12 Separately

IN THF SUPRFMF COURT OF FLORIDA

CITY OF FDGFWOOD,

Petitioner,

vs.

MICHAEL L. WILLIAMS,

Respondent

_____/

CASF NO. 74,125

BRIEF OF PETITIONER ON JURISDICTION

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STATFMFNT OF THF CASF

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 Appellee, City of Fdgewood, Florida.

In entering that Final Judgment (R 231-232), 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 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 with Duckham v. State, 478 So.2d 347 (Fla. 1985) was distinguished.

A copy of the Fifth District Court of Appeal's opinion in this case is attached hereto as Fxhibit A. A copy of its Order dated April **13, 1989** denying Petitioner's Motion For Rehearing and Clarification is attached hereto as Fxhibit B. A copy of Petitioner's Notice to Invoke Discretionary Jurisdiction dated May *3*, **1989** is attached hereto as Fxhibit C.

STATFMFNT OF THF FACTS

It is undisputed that the victim, M.H., born **1971,** (R-35) was in her brother's condominium in the Camelot Apartments in the City of Fdgewood, 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 Fdgewood. At trial, Vapor Products was characterized by the Petitioner'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).** 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 M.A.H. to an extent that the Court concluded was sufficient to come within the definition of lewd and lascivious within the meaning of Florida law. This finding 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 a finder of fact could reasonably conclude was lewd and lascivious.

in addition, the testimony at trial showed that the BMW 735 was the vehicle used by the Respondent a) to drive himself to the victim's brother's apartment, the scene of the crime; b) to offer the victim a ride home and c) to drive the victim home. Respondent, while acknowledging a certain lack of memory on these points, never directly denied or rebutted these three uses of the automobile.

SUMMARY

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. 2nd DCA 1986). The decision of the Fifth District Court of Appeal is prernised 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. The disputed issue which the Petitioner seeks this Court to review is whether or not the provisions of the Contraband Forfeiture Act, Sections 932.701-732.704 Florida Statutes (1987), 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).

I. ISSUE

WHETHER THE COURT HAS JURISDICTION AND SHOULD EXERCISE IT HEREIN

II. ARGUMENT

THE COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE FIFTH DISTRICT COURT AND SHOULD GRANT THE PETITION FOR DISCRETIONARY REVIEW.

The Florida Supreme Court has the jurisdiction to hear the case at bar pursuant to Rule 9.030(a)(2)(A)(iv), which provides that the discretionary review jurisdiction of this Court may be sought to review a decision of a district court when that decision expressly and directly conflicts with a decision of the Supreme Court or of another district court. By reversing the trial court's final judgment of forfeiture, the district court's opinion in this case directly and expressly conflicts with Duckham v. State, supra, In Re: Forfeiture of One 1983 Lincoln, supra and Smith v. Caggiano, supra. The conflict presented to this Court is essentially the same one presented to this Court in Crenshaw v. State, supra, to which this Court has already granted review.

The opinions of the First and Fifth District Courts in Crenshaw and 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 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 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 that Duckham cannot be distinguished and that a conflict exists. Petitioner further suggests that Judge Cobb's attempt to distinguish Duckham is a distinction without a difference.

Judge Cobb's d stinction 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, 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 narrowing construction set forth by this court in Griffis v.

State, 356 So.2d 297 (Fla. 1978). Duckham recognized that the legislature 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 not defined. Both words 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 but have only announced their intention to second-guess the judgment of the trial courts by using the "remotely incidental" test.

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 suggests that this extra step is constitutionally compelled. In addition, they have "refined" the statute in a vague and ambiguous way that only creates turmoil in the trial courts and with the law enforcement agencies of their districts. The District Court's opinion in this case expressly conflicts with this Court's opinion in Duckham and with the other cases cited from the Second and Fourth Districts. Accordingly, this Court has jurisdiction and should grant review.

CONCLUSION

Petitioner respectfully requests this Court to accept

jurisdiction and grant review in this case to resolve the conflict among the district courts and with this Court on the issue of whether the Contraband Forfeiture Act requires a showing that the proven nexus between the use of the alleged contraband article and the prohibited criminal activity must be beyond what may be characterized as remotely incidental.

In the alternative, Petitioner requests, pursuant to Rule 9.120(e), Fla.R.App.P., that this Court postpone a decision on jurisdiction in this case until such time as this Court decides the case of Crenshaw v. State (Case No. 72, 181) presently pending before this Court. The opinion of the District Court in this case was premised solely upon the First District Court of Appeal's decision in Crenshaw found at 521 So.2d 138.

CERTIFICATE OF SERVICE

I HFRFBY CFQTIFY that a copy of the foregoing has been furnished by mail delivery to William A. Greenberg, Fsq., 6500 U.S. Highway 17-92, Fern Park, FL on this the 9th day of May, 1989.

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