O/A 5-7-85

IN THE SUPREME COURT OF FLORIDA

JEFF C. DUCKHAM, :

Petitioner, : Case No.: 66,017

vs. : DCA Case No.: AV-364

THE STATE OF FLORIDA, :

Respondent. :

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

PETITIONER DUCKHAM'S REPLY BRIEF

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PRELIMINARY STATEMENT

Claimant JEFF C. DUCKHAM will be referred to in this REPLY BRIEF as "DUCKHAM" or the "Petitioner"; the STATE OF FLORIDA will be referred to as the "STATE" or the "Respondent." Reference to the original RECORD ON APPEAL will be by the designation "[R. _____]"; reference to prior Briefs in this case will be by the designation "[INITIAL BRIEF, p. _____]" and "[ANSWER BRIEF, p. _____]".

TABLE OF CITATIONS

ARGUMENT

1. Introduction -- A Case of First Impression

JEFF DUCKHAM's use of his 1977 Volkswagen Rabbit automobile solely as a means of local transportation in this case did not, without more, substantiate "facilitation" under the Florida Contraband Forfeiture Act. To prove "facilitation" the State must demonstrate a more significant relationship, or nexus, between the use of DUCKHAM's vehicle and the prohibited activity -- here, the delivery of a controlled substance by DUCKHAM's roommate to an undercover police officer. The Petitioner's use of his Volkswagen was incidental to this illegal transaction. If DUCKHAM had used his vehicle to transport contraband or participants to an illegal transaction, or as a negotiation or transaction site, or as part of a purposeful or intentional "modus operandi" or plan for the transaction which subsequently occurred between his roommate and the undercover police officer, then forfeiture would be appropriate under subsection 932.702(3) of the Act. See, e.g., 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 withdrawn sub nom., Mora v. City of Ft.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. 1984); 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); Mosley v. State, 363 So.2d 172 (Fla. 4th DCA 1978). However, DUCKHAM used his vehicle only for personal transportation, and nothing more, as the STATE concedes [see, e.g., ANSWER BRIEF, p. 2].

Such facts certainly make this case one of first impression -- a point also recognized by the STATE [ANSWER BRIEF, p. 4]. No other reported Florida decision (in which a Court has articulated the facts found sufficient to justify facilitation) is similar to the instant case. In all prior relevant facilitation decisions, including those relied upon by the State in its ANSWER BRIEF, the vehicles at issue were more significantly involved in criminal transactions.

Yet, while the STATE recognizes the importance of the instant case, it attempts to refocus the "facilitation" issue from how the vehicle was used to the difference between such labels as "key figure," "middleman" or "broker" [see, e.g., ANSWER BRIEF, pp. 2-3, 4-6]. The question of whether the claimant was a "key figure" or not is but one factor to consider in the facilitation equation [INITIAL BRIEF, pp. 23-24]. A more realistic approach to disposition of the instant case, and an approach that will guide the lower Courts of this State in this murky area of forfeiture law, requires a precise examination of how a vehicle

was actually used in a criminal transaction to determine if such use "facilitated" the transaction within the meaning of the statute.

2. Griffis and Statutory Construction

Griffis v. State, 356 So.2d 297 (Fla. 1978) offers guidance for the facilitation inquiry of the case sub judice. In Griffis, this Court applied established rules of statutory construction, including a close analysis of the legislative intent of the predecessor statute to the Florida Contraband Forfeiture Act, to discern a blueprint for interpretation and application of Florida's general forfeiture law. The STATE pays lip service to Griffis by agreeing "that this Court set down the standard for forfeiture" in that case [ANSWER BRIEF, p. 6]. Yet at no point in the ANSWER BRIEF does the STATE acknowledge certain principles recognized by the Griffis Court: that forfeiture is a drastic remedy; that strict construction of the language of a forfeiture statute is a prerequisite to application of such law; that an examination of legislative intent is critical to application of forfeiture law; and finally, that a forfeiture statute must be applied in a fair and just manner to avoid unnecessary constitutional ramifications.

Thus, the basic flaw of the STATE's argument is its assertion that subsection 932.702(3) of the Act "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" [ANSWER BRIEF, p. 2 (emphasis added)] and that "[t]he interpretation the Petitioner uses to define 'facilitate' is in fact much narrower than the legislature intended or the courts have recognized" [ANSWER BRIEF, p. 9 (emphasis added)]. The STATE offers no support for this interpretation of legislative intent, and its passing reference to Griffis fails to acknowledge the key point of legislative intent recognized by this Court in that decision -- that "[t]he express intent of the Legislature was that the Florida forfeiture statute be in uniformity with its federal counterpart." 356 So.2d at 299. The STATE makes no reference to the Federal counterpart (49 U.S.C. §§781-782), to Florida's Act, to Florida precedent applying the facilitation provision of the Act in conformity with 49 U.S.C. §§781-782, or to factually similar Federal precedent applying the identical "facilitation" provision of the Federal forfeitute statute. By ignoring this substantial legislative history and intent, the STATE finds it easy to conclude that "[t]o be forfeited, all the vehicle has to do is assist or make easier any part of the drug transaction" [ANSWER BRIEF, p. 9].

Not surprisingly, the requisite application of established rules of statutory construction and an examination of legislative intent, fully addressed in the INITIAL BRIEF ON THE MERITS, demonstrates that the STATE's facilitation formula is mired in conclusory quicksand. The argument that a vehicle has facilitated a transaction when used by a participant only as a means of "covering ground" improperly expands the Act's scope to permit forfeiture of a vehicle used in any manner. This conclusion follows because the only factual scenario less egregious than using a vehicle for incidental transportation is to not use the vehicle at all. Yet subsection 932.702(3) does not permit forfeiture when a vehicle facilitates criminal activity in any manner, unlike 21 U.S.C. §§881 et seq. That Federal statute, in effect when Florida's general forfeiture statute was drafted, enacted and amended by the Florida Legislature, obviously provides a broader basis for facilitation than 49 U.S.C. §§781-782. If the Legislature had deemed it appropriate to insert such language in subsection 932.702(3), then it would have done so. The Legislature has not used such language to date, and the STATE's argument is nothing more than a proposal for judicial legislation.

Alternatively, the STATE's facilitation argument, if accepted by this Court, would render meaningless the statu-

tory language which presently exists in subsection 932.702(3). If the Legislature, in fact, intended to permit forfeiture of a vehicle that is used in any manner during a criminal transaction, then there would be no need for a "facilitation" requirement under subsection 932.702(3). The Legislature could simply permit forfeiture of a vehicle that is used during criminal activity.

Whether the STATE's argument is viewed as an attempt at judicial legislation or, alternatively, whether acceptance of that argument would render moot the statutory requirement for a finding of "facilitation," the STATE's position overlooks the principle of strict construction of forfeiture statutes.

Further, the STATE's facilitation argument ignores the legislative intent to authorize forfeiture of vehicles that are regularly used as "operating tools" by "narcotics peddlers." Griffis v. State, 356 So.2d at 300 (quoting United States v. One 1972 Datsun, 378 F.Supp 1200, 1205 (D.N.H. 1974)). The STATE concludes that DUCKHAM's 1977 Volkswagen was such a "tool" and that it was "probably acquired from the profits of his dealings" [ANSWER BRIEF, p. 6]. These assertions are unfounded. There is, of course, absolutely no evidence in the Record that DUCKHAM had previously engaged in any criminal activity, nor is there any

indication whatsoever that DUCKHAM's 1977 Volkswagen Rabbit -- certainly not a "profile" vehicle of a drug dealer such as a sports car or luxury sedan -- was bought with illegally obtained money. Indeed, the STATE presented no facts to suggest that DUCKHAM received anything for his activity as an intermediary between his roommate and the undercover police office conducting the Gainesville "sting" operation. Under the circumstances of this case, "'it is not clear that forfeiture of the vehicle will help to prevent the illegal sale of narcotics any more than forfeiture of any number of claimant's personal effects which facilitate his ability to deal with such commonplace and everyday problems as transportation'," 356 So.2d at 300 (quoting United States v. One 1972 Datsun, 378 F.Supp. at 1205).[1]

3. Selective Precedent

Devoid of a meaningful analysis of legislative intent and statutory construction, the STATE's facilitation argument is simply one based on selective precedent. The STATE does not attempt to distinguish decisions such as In re: Forfeiture of One 1979 Mazda, 453 So.2d 144 (Fla. 1st DCA 1984); City of Clearwater v. One 1980 Porsche 911 SC, 426

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[1]See Judge Barfield's dissenting opinion, APPENDIX TO PETITIONER DUCKHAM'S INITIAL BRIEF ON THE MERITS, p. 4.

So.2d 1260 (Fla. 2d DCA 1983); 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); State v. Franzer, 364 So.2d 62 (Fla. 4th DCA 1978) or Mosley v. State, 363 So.2d 172 (Fla. 4th DCA 1978), all of which are addressed in the INITIAL BRIEF. Rather the STATE places primary reliance on 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. 1984) and In re: Forfeiture of One 1979 Ford, 450 So.2d 863 (Fla. 4th DCA 1984); One 1976 Dodge Van v. State, 447 So.2d 984 (Fla. 1st DCA 1984); and In re: Forfeiture of 1977 Jeep Cherokee, 443 So.2d 1027 (Fla. 2d DCA 1983).

1979 Toyota, supra, is thoroughly analyzed in the INITIAL BRIEF at pages 20 through 24. Suffice it to say that in 1979 Toyota, the vehicle was used by the claimant as an integral part of an obvious, purposeful "modus operandi" or plan for the delivery of cocaine in a parking lot. A substantial nexus existed in the 1979 Toyota case between the use of the vehicle and the criminal transaction -- not only was the transaction dependent upon use of the claimant's vehicle, but the use of the vehicle made the transaction safer, as expressed by the claimant himself.

424 So.2d at 923. While the vehicle served as a means of transportation, forfeiture was appropriate because that transportation -- and the vehicle's role as a mobile and secure base for the claimant to work from -- was instrumental to the parking lot transaction. In the instant case, on the other hand, DUCKHAM's use of his Volkswagen for transportation was never demonstrated by the STATE to be anything other than incidental to the criminal transaction. Despite the STATE's assertion that it "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" [ANSWER BRIEF, p. 17], what the STATE feels and what is proved are two different things. The facts demonstrate nothing more than incidental use of a vehicle for local transportation purposes.

Similarly, 1977 Jeep, One 1976 Dodge Van, and One 1979 Ford involve forfeitures of vehicles that were more significantly involved in the underlying criminal activity than the "nexus" demonstrated in the instant case. These cases have also been analyzed in detail by the Petitioner [INITIAL BRIEF, pp. 25-30]. In each case, without any doubt, the vehicles sought to be forfeited were used to transport contraband. That fact alone affords a sufficient factual

basis for forfeiture. Thus, the decisions in each case are correct -- the vehicles should have been forfeited. However, there is no such inference under the facts of the instant case. DUCKHAM did not use his vehicle to transport contraband.

There is an additional, critical distinction between these three cases and the instant case. The claimants in 1977 Jeep, One 1976 Dodge Van and One 1979 Ford purposefully used their vehicles as part of their modus operandi for the criminal transactions. In 1977 Jeep, the claimant traveled to and from a restaurant, where he delivered cocaine, and his residence, where he apparently picked up the cocaine. The use of his vehicle was instrumental to the transaction, which occurred at a location other than the residence. In One 1976 Dodge Van, the claimant used his van on one occasion to travel to a hotel for the delivery of dilaudid and also used the van as a negotiation site during that transaction for conversations between himself and the person who actually delivered dilaudid in the hotel (Crenshaw). Further, the claimant in that case agreed to deliver drugs to a residence on a second occasion; that delivery presumably would have taken place through the use of the claimant's van. Thus, in both 1977 Jeep and One 1976 Dodge Van the vehicles played instrumental roles in the delivery

of controlled substances.

Similarly, One 1979 Ford appears to deal with a factual setting in which either a drug supplier or buyer used a vehicle to transport himself to and from the site of the transaction. 450 So.2d at 864. While the facts of One 1979 Ford are not extensive, creating uncertain value as precedent, it is apparent that the Fourth District in One 1979 Ford relied on 1979 Toyota as authority. This reliance illustrates a significant point, for 1979 Toyota requires that the vehicle be part of the criminal transaction's plan, rather than merely a means of covering ground. The reference to 1979 Toyota thus suggests that unstated facts in One 1979 Ford demonstrate what is apparent in 1977 Jeep and One 1976 Dodge Van -- that the vehicle was purposefully used an intregal part of the drug transaction. A similar inference cannot be drawn in the instant case.

In summary, the cases relied upon by the STATE do not stand for a proposition that incidental transportation constitutes facilitation, because the facts of those cases demonstrate a more significant use of the vehicles than DUCKHAM's use of his Volkswagen. To the extent that 1977 Jeep, One 1976 Dodge Van, and One 1979 Ford can be interpreted to suggest that transportation alone is sufficient to justify forfeiture under the Act, the Petitioner

respectfully submits that such a proposition is incorrect, as evidenced by the legislative history and intent of the Act. While none of these three cases explore that legislative background, decisions such as Mosley v. State, supra, which have, require the denial of forfeiture in the instant case.

4. Remand

The cases cited by the STATE at page 18 of the ANSWER BRIEF do not support its argument that DUCKHAM has "waived any chance to have the [three] alternative grounds now heard by any Court" [ANSWER BRIEF, p. 19]. Indeed, one decision cited by the STATE, City of Coral Gables v. Puiggros, 376 So.2d 281 (Fla. 3rd DCA 1979) suggests the contrary. Judge Schwartz, writing for the Third District, declined to make an initial appellate determination of the merits of the appellee's alternative theories of relief, despite the Court's decision to reverse and remand the case on one issue raised by the appellant. Noting that, on remand, the trial Court might decide the case differently and avoid the need to reach the alternative issues, Judge Schwartz also stated:

> If, on the other hand, these issues must eventually be reached, appropriate principles of appellate decision-making dictate that we have the benefit of their having been first considered and decided by the lower court. See Aetna Cas. &

Surety Co. v. Flowers, 330 U.S. 464, 468, 67 S.Ct. 798, 800, 91 L.Ed. 1024, 1027 (1946); United States v. Ballard, 322 U.S. 78, 88, 64 S.Ct. 882, 887, 88 L.Ed. 1148, 1154 (1944).

376 So.2d at 285.

Among the issues raised by DUCKHAM before the trial Court were constitutional questions which Judge Chance appropriately refrained from deciding because of his decision that the facts of this case do not amount to facilitation. Under these circumstances, it is entirely appropriate for remand to the trial Court for its initial determination of the constitutional validity of subsection 932.702(3), as well as for the trial Court's consideration of the other issues posed by DUCKHAM in this cause.[2]

CONCLUSION

The case sub judice is an extreme on the broad spectrum of facilitation. By holding that this case presents facts which are beyond the "outer limits" of subsection 932.702(3) and which are inadequate to justify forfeiture under the facilitation theory, this Court will establish a discernible standard -- and limit -- for application of the facilitation provision of the Florida Contraband Forfeiture Act. The "standard" is governed by a pragmatic and precise analysis

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[2]At page 43 of his INITIAL BRIEF ON THE MERITS, the Petitioner recites In re: Kionka's Estate, 121 So.2d 644 (Fla. 1960) for the proposition that a District Court of

of Florida and Federal facilitation precedent which requires that incidental use of a conveyance for local transportation by a participant in a criminal transaction, without more, is insufficient to justify forfeiture. The "limit" is controlled by legislative intent, tempered by that strict construction traditionally required in the interpretation and application of the harsh penalty of statutory forfeiture. Under such analysis, forfeiture is not authorized and should be denied in this case.

Appeal does have the authority to remand a cause to the trial Court for an initial determination of the validity of a statute. The Petitioner failed to note that the quotation recited from this case is, in fact, the opinion of Justice O'Connell, concurring specially. Additionally, the Petitioner mistakenly misquoted Justice O'Connell; the sentence beginning "[i]n such cases ..." should read: "In such cases the appellate court could [rather than would] no doubt remand the cause to the trial court for a written ... determination of the validity of the statute, but it need not do so and could decide the question without remand." 121 So.2d at 646. Nonetheless, the import of Justice O'Connell's concurring opinion is that the District Court has full authority to remand a case under such circumstances for initial trial Court determination of constitutional issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF has been furnished by regular United States Mail to Eric J. Taylor, Assistant Attorney General, Department of Legal Affairs, Civil Division, The Capitol, Suite 1501, Tallahassee, Florida 32301, this 17th day of April 1985.

ROBERT S. GRISCTI