14
5 Appendix

IN THE SUPREME COURT OF FLORIDA

CITY OF EDGEWOOD,

Petitioner,

vs.

MICHAEL L. WILLIAMS,

Respondent.

_____/

CASE NO. 74,129

BRIEF OF RESPONDENT ON JURISDICTION

WILLIAM A. GREENBERG, ESQ,
GREENBERG & LESTER
6500 Highway 17-92
Post Office Box 300310
Fern Park, Florida 32730
(407) 339-5944
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

PREFATORY STATEMENT

In this brief, the designations to the Record on Appeal will be designated by "R".

STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case and incorporates it by reference herein.

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 Appellant 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 Appellant because it was raining (R-39). Appellant suggested that Ms. H. find another way home, that he couldn't give her a ride (R-40, 87). Ms. H. called Appellant a second time, again asking for a ride home (R-40).

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

Upon arriving at the apartment, Appellant 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.

The 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.

SUMMARY OF ARGUMENT

The Florida Supreme Court does not have jurisdiction to hear the case at bar pursuant to any provision whatsoever of Florida Rule of Appellate Procedure 9.030. Specifically, the Court does not have jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv) because the decision of the Fifth District Court of Appeals did not expressly and directly conflict with a decision of another District Court of Appeal or expressly and directly conflict with a decision of the Florida Supreme Court on the same question of law.

Petitioner, in its brief, has attempted to argue to this Court that the decision of the Fifth District Court of Appeals sought to be reviewed imposes some additional standard or burden upon a law enforcement agency seeking forfeiture. Petitioner asserts that the opinion of the Fifth District Court of Appeals in Crenshaw v. State, 521 So.2d 138 (Fla. 1st DCA 1988) review granted, Case No. 72181 (Fla. May 13, 1988) create a "remotely incidental" test or standard not contemplated by the provisions of Florida Statutes 932.701 to 932.704.

Neither the decision by the Fifth District Court of Appeals in the instant case, nor Crenshaw v. State, supra are in conflict with the decisions of the Florida Supreme Court or the District Courts of Appeal of this state.

Florida Statute 932.701(2)(e) defines contraband article to include:

> 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 of, or in aiding or abetting in the commiting of a 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 ruling in Crenshaw v. State, supra as well as the reasoning of the Second District Court of Appeal in City of Clearwater vs. One 1980 Porsche 911SC, Vehicle ID No. 91A0140918, 426 So.2d 1260 (Fla. 2nd DCA 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 DCA 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.~~ Cagqiano, 496 So.2d 853 (Fla. 2nd DCA 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 abet 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. Hierholzer, 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."

If the Supreme Court in Duckman, supra can distinguish the holding in ~~One 1980~~ Porsche, supra, this Court cannot have jurisdiction of this cause on the basis of the instant case being in conflict with Duckham.

CONCLUSION

The decision of the Fifth District Court of Appeals below has created no additional step nor has it created an additional burden for law enforcement agencies seeking forfeiture. Rather the decision below correctly interpreted the forfeiture statute to require the commission of the felonious act to have some dependence upon the property sought to be forfeited as a prerequisite to forfeiture. The instant case is not in conflict with any decision of any District Court of Appeals of this state or any decision of the Florida Supreme Court. There is thus no jurisdiction to grant review in this cause.

Respectfully submitted,

WILLIAM A. GREENBERG, ESQ.
GREENBERG & LESTER
Post Office Box **300310**
Fern Park, Florida **32730**
(407) 339-5944
Attorney for Respondent
Florida Bar **#248738**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to JAMES PATRICK CURRY, ESQ., 225 E. Robinson Street, Suite 445, Orlando, Florida 32801, this 25 day of May, 1989.

WILLIAM A. GREENBERG, ESQ.
GREENBERG & LESTER
Post Office Box 300310
Fern Park, Florida 32730
(407) 339-5944
Attorney for Respondent
Florida Bar #248738