

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,080

GEORGE A. BRESCHER,
Sheriff of Broward County,

Petitioner,

vs.

LLOYD A. GREEN,

Respondent.

FILED
SID J. W.
JUN 8 1985
CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

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PETITION FOR DISCRETIONARY REVIEW
PURSUANT TO RULE 9.030(a)(2)(A)(iv)

* * * * *

JURISDICTIONAL BRIEF OF PETITIONER

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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 be 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 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 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 Fourth 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" certiorari jurisdiction of this Honorable Court.

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 substance, 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 rolled 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. Although not argued, Claimant called 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" as 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)

ISSUE

WHETHER THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE PRESENT CASE CONFLICTS WITH THAT OF THE FIRST DISTRICT COURT OF APPEAL AND 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

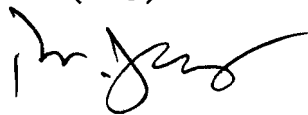
By its acknowledgement, as well as upon reading of both Opinions, it is obvious that there is an expressed and direct conflict as between the Opinions which have been rendered by these two appellate courts on this one issue as to whether claimants in contraband forfeiture proceedings are entitled to trial by jury. As the conflict is expressed and direct, it is appropriate that this Honorable Court exercise its discretionary jurisdiction in entertaining this appeal. There is conflict as between the circuits as within the two appellate courts as to whether trials by jury, in similar proceedings, are proper, and there is confusion engendered as to the remaining circuits within the three other appellate court jurisdictions. As the amount of litigation under the Florida Contraband Forfeiture Act has greatly increased subsequent to the substantial amendment to the Act in 1980, it is of sufficient importance to have this matter of right to trial by jury, with both its procedural and substantive ramifications, resolved with finality by review and opinion of this Honorable Court.

CONCLUSION

This Honorable Court should grant jurisdiction to resolve the expressed and direct conflict between the First District Court of Appeal and the Fourth District Court of Appeal as to whether claimants in contraband forfeiture proceedings are entitled to trial by jury, and, if so, to what issue does such right exist. Upon reading the Opinion rendered by the Fourth District Court of Appeal, and that as rendered by the First District Court of Appeal in Smith, supra, litigants are hopelessly confused as to the answer to this question. Only this Honorable Court can provide this answer and it is appropriate that it exercise its discretionary jurisdiction as contemplated by Rule 9.030(a)(2)(A)(iv).

Respectfully submitted,

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BY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 31 day of May, 1985, to: KENNETH E. DELEGAL, ESQ., 222 S.E. 10th Street, Ft. Lauderdale, Florida 33316.

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