IN THE SUPREME COURT OF FLORIDA

CITY OF EDGEWOOD,

Petitioner,

vs.

MICHAEL L. WILLIAMS,

Respondent

_____/

CASE NO. 74,129

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

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

Forfeiture of the subject BMW motor vehicle is appropriate in this case under the reasoning of both the majority and dissenting opinions in State v. Crenshaw, --So.2d--, 14 F.L.W. 421 (Fla. 1989). The 1980 amendments to the Florida Contraband Forfeiture Act contain a provision to forfeit any personal property employed as an instrumentality in the commission of, or in aiding or abetting the commission of, any felony. The application of that legislative mandate is not one of degree, nor subject to judicially created de minimis exceptions, but even if it were, forfeiture in this case would still be appropriate.

ISSUE

THE DISTRICT COURT OF APPEAL ERRED IN THIS CASE BY:

A) APPLYING THE "REMOTELY INCIDENTAL" TEST TO THESE FACTS AND

B) MIS-APPLYING THE APPROPRIATE LEGAL TEST TO THESE FACTS.

The First District Court of Appeal in Crenshaw v. State, 521 So.2d 138 (Fla. 1st DCA 1988), rev'd --So.2d--, 14 F.L.W. 421 (Fla. 1989) and the Fifth District Court of Appeal in this case were both wrong in their application of the Florida Uniform Contraband Act, Section 932.701-.704, Florida Statutes. They were wrong, however, both for different reasons and for one common reason.

Both District Courts of Appeal ignored the plain and simple meaning of the 1980 amendments to the forfeiture laws. Ch. 80-68, ~~Laws of~~ Florida. As this Court correctly pointed out in its reversal of Crenshaw, the 1980 changes "substantially amended our forfeiture law." Crenshaw at 14 F.L.W. 422 (Fla. 1989). The issue in Crenshaw, because it involved a controlled substance in a vehicle, turned on the interpretation of Sections 932.701(2)(a), 932.702(1)-(4) and 932.703, Florida Statutes. In applying those sections, this Court characterized the legislative intent as follows:

> "We find that the legislative message was 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."
>
> Crenshaw, ibid.

Applying that legislative mandate, this Court reversed the First District Court of Appeal's holding 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 illegal drugs for personal use." Crenshaw, 521 So.2d at 141 (Fla. 1st D.C.A. 1988).

The language of the 1980 amendments has no latent ambiguity or fuzziness which requires the fashioning of judicial glosses or exceptions.

The Fifth District Court of Appeal's Opinion in this case is wrong for relying on Judge Zehmer's language in Crenshaw for two reasons: 1) the "remotely incidental" test is wrong and 2) Crenshaw is a drugs-in-a-vehicle case, not governed by the same statutory provision of the forfeiture laws as this case is.

Forfeiture in this case was pursuant to Section 932.701(e), Florida Statutes, which also was a part of the 1980 legislation. Ch. 80-68, Section 1, ~~Laws of~~ Florida. The trial court's final judgment so reflects, as does the District Court's Opinion (ROA, p. 4). Section 932.701(e) defines as contraband "[a]ny personal property, including ...any... vehicle of any kind..., which has been or is actually employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony."

If one applies the analysis of the majority in Crenshaw to Section 932.701(e) and the facts in this case, the Petitioner asserts that the following conclusions are evident:

1) Section 932.701(e) represents a clear legislative mandate to extend the forfeiture laws to the instrumentalities of all felony crimes, without exception;

2) Reversal of the trial court's finding that the vehicle was contraband would require the appellate court to find either

a) that there was no felony crime or

b) that the BMW motor vehicle was not used as an instrumentality of the crime or was not used to aid and abet the crime.

Respondent has never argued on appeal that a felony was not committed. Therefore, the only possible grounds for reversal would be a finding by the District Court that the car was not used as an instrumentality of, or in aiding or abetting the commission of, the felonious lewd and lascivious act. The District Court of Appeal did not, nor could not actually make such a finding. The Opinion (ROA, p. 4-6) implicitly finds that the vehicle was *so* used by Respondent, but characterizes the use as "remotely incidental to his criminal conduct." Notwithstanding the assertions of Judge Cobb in his concurrence, the use of the vehicle cannot be distinguished from Duckham v. State, 478 So.2d 347 (Fla. 1985). Duckham is not factually identical to either Crenshaw or this case, but Petitioner would argue that the facts in Duckham are closer to this case.

Duckham, unlike Crenshaw, did not involve drugs in a car. Duckham's vehicle was forfeited because he used it to facilitate

a sale of contraband. Duckham at 348; Section 932.702(3), Florida Statutes. This Court held in Duckham that Duckham's driving himself in the vehicle to a restaurant where a drug sale was arranged and then home to his apartment where the sale took place was a facilitating use of the vehicle. Id. The concept of "facilitating" a felony is almost identical to "aiding or abetting" a felony and Duckham cannot be distinguished from this case on any substantial basis.

Even if one were to apply to this case the analysis of Justice Kogan's dissenting opinion in Crenshaw, Petitioner believes the same result is reached. The unrebutted testimony in this case shows that the underage victim called and asked respondent for a ride home. Respondent drove himself to the victim's brother's condominium, where he knew he would find the victim alone and in need of a ride home. Prior to giving her a ride home in the vehicle, he lewdly and lasciviously fondled the victim, thereby committing a felony. No complex legal analysis is necessary to support the trial court's implied conclusion that 1) under Duckham, forfeiture was appropriate and 2) even without Duckham, the Respondent's offer of a ride home was the bait and the quid pro quo for the felonious consensual sexual acts with the minor victim.

CONCLUSION

If, as the majority in Crenshaw held, the clear legislative meaning of the forfeiture statute must be followed, forfeiture is appropriate. If, as the dissent in Crenshaw suggests, a nexus need not be shown anymore between the use of the vehicle and the criminal conduct, forfeiture in this case is appropriate. If all or some part of the traditional nexus requirements remain after Crenshaw, the facts in this case meet that requirement in every way and forfeiture is again appropriate. Accordingly, the Judgment of the District Court of Appeal should be reversed and the trial court's Final Judgment of forfeiture should be affirmed and carried out.

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 19th day of September, 1989.

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Reply Br of Pet