

15
6 Appendix

IN THE SUPREME COURT OF
FLORIDA

CITY OF EDGEWOOD,

CASE NO. 74,129

Petitioner,

DISTRICT COURT OF APPEAL
5TH DISTRICT - NO. 88-1196

vs .

MICHAEL L. WILLIAMS,

Respondent

FILED
SID A WHITE
AUG 30 1989
SUPREME COURT
Deputy Clerk

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE

Respondent Michael Lynn Williams appealed to Fifth District Court of Appeal from a Final Judgment of Forfeiture entered against him on May 18, 1988 by the Circuit Court, Ninth Judicial Circuit, in and for Orange County. The Final Judgment had forfeited Respondent's ownership interest in a certain 1985 BMW Model 735 four-door automobile and vested ownership in the Petitioner, City of Edgewood, Florida.

In entering that Final Judgment (R 231-2321, the trial court had made certain findings of fact and conclusions of law:

1) that the automobile was used and employed in aiding or abetting the commission of the crime of a lewd and lascivious act on a child under the age of sixteen, in violation of Section 800.04, Florida Statutes

2) that the automobile was contraband as defined by the Florida Contraband Forfeiture Act

3) that Respondent had failed to show good cause why the automobile should not be forfeited.

On March 16, 1989, the Fifth District Court of Appeal, filed an opinion reversing the trial court. The Court's opinion conceded that the BMW was used to drive Respondent to the scene of the alleged crime but found that particular use to be only "remotely incidental", a test found in the First District Court's opinion in Crenshaw v. State, 521 So.2d 138, 141 (Fla. 1st DCA 1988), review granted, Case No. 72, 181 (Fla. May 13, 1988). In a special concurrence by Judge Cobb, the apparent conflict of the Court's ruling in this case with Duckham v. State, 478 So.2d 347

(Fla. 1985) was discussed and, in Judge Cobb's view, distinguished. A copy of the Fifth District Court of Appeal's opinion in this case is attached hereto as Exhibit A of the Appendix. A copy of its Order dated April 13, 1989 denying Petitioner's Motion For Rehearing and Clarification is attached hereto as Exhibit B of the Appendix. A copy of Petitioner's Notice to Invoke Discretionary Jurisdiction dated May 3, 1989 is attached hereto as Exhibit C of the Appendix. A copy of this Court's Order accepting Jurisdiction and Dispensing with Oral Argument dated August 3, 1989 is attached hereto as Exhibit D of the Appendix.

STATEMENT OF THE FACTS

It is undisputed that the victim, M.H., born 1971, (R-35) was in her brother's condominium unit 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. At trial, Vapor Products was characterized by the Petitioner's witness, Lieutenant Hutto, as being "almost across the street," from Camelot Apartments (R-29).

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

Upon arriving at the apartment, Respondent had physical contact with the child 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. That finding that a second degree felony was committed has not been at issue on appeal. The evidence at trial, even from the testimony of the Respondent, was that Respondent touched or fondled the victim's breast in a manner that was lewd and lascivious. The victim was under the age of sixteen (16) at the time of the incident.

In addition, the testimony at trial showed that the BMW 735

automobile was the vehicle used by the Respondent: a) to drive himself to the victim's brother's apartment, the scene of the felony crime; b) to entice the victim into accepting the Respondent's offer of a ride home and c) to drive the victim home and transport himself from the scene of the crime. Respondent, during his testimony at trial, acknowledged a certain lack of memory on these points, but never directly denied or rebutted these three uses of the automobile.

SUMMARY OF ARGUMENTS

The decision of the Fifth District Court of Appeal in the case at bar is in direct and express conflict with Duckham v. State, 478 So.2d 347 (Fla. 1985), ~~In Re~~ Forfeiture of One 1983 Lincoln, 497 So.2d 1254 (Fla. 4th DCA 1986) and Smith v. Caggiano, 496 So.2d 853 (Fla. 2d DCA 1986). The decision of the Fifth District Court of Appeal is premised squarely and solely upon a case to which this court has already granted review and which is still pending and awaiting a decision. Crenshaw v. State, supra. Petitioner urges this Court to find that the provisions of the Contraband Forfeiture Act, Sections 932.701-932.704 Florida Statutes (1987), do not require an additional showing beyond the statutory requirement that the alleged contraband "has been or is actually employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony". Section 932.701 (2)(e), Florida Statutes (1987). Petitioner specifically urges this Court to disavow the "remotely incidental" test announced in Crenshaw, supra and in the District Court of Appeal's opinion in this case on two grounds: a) the test is an improper exercise of judicial interpretation in the face of an unambiguous and unequivocal legislative mandate and b) the "test" as enunciated is subjective, vague, ambiguous and not conducive to uniform application by the various circuit and district court judges.

Lastly, the Petitioner would argue that even if the "remotely incidental" test is a proper and workable standard, it was misapplied by the District Court of Appeal in this case,

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING
THE FINAL JUDGMENT OF FORFEITURE ONCE IT WAS
SHOWN THAT THE VEHICLE HAD BEEN USED AS AN
INSTRUMENTALITY IN OR IN AIDING OR ABETTING
THE COMMISSION OF A FELONY

ARGUMENT

The opinions of the First and Fifth District Courts in Crenshaw and in this case respectively, stand for the proposition that, in addition to the plain and obvious words of Section 932.701(2)(e), Florida Statutes (1987), there is an additional, judicially created standard for determining whether an item is forfeitable as contraband under the Contraband Forfeiture Act. That additional standard, which was quoted directly from Judge Zehmer's opinion in Crenshaw in Judge Goshorn's opinion in this case, is hereafter referred to as the "remotely incidental" test or standard.

Other courts, applying the same statute, have not seen fit either to create or to apply the remotely incidental test. In In Re: Forfeiture of One 1983 Lincoln, supra, a forfeiture of an automobile was ordered by the Fourth District Court of Appeal. The vehicle had been used to drive its owner to a meeting, not held in the automobile, at which a borrower discussed a usurious loan with the lender who was the owner and driver of the vehicle. The usurious transaction had not yet been consummated at the time the vehicle was used or seized. Nonetheless, the court found that the vehicle had been used to facilitate the felonious usury and was subject to forfeiture, reversing the trial court which had refused forfeiture.

In Smith v. Caggiano, supra, the Second District Court of

Appeal ordered the forfeiture of a Cadillac automobile, thereby reversing the trial court which had refused forfeiture. In Caggiano, the Court found that Mr. Caggiano's use of his vehicle to transport himself to the scene of felonious wagering was enough to justify forfeiture.

Both the ~~One 1983~~ Lincoln and Caggiano cases relied on Duckham v. State, supra, as precedent. In Duckham, the defendant drove his Volkswagen to a restaurant. In the restaurant, Duckham struck a deal to buy drugs from an undercover policeman and then drove himself to his apartment. No drugs were transported in the car. No conversations took place in the car. The undercover policeman was never in the car. The sale of the drugs eventually took place in Duckham's apartment.

In his special concurrence in the District Court's opinion in this case, Judge Cobb correctly points out the need to distinguish the case at bar from Duckham if the forfeiture here is to be reversed. Petitioner urges this Court to find that Duckham cannot be so distinguished and that a clear conflict with Duckham exists. Petitioner further suggests that Judge Cobb's attempt in his concurrence to distinguish Duckham is a distinction without a difference.

Judge Cobb's apparent distinction was this: in Duckham the vehicle was used to facilitate the "drug deal" after it was already in progress, whereas in this case the evidence did not show that the use of the vehicle "intervened during the progress of activity." Nothing in Duckham, nothing in ~~One 1983~~ Lincoln, and nothing in Caggiano suggests that there is something

essential about the time sequencing of the use of the alleged contraband item and the felony activity. In Duckham, the opinion clearly states that the car was used to facilitate the sale. The sale took place after the use of the vehicle. In this case the felony assault on the child took place after the use of the vehicle. Judge Cobb's use of the term "drug deal" to characterize the whole series of events in Duckham, allows him to characterize the use of the vehicle as being "during the progress of the criminal activity."

But the term "drug deal" is undefined and broad. Could not the whole series of events in this case be similarly characterized as "the seduction of a child" thereby allowing the use of the car to be said to be during the progress of that criminal activity?

Duckham enunciated the end of the usefulness of the narrow construction set forth by this court in Griffis v. State, 356 So.2d 297 (Fla. 1978). Duckham explicitly recognized that the legislature clearly intended that the Contraband Forfeiture Act be read literally. Duckham at 349. The literal reading of the Act and the "bright line" standard that it contains are thus eroded by Crenshaw and the District Court's opinion in this case. The term "remotely incidental" is vague, relative and is not defined. Both words of the phrase are, in and of themselves, relative terms and not easily defined. By the use of such terms, the First and Fifth District Courts have not provided a guideline for either the trial courts or for law enforcement agencies within their jurisdiction. Rather, they have only announced

their intention to second-guess the judgment of the trial courts at the appellate level by using the "remotely incidental" test. As such, the "remotely incidental" test fails in the primary task of an appellate court, namely, to assure the uniform application of the law along guidelines which the inferior courts can understand and apply.

After Griffis, the legislature enacted a broad but clearly defined statute, as discussed in Duckham. In this case and in Crenshaw, the District Courts of Appeal have exceeded their proper functions by judicially creating an extra step in the forfeiture criteria, not found in the statute. Nothing in their opinions suggest that this extra step is in any way constitutionally compelled or legislatively implied. In addition, they have "refined" the statute in a vague and ambiguous way that only creates turmoil in the trial courts and within the law enforcement agencies of their districts. The District Court's opinion in this case cannot be squared with Duckham and with the other cases cited from the Second and Fourth Districts. Accordingly, this Court has jurisdiction and should grant review.

Lastly, the term "remotely incidental" cannot be fairly applied to the facts in this case. Respondent's use of his car to offer a ride home to a fifteen year old girl, to transport himself to the premises where he lewdly and lasciviously assaulted her, and then to transport her home and himself from the scene of the crime is neither incidental to the crime nor remote in any sense of that word. See In Re Forfeiture of 1978

Ford Fiesta, 436, So.2d 373 (Fla. 4th DCA 1983). In this case, the vehicle was, in every sense, an instrumentality and facilitator of the crime.

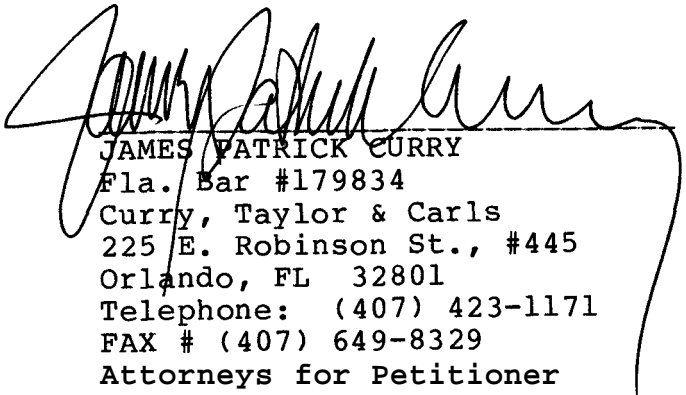
At the very least, the "remotely incidental" test should not be used to prevent forfeitures of vehicles which are used to transport criminals to or from the scene of their felony crimes or to transport a victim of felony crime or tangible fruits of felonies from the scenes of those crimes. See One 1976 Dodge Van v. State, 447 So.2d 984 (Fla. 1st DCA 1984) [illegal drugs]; In Re Forfeiture Of One 1979 Ford, 450 So.2d 863 (Fla. 4th DCA 1984) [illegal drugs]; Smith v. Caggiano, supra [felonious wagering]; In Re Forfeiture Of One 1983 Lincoln, supra (usury); ~~see also In Re Forfeiture of 1978 BMW Automobile~~, 524 So.2d 1077 (Fla. 2d DCA 1988) [burglary of conveyance].

CONCLUSION

Petitioner respectfully requests this Court to reverse the opinion of the District Court of Appeal and to affirm the trial court's final judgment of forfeiture of the subject vehicle.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to William A. Greenberg, Esq., 6500 U.S. Highway 17-92, Fern Park, FL on this the 28th day of August, 1989.



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