O/a 5-7-85

IN THE SUPREME COURT OF FLORIDA

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JEFF C. DUCKHAM,

Petitioner,

vs. CASE NO. 66,017

THE STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FLORIDA DISTRICT COURT OF
APPEAL, FIRST DISTRICT

ANSWER BRIEF OF THE STATE OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

ERIC J. TAYLOR
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

Counsel for the State of Florida

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STATEMENT OF THE CASE AND FACTS

The Respondent, State of Florida, adopts the Statement of the Case and Facts as set out in Petitioner's Initial Brief on the Merits.

SUMMARY OF ARGUMENT

I

Sections 932.701-.704, Florida Statutes was enacted to take away from drug dealers the tools of their trade that allows them to continue in the business of narcotics trafficking. The statute was intended to apply and does apply to all participants involved in narcotics trafficking, including middlemen/brokers who bring a willing buyer to a willing seller. Any individual who knowingly takes part in a drug transaction is subject to having his property forfeited pursuant to Sections 932.701-.704.

If a vehcile is used to "facilitate" a drug deal, it is subject to forfeiture. Sections 932.702(3) was broadly written to cover all aspects of a narcotics transaction, including the use of a vehicle to merely transport a knowing participant of a transaction to and from the sites of negotiations and exchange. This position has been approved by the First, Second and Fourth Districts Courts of Appeal.

In this case, the Petitioner knowingly took an active part in a drug transaction. His role was that of the middleman/broker who brought the willing buyer to the willing seller. Petitioner used his car, the 1977 Volkswagen, to transport himself to the site of the drug negotiations and then to the site of the drug exchange. His use of his vehicle in this manner made it easier,

facilitated, his role in the drug deal. Because of his role and the car's use, the 1977 Volkswagen was properly seized and then ordered forfeited by the First District Court of Appeal.

II

Because an appellate court can sustain a trial court's decision on any grounds found in the record that would support the decision, the appellee has the duty to present and argue all alternative grounds to the appellate court to sustain the trial court's decision. Thus the Petitioner failed to do before the district court of appeal and now he is barred from having any court rule upon those unraised alternative grounds.

ARGUMENT

I

A VEHICLE IS SUBJECT TO FORFEITURE UNDER THE "FACILITATION" PROVISION OF SECTION 932.702(3), FLORIDA STATUTES, IF IT IS USED BY A MIDDLEMAN IN THE FUTHERANCE OF A DRUG TRANSACTION.

INTRODUCTION

This case not only, as the Petitioner stated on page 5 of his brief, presents the important issue of interpretation and application of the "facilitation" provision of subsection 932.702(3), Florida Statutes (Florida Contraband Forfeiture Act) but is also a case of first impression, for before this Court is a question concerning the application of that law to one whose part in the drug transaction was as the middleman who brought the willing buyer the willing seller.

Since this is the first case that addresses the application the Florida Contraband Forfeiture Act to a middleman/broker, all prior case law must be re-examined.

A.

THE FLORIDA CONTRABAND FORFEITURE ACT, SECTIONS 932.701-704, FLORIDA STATUTES, IS TO BE APPLIED WITH EQUAL FORCE TO MIDDLEMEN WHO ASSIST IN THE SALE AND TRANSFER OF NARCOTICS.

The Florida Contraband Forfeiture Act, Section 932.701-704, Florida Statutes, and its predecessors, Section 893.12 and

943.41-44 were enacted to assist law enforcement officers in their war on drug traffickers by taking, from those involved in the trafficking of narcotics, the "operating tools" of their trade. Griffis v. State, 356 So.2d 297, 300 (Fla. 1978). The State submits that this law applies to all persons involved in drug trafficking with equal force. This includes not only the actual seller of the drugs but also the transporter of the narcotics, the financer of a drug deal, the manufacturer of the drugs and the middleman or broker who brings willing buyers to willing sellers. This intent is expressed in the manner in which Section 932.702(3) was written. That section states:

> It is unlawful:
>
> (3) To use any vessel, motor vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article. (emphasis added)

Anyone involved in a drug transaction is subject to the Act and subject to having his personal vehicle forfeited if that vehicle was used to "facilitate" the transaction. So therefore, contrary to Petitioner's assertion, stated on pages 23 and 24 of his brief, that he was not a key figure in the transaction and acted as an intermediary, Petitioner's knowledge of and his role in the drug transaction is critical to the disposition of this case and whether or not his vehicle may be forfeited.

If, as the Petitioner implies, an intermediary or middleman who unites a buyer with a seller is not liable to have his vehicle forfeited, because no drugs were ever in the car, then the law would permit the growth in the numbers of broker/middlemen. These enterprising individuals could then use their vessels, aircraft or cars to transport them both short and long distances to effectuate drug deals and yet be insulated from the forfeiture of those modes of transportation (probably acquired from the profits of his dealings) as long as they were smart enough never to carry the drugs with them or carry on any negotiations in the confines of their property. The intent of Sections 932.701-.704 was to use forfeiture as a weapon against all participants in the manufacture, transportation and distribution of narcotics, not just sellers. Therefore the Act must be interpreted to allow forfeiture of vehicles used by brokers to effectuate drug deals.

1.

THE LAW OF FACILITATION
IN FLORIDA

While the State strongly disagrees with the Petitioner's application of the facts to the law, it does agree in general to his statement of the law on facilitation. The State agrees that this Court set down the standard for forfeiture in Griffis v. State, supra. Since the purpose of the Act was to halt drug trafficking, seziure of a vehicle involved in the transportation

of drugs for personal use was not permitted. Griffis, id. The vehicle, to be seized, must be shown to have been involved in an illegal drug operation. Id. at 299-300. Therefore, if a vehicle was used to "facilitate" a drug transaction, it may be seized and forfeited. Section 932.702(3), Florida Statutes. Such a forfeiture would deprive the participants, in the chain of a narcotics transaction, of their "operating tools." Griffis, 356 So.2d at 300.

The question then becomes, what is meant by "facilitation". Unfortunately, the legislature left the term undefined in Section 932.702(3) and so the courts of this State have been left to interpret the term on a case by case determination. "Facilitation" is a common term used in ordinary transactions between people. The American Heritage Dictionary, New College Edition (1980) defines "facilitate" as "to free from difficulties or obstacles; make easier; aid; assist". (page 469) A similar definition was adopted by the First District Court of Appeal in In Re 1968 Desco Shrimping Vessel, Stargazer, 417 So.2d 279 (Fla. 1st DCA 1982) when it approved the Fourth District Court of Appeal's discussion of facilitation in Mosely v. State, 363 So.2d 172 (Fla. 4th DCA 1978). The problem arises not so much over the definition of facilitation but the application of a particular set of facts to the definition.

Based upon their particular facts, the District Courts of Appeal have determined that the vehicle or vessel in

question was used to "facilitate" the underlying drug transaction in the following cases:

Mosely v. State, 363 So.2d 173 (Fla. 4th DCA 1978). Seller parked his car near a bar and used it as the site for negotiation, delivery and payment of heroin.

In Re: Forfeiture of 1968 Desco Shrimping Vessel, "Stargazer", 417 So.2d 279 (Fla. 1st DCA 1982), Pet'n for review denied, 424 So.2d 760 (Fla. 1983). Vessels purposeful use as a decoy to divert police officers from site of actual transaction facilitated the transaction.

In Re: Forfeiture of 1979 Toyota Corolla, 424 So.2d 922 (Fla. 4th DCA 1982), juris. withdrawn sub nom., Mora v. City of Ft. Lauderdale, 446 So.2d 97 (Fla. 1983). Seller drove car to a parking lot where he met an undercover police officer. Deal consummated in the police car and drugs changed hands in the parking lot but not the sellers car. Car found to be significantly involved.

In Re: Forfeiture of 1977 Jeep Cherokee, 443 So.2d 1027 (Fla. 2nd DCA 1983). Jeep used to drive seller to restaurant where deal was consummated and then used to drive seller back to his residence, pick up drugs and deliver it to the buyer.

One 1976 Dodge Van v. State, 447 So.2d 984 (Fla. 1st DCA 1984). Van used to transport seller to site of drug transaction (no positive proof to show any drugs were ever in the van)

In Re: Forfeiture of One 1979 Ford, 450 So.2d 863 (Fla. 4th DCA 1984). Car used to transport seller to site of drug transaction.

In Re: Forfeiture of One 1979 Mazda, 453 So.2d 144 (Fla. 1st DCA 1984). Car used to transport passenger who possessed marijuana to a shopping center where the passenger sold the drug.

The interpretation the Petitioner uses to define "facilitate" is in fact much narrower than the legislature intended or the courts have recognized. The vehicle does not have to actually be used to transport the drug nor does a transaction have to taken place within its doors. To be forfeited, all the vehicle has to do is assist or make easier any part of the drug transaction. See, Section 932.702(3), Florida Statutes.

If a vehicle used by a manufacturer to transport a drug to a distributor; a distributor's vehicle used to transport a drug to a seller; a seller's vehicle used to transport him to a site of a deal (with or without drugs) are subject to seizure because it assisted in the drug distribution, then a broker's vehicle can also be forfeited for its use in making it easier for the broker to arrange a sale of drugs. We must look not only to the vehicle's actual use, but its use vis-a-vis the role the party had in the drug transaction.

The State submits that the forfeiture of a vehicle used to transport a broker to the site of a drug transaction is consistent with similar prior decisions of the district courts of appeal. Beginning with Forfeiture of 1979 Toyota Corolla, 424 So.2d 922 (Fla. 4th DCA 1982), the various district courts of appeal have determined that the use of a vehicle to transport a participant to the site of the transaction was sufficient grounds to find that the vehicle was used to facilitate the transaction and subject to being forfeited. In 1979 Toyota, the seller drove his car to a parking lot where he parked it next to an undercover agent's automobile. The entire negotiations took place inside the police officer's car and the drugs were delivered to the lot in a third car. Yet the Fourth District Court of Appeal found that the Toyota was used to facilitate the deal. That Court based its decision on four factors:

> (1) a drug deal was made;
> (2) the vehicle owner was a key figure in the transaction;
> (3) the deal was consummated in a parking lot; and
> (4) the seller drove the car to the site to consummate the drug transaction.

See 424 So.2d at 924. Specifically, irrespective of all other factors or events, the Court said "[b]y using his car to transport himself to the site of a drug transaction Mora used the car to facilitate the consummation of the transaction" id. (emphasis added)

The Second District Court of Appeal, following the lead of the Fourth District, in the Forfeiture of 1977 Jeep Cherokee, 443 So.2d 1027 (Fla. 2nd DCA 1983) also held that transportation to the site of a drug deal was sufficient cause to find facilitation. In that case, the court found that the seller drove his jeep to a restaurant to meet an informant. After the negotiations inside the restaurant, the seller drove the jeep home, picked up the drugs and drove back to the restaurant to deliver them to the informant/buyer. Even though the court found that the evidence did not firmly establish that the drugs were ever in the jeep, the Court felt that that did not matter, saying:

> ". . . the record clearly reflects that the jeep was used to transport cocaine or to carry Kratz to and from the transaction site. In either event, the jeep was used to "facilitate" the sale of cocaine. (emphasis added)

443 So.2d at 1029 Therefore, use of a vehicle to transport the seller to a drug deal is sufficient in and of itself to warrant forfeiture.[1]

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[1] While the Petitioner, on page 30 of his brief, attempts to say that the "inescapable inference from the facts of 1977 Jeep is that the cocaine was actually transported in the subject vehicle", he overlooks the phrase "in either event" on page 1029 of the opinion. Those three words totally contradict his argument about the need to show more than the use of the car for transportation to a transaction site. For the Second District Court of Appeal, transportation is enough.

The First District Court of Appeal was the next court to say that use of a vehicle to transport a participant to a drug transaction site was enough to warrant forfeiture. See, One 1976 Dodge Van v. State, 447 So.2d 984 (Fla. 1st DCA 1984). In that case, the van owner was part of a drug deal that took place at a hotel. While that court, like the Second District, did not explicitly find that drugs were ever in the subject van, that court also did not feel that that was a requirement to a forfeiture. The court found a connection between its use as a transporting mechanism and the illegal drug deal sufficient to bring it within scope of being forfeited. The court then said:

> Specifically, by using the van to transport himself to the site of the drug transaction, appellant used the van to "facilitate the consummation of the transaction" (citing 1979 Toyota) 447 So. 2d at 986 (underlined emphasis added)

So transporting a seller to a negotiation site is a sufficient ground for the forfeiture of a vehicle.[2]

Finally, if there was any question that the Fourth District Court of Appeal felt that transportation alone was enough to

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[2] Again the Petitioner misinterprets the words of the appellate court. Petitioner, on page 28 of his brief "assumes" the facts of that case raises a clear inference that drugs were in the van. However, if the court thought the drugs were in the van they would have said so. Anyway, such an inference does not matter for the First District made it abundantly clear, in the choice of their words, that the use of the van to transport the seller to the transaction site is clearly enough, standing alone without any inference, to warrant forfeiture.

warrant forfeiture, that question was put to rest in Forfeiture of One 1979 Ford, 450 So.2d 863 (Fla. 4th DCA 1984). The court found:

> the only connection shown between the vehicle forfeited and the appellant's illegal activities was that the vehicle was used by the appellant to travel to and from a bar where appellant consummated an illegal drug transaction. (emphasis added)

450 So.2d at 864. To that court, the use of a car to travel to the site of a drug transaction was sufficient grounds, by itself to permit the forfeiture of the car for its use facilitated or aided and abetted the commission of an illegal activity. Id.[3]

2.

APPLICATION OF THE FACTS OF THIS CASE TO THE LAW OF FACILITATION.

Based upon the stipulated facts, the decision of the First District Court of Appeal is clearly supported. Petitioner used

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[3] Again the Petitioner "assumes" that "drugs must have been transported in the vehicle". Brief at page 26. Considering the words used by the court, this is some assumption. If there had been any evidence of drugs in the car, the court would have stated it. No court wants to base a decision on inference or speculation when it has solid evidence before it. When the court said "the only connection shown", they meant those words. Therefore, Petitioner cannot make the assumption that drugs were in the car. He can only accept the words stated by the court that the 1979 Ford was used for transportation only.

his vehicle to facilitate the consummation of an illegal drug transaction.

The facts are clear in this case. As stated in the Stipulated Facts (R: 21-22), Petitioner drove to Leonardo's Pizza Restaurant in Gainesville on November 9, 1981 to meet Brad Joll, an undercover police officer. Petitioner drove alone in his 1977 Volkswagen to the restaurant, as did Officer Joll in his own vehicle. Joll had previously contacted the Petitioner to discuss purchasing cocaine from the Plaintiff's roommate, Shawn Parker. In the restaurant, Petitioner questioned Joll so that Petitioner could reasssure Parker of Joll's credibility. After this conversation, Petitioner drove his car to his residence, with Joll following, where both Joll and Petitioner left their respective cars. Both persons then entered Petitioner's apartment where the exchange of cocaine took place.

Using the factors laid out in 1979 Toyota[4]:

> (1) a drug deal was made;
> (2) Petitioner was a key figure in the deal; and
> (3) Petitioner drove his car both to the site of the final negotiations and then to the site of the exchange of drugs. To begin, there can be no

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[4] The actual site of a drug transaction is not really relevant in this analysis. While the drug deal took place in a parking lot in 1979 Toyota, it did not in 1977 Jeep (restaurant), 1976 Dodge Van (hotel) or 1979 Ford (bar).

> question that a drug deal was made. The stipulated facts clearly admit this fact.

Secondly, Petitioner was a key figure or participant in this illegal drug transaction. While Petitioner was not the actual seller, his role in this scenario was in fact very important to its consummation. From the wording of the stipulated facts, it is clear that the intended buyer, Officer Joll, did not know or was not known by the seller, Shawn Parker. This inference can be found in the fact that Petitioner had to question Joll in order to obtain sufficient information so that Petitioner "could assure his roommate of Joll's credibility" Petitioner's Brief at page 1. If Joll had known Parker or was known by him, there would have been no need to assure Parker of Joll's credibility. Because of his position, Petitioner was the only one who could have brought Joll and Parker together to seal the deal. Therefore, Petitioner acted as a middleman/broker to bring the willing buyer to the willing seller. Without Petitioner's assistance, no illegal drug transaction would have occurred between Parker and Joll on November 9, 1981.

In any case, Petitioner "knowingly" assisted or aided and abetted the commission of an illegal drug transaction. He knew he was going to the restaurant to meet Joll; he knew his purpose in meeting Joll was to take him to the actual seller, Parker; and he knew that, once together, Joll and Parker would consummate a drug deal. The fact that Petitioner may have acted independently of Parker or was his partner in the deal is not relevant here.

The question is, did Petitioner's purposeful acts assist or aid and abet the commission of a crime. To that question we must say yes!

Since a drug transaction took place and since Petitioner took an active, knowing part in that transaction, the only issue remaining is whether the use of his car "facilitated" Petitioner's role in the illegal criminal activity. The State submits that the use of the 1977 Volkswagen by Petitioner to transport him both to the site of the negotiations and then to the site of the drug exchange did assist Petitioner in carrying out his role in the deal. The facts of this case compare favorably with those in the cases of 1977 Toyota, 1976 Dodge Van, 1977 Jeep Cherokee and 1979 Ford. In all those cases, as stated above, the forfeited vehicle was used to transport a major participant of the drug deal to the site or sites of the transaction. In none of those cases was it conclusively shown in the evidence that drugs were ever in the cars or that any dealings took place inside the cars. Those courts of appeal explicitly rested their decisions on the fact that the vehicles were used as modes of transportation. The only difference between the facts of this case with those other cases is the fact that the Petitioner was not the drug seller, but the broker who arranged the sale.

In those cases, as in this, the vehicles assisted the participants in getting to the site of the transaction. Without those vehicles, other forms of transportation would have been required, implying that the deals would have been harder to consummate. If Petitioner had had to walk, take a bus or ride a bike, he would not have been able to aid the sale as <u>easily</u> as when he used his car. The test is <u>not</u> whether the deal could have taken place without the use of a vehicle, but whether the vehicle's use made the deal easier to accomplish. The State feels that Petitioner's use of his car to drive him to and from the sites of the transaction permitted the Petitioner to more easily accomplish his role in the transaction.

Since the use of the Volkswagen made the deal easier, the First District Court of Appeal's decision should be affirmed.

II

THE DISTRICT COURT OF APPEAL DID NOT ERR WHEN IT DENIED PETITIONER'S REQUEST TO REMAND THE DECISION TO THE TRIAL COURT.

The Petitioner now complains that the District Court of Appeal denied his request to have the case remanded to the trial court so that it could rule upon the three alternative grounds for dismissal of the forfeiture action that were presented to the Court but not ruled upon. Because the Petitioner failed to raise those grounds in his answer brief before the First District Court

of Appeal, the appellate court was correct in denying Petitioner's request for remand.

It is a central tenant of appellate practice and law that a trial court's decision must be affirmed on appeal if there are some grounds or alternative theories in the record to support the lower court's decision, even if the reasons or theories cited by the trial court are erroneous. Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984); Applegate v. Barnett Bank of Tallahassee, 337 So.2d 1150 (Fla. 1979). A judgment may be affirmed even on grounds not relied upon by the trial court, as long as the grounds appear in the record. In Re: Yohn's Estate, 238 So.2d 290 (Fla. 2970); Crown Life Insurance Co. v. Garcia, 424 So.2d 893 (Fla. 3rd DCA 1982); City of Coral Gables v. Puiggros, 376 So.2d 281 (Fla. 3rd DCA 1979).

The three alternative grounds Petitioner now wants the trial court to rule upon were presented to the trial court in Petitioner's Motion to Quash Rule to Show Cause (R: 8-10), Petitioner's Memorandum of Law (R: 23-38) and Petitioner's Reply Memorandum (R: 11-18). The three issues were also argued before the trial court at a hearing on May 26, 1983 (R: 54-71). Thus, the three grounds were part of the record and before the trial court where it made its decision on October 12, 1983. (R: 46-48).

The State submits it was the Petitioner's duty to present any and all grounds to the appellate court that would permit the appellate court to sustain the trial court's decision. An appellee has the duty to see to it that the appellate court knows all the grounds so that the appellate court may find those alternative grounds and theories that would uphold the trial court's decision even though the trial court did not rely upon the other grounds below. Since the Petitioner failed to present and argue the alternative grounds to the appellate court that may have permitted the appellate court to sustain the trial court's decision in his favor, he has waived any chance to have the alternative grounds now heard by any court.

CONCLUSION

For the foregoing reasons, the decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

ERIC J. TAYLOR
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
Suite 1501 - The Capitol
Tallahassee, Florida 32301
(904) 488-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Larry G. Turner, Esquire; Robert S. Griscti, Esquire; and Thomas W. Kurrus, Esquire, Counsel for Petitioner, Post Office Box 508, Gainesville, Florida 32602 this 22nd day of March, 1985.

Eric J Taylor

ERIC J. TAYLOR