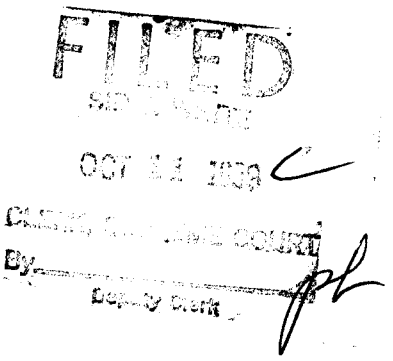
SUPREME COURT OF FLORIDA

CASE NO.: 74,129



CITY OF EDGEWOOD,

Petitioner,

vs.

MICHAEL L. WILLIAMS,

Respondent.
_____/

BRIEF OF AMICUS CURIAE

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ISSUE

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE FINAL JUDGMENT OF FORFEITURE ONCE IT WAS SHOWN THAT THE VEHICLE HAD BEEN USED TO TRANSPORT THE RESPONDENT TO AN APARTMENT WHERE HE COMMITTED A LEWD AND LASCIVIOUS ACT UPON A MINOR.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopts the Statement of the Case and Statement of the Facts set forth in the Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal erred in reversing the order of forfeiture entered by the trial court. The remotely incidental test adopted by the District Court of Appeal is an improper construction of section 932.701(2)(e), Florida Statutes (1987). By rejecting this test in State v. Crenshaw, 14 F.L.W. 421, (Fla. August 31, 1989) this Court established a precedent which requires the reversal of the opinion of the district court below.

The use of the Respondent's vehicle to transport the Respondent to the scene of the crime falls within the meaning of "instrumentality" as the term is used in section 932.701(2)(e). The vehicle was used to assist the Respondent in the commission of his offense. In this sense, the case cannot be distinguished from Duckham v. State, 479 So.2d 347 (Fla. 1985), because in both cases the subject vehicle was used to transport the claimant to the scene of the crime. In addition, the vehicle was used to aid or abet in the commission of the offense by transporting the Claimant to the scene of the crime and to transport the victim from the crime scene.

Further, the legislative history of section 932.701(2)(e) demonstrates a clear intent by the legislature to direct forfeiture in the instant case. Legislative committee changes evince a clear intent to broaden the meaning of instrumentality, which would encompass the use of the vehicle by the Respondent. The obvious intent of the legislature, is inconsistent with the restrictive application of the statute by the Fifth District Court of Appeal. In view of the clear wording of section 932.701(2)(e), the cases construing this statute and the underlying legislative intent, the opinion of the Fifth District should be reversed.

ARGUMENT

The vehicle was employed as an instrumentality in the commission of or in aiding or abetting in the commission of a felony offense.

The issue in this case is whether the provisions of Florida's Contraband Forfeiture Act, sections 932.701-932.704, Florida Statutes (1987), direct the forfeiture of a vehicle which is used to transport the driver to an apartment where he commits a lewd and lascivious act upon a minor. The question is one of legislative intent. In this context, the recent decision of this Court in State v. Crenshaw, 14 F.L.W. 421 (Fla. August 31, 1989) must be considered.

Although Crenshaw addresses a different scenario - the possession of a personal use amount of controlled substances by the driver or occupant of a vehicle - the case is nevertheless important to the present case for three reasons. First, the Fifth District Court of Appeal bottomed its opinion upon the decision of the First District Court of Appeal in Crenshaw which established a "remotely incidental" test. Second, in rejecting the "remotely incidental" test, this Court relied upon the plain wording of the pertinent provisions of the Contraband Forfeiture Act. Third, in discerning the legislative intent, this Court also considered the legislative history of the relevant statutes. The Department, as Amicus Curiae, suggests that a similar analysis when applied to the instant case demonstrates reversible error by the District Court of Appeal.

In Crenshaw, the First District Court of Appeal held 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." 521 So.2d at 141. The Fifth District, in its opinion below, seized upon this language in denying the forfeiture. The use of Respondent's vehicle, held the court, to drive approximately one block to an apartment where the offense was committed "can only be considered remotely incidental to his criminal conduct." 541 So.2d at 123.

However, this Court in reviewing the First District's opinion in Crenshaw rejected the remotely incidental test. The Court looked at the clear and unambiguous wording of sections 932.702(4) and 932.703(1), holding that the legislature unambiguously intended that the vehicle be forfeited in such a case. 14 F.L.W. at 422.

In light of this Court's opinion in Crenshaw, it is appropriate therefore to examine closely the underlying statutes in question to determine the intent of the legislature given the facts of the present case. Section 932.702(4), Florida Statutes, makes it unlawful to possess or conceal any contraband article. Section 932.701(2)(e) defines a contraband article to include any vehicle which has been employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony.

The Fifth District Court of Appeal fleshed out the meaning of instrumentality as the term is used in section 932.701(2)(e) in City of Indian Harbor Beach v. Damron, 465 So.2d 1382 (Fla. 5th DCA 1985). According to the court, "An instrumentality provides a means or assists in the commission of a felony offense; it is ancillary to the commission of the offense, rather than an element of the offense itself." Id. at 1383. An improperly registered aircraft did not assist in the commission of another felony offense, and therefore was not considered a contraband article. Id.

Following this definition of instrumentality, the vehicle in the case at bar is a contraband article. The Respondent drove his vehicle to the apartment where he committed the felonious act. By transporting him to the scene of the crime, the vehicle assisted in the commission of the offense. See Duckham v. State, 479 So.2d 347 (Fla. 1985).

The Fourth District has also examined the meaning of "instrumentality" in the case of In re: Forfeiture of 1983 Lincoln, 497 So.2d 1254 (Fla. 4th DCA 1986). The vehicle in this case was driven to a meeting where a usurious transaction was consummated in violation of section 687.071(3), Florida Statutes (1983), a third degree felony offense. As in the present case, the statute under consideration was section 932.701(2)(e). Upholding the forfeiture, the court held that the vehicle "facilitated" the commission of the contemplated crime, the same standard set forth in section 932.702(3).

In its opinion, the Fourth District cited United States v. One 1979 Porsche Coupe, 709 F.2d 1424 (11th Cir. 1983) which involved a vehicle which was used to transport the principal figure in a narcotics transaction several hundred miles to the location where the attempted purchase was to take place. One 1979 Porsche Coupe was favorably cited by this Court in Duckham v. State, supra. Duckham, similar to One 1979 Porsche Coupe, upheld the forfeiture of a vehicle which transported a drug dealer to his apartment where a sale of narcotics transpired. 479 So.2d at 348. The court agreed with the district court's finding that the vehicle facilitated the sale of contraband within the meaning of section 932.702(3), Florida Statutes (1981). Thus, Duckham and the present case are inextricably linked by a common standard: whether the use of the vehicle facilitated commission of the crime.

Yet, the concurring opinion by Judge Cobb in the case at bar attempts to distinguish Duckham. Concurring specially, Judge Cobb opined that "under the facts in Duckham the forfeited vehicle was used to facilitate the drug deal after it was already in progress; in the instant case the evidence does not show that the defendant's use of his vehicle intervened during the progress of criminal activity." 541 So.2d at 123. Judge Cobb overlooks In re: Forfeiture of 1983 Lincoln and the federal cases cited by this Court in Duckham[1] such as one 1979 Porsche Coupe and

[1] 478 So.2d at 348, n.3.

United States v. One 1980 Cadillac Eldorado, 705 F.2d 862, 863 (6th Cir. 1983), holding that "[I]ntent is the determining factor..."; United States v. Fleming, 677 F.2d 602, 610 (7th Cir. 1982), holding that "[a]rrival of the car at a location far from the southside home, his participation in the drug transaction..., and the likelihood that he planned to leave as he had come" supported forfeiture; and United States v. One 1977 Cadillac Coupe deVille, 644 F.2d 500 (5th Cir. 1981), which held that transportation of a person who was an indispensable link in an illegal transaction warranted forfeiture of the motor vehicle. None of these cases requires the fact that the criminal act was "already in progress"[2] at the time the vehicle was driven to the apartment. See also United States v. One 1974 Cadillac Eldorado, 548 F.2d 421 (2nd Cir. 1977) upholding the forfeiture of a vehicle driven to a preliminary meeting to arrange the sale of narcotics.

Section 932.701(2)(e) also directs forfeiture if the vehicle is used to aid or abet in the commission of any felony. This provision was considered by the Fourth District Court of Appeal in One American Jeep v. State, 427 So.2d 364 (Fla. 2nd DCA 1983). In this case, the owner of a Jeep drove his vehicle to the scene of a burglary and used it to transport the stolen property. The trial court found that the Jeep had been used to aid or abet in the commission of grand theft and ordered the

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[2]Williams v. City of Edgewood, 541 So.2d 122, 123 (1989) (Cobb, J., concurring)

vehicle forfeited. The District Court affirmed the order of forfeiture, holding that the vehicle was used to aid in the commission of the felony of grand theft. Id. at 366.

One American Jeep, when applied to the present facts, warrants a similar result. As in the case of the Jeep, the subject vehicle was used to transport the owner to the scene of the crime. The victim in the instant case requested a ride from the Respondent in his automobile because it was raining. The avowed purpose of the Respondent's meeting with the victim was to transport her in the Respondent's vehicle following his physical contact with the victim. The vehicle transported both the Respondent and the victim from the scene of the crime; the Respondent drove her to her home. (Statement of the Facts, Petitioner's Initial Brief p. 3, 4) Surely no reasonable interpretation of section 932.701(2)(e) can hold that the vehicle was not used to aid or abet in the commission of the lewd and lascivious act.

A deciding factor in the Crenshaw case was the legislative history of the Contraband Forfeiture Act. This Court traced the history of the legislation which followed Griffis v. State, 356 So.2d 297 (Fla. 1978) and discerned a clear intent of the legislature to direct forfeiture of a vehicle if drugs in the vehicle are possessed for personal use. 14 F.L.W. at 422. A recitation of the legislative history of section 932.701(2)(e) may also be helpful to the Court in determining the legislative intent of this statute.

The Florida Uniform Contraband Transportation Act, sections 943.41-943.44 (1979) was amended in 1980 in direct response to Baker v. State, 343 So.2d 622 (Fla. 2nd DCA 1977). See State of Fla. Senate Comm. on Judiciary-Crim., CS/SB 93, Staff analysis 3 (June 26, 1980); (A1-3). Raker held that the provisions of the Florida Uniform Contraband Transportation Act were strictly limited to vessels, motor vehicles and aircraft. Currency used in violation of chapter 893 was not covered. 343 So.2d at 624.

Accordingly, Senator Steinberg introduced legislation amending the act to provide that

> Any personal property including, but not limited to, any item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, or currency, which is employed as an instrumentality and essential to the commission of, or in aiding or abetting the commission of, any of the following offenses...Fla. SB 93 (1980); (A 4-7).

Specifically identified as one of the felony offenses was lewd and lascivious behavior. Id.

At the March 13, 1980 meeting of the Senate Judiciary-Criminal Committee, the bill was rewritten as a committee substitute. Fla. Legis. Final Bill Info. (Reg. Sess. 1980). A 8. The committee deleted the requirement that the property be used in a manner essential to the commission of the offense, and included any felony offense. Fla. CS/SB 90 (1980); A 9-15. This version, which was ultimately enacted by the legislature, is identical to the wording in current law. Ch. 80-68 §3, Laws of Florida; compare section 932.701(2)(e), Florida Statutes (1987).

The history is significant. The legislature initially targeted the general offense in question, lewd and lascivious behavior, as an offense which warranted forfeiture of property used to commit the offense. When the legislature eliminated the requirement that the use of property must be essential to the commission of the offense, it broadened the meaning of instrumentality. If the legislature intended to restrict the meaning of instrumentality in the manner proposed by the Fifth District, it would have retained the requirement that the use of the property be essential to the commission of the offense. By deleting this requirement and retaining the "aiding or abetting" provision, the legislature has demonstrated a clear intent to direct the forfeiture of property, such as the Respondent's vehicle, which generally assists or facilitates the commission of a felony offense.

In summation, the vehicle in this case was employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, a felony offense. If the Respondent had sold or purchased drugs at the apartment rather than committing a lewd and lascivious act, the vehicle would have been considered an instrumentality under Duckham, supra. If the Respondent had committed usery at the apartment the vehicle would have been considered an instrumentality according to One 1983 Lincoln, supra. If he had committed burglary or grand theft at the apartment, the vehicle also would have been considered an instrumentality pursuant to One 1986 American Jeep, supra. The Respondent, however, did not commit any of these acts; he

committed the morally reprehensible crime of lewd and lascivious behavior with a minor. It defies logic to hold that the legislature intended for the vehicle to be forfeited under the foregoing circumstances but not under the facts of the instant case.

The state and federal cases cited above, the clear wording of the applicable statutes, and the legislative history mandate the forfeiture of the vehicle in the instant case. The decision of the Fifth District should be reversed.

CONCLUSION

In view of the authorities cited above, Amicus Curiae respectfully requests this Honorable Court to reverse the decision of the Fifth District Court of Appeal. The trial court's order of forfeiture should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular United States mail to James Patrick Curry, Curry, Taylor & Carls, 225 East Robinson Street, Suite 445, Orlando, Florida 32801, and William A. Greenberg, Esquire, 6500 U.S. Highway 17-92, Fern Park, Florida, this 9th day of October, 1989.

R. W. EVANS