rather than the Fifth Amendment right against deprivation of property without due process of law.

Nevertheless, the Fifth Amendment claims here - which challenges only the length of time between the seizure and the initiation of the forfeiture trial- mirrors the concern of undue delay encompassed in the right to a speedy trial."

"The third element to be considered in the due process balance is the claimant's assertions of the right to a judicial hearing. A claimant is able to trigger rapid filing of a forfeiture action if he desires it. First, the claimant can file an equitable action seeking an order compelling the filing of the forfeiture action or return of the seized property." See Slocum v. Mayberry, 15 U.S. (2 Wheat) 1, 10. (1817) (Emphasis added).

With this in mind, the appellee has done what the United States Supreme Court and the District Court have directly and by inference indicated what one might do. The appellee is attempting to show that the action, or lack thereof by the appellant, is unreasonable that this does prejudice the appellee and the appellant has been less than diligent.

The procedure of the appellee to vigorously pursue and protect its rights are met with a challenge and accusation of circumventing proceedings and dictating the course of the action.

The appellee contests the taking of its property and wants it returned.

The appellant argued and relied in the District Court on the Ethiopian Zion Coptic Church v. City of Miami Beach, 376 So2d 925 (3rd DCA 1979). They have returned to this case and argue that the appellee's distinguighing of that case and the case at bar and the District Courts agreeing with appellee as incorrect. Consequently, appellee feels compelled again to respond and distinguish.

In Ethiopian the subject matter involved in the replevin action were marijuana plants. Marijuana plants in the State of Florida are contraband per se. The mere possession of these items violates the criminal laws of this state. However, this case concerns a firearm being classified as contraband because of its alleged involvement (which has not yet been proved) in a felony. It may take on the characteristic of contraband after it has been proved it has been involved in a felony. If it has been involved in a felony and subsequently transported in a vehicle, then the vehicle may properly be the subject matter of a forfeiture proceeding.

Appellant argues that the Ethiopian case made no distinction between items of contraband and contraband per se. Appellee insists logic and common sense require such a distinction and the interpretation is appropriate and proper.

Consequently, appellant relying on that case does not apply herein.

In Sandidge v. State ex rel City of Oveido, 424 So2d 152 (5th DCA 1982) the due process argument is addressed and satisfied where the action was filed and a hearing was held six (6) months after the seizure the "prompt filing" dictates of the statute had been satisfied.

What is distinguishable and crucial in the instant case as oppossed to the Sandidge case is that the claimant here has contested the seizure. The claimant here acted and evidenced its contestment and opposition to the appellant's holding of its property. The claimant in Sandidge was inactive and hibernated in an attempt to rely on the seizing agency's delay which would consequently violate the "prompt filing" proviso of the statute. Such is not the case here. To state again - appellee has done all that is possible to protect its right for a prompt filing by initiating an action itself to bring it before appropriate forum for a resolution of the continued holding of the property.

The appellant states "Due process is due process, whether before or after the fact" (appellant's brief page 2). How absurd, how incredulous! To stretch the bizzare logic to its limits and then beyond appellant continues, "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," (appellant's brief page 3.)

The predictions of George Orwell's, 1984 have arrived. The government is now saying to the appellee "Don't worry about your property or your rights, we as Big Brother will protect you. - Unfortunately, appellee doesn't want to be protected by Big Brother rather <u>from</u> Big Brother.

ISSUE II

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

In lieu of presenting arguments in Issue II, appellee relies on sound reasoning of 5th DCA found in its opinion concerning this issue upon which appellee can not improve.

CONCLUSION

The Constitution, both of the State of Florida and of the United States have assured its citizens of the availability to timely have their redresses heard. The appellant wishes to significantly and severly cut into and deny these safeguards.

The procedures employed by the appellee have been lawful, legitimate and warranted. The appellant ought to be put on notice that when they begin a course of conduct, they must be prepared to prosecute or defend it without delay.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 17th day of September, 1984, to Peggy Morris, Assistant Staff Attorney, Sheriff of Orange County, 2400 West 33rd Street, Orlando, Florida 32809.

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