IN THE SUPREME COURT OF FLORIDA

CITY OF EDGEWOOD,

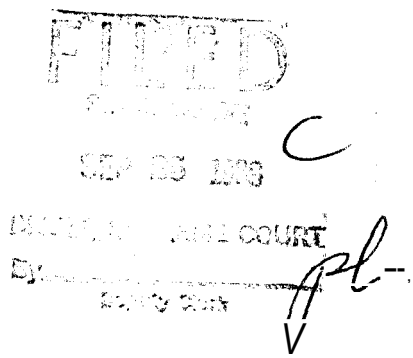
Petitioner,

vs.

MICHAEL L. WILLIAMS,

Respondent.
_____/

CASE NO. 74,129



AMENDED ANSWER BRIEF ~~OF~~ RESPONDENT

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE

Respondent accepts and adopts the Statement of the Case as contained in the Initial Brief of the Petitioner.

Respondent has attached hereto his Appendix which is identical to the Appendix to the Initial Brief of the Petitioner.

STATEMENT OF THE FACTS

It is undisputed that M.H., born, 1971 (R-35) was in her brother's condominium in the Camelot Apartments in the City of Edgewood, Orange County, Florida on a particular day in July, 1987 (R-38). Between 5:00 P.M. and 5:30 P.M., Ms. H. called Respondent at his place of employment, Vapor Products, also located within the city limits of Edgewood. In fact, Vapor Products was characterized by the City's witness, Lieutenant Hutto, as being "almost across the street," from Camelot Apartments (R-29).

Ms. H. stated that she had planned to ride her bicycle back home at the end of the day, but instead sought a ride from Respondent because it was raining (R-39). Respondent suggested that Ms. H. find another way home, that he couldn't give her a ride (R-40, 87). Ms. H. called Respondent a second time, again asking for a ride home (R-40).

Ms. H. was on the telephone when Respondent arrived and, in any event, was in an apartment that did not afford her a view of the parking lot where Respondent would have had to have parked the subject vehicle, if he had driven it, as alleged (R-55).

Upon arriving at the apartment, Respondent had physical contact with M.A.H. to an extent that the trial court concluded was sufficient to come within the definition of lewd and lascivious within the meaning of Florida law.

The trial court concluded that by the greater weight of the evidence, all elements of the forfeiture had been satisfied, including the particular matter as to whether or not there was sufficient nexus between the vehicle and the commission of the crime to come within the purview of the forfeiture statute.

The Fifth District Court of Appeals reversed the opinion of the trial court finding the use of the vehicle to be only "remotely incidental" to the alleged crime.

SUMMARY OF ARGUMENT

The showing of a nexus between the Respondent's automobile and the alleged criminal activity was a prerequisite to forfeiture in the case at bar. As opposed to factual situations allowing forfeiture of vehicles whose occupants therein possess contraband drugs, nexus should still be a requirement, as in the instant case.

The facts clearly presented show that the vehicle to be forfeited contained no contraband article and in no way aided, abetted or facilitated the commission of the alleged criminal act. Requiring nexus is nothing more than to acknowledge the statutes implicit directive that the vehicle be something more than remotely incidental to the commission of the crime.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL DID NOT ERR IN REVERSING THE FINAL JUDGMENT OF FORFEITURE.

Petitioner would have this court believe that the decision of the Fifth District Court of Appeals, here the subject of review is in error because the Courts of Appeal departed from Florida's Contraband Forfeiture Act contained in Sections 932.701 to 932.704, Florida Statutes (1987). Petitioner argues that the decision in the case at bar serves to impose an additional standard or burden upon the law enforcement agency seeking forfeiture by imposing a "remotely incidental" test or standard not contemplated by the provisions of Florida Statute 932.701 to 932.704.

Florida Statute 932.701(2)(e) defines a contraband article:

> "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 has been or is actually employed as an instrumentality in the commission, or in aiding or abetting in the commission of any felony."

Webster's New Collegiate Dictionary, 1977 offers the following definitions:

> Instrumentality - the quality or state of being instrumental.

Instrumental - serving as a means, agent or tool.

Aid - to provide what is useful or necessary in achieving an end.

Abet - to assist or support in the achievement of a purpose.

Florida Statute 932.701(2)(e) does not define a contraband article so broadly as to include any item of personal property merely used in the commission of a felony. The ruling of the Fifth District Court of Appeals sought to be reviewed and the reasoning of the Second District Court of Appeal in City ~~of~~ Clearwater ~~vs. One 1980~~ Porsche 911SC, Vehicle ~~LD No.~~ 91A0140918, 426 So.2d 1260 (Fla. 2nd D.C.A. 1983) merely serve to interpret the forfeiture statute as requiring something other than a remotely incidental connection between the commission of a felony and an item of personal property employed in the commission of that felony. The decision of the Court below merely carries out the stated limitation of the forfeiture statute by requiring that the personal property sought to be forfeited actually does aid or abet in the commission of a felony, or qualify, as per the definition above, as an instrumentality employed in the commission of that felony.

In ~~In Re:~~ Forfeiture ~~of One 1983~~ Lincoln, 497 So.2d 1254 (Fla. 4th D.C.A. 1986), the Court stated that:

> "...the vehicle driven by Pappas to the February 6, 1984 meeting was still used to facilitate the commission of the contemplated crime." 497 So.2d 1254, 1256.

By concluding that the vehicle in question facilitated the commission of the crime, the Fourth District Court of Appeals satisfied the forfeiture statute. This facilitation was undoubtedly absent in the case at bar, allowing the Appellate Court to deny forfeiture. The case at bar and ~~In~~ ~~Re:~~ Forfeiture ~~of~~ ~~One~~ ~~1983~~ Lincoln, supra are thus not in conflict.

Smith v. Caggiano, 496 So.2d 853 (Fla. 2nd D.C.A. 1986) saw the appellate court allow a forfeiture where a vehicle had been used to transport its owner to the scene of felonious wagering activity. The case at bar is distinguishable again in that the owner of this vehicle did not use his car as an instrumentality or to aid and abent in the alleged commission of the felony. The undisputed facts are that the owner of the BMW drove his car not much further than across the street. Additionally, the victim of the alleged felony, Ms. H., made at least two telephone calls to the vehicle's owner seeking a ride home (R-41); and the meeting at the condominium between the owner of the vehicle and the victim was not prearranged (R-54). The decision of the Fifth District Court of Appeals below reflects the conclusion that the vehicle in no way aided, abetted, or facilitated the crime that could have taken place in the absence of the vehicle's owner driving it little more than across the street.

In Duckham v. State, 478 So.2d 347 (Fla. 1985) the vehicle sought to be forfeited was driven to a restaurant wherein a deal was struck to buy drugs from an undercover policeman. The vehicle

was then driven to an apartment where the sale of the drugs took place. As related by Justice Cobb in his concurring opinion in the case below, Duckham is distinguishable from the facts in the case at bar because there the vehicle was used to drive to the site of the consummated drug transaction. The car thus undoubtedly facilitated the commission of the felony in Duckham, clearly distinguishing it from the facts in the case at bar. In fact the Court specifically, in Duckham, held that the particular use of the vehicle facilitated the illegal sale. 478 So.2d 347, 348.

The Court in Duckham recognized the notion that property sought to be forfeited can be too remotely related to the felony to support a forfeiture. This Court stated in Duckham:

> "The instant case is also distinguishable from that case and we find no conflict with One 1980 Porsche. 478 So.2d 347, 349."

In City of Clearwater **vs.** One 1980 Porsche 911SC, supra, the vehicle sought to be forfeited was driven to Tampa International Airport where its driver then flew to North Dakota to consummate a drug transaction. There the Court stated that:

> "Even assuming that there was evidence sufficient to show that the Porsche was used in part of the journey to North Dakota, such use appears to be only remotely incidental to the sale of marijuana. The criminal activity was not proved to have dependence upon the use of the Porsche. We believe that any other ruling by the trial court under the particular circumstances of this case would have passed beyond the outer limits of the terms 'facilitate' and 'aiding or abetting.' 426 So.2d 1260, 1262."

Martinez v. Heinrich, 521 So.2d 167 (Fla. 2nd D.C.A. 1988) saw an appellate court review the question of sufficency of nexus by requiring a "but for" test. There, the owners of the automobile sought to be forfeited used the vehicle to transport themselves to their adult bookstores where obscene materials were sold in violation of state RICO laws. The District Court of Appeal reversed the trial court's forfeiture because there had been no showing that, but for the use of the automobiles, the illegal activity could not have occurred.

This court recently decided State of Florida v. Crenshaw, 14 Fla. Law Weekly 421 (Fla. August 31, 1989) which reviewed Crenshaw v. State, 521 So.2d 138 (1st D.C.A. 1988) in which the First District Court set aside the trial court's order of a forfeiture, holding that, before there can be a forfeiture of a vehicle for a felony possession of drugs found on a person in the vehicle, there must be a showing that the vehicle played some part in the drug activity. The Supreme Court disagreed with the holding in the lower appellate court. This recent ruling is not in conflict with Respondent's argument; and that decision is clearly distinguishable from the instant case.

In Crenshaw, the Supreme Court held that forfeiture was an appropriate penalty where the individual possesses a felony amount of drugs, while in a vehicle, even in the absence of a showing that the vehicle played some part in the drug activity. This holding represented the court's strict interpretation of Florida Statute 932.703(1) which provides in part:

> "...In any incident in which possession of any contraband article defined in s. 932.701(2)(a)-(d) constitutes a felony, the vessel, motor vehicle, aircraft, or personal property in or on which such contraband article is located at the time of the seizure shall be contraband subject to forfeiture. It shall be presumed in the manner provided in s. 90.302(2) that the vessel, motor vehicle, aircraft, or personal property in or on which such contraband article is located at the time of seizure is being used or was intended to be used in a manner to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of contraband article defined in s. 932.701(2)(a)(d)." (emphasis added)

In ~~Crenshaw~~, the Supreme Court determined that the legislature intended there to be a forfeiture of vehicles wherein there was felony possession of drugs.

> "We find that the legislature unambiguously intended that a forfeiture is proper under the instant facts. Section 932.702(4), added in 1980, makes it unlawful 'to conceal or possess any contraband article.' Further, Section 932.703(1) in pertinent part states: 'In any incident in which possession of any contraband article defined in s.932.701(2)(a-d) constitutes a felony, the vessel, motor vehicle, aircraft, or personal property in or which such contraband article is located at the time of seizure shall be contraband subject to forfeiture.' (Emphasis added) We find that the legislative message is clear: possessing drugs, even solely for personal use, subjects individuals not only to criminal penalties, but also to forfeiture of the vehicle, boat, or aircraft in which the drugs are found. It makes no difference whether the drugs are on the seat, in the console or in the occupant's pocket." Fla. Law Weekly 421, 422.

The facts in the case at bar could not have been any more distinguishable. Respondent did not possess any contraband articles in the vehicle; and the vehicle was not instrumental nor

did it aid or abet in the commission of a felony. If the legislature intended the harsh penalty as applied in Crenshaw, it did so in an effort to aid in the fight against trafficking, transportation, sale, use and possession of drugs. Had the legislature intended forfeiture to be appopriate to the facts in the case at bar, it would have done so with language analogous to that contained in Florida Statute 732.703(1) so as to leave little doubt as to its intention.

Respondent asserts that the particular facts in the case at bar clearly demonstrate that the use of the vehicle was only remotely incidental to the commission of the alleged criminal act and further that the acts complained of could have been committed even without the use of the BMW. The vehicle then could not be deemed either an instrumentality in the commission of a felony or in the aiding or abetting in the commission of a felony as required by a literal reading of Florida Statute 932.701(2)(e). The simple fact is that the use of the BMW did nothing to facilitate or aid in the commission of the alleged felonious acts.

The decision of the Fifth District Court of Appeals in the case at bar is merely a proper application of the statutory requirement that there be a nexus between the property sought to be forfeited and the criminal act.

CONCLUSION

Florida's contraband forfeiture act, even read literally, requires that there be sufficient nexus between the property to be forfeited and the alleged criminal activity.

The District Court of Appeal in the case at bar refused to attentuate the concept of nexus *so* far as to allow the forfeiture of the BMW given the facts of this case. This Honorable Court should not reverse that correct application of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Amended Answer Brief of Respondent has been furnished by mail delivery to JAMES PATRICK CURRY, ESQ., 225 E. Robinson Street, Suite 445, Orlando, Florida 32801, this 21 day of, September, 1989.

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