OA 11-8-88

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

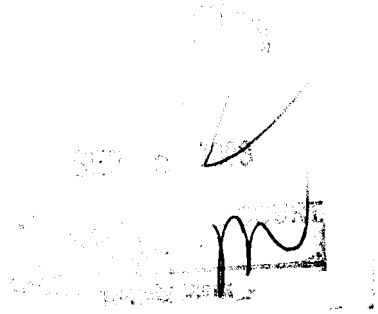
Appellant,

-vs-

CASE NO: 72,181

RICHARD CRENSHAW,

Appellee.
_____/



ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellee, Richard Crenshaw, was the Defendant in the trial court, Appellant in the District Court, and is the Appellee before this Court. The parties will be referred to as they appear appear before this Court. Any citations will be to the Appendix (attached to the State's brief) and will be made by use of the symbol "A", with additional descriptive reference as necessary. All emphasis is supplied by Appellee unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Statement of the Case and Facts as set forth in Appellant's Brief; however, such will be recited here merely for convenience.

On October 30, 1985, acting upon the alert of a confidential informant that the driver of a 1984 Volvo was carrying cocaine, officers of the Pensacola Police

Department stopped the Appellee, who was driving his 1984 Volvo, and subsequently arrested him for the unlawful possession of a vial of cocaine. This illegal substance, less than 1 gram, was taken from the Appellee's person.

Following Appellee's arrest, his Volvo was taken into custody. Appellant filed a timely petition for the forfeiture of the vehicle, to which the Appellee and his counsel objected at hearing before the Honorable M. C. Blanchard, Circuit Judge in and for Escambia County, Florida. At hearing, Appellee admitted possession of the cocaine, admitted a prior federal conviction and prison sentence for possession of illegal drigs with intent to distribute, and denied any intent to distribute the cocaine involved in the instant case.

By order dated March 13, 1986, Judge Blanchard ordered the Appellee's Volvo forfeited, from which Order the Appellee took appeal to the First District Court of Appeal. On January 19, 1988, the District Court reversed the forfeiture, remanding it to the trial court for further proceedings. Appellant's Motion for Rehearing/Rehearing En Banc was denied. Appellant has appealed to this Court, seeking reinstatement of Judge Blanchard's Order forfeiting Appellee's 1984 Volvo.

SUMMARY OF ARGUMENT

The bottom line issue here is whether the "Florida Contraband Forfeiture Act" requires some "nexus" between the item to be forfeited and illegal activity. Appellee agrees with the First District (and the Second District, see Martinez v. Heinrich, 521 So.2d 167 (Fla. 2d DCA, February 5, 1988) that Sections 932.701 - 932.704, known as the "Florida Contraband Forfeiture Act", require some connection between the items sought to be forfeited and the illegal activity legislated against.

This conclusion is inescapeable if the Court stays within the long-tested guidelines of statutory interpretation, i.e., 1) the plain wording of the statute itself; 2) the rule of strict construction against the State in any areas of possible ambiguity; and 3) avoidance of constitutional issues if at all possible.

The word "used" is found throughout the statutes in question, and Appellee feels it is the presence of this word that requires that the item to be forfeited must be "linked" to the illegal activity.

In each of the cases cited by the State that supposedly are in conflict with the First District's opinion in this case, the vehicle sought to be forfeited was "used" for an illegal purpose. Each of those cases interpreting this same section did not conflict with the First District's opinion because there was in fact a "nexus" between the item

sought to be forfeited and the illegal activity. For these reasons, the opinion of the First District Court should be affirmed.

ARGUMENT

WHETHER THE "FLORIDA CONTRABAND FORFEITURE ACT" REQUIRES SOME "NEXUS" BETWEEN THE ITEM TO BE FORFEITED AND THE ILLEGAL ACTIVITY LEGISLATED AGAINST?

The State never really identifies any specific issue, it merely takes a position and argues that position against either the First District, Rip Van Winkle, or both. To respond directly to the positions taken by the State would create a very real possibility of getting lost in a useless tangle over the words shall and *may,* and completely missing the point involved in this appeal. Therefore, it is the purpose of the Appellee to focus on the precise issue involved and restrict any comments and arguments directly to that point.

The Appellee in this case owns a Volvo automobile. He had a small amount of cocaine, enclosed in a vial, enclosed in his pant's pocket, at the same time that he drove his Volvo. The question here is whether the "Florida Contraband Forfeiture Act" requires forfeiture of his Volvo under these circumstances.

There is nothing unlawful about owning and operating a Volvo automobile. A Volvo automobile is not "contraband" unless it has been, or is actually, employed as an instrumentality in the commission of, or in aiding and abetting in the commission of, any felony (Florida Statute 932.701(2)(e). This is not a "facilitation" case. The State does not attempt to argue that the Appellee's Volvo

was being used to aid him in possessing the cocaine in his pocket, nor does the State contend that the Volvo was being used to drive the Appellee to or from a drug transaction. The State depends entirely upon its interpretation of Section 932.702(1), (2), (3), and (4). This section makes it unlawful to do certain things with contraband articles (note the contraband here is cocaine, not the Volvo). The second part of 932.702 makes it unlawful to "use" a vessel, motor vehicle, or aircraft to do any of the unlawful acts mentioned therein. The idea of the vehicle being used to further an illegal purpose is carried on in the forfeiture section of the Act.

Section, 932.703(1) deals with forfeiture, and provides that:

> "Any vessel, motor vehicle, aircraft, and other personal property which has been or is being used in violation of any provision of Section 932.702, or in, upon, or by means of which violation of that Section has taken or is taking place...may be seized and shall be forfeited..."
>
> Further:
>
> "All rights and interests entitled to contraband articles or contraband property used in violation of 932.702..."

So the question becomes whether the Appellee's Volvo was used to transport, carry, or convey cocaine (932.702(1)); or was the Volvo used to conceal or possess cocaine (932.702(2)); or was the Volvo used to facilitate transportation...possession...of the cocaine (932.702(3));

or was the Volvo used to conceal or possess the cocaine (932.702(4)).

In our case, the Appellee possessed and concealed the cocaine in a vial in his pant's pocket. The Volvo had nothing to do with the possession and concealment of this contraband. The Appellee would have possessed and concealed the cocaine whether he was in the vehicle or not. This is exactly the point that Judge Schwartz was making in Department of Highway Safety and Motor Vehicles v. Pollack, 462 So.2d 1199 at (Fla. 3d DCA 1985), that the vehicle was being used to transport the person, rather than, as the statute requires, the contraband. Id. at 1202.

The State may point out that further along in 932.703(1) it reads:

> "In any incident in which possession of any contraband article...constitutes a felony, the...motor vehicle...in or on which such contraband article is located...shall be contraband subject to forfeiture."

The State would argue that since any amount of cocaine is a felony, and if it is located on a person who is located in a motor vehicle, the vehicle itself becomes contraband subject to forfeiture. However, the next sentence states:

> "It shall be presumed...that the motor vehicle in or on which such contraband article is located...is being used or was intended to be used to facilitate..."

If the mere possession of the felony contraband on the person of a vehicle occupant is enough for forfeiture of the vehicle, why did the legislature add the next sentence and

create a presumption of facilitation? Obviously, this is a reference to 932.701(2)(e) which provides that a vehicle becomes contraband if it is used to facilitate the commission of a felony. Thus, the plain reading of the statute shows that the Legislature intends a vehicle to become contraband subject to forfeiture only if it is used in an unlawful manner. The word used creates a connecting "link" between the item sought to be forfeited and the illegal activity. The Second District Court of Appeal dissallowed a forfeiture precisely because of the absence of any direct "link" between the use of the automobile and the illegal activity.

> "We are troubled, however, by the absence of any direct link between the use of the automobiles and the illegal activity". Martinez v. Heinrich, supra at 168.

This connecting "link" or "nexus" is exactly what the First District Court of Appeal referred to in its opinion in this case. Crenshaw v.' State, 521 So.2d 138, 141 (A-5):

> "Referring again to the statutory language, forfeiture will lie only if the vehicle is used either to transport, carry, convey, conceal, or possess the illicit drugs or facilitate the transportation, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of the illicit drugs. Because the statute continues to require a nexus involving the occupant's use of the vehicle that is more than remotely incidental to the criminal conduct alleged, we agree with the observation by Judge Schwartz and hold that use of the vehicle must play some part in carrying out a prohibited criminal transaction involving

> the contraband drugs that it is shown to be more than remotely incidental to an occupant's possession of the illicit drugs for purely personal use."

The State cites four cases which it claims support its position that the mere possession of felony contraband on the person of the occupant of a vehicle is enough to warrant forfeiture. An examination of those cases will show that they do not contradict the First District's opinion in this case, and in each one there is a "nexus" between the vehicle and the illegal activity although it is not specifically alluded to in the opinions.

First, in City of Clearwater v. Malick, 429 So.2d 718 (2d DCA 1983), the Appellee and a friend were arrested while preparing to snort cocaine in a van. The van was being used as a place to snort the cocaine. In Naples Police Department v. Small, 426 So.2d 72 (2d DCA 1983) the police discovered twelve Methaqualone tablets in a briefcase in the trunk of Small's car. In this case the car was used as a place to store and transport the contraband. The contraband would have been transported any time the vehicle was moving whether the Defendant was driving the vehicle or not. The same argument applies to Department of Highway Motor Vehicles and Highway Safety v. Pollack, supra; Pollack was stopped by a Highway Patrol trooper on a traffic charge and while searching for his car keys the trooper found methaqualone on the seat and/or the console in the vehicle. In otherwords, the possession was more than merely

on the person of the defendant; it was being carried in the vehicle itself. Whether the Defendant was present or not present, the contraband would have still been carried in the vehicle. The vehicle was being used. Finally, In re: Forfeiture of a 1977 Datsun 2802, 448 So.2d 78 (4th DCA 1984), the owner of the vehicle was inside loading a cube of hashish into a pipe. As in the Malick case, the vehicle was being used as a place to load the defendant's pipe with contraband.

It is interesting that the State appears to rely heavily on this Court's decision in Duckham v. State, 478 So.2d 347 Fla. 1985). At page 348 of this Court's opinion in Duckham we find the following statement:

> "But for Duckham's meeting at the restaurant this exact sale would not have taken place."

Duckham was a facilitation case in which the defendant drove his car to a restaurant to discuss a sale ,of contraband after which he drove to his apartment in the vehicle where the sale occurred. And this Court pointed out at page 348 that "but for Duckham's meeting at the restaurant, this exact sale would not have taken place." The Second District, relying on the above-mentioned language from the Duckham decision, ruled that there must be a sufficient evidentiary "nexus" between the cars and the illegal activity. In Martinez v. Heinrich, supra at page 169, the Court reasons:

> "To uphold forfeiture in the case before us

> would be to approve the taking of the automobiles...without requiring a demonstration that but for the use of the automobiles the illegal activity could not have occurred."

The Heinrich Court relied not only on Duckham, supra, but also Smith v. Caqqiano, 496 So.2d 853 (Fla. 2d DCA 1986). In those cases the Court found that the commission of the felony and the forfeited automobile were "inextricably wedded".

The First District in its opinion being reviewed in this appeal held that the statute requires a sufficient evidentiary nexus between the Volvo and the possession of the cocaine, and that "sufficient" meant more than ''remotely incidental" to the illegal conduct as held In City of Clearwater v. One 1980 Porshe, 426 So.2d 1260 (Fla. 2d DCA 1983). The "but for" requirement set out by this Court in Duckham, and relied upon by the Second District in Heinrich, affords a more workable guideline than ''remotely incidental", and Appellee suggests that the "but for" requirement would resolve any questions about whether forfeiture is proper or not in any future litigation concerning the construction of these statutes.

As it applies to this case, it cannot be said that "but for" the Appellee's presence in his Volvo he would not have possessed or concealed the cocaine in the vial in his pocket. Nor can it be said that "but for" the position of the Appellee in the Volvo the cocaine would not have been transported. Transportation of the cocaine in the vial in

his pocket was going to take place anytime the Appellee moved about, whether he was walking, riding a bicycle, or driving this Volvo. The possession of the cocaine and the operation of the Volvo were not "inextricably wedded" as required by Duckham and Caqqiano.

Finally, on page 141 of the First District's opinion in footnote 5 (Crenshaw v. State, supra, A-5), the Court pointed out that "any construction of these sections which would permit forfeiture in absence of any such nexus may present serious constitutional questions under various sections of the State and Federal Constitutions going to the validity of the statute." Appellee agrees and adds that the construction of these sections urged by the State will bring the provisions of this Act hopelessly in conflict with the principals of due process.

The principal of strict construction in favor of the accused citizen and against the State applies to forfeiture proceedings. Hotel and Restaurant Commission v. Sunny Seas No. One, 104 So.2d 570 (Fla. 1958); General Motors Acceptance Corp. v. State, 152 Fla. 297, 11 So.2d 482 (1943). This principal, along with the long-standing rule that courts should avoid deciding constitutional issues unnecessarily, Jean v. Nelson, 472 U.S. 846, 105 S.Ct. 2992, 2998, 86 L.Ed. 2d 664, 1985, inescapeably leads to a construction of the sections in question that. requires some "nexus" between the item to be forfeited and the illegal

activity legislated against.

CONCLUSION

The clear meaning and constitution 1 validity of th "Florida Contraband Forfeiture Act" require some connecting link between the item to be forfeited and the illegal activity. The opinion of the First District Court in this case is entirely consistent with the plain meaning of the sections in question as well as opinions of other District Courts of Appeal, especially the Second. Consequently, the opinion of the First District Court in the instant case should be affirmed; and the matter mandated to the trial court for further proceedings as provided in that opinion.

Respectfully submitted,

WILLIAM B. RICHBOURG
Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to JERRY T. ALLRED, Assistant State Attorney, 190 Governmental Center, Pensacola, Florida 32501, by hand delivery this 8TH day of September, 1988.

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