O/a 2-11-86

IN RE: FORFEITURE OF:

1978 Chevrolet Van; VIN: CGD1584167858; Approximately $4,478.00 in U.S. Currency; and One .45 Caliber Automatic Star Handgun; Serial No. 1481675.

SUPREME COURT OF FLORIDA

CASE NO. 67,080

District Court on Appeal,
4th District - No. 84-1556

FILED

NOV 4

CLERK, SUPREME COURT

By Chief Deputy Clerk

* *

INITIAL BRIEF OF PETITIONER
GEORGE A. BRESHCER, FORMER
SHERIFF OF BROWARD COUNTY, FLORIDA

* *

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PREFACE

Petitioner, GEORGE A. BRESCHER, was the Sheriff of Broward County, Florida, during the trial court proceedings of this contraband forfeiture action initiated pursuant to the Florida Contraband Forfeiture Act.

Respondent, LLOYD ANTHONY GREEN, was the Claimant below.

The parties will be referred to herein as they stood in the trial court, i.e., Petitioner and Claimant.

Citations to the original Record on Appeal will be preceded by the letter "R".

Citations to the Appendix will preceded by the letter "A".

STATEMENT OF THE CASE

On November 23, 1983, a Wednesday, Claimant was arrested by Broward Sheriff's deputies for various alleged violations of Chapter 893, Florida Statutes (1983). Contemporaneous therewith, the vehicle and currency at issue in the appeal were seized for confiscation and forfeiture. (R 7-11)

Thereafter, contraband forfeiture proceedings pursuant to Chapter 932, Florida Statutes (1983) were promptly initiated on January 17, 1984, by the filing of a Complaint for Rule to Show Cause and for Final Order of Forfeiture. (R 1-3) Notice of the forfeiture proceedings was made as required by the Contraband Forfeiture Act. A copy of the Complaint and a copy of the Notice of the hearing on the Complaint were made available to the Claimant. (R 3, 4) Additionally, constructive notice as required by the Contraband Forfeiture Act was first published on January 24, 1984, for which Proof of Publication was submitted on or about February 9, 1984. (R 6)

In support of the Complaint for Rule to Show Cause and for Final Order of Forfeiture the Affidavit of Pedro Rojas was submitted. (R 7-11)

The trial court entered the Rule to Show Cause on March 20, 1984, scheduling the final hearing for the two week trial calendar commencing June 25, 1984. (R 12) That Rule further compelled the filing of an Answer thereto not later than twenty days from the date of issuance, and the Answer to the Complaint incorporating

Affirmative Defenses, a Motion to Dismiss and Demand for Jury Trial was filed on behalf of Claimant on April 13, 1984. (R 13-15) This defensive pleading incorporated various arguments not all of which were specifically raised as issues before the trial court. Nevertheless, Claimant did demand trial by jury and did raise the issues of insufficiency of evidence.

Petitioner, in response to the Demand for Trial by Jury, filed a Motion to Strike Demand for Trial by Jury accompanied by Memorandum of Law. (R 16-19) The Demand as well as Motion to Strike were argued before the trial court as a matter preliminary to the trial. (R 31-39) After argument, the Demand was denied. (R 38, 101) During argument at the close of the evidentiary portion of this non-jury proceeding, the forfeitability of the vehicle was all but conceded. (R 94) The only real argument pertained to the currency, and the court made certain comments with regard to the credibility of the Claimant's testimony (R 99), determining that there was probable cause to conclude that the van and currency had been used in contravention of Chapter 932, Florida Statutes (1983), and that it was the Claimant's burden to overcome that determination of probable cause by a preponderance of the evidence, which burden was not met. (R 100) The Final Order of Forfeiture as to all of the personal property at issue was entered on June 28, 1984. (R 25-26) The appeal was timely commenced. (R 27)

After submission of briefs by both Claimant and Petitioner, the Fourt District Court of Appeal concluded that trial of this

forfeiture action without jury was error where Claimant had made a timely demand for trial by jury, and reversed the Final Order of Forfeiture, remanding the cause for trial with jury. (A 1-2) It is that Opinion with specific regard to the determination that Claimant was entitled to trial by jury that is the basis for the invocation by Petitioner of the "conflict" certioriari jurisdiction of this Honorable Court.

Jurisdiction of the Supreme Court was timely invoked by the filing of Notice to Invoke Discretionary Jurisdiction pursuant to Rule 9.120(b) of the Florida Rules of Appellate Procedure. Thereafter, this Honorable Court, on October 9, 1985, entered its Order Accepting Jurisdiction and Setting Oral Argument, and this Brief is filed and served pursuant thereto.

STATEMENT OF THE FACTS

The proceedings before the trial court involved contraband forfeiture litigation initiated pursuant to Chapter 932, Florida Statutes (1983) which had as its object the following personal property:

1. One 1978 Chevrolet Van; V.I.N. CGD1484167858
2. Approximately $4,478.00 in U.S. Currency
3. One .45 Caliber Automatic Star Handgun, Serial No. 1481675 (R 1-3)

The allegation was that the personal property as described was subject to seizure and forfeiture "in that the said property had been or were actually employed as instrumentalities in the commission of, or in the aiding or abetting in the commission of any felony, to wit: sale, delivery or possession with intent to sell, a controlled substances, contrary to §893.13(1)(a)(2)., Florida Statutes (1981)." (R 2)

At the trial conducted before the trial court, the Claimant was the first witness to testify. He did admit that he sold cannabis to police officers on November 23, 1983, (R 43) which cannabis had been stored or hidden in the vehicle which was at issue. (R 41) Further, the cannabis had been brought to the location at which the narcotics transaction had occurred in the truck. (R 42)

Two narcotics purchases were made from the Claimant on November 23, 1983. Both took place at the same location in or around the Claimant's van. (R 53-54) The Claimant was selling

"nickel bags" from this location. (R 46) According to one of the arresting officers, Deputy Pedro Rojas, during the second transaction, Claimant reached into a tool box within the van which had located in it a black pouch and folled money which also contained the plastic bags containing marijuana. (R 55) Within the pouch was the .45 caliber weapon. (R 56) There was no money contained within the black pouch. (R 62)

The only witnesses called by Petitioner were the Claimant and Deputy Rojas. At the end of that testimony, Petitioner rested, suggesting to the court that sufficient probable cause had been demonstrated to warrant forfeiture, thereby shifting the burden of proof to the Claimant. That matter was not argued at that time. Rather, testimony continued with Claimant calling Deputy Timmes, the other arresting officer, to testify. (R 68) Deputy Timmes testified that just prior to the second narcotics purchase, Claimant had stated to him that he only had "forty dollar bags." (R 74) The two big bags (sandwich bags) were retrieved from within the tool box located in the van. (R 75) Deputy Timmes was not clear as to where specifically within the tool box the currency was located.

Subsequent to Deputy Timmes testifying, Claimant was recalled to testify. Claimant attempted to raise issues of fact as to where within the van or where within the tool box the weapon and currency were located. Claimant testified on cross examination that only a couple hundred dollars was "dope money" and he was "just

selling nickel bags, and that's five dollars." (R 88) Further, he testified that he was carrying the additional four thousand dollars in the back of the truck as it made him feel like a "big person" (R 88) and the gun was used for protection. (R 89)

At the conclusion of the testimony and argument, the court determined that forfeiture was proper whether the burden of proof imposed upon the petitioning agency was one of probable cause or preponderance of the evidence. In effect, the trial court found Claimant's testimony to be non-credible and not reasonable. (R 99)

SUMMARY OF ARGUMENT

The trial court proceedings here involved an action initiated pursuant to The Florida Contraband Forfeiture Act [§§932.701-932.704, Florida Statutes (1983)] seeking forfeiture of certain personal property used in violation of Chapter 893, Florida Statutes (1983). A demand for trial by jury was made, and denied.

The issue presented is whether claimants, whose property is the subject of forfeiture proceedings initiated pursuant to The Florida Contraband Forfeiture Act, are entitled to trial by jury. The Florida Contraband Forfeiture Act is a purely statutory remedy provided to law enforcement agencies without historical common law origins, which came into existence in 1945. The Act makes no specific provision for trial by jury, and subsequent appellate decisions, which rendering procedural guidance, suggest that trial by jury is inappropriate. Thus, the Act is not in derogation of Article I, §22 of the Florida Constitution, and trial by jury is not necessary.

ISSUE

INVOCATION OF JURISDICTION OF THE SUPREME COURT PURSUANT TO RULE 9.030(a)(2)(A)(iv) IS PROPER IN THAT THE PRESENT CASE CONFLICTS WITH THAT OF THE FIRST DISTRICT COURT OF APPEAL IN SMITH V. HINDERY, 454 So.2d 663 (1st DCA 1984)

One of the issues involved in the original appeal by Claimant, which was the only issue resolved by the Fourth District Court of Appeal, involved the question of whether this Claimant (and presumably any claimant) in a contraband forfeiture proceeding initiated pursuant to the Florida Contraband Forfeiture Act was entitled to have the issues resolved by way of trial by jury as opposed to trial by judge. Upon authority of United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453 (7th Cir. 1980), the Fourth District Court of Appeal resolved the issue in favor of trial by jury, and reversed the Final Order of Forfeiture. In so ruling, the Fourth District Court of Appeal acknowledged:

> "We hold that Appellant was entitled to a jury trial, recognizing that in so holding we are in conflict with a contrary holding of the First District Court of Appeal in Smith v. Hindery, 454 So.2d 663 (1st DCA 1984)." (A 2)

In Smith, supra, the identical issue of right to trial by jury in forfeiture proceedings was presented to that First District Court of Appeal, which by its decision, the appellate court resolved contrary to that decision rendered by the Fourth District Court of Appeal in this cause. In fact, in considering the issue, the First District Court of Appeal stated as follows:

> "The Smiths further contend that they were denied a jury trial in violation of Article I, Section 22 of the Florida Constitution. That contention is without merit. The right

> to a jury trial is guaranteed by the Florida Constitution only in cases where that right existed at common law, not where a right and remedy were thereafter created by statute. Hathorne v. Panama Park Company, 44 Fla. 194, 32 So. 812 (1902). The Florida Contraband Forfeiture Act did not exist at common law, and there is therefore no right to a jury trial in a forfeiture proceeding under that Act." at Page 664

As acknowledged by the Fourth District Court of Appeal, and as is obvious upon a reading of both Opinions, it was appropriate that this Court exercise its discretionary jurisdiction, allowing this matter to be considered pursuant to Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure.

ISSUE

WHETHER FORFEITURE PROCEEDINGS INITIATED PURSUANT TO §§932.701-932.704, FLORIDA STATUTES (1983) COMPEL EMPANELING OF JURY AS TO ANY OR ALL ISSUES

Frankly, the issue as presented is now ripe for consideration and resolution by this Court. As already suggested above, the conflict between the two District Courts of Appeal as reflected in Smith, supra and that opinion which is the object of this appeal is obvious and should be settled. Further, assuming settlement of the conflict in favor of that position argued by Claimant, in light of precedent interpreting the forfeiture statute since that substantial amendment of the Act of 1980 necessitates clarification as to procedures utilized by trial courts.

The question presented before this Court is purely one of state law, both statutory and constitutional. Any determination that trial by jury is appropriate or not will not be determined by reference to the Seventh Amendment to the United States Constitution, as such constitutional provision is not applicable to state courts either directly or indirectly through application of the Fourteenth Amendment. See Iacaponi v. New Amsterdam, 258 F.Supp 800, aff'd 379 F.2d 311 (1967), cert.den. 389 U.S. 104 (1967) Additionally, the fact that a forfeiture statute does not provide for the right to trial by jury does not by that fact alone cause such statutory provision to be fatally infirm. See VanOster v. Kansas, 272 U.S. 465 (1926) The United States Constitution does not compel state legislatures, when establishing forfeiture proceedings, to require allowing for trial by jury.

The position that Petitioner has adopted throughout the course of this litigation is that trial by jury is inappropriate in forfeiture litigation. The claim has been and remains that contraband forfeiture proceedings are purely statutory in nature, without common law antecedent, and as such failure to empanel a jury for trial of those issues raised in such proceedings is not violative of Article I, §22 of The Florida Constitution.

The Florida Constitution provides in Article I, §22, in pertinent part, as follows:

> "The right of trial by jury shall be secured to all and remain inviolate . . ."

This section has existed in varying forms since the inception of Florida as a state. The original Florida Constitution went into effect in 1845, contemporaneous with statehood. Therefore, the question of whether the Claimant here is entitled to a trial by jury is determined by an historical analysis of the present forfeiture statute, for the purpose of determining whether it was in existence in the year 1845. See Pugh v. Border, 45 So. 499 (Fla. 1907); Carter v. State Road Department, 189 So.2d 793 (Fla. 1966); State v. Webb, 335 So.2d 826 (Fla. 1976)

The present Florida Contraband Forfeiture Act is codified in Chapter 932, Florida Statutes (1983). The type of proceeding as contemplated in The Florida Contraband Forfeiture Act, as it is more commonly called, was apparently first codified in Florida in 1945 (Chapter 22800, Law of Florida 1945). Since 1945, the legislature has made, at various times, both procedural and substantive changes. However, the action of the legislature in 1945 was the first attempt

by the Florida legislature to create a specific type of remedy now contemplated in Chapter 932, Florida Statutes (1983). Prior to 1945, Florida law enforcement agencies had no substantive remedies such as now exist as enacted by the legislature, codified in §§932.701-932.704, Florida Statutes (1983). Any attempt to make seizures based upon unlawful use for the purpose of vesting title in the seizing agency would have been unauthorized and unlawful in the absence of existing statutory authority, common law notwithstanding. The specific remedies existing as created in The Florida Contraband Forfeiture Act did not exist at common law, and therefore, Article I, §22 of The Florida Constitution, guarantying the right to trial by jury where that right existed at common law has no application to the instant proceedings. See Smith, supra; Hathorne, supra The conclusion of the Court in Smith, supra and argument being offered here is not without support, although it is equally obvious that it is subject to active debate.

In State Conservation Department v. Brown, 335 Mich. 353, 55 N.W.2d 859 (1952), the issue presented involved both a forfeiture statute and state constitutional provision similar to those at issue here. Sought to be forfeited was a fish net allegedly used illegally within Lake Huron. The statute under which forfeiture was sought made no provision for trial by jury, but the applicable state constitutional provision guaranteed right to trial by jury where it existed prior to adoption of the state constitution. Whether trial by jury was authorized was, as here, determined by whether such right existed at common law. The court did conclude that this proceeding was unlike

any proceeding existing at common law, rejecting that trial by jury was required. There, as here, the forfeiture proceeding was a proceeding in rem. See In Re: Forfeiture of Approximately Forty-eight Thousand Nine Hundred Dollars ($48,900.00) in U.S. Currency and other personal property, 432 So.2d 1362 (4th DCA 1983) The court concluded there, as Petitioner would argue here, that such forfeiture proceedings as are at issue were unknown to the legal system of the state prior to that first codification as recited above.

> ". . . it has been held that a statute may validly prescribe the forfeiture of property ordinarily used in a lawful means, such as automobiles, without permitting a trial by jury, on the theory that such condemnation is not under a cause of action known to the common law, to which the constitutional guarantee of a trial by jury extends, but is under a new cause of action created by statute, and is thus a statutory proceeding for the forfeiture and condemnation of property which was unknown to the legal system at the time when the state constitution was adopted." See 36 AmJur 2d, Forfeitures and Penalties, §44, at Page 640

See State v. Kelly, 67 Mont. 123, 187 P. 637 (1920); Campbell v. State, 171 Ind. 702, 87 N.E. 212 (1909)

As suggested before, the position that forfeiture proceedings are not proceedings existing at common law, is not without opposition. See State v. 1926 Studebaker Touring Car, 251 P. 701 (Or. 1926); People v. One 1941 Chevrolet Coupe, 231 P.2d 832 (Cal. 1951); United States v. One 1976 Mercedes, supra Notwithstanding that these opinions appear well reasoned, making great effort in terms of historical analysis to support the theory that forfeitures conceptually existed at common law, such authority is of no actual precedent in Florida. Rather, there is no historical, authoritative or statutory precedent to allow for

the conclusion that The Florida Contraband Forfeiture Act as it exists in Florida is derived from common law. It is unique and modern in addressing problems presented in a progressive state attempting to deal with the potentially debilitating problem presented by criminal activity.

These forfeiture proceedings are comparable to actions for declaratory relief such as contemplated in Chapter 86, Florida Statutes (1983) or an action comparable to abatement of nuisance such as created by §60.06, Florida Statutes (1983). The relief sought is one that is equitable in nature, i.e. a determination or declaration that a specific article of personal property is contraband and therefore forfeitable. It is not an action for damages or monetary relief as against an individual. Rather, the relief sought is purely one against a thing, seeking a determination as to whether title is to remain vested in a seizing agency or to be divested through application of specific statutory exceptions to the statute. The empaneling of a jury to make a legal determination of unlawful use is competently and properly left to determination by able trial court judges.

Trial by jury does not appear contemplated by the specific wording of the statute, nor as the Act has been interpreted by appellate court decision rendered since 1980. The Act compels the seizing agency to proceed in circuit court to establish forfeitability by the standard of "due proof." It is the obligation of the law enforcement agency to make such showing initially, and the suggestion is that "due proof" is comparable to "probable cause." See In Re: $48,900.00, supra; In Re: Forfeiture Of One 1976 Chevrolet Corvette, 442 So.2d 307 (5th DCA 1983) The Act provides, by way of defense, that

an owner may demonstrate that he is an "innocent owner" or that a lienholder is a "bona fide lienholder" after establishing "that he neither knew nor should have known after a reasonable inquiry that such property was being used or was likely to be used for illegal activity, and that such use was without his consent, express or implied, and that the lien had been perfected in the manner prescribed by law prior to such seizure." See §§932.703(2) and 932.703(3), Florida Statutes (1983) Further, at least with regard to a lienholder, such proof must be made "to the court." It has been further established that there are specific procedures to be utilized preliminary to the invocation of the claim proceeding.[1] Determinations of "due proof" or "probable cause" are classically those falling within the province of a trial court as opposed to a jury. The question presented is, assuming forfeitures require the empaneling of a jury, at what point in the proceedings does a trial by jury become mandatory. Assuming that a trial by jury is mandatory, what is the standard of proof by which such jury is to determine the factual issues presented to it. This is important as the burden of proof theoretically shifts upon

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[1]See In Re: Forfeiture of United States Currency in the amount of $5,300.00, 429 So.2d 800 (4th DCA 1983) This Opinion suggests the filing of application or complaint for rule to show cause in verified form, to be presented to the trial court, ex parte. It is upon that petition or complaint that a rule to show cause is to be issued solely upon a determination by the trial court that the petition states a cause of action. Testimony is not required. Thereafter, upon issuance of the rule to show cause, and upon publication as otherwise required, any potential claimant is supposed to make claim by the filing of a responsive pleading addressing the material allegations of the complaint, further setting forth affirmative defenses. It is upon the complaint or petition, the rule and the responsive pleading that the issues are apparently framed for trial.

demonstration of probable cause. See In re: 1979 Lincoln Continental, etc., 405 So.2d 249 (3rd DCA 1981) The trial proceeding as contemplated in the Act and as interpreted by subsequent appellate opinion reveals that trial by jury was not foreseen as a part of this forfeiture scheme, and is unwieldy and unworkable.

The Act originally provided that it was the exclusive device by which claimants could make claim to any property which had been seized pursuant thereto. Section 932.703(1), Florida Statutes (1983) provided, in pertinent part, that:

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

That specific portion of the statute was declared unconstitutional as a deprivation of due process and as being violative of Article I, §21, Florida Constitution (1968) in denying access to the courts. See Lamar v. Universal Supply Company, Inc., 450 So.2d 67 (5th DCA 1984) As a result a potential claimant now has available to him the remedy of replevin (when circumstances justify), or remedy of motion for return of property to the criminal court having jurisdiction of then pending criminal proceedings. See Lamar, supra; Golding v. Director of Public Safety Department, Metropolitan Dade County, 400 So.2d 990 (3rd DCA 1981) In the replevin proceeding, trial by jury would be authorized. See General Accident Fire and Life Assurance Corp. v. Skaff, 193 So.2d 21 (1st DCA 1966) In a Golding, supra proceeding, no trial by jury would be authorized. If the proceeding is one in replevin initiated by a claimant, resulting in the initiation of a forfeiture claim by way of counter-claim, the claimant would

theoretically be entitled to trial by jury, and the trial of the matter would, in all likelihood, be conducted before a jury. See Allstate Insurance Company v. Vanater, 297 So.2d 293 (Fla. 1974)

The Florida Contraband Forfeiture Act and proceedings conducted thereunder do not require trial by jury in resolution of issues that may arise. The denial of the demand for trial by jury by the trial court was proper, and the Opinion of the Fourth District Court of Appeal, which is the object of this appeal should be reversed, and this matter should be remanded in its entirety for proceeding not inconsistent with the actions of this Court.

CONCLUSION

It is the position of the Petitioner that the original determination by the trial court that Claimant was not entitled to trial by jury was correct. Second, it is the position of the Petitioner that the reversal of the trial court's actions by the Fourt District Court of Appeal concluding that denial of trial by jury was improper was in error. It is specifically requested that this Court review the actions of the Fourth District Court of Appeal, and determine that trial by jury was not necessary in the instant proceedings and is not otherwise required in forfeiture proceedings being conducted pursuant to The Florida Contraband Forfeiture Act. Such determination will necessarily compel the entry of an order reversing the actions of the Fourth District Court of Appeal which will allow for the reinstatement of the Final Order of Forfeiture.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 30th day of October, 1985, to: KENNETH E. DELEGAL, ESQ., 222 S.E. 10th Street, Ft. Lauderdale, Florida 33316.

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