SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
PETITIONER

CASE NO. 72-181
DCA-1 BM-281

VS.

ON REQUEST TO INVOKE DISCRETIONARY JURISDICTION OF THE SUPREME COURT

RICHARD CRENSHAW,
RESPONDENT

BRIEF OF PETITIONER, STATE OF FLORIDA, ON JURISDICTION

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STATEMENT OF THE CASE

The Petitioner filed a Petition for Rule to Show Cause with the Circuit Court of Escambia County, Florida on November 26, 1985 seeking forfeiture of the 1984 Volvo Automobile which is the subject of the proceedings below. A Rule to Show Cause was issued on December 26, 1985 by the Honorable M. C. Blanchard, Circuit Judge. A hearing in chambers was held on March 4, 1986 and, on March 13, 1986, the Trial Court entered an Order granting forfeiture of the automobile to the Petitioner (A-1). The Respondent sought review in the First District Court of Appeal and, there being no transcript of the proceedings made in the Trial Court, the parties filed a Stipulation as to the facts. On January 19, 1988, the First District Court of Appeal rendered the Opinion sought to be reviewed here (A-2-12) reversing the forfeiture and remanding for further proceedings. The Petitioner filed a Motion for Rehearing/Rehearing En Banc (A-13-18) and, on March 10, 1988 the First District Court of Appeal denied the motion (A-19) and Petitioner commenced to this proceeding seeking to invoke the discretionary jurisdiction of the Supreme Court.

STATEMENT OF THE FACTS

On October 25, 1985 the Respondent was stopped by officers of the Pensacola Police Department who had been alerted by a confidential informant that a suspect carrying cocaine would be driving the 1984 Volvo automobile which is the subject of this proceeding. Upon the officers' request, the Respondent stepped

out of his car and was searched, whereupon the officers found on his person a vial of a substance suspected of being cocaine.

The Respondent was arrested and charged with possession of cocaine and his car taken into custody. The contents of the vial found on the Respondent's person were analyzed and found to be a small amount of cocaine, the exact quantity of which was not attempted to be measured because it was clearly below the 28 grams necessary to sustain a charge of trafficking. The Respondent admitted posession of the cocaine for his personal consumption and denied dealing in cocaine. Respondent admitted at hearing that he had previously been convicted and incarcerated by federal authorities for possession of illegal drugs with intent to distribute.

ARGUMENT

WHETHER THE SUPREME COURT SHOULD EXERCISE DISCRETION TO REVIEW THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL BELOW

The State of Florida seeks to invoke the jurisdiction of this Court on the basis of Art. V, Sections *3* (b)*(3)* and (7), Fla. Const. and Fla. R. App. P. *9.030* (a) (2) (A)(iv) and *9.030* (a)*(3)* which authorize the Florida Supreme Court to review decisions of the District Courts of Appeal which expressly and directly conflict with the decision of another District Court of Appeal and to issue all writs necessary to the completion of its jurisdiction, including the issuance of writs of certiorari.

I

CONFLICT JURISDICTION

A new standard for contraband forfeiture has been created by the opinion of the District Court of Appeal below, amending the legislative scheme set forth in the Florida Contraband Forfeiture Act, Section 932.701 ff, Florida Statutes. On Page 7 of its Opinion, the First District Court of Appeal, applying the forfeiture statute to the facts in question held:

> 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...hold that the use of the vehicle must play some part in carrying out a prohibited criminal transaction involving the contraband drugs that is shown to be more than remotely incidental to an occupant's possession of illicit drugs for purely personal use.

Thus, the subject decision expressly and directly conflicts with: In re Forfeiture of a 1977 Datsun 2802 Automobile, 448 So.2d. 78 (Fla. 4th DCA 1984); City of Clearwater v. Malick, 429 So.2d. 718 (Fla. 2d DCA 1983); and, Naples Police Department v. Small, 426 So.2d. 72 (Fla. 2d DCA 1983). In each case, the appellate court found that the presence of felony drugs in the vehicle demanded forfeiture under the statute despite lack of evidence of any "transaction" or any purpose for the drugs other than personal use.

In In re forfeiture of a 1977 Datsun 2802, supra, the Fourth District reversed the trial court's refusal to order

forfeiture as a result of the presence of two and one half diazepam tablets and eight grams of hashish. The owner had been observed in the process of loading a cube of hashish into a pipe while in the automobile. The trial court denied forfeiture on the theory that it had discretion to do *so* because of the small amount of drugs involved. The District Court reasoned that, since both hashish and diazepam are "contraband articles" within the meaning of Paragraph 932.701 (2) (a), Florida Statutes, the vehicle was necessarily subject to forfeiture because possession of any amount of diazepam or hashish was a felony and Subsection 932.703 (1) specifically provided for forfeiture in those circumstances. The court stated:

> There is no exception for cases involving small quantities of drugs, provided a felony amount is at issue....

In re Forfeiture of 1977 Datsun 2807; Automobile, **supra**, at 79.

The Second District reversed the trial court and mandated the forfeiture of David Malick's van on the basis that it contained cocaine that he admitted he was preparing to snort with a friend when police approached his vehicle. The court held that the Florida Contraband Forfeiture Act:

> ...provides for seizure and forfeiture of a vehicle when contraband is transported, concealed or possessed in it, if possession of the contraband constitutes a felony.

City of Clearwater v. Malick, **supra**, at 719.

The Second District also reversed the trial court and directed forfeiture in the case of Naples Police Department v. Small, supra, holding that there was basis for forfeiture because of the twelve Methaqualone tablets found in a briefcase in the trunk of the car. The trial court had found that the facts showed mere possession and that there was no evidence to show that the automobile was used to facilitate the commission of the crime, other than the fact than it was the container in which it was placed at the time. The Second D.C.A. found that the 1980 amendments to the legislation [after Griffith v. State, 356 So.2d. 297 (Fla. 1978)] included provision that:

> ...if a vehicle contained a felony amount of contraband, then the State could forfeit the vehicle.

Naples Police Department v. Small, supra, at 72.

Subsection 932.702 (2), Florida Statutes, makes it unlawful to conceal or possess any contraband article in or upon any motor vehicle. Paragraph 932.701 (2) (a) defines contraband article as including a controlled substance under Chapter 893 such as the cocaine in question here. The Second and Fourth District Courts of Appeal saw clearly the express intent of the legislature which is further confirmed by the fourth sentence of Subsection 932.703 (1) which states:

> In any incident in which possession of any contraband article defined in s. 932.701 (2) (a)- (d), constitutes a felony, the... motor vehicle...in or on which such contraband article is located at the time of seizure shall be contraband subject to forfeiture.

The opinion of the First District is clearly in conflict with those of the Second and Fourth Districts cited above and thus the Supreme Court clearly has jurisdiction to review it pursuant to Art. V, Section 3 (b)(3) Fla. Const. and R. App. P 9.030 (a)(2)(A)(iv).

II

ORIGINAL JURISDICTION

The Supreme Court, pursuant to Art. V, Section 3 (b)(7), Fla. Const. and Fla. R. app P. 9.030 (a)(3) has authority to issue all writs necessary to the completion of its jurisdiction, including issuance of writs of certiorari, which are the appropriate remedy when an inferior tribunal has not proceeded in accord with the essential requirements of law in cases where no remedy will lie by appeal. State ex rel. Boyles v. Parole and Probation Commission, 436 So.2d. 207, 208 (Fla. 1st. DCA 1983).

Here, the Respondent acknowledged to the arresting officers possession of the cocaine found on his person after he stepped from the car which he had been driving. He did so at hearing and so stipulated for the purposes of the appeal below. Clearly, the requirement of the legislation for forfeiture of the vehicle has been met and yet the First District Court of Appeal has created a new standard which would require the State or other entities seeking forfeiture to prove that there is some additional nexus with activity other than possession of drugs for personal use.

The District Court of Appeal has injected into the legislative scheme the standard of "personal" use or consumption, indicating that law enforcement agencies and the courts must now decide that there is some quantity of drugs which, although it may be sufficient to constitute a felony, is insufficiently illicit to form a basis for forteiture. The decision renders the provisions of Subsection 932.702 (2), Florida Statutes, making possession of contraband unlawful for the purposes of the forfeiture act, completely meaningless.

The opinion of the District Court of Appeal evinces a distaste for the severity of the sanction potentially imposed through the Florida Contraband Forfeiture Act. But that issue is clearly one for the legislature rather than for the Court unless it finds the penalty unconstitutionally severe. The District Court has violated the first rule of statutory construction:

> [A]bsent a violation of constitutional right, specific, clear and precise statements of legislative intent control regarding intended penalties. Only where no clear intent exists does any other rule construction come into play. [R]ules of statutory construction "are useful only in case of doubt and should never be used to create doubt, only to remove it." State v. Egan, 287 So.2d. 1, 4 (Fla. 1973). The Courts never resort to rules of construction where the legislative intent is plain and unambiguous.

Carawan v. State, 515 So.2d. 161, 165 (Fla. 1982);

The District Court of Appeal has exceeded the appropriate limits of the well recognized legislative function of the judiciary. Justice Cardozo observed that the limits upon the judge in that realm are narrower than those of the legislature:

"He legislates only between gaps. He fills the open spaces in the law." Cardozo, "The Nature Of The Judicial Process," P. 113.

It is respectfully suggested that, if it were to be placed in a statute, the District Court of Appeal's "personal use" standard would be found to be unconstitutionally vague. How is a law enforcement agency to determine what amount is for "personal use" when such a matter depends upon such factors as the finances and level of addiction of the possessor? The end result is a creation of a multilayered standard which will throw law enforcement agencies into turmoil and engender an endless round of litigation in attempts to determine what is an amount of felony drugs to be used for "personal" purposes. Remand to the circuit court for further findings, no matter what those findings are, will have no effect in lessening the turmoil created by the proliferation of indeterminant standards created by the District Court's opinion.

III

CONCLUSION

It is clear that the First District Court of Appeal deviated from the essential requirements of the law in that it injected its own opinion on what should be the level of sanction levied against a criminal wrongdoer under the Florida Contraband Forfeiture Act and created direct and express conflict of decisions of other District Courts of Appeal.

The Respondent respectfully suggests that reversal of the opinion of the District Court of Appeal is essential for the purposes of stability and predictability of law in the area and the carrying out of the legislative mandate expressly set forth in the statutes in question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been provided to Barry Z. Rhodes, Esquire, 358 West 9 Mile Road, Suite C, Pensacola, Florida 32514 this 7th day of April, 1988 by U.S. mail.

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