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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,076

IN RE: FORFEITURE OF 1969
PIPER NAVAJO, Model PA-31-310
S/N-31-395 U.S. Registation N-1717G

_____/

BRIEF OF AMICUS CURIAE
ON BEHALF OF APELLANT NAVARRO

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STATEMENT OF THE CASE AND FACTS

Before this Court is an appeal from a decision of the District Court of Appeal, Fourth District of Florida, reported as In re: Forfeiture of 1969 Piper Navajo, Model PA-31-310, S/N-31-395, U.S. Registration N-1717G, 570 So.2d 1357, (Fla. 4th DCA, 1990). The district court affirmed a trial court's order declaring the forfeiture provision contained in Sec. 330.40, Florida Statutes, to be unconstitutional. It is proper that the Attorney General, designated in the Constitution as the chief state legal officer, and required by law to appear in all suits in which the state is a party or anywise interested, be heard in this case. Section 16.01(4), Florida Statutes. The interest of the state in this appeal is the preservation of the integrity and validity of the statute declared by lower courts to be constitutionally infirm. Accordingly, a petition to be heard as amicus curiae in support of the Appellant, Nick Navarro, has been filed.

The facts in this case, as set forth in Appellant NAVARRO's brief to the district court, show that on February 8, 1988, sheriff's deputies in Broward County seized a 1969 Piper Navajo aircraft which appeared to be equipped with extra fuel tanks not complying with Federal Aviation Administration [F.A.A.] regulations nor approved by that agency. A Petition for Forfeiture to the Broward County Sheriff's office was filed within the period prescribed by law and an entity known as "Anacaola Trading", Appellee before the district court, moved to dismiss. The basis of the forfeiture petition was that the

aircraft was "contraband" under Florida Statute 330.40. The motion to dismiss challenged the constitutionality of that section.

On January 11, 1989, the trial court, without evidentiary hearing, granted Appellee's motion to dismiss in an order subsequently adopted in substantial part by the appellate court. Both courts have concluded that the statute was violative of due process.[1]

SUMMARY OF THE ARGUMENT

On the basis of little, if any, record support, the lower courts have declared a forfeiture statute unconstitutional. In doing so, where the need for such a declaration does not exist, the courts have ignored the standards of constitutional construction and embarked on a course in conflict with legislative prerogative of exercising the police power granted under the constitutions, federal and state. The aircraft in this case, may or may not have fit within the contraband definition set forth in Section 330.40, Fla. Stat. Hence a factual determination to that end should have been made. Failure to do so is judicial error.

Both federal and state statutes permit forfeiture of aircraft with altered fuel tanks not F.A.A. approved. There is no conflict, and the suggestion of preemption does not apply.

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[1] Judge Warner, in a specially concurring opinion, disagreed with the substantive due process analysis, but concluded that the statute was preempted by federal legislation and the forfeiture was improper on that basis. In re Forfeiture of 1969 Piper Navajo, 570 So.2d 1357, 1361 (Fla. 4th DCA 1990).

This case should be remanded for full consideration at the trial level.

ARGUMENT

ISSUE

WHETHER SECTION 330.40, FLORIDA STATUTES, IS VIOLATIVE OF SUBSTANTIVE DUE PROCESS AND THEREFORE UNCONSTITUTIONAL

At the outset, it should be observed that the analysis of the lower courts is not predicated upon any factual determination that the particular aircraft for which the forfeiture was sought had nonconforming fuel tanks. To the contrary, the appellate court, by way of footnote, observed that the owner had claimed by affidavit that the tanks did conform and certification by the F.A.A. had been given. If true, no statutory violation occurred and release of the plane would have been proper. In that situation, need for a constitutional determination was unnecessary. Nonetheless, and without record support, a statute has been declared to be unconstitutional in a most irregular approach. If it is accepted that every statute is clothed with a strong presumption of correctness, and the burden rests on the one challenging the statute to demonstrate any constitutional infirmity beyond a reasonable doubt, State v. Kinner, 398 So.2d 1360 (Fla. 1981), then the decision of unconstitutionality based on a motion to dismiss filed in a civil forfeiture action constitutes judicial error especially when the need for such a declaration is nonexistent, and the grounds for unconstitutionality [substantive due process] are not advanced by the challenger.

The courts below accept the statute as a product of legitimate legislative concern and proclaim the enactment of the Florida Contraband Forfeiture Act as an exercise of the state's police power to curtail the flow of illicit drugs. Yet, the analysis employed in the trial court runs into immediate trouble when, on the unsupported factual assumption that additional tanks would be used to carry drugs and with little or no consideration being given to any other legislative purpose, the court deemed the section to be unreasonable, arbitrary, capricious and, therefore, violative of substantive due process under both the federal and state constitutions.

It was reasoned below that the statute would criminalize activity otherwise inherently innocent since possession of an airplane equipped with nonconforming tanks did not mean that one would be using the tanks for criminal purposes. Consequently, "... the statute gives the law enforcement agency untethered discretion to determine whether to seek forfeiture, and deprives the trial court of any discretion other than procedural review. As such, the court is unable to make a determination as to whether there existed criminal intent to put the tanks to an improper use." In re Forfeiture of 1969 Piper Navajo, supra, at 1360. Finally, the lower courts stated:

> This Court finds that the statute at issue lacks a rational relation to the legislative purpose in that it goes beyond fines or temporary confiscation of the aircraft to assure compliance with F.A.A. regulations. It subjects the aircraft to forfeiture procedures created to stem the flow of drugs, obscene materials, and gambling equipment. It is perfectly plausible for an airplane to be equipped with extra fuel tanks for purposes other than smuggling. Therefore, the statute brings within its ambit otherwise innocent activities.

In re forfeiture of 1969 Piper Navajo, 570 So.2d at 1357, 1360 (Fla. 4th DCA 1990).

This reasoning is flawed. Operation of an airplane with nonconforming fuel tanks is not, as a matter of federal law, an innocent activity but one subject to fine and imprisonment, see 49 U.S.C.A. §1472 (2), and, also, it is to be presumed that an airplane equipped with nonconforming and unapproved tanks has been so operated. 49 U.S.C.A. §1472 (3)(B). Thus, an airplane "equipped with extra fuel tanks" may not be used for any purpose -- drug smuggling or otherwise -- unless F.A.A. approved. If it is shown that the operation of the aircraft was in connection with transportation of a controlled substance, the fine for operation of the plane increases from a limit of $15,000 to $25,000 and the term of imprisonment from 3 to 5 years. 49 U.S.C.A. §1472(2). In enacting this legislation, Congress recognized that the fact that -

> ...smugglers are often aided in their illegal activities by flying with their lights off or by modifying their fuel tanks. These can be violations of F.A.A. regulations in any event, but they would now be criminal acts as well when done in connection with the illegal transportation of a controlled substance.

Remarks of Congressman Hammerschmidt, September 10, 1986, Congressional Record H 6571. There can be no question that removing the planes from the skies would be an exercise of the police power in the public interest.

The lower courts' reluctance to accept the statutory declaration that aircraft with nonconforming fuel tanks are contraband appears to be twofold. First, the declaration and

definition of the airplane's contraband status does not appear within the Florida Contraband Forfeiture Act, §932.701 et seq., Florida Statutes, and, secondly, the courts' inability to depart from the concept that for forfeiture purposes, the aircraft must have been an instrumentality used in drug trafficking. An unapproved modification was not accepted as a crime within itself, nor did the lower courts appear receptive to removing an airplane lacking F.A.A. approval from the skies.

In justification, the courts below relied upon two cases in which Florida statutes were invalidated on substantive due process grounds. In State v. Saiez, 489 So.2d 1125 (Fla. 1986), this Court invalidated a statute criminalizing the possession of a credit card embossing machine. Although it was held that curtailing credit card fraud is a legitimate state goal, it determined that the means chosen was not reasonably related to achieving its legitimate purpose, stating;

> It is unreasonable to criminalize the mere possession of embossing machines when such a prohibition clearly interferes with the legitimate personal and property rights of a number of individuals who use embossing machines in their businesses and for other noncriminal activities.

Saiez, supra at 1129. That is not the case here. By their own characteristics, aircraft are dangerous instrumentalities and fuel tank modifications without F.A.A. approval is treacherous, without question. Judge Warner's observation in her concurring opinion as to fuel tank modification is perhaps a better view. The statute, under her view, should be upheld on substantive due process grounds for what is forbidden is possession of an

inherently unsafe airplane, so that an airplane equipped with nonconforming fuel tanks cannot be put to lawful use. In re Forfeiture of 1969 Piper Navajo, supra, at 1361. This is not equivalent to the embossing machine in Saiez.

The other case, State v. Walker, 461 So.2d 108 (Fla. 1984), focused on the invalidation of a statute criminalizing possession of a prescribed controlled substance in a container other than that in which it was originally delivered. The trial court determined that outlawing possession of drugs in other than the original container had nothing to do with the preventing of unlawful manufacture, distribution and possession of controlled substances. The appellate court reasoned that the statute did not bear a fair and substantial relationship to the objective sought but even enhanced opportunity for accidental abuse of prescribed drugs. It was the act of moving the drugs to another container by one legally in possession that constituted the crime.

> [T]he statute under attack in the case at bar is inconsistent with the objective of statutory scheme and "cannot be said to bear a fair and substantial relationship to the objective sought." Indeed, §893.13(2)(a)(7) Fla. Stat. (1981) hampers the accomplishment of the legislative objectives. It lends itself to intentional drug abuse in two significant ways. First, one who must consume significant quantities of drugs (i.e. a heart patient) must carry all of them with him during his daily activities, thereby making them easily accessible to many people during the course of the day. Second, compliance requires that those persons who have prescription tranquilizers carry many pills with them in order to take their daily dosage. If the stresses of daily life become to [sic] great it is easy to reduce the stress by consuming excess dosages of the tranquilizers, because they are readily available in the original container which must be carried by the patient.

> The law also enhances the opportunity for accidental abuse of prescribed drugs in that it prohibits utilization of pill boxes or any other device to keep track of the proper daily and weekly dosages. It is consistent with common sense and reason to conclude that many elderly citizens and others lose track of the amount of drugs they have consumed in the absence of such a technique.

State v. Walker, 444 So.2d 1137, 1139-40 (Fla. 2d DCA 1984).

No such rationale is evident in the instant case. Here the focus is on an inherently unsafe aircraft that should not be put to any use whatsoever. While the State does indeed have a substantial interest in curbing drug importation into Florida by aircraft improperly modified for long trips from foreign countries, the possession of aerodynamically unsafe aircraft is of equal if not greater concern. Any such aircraft, having unapproved nonconforming fuel tanks represents a danger to the possessor and the public. As Judge Warner acknowledged in her special concurring in the opinion below, "... forfeiture, while extreme, is exceedingly effective in removing an unsafe (or illegal) airplane from use." In re Forfeiture of 1969 Piper Navajo, supra, at 1361.

The lower courts appear to have leaped upon the due process ground on the theory that forfeiture is a harsh remedy. As seen above, the federal legislation permits such forfeitures and the state should also. In Conner v. Carlton, 223 So.2d 324 (Fla. 1969), appeal dismissed, 396 U.S. 272, 24 L.Ed.2d 417, 90 S.Ct. 481 (1969), this Court (quoting State Plant Board v. Smith, 110 So.2d 401, 407, (Fla. 1959)), stated;

> "It is well settled, however, that the concept of due process does not necessarily require the granting of a

> hearing prior to the taking of official action in the exercise of the police power. Where a compelling public interest justifies the action, the Legislature may authorize summary action subject to later judicial review of the validity thereof. See Yakus v. United States, 1944, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834, often cited in cases involving "due process." Thus, it has long been established that in the exercise of its police power the state may summarily seize or destroy diseased cattle, contaminated food, obscene publications, illicit intoxicants, narcotics, prohibited weapons, gambling devices and paraphernalia, and other property that menaces the public health, safety or morals. The seizure of such goods is justified because the danger exists that the property deemed malefic will be distributed to the public to its injury, or used for an illegal purpose, absent a seizure and pending a proceeding to determine the propriety of the seizure. Cf. Metallic Flowers v. City of New York, 1957, 4 A.D. 2d 292, 164 N.Y.S.2d 227."

To the list so enumerated, the legislature has added suspect aircraft and this is proper.

Many years ago, Justice Elwyn Thomas observed that exercise of police power, from its very nature, clashes with full enjoyment of property by the owner, and it is only because the welfare of the whole people so far outweighs the importance of the individual that such interference with constitutional guarantees can be justified. Town of Bay Harbor Islands v. Schlapik, 57 So.2d 855 (Fla. 1952). In considering the validity of a legislative enactment, the Supreme Court has been reluctant to overturn an act on due process grounds except when it is clear that it is not in any way designed to promote people's health, safety or welfare, or that the statute bears no rational relationship to the statute's allowed purpose. Department of Ins. v. Dade County Consumer Advocate's Office, 492 So.2d 1032 (Fla. 1986).

The legislature possesses broad discretion in determining what measures are necessary for the public's protection, and the court may not substitute its judgment for that of the legislature insofar as the wisdom or policy of the act is concerned. Barnes v. B.K. Credit Service, Inc., 461 So.2d 217 (Fla. 1st DCA 1984), petition for review denied, 467 So.2d 999 (Fla. 1985). Whether a plan adopted by the legislature was the best plan or even a good plan was a question of legislative policy with which the court had no concern. Overman v. State Board of Control, 62 So.2d 696 (Fla. 1952).

The lower courts also fault the statute by concluding that the forfeiture procedure deprives the trial court of an opportunity to determine whether there was any criminal intent. This conclusion misses the mark. Criminal intent in forfeiture proceedings is irrelevant, as a forfeiture proceeding is a civil in rem proceeding. See United States v. One Tintoretto Painting, 691 F.2d 603 (2d Cir. 1982); In re Forfeiture of a 1981 Ford, 432 So.2d 732 (Fla. 4th DCA 1983); In re Forfeiture of Five Thousand Three Hundred Dollars ($5,300.00), 429 So.2d 800 (Fla. 4th DCA 1983), Willie v. Karrh, 423 So.2d 963 (Fla. 4th DCA 1982); Mark v. State, 416 So.2d 872 (Fla. 5th DCA 1982); City of Tallahassee v. One Yellow 1979 Fiat, 414 So.2d 1100 (Fla. 1st DCA 1982). Furthermore, the owner, upon proper showing (proper modification, F.A.A. approval) may retrieve his aircraft so that forfeiture is not automatic. It does not appear from the record in this case whether the owner of the aircraft was criminally prosecuted, but lack of prosecution does not make safe a dangerous aircraft nor

justify the continuation of its use. The interest of the public to live in safety remains the same.

Where legislative action is within the scope of police power, fairly debatable questions regarding its soundness, wisdom, and propriety, that is, the efficacy of the statute to achieve the desired ends, is for legislative, not judicial, determination, and courts are not concerned with hardships or difficulties which may attend enforcement of the statute. Publix Cleaners v. Florida Dry Cleaning and Laundry Board, 32 F.Supp. 31 (S.D. Fla. 1940).

As one final consideration, preemption must be addressed. Judge Warner, in her special concurrence, suggests that 49 U.S.C.A. §1472 preempts State legislation on the subject pursuant to the Supremacy Clause of the U.S. Constitution, as that section makes it unlawful to operate an aircraft with nonconforming fuel tanks and provides for forfeiture. It is important to note, however, that §330.40, F.S., merely employs F.A.A. regulations as a standard by which to measure conformity and further states that if the fuel containers are already inspected and approved by the F.A.A., that the aircraft does not fall under the statute. Conflicts between state and federal law arise when compliance with both is a physical impossibility or when state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. Hillsborough County v. Automated Med. Labs, 471 U.S. 707, 85 L.Ed.2d 714, 105 S.Ct. 2371 (1985). The Supremacy Clause, U. S. Const. Art. VI, cl.2, invalidates state laws that interfere with or are contrary to

federal law. Gibbons v. Eden, 9 Wheat 1, 211, 6 L.Ed. 23 (1824) (Marshall, C.J.). Here there is no conflict nor is there any indication that Congress preempted the field. Consequently, there is no preemption problem regarding §330.40, F.S.

As §330.40, F.S., addresses a legitimate state goal and is a valid exercise of the state's police power, it bears a rational relationship to the stated goal and is neither arbitrary nor capricious. The statute is constitutional and does not violate substantive due process.

CONCLUSION

Appellant respectfully urges this Honorable Court to declare §330.40, F.S. (1987), to be constitutional, quash the opinion of the appellate court below and remand the instant case to the trial court with orders to reinstate the forfeiture proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae has been furnished by U.S. Mail to John W. Jolly, Jr., Esquire, Shailer, Purdy & Jolly, P.A., Attorney for Appellant, 1322 S. E. Third Avenue, Fort Lauderdale, FL 33316, and Miguel San Pedro, Esquire, Attorney for Appellee, 2296 Coral Way, Miami, FL 33145, this 13th day of February, 1991.

Walter M. Meginniss