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. REGISTRATION NO. N-1717G.

/

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

APPELLEE'S ANSWER BRIEF

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I N T R O D U C T I O N

The Appellant, Petitioner/Plaintiff in the Lower Court, is appealling from a Final Order from the Florida Fourth District Court of Appeals, rendered in favor of Appellee as the Claimant below. The Appellant/Petitioner will be referred to as he stood in the Trial Court and as Appellant. The Appellee/Claimant in the Lower Court will be referred to as he stood in the Trial Court, and as Appellee.

There are no transcripts in this case.

The pages in the record on appeal will be referred to by the symbol "R" followed by the page's number.

STATEMENT OF FACTS

On February 8, 1988, deputies of the Appellant, NICK NAVARRO, Sheriff of Broward County, seized a 1969 PIPER NAVAJO aircraft because it is alleged, but remains to be proven, that said aircraft was equipped with extra fuel tanks.

Subject to this case is a seized airplane "PIPER AIRCRAFT MODEL PA-31-310", converted in 1984 into a "PANTHER MODEL" in order to have installed by an FAA approved Repair Station, auxiliary wing fuel transfer tanks (see logo book copied pages "T" pages 34 to 39) proper to a Panther model. Airworthy certificate was issued, after the conversion, with new tanks were performed. The Appellee was a goodfaith buyer of the plane in 1984, the year after the works were done.

The plane was inspected on 11-9-87 by an FAA Repair Station and found in airworthy condition (T pages 36 to 39) the fuel tanks approved in compliance with F.S. 330.40.

These facts were alleged in Appellee's Motion in the Lower Court for Summary Judgment (T p. 32-33).

A Petition for Forfeiture of said aircraft to the Broward Sheriff's Office was filed within the ninety day period contemplated by the statute. The Petition alleged that the aircraft was subject to forfeiture because it was "contraband" as defined in Florida Statute 330.40 (1987).

ANACOLA TRADING, the Appellee herein, presented its Amended Motion to Dismiss, which sought dismissal of the Petition on the basis that, among other reasons, the statute upon which the

forfeiture Petition was based, was unconstitutional because it violated the Claimant's Federal Due Process Rights. (R-1-44-48 and R-1-53-58), the Court issued its Order granting the Motion to Dismiss on constitutional grounds on January 11, 1989. (R-1-58 (a)(f)). Thereafter, the Court rendered its Final Order of Dismissal on May 8, 1989. (R-1-61).

Appellant Navarro and amicus curiae in their Brief's Statement of Facts have both erroneously overseen the fact that in the case subjudice, the supplemantary tanks were inspected and properly approved by the FAA authority and no violation of F.S. 330.40 was incurred.

STATEMENT OF THE CASE

The Appellant, NICK NAVARRO, as Sheriff of Broward County, Petitioner at the trial court. He filed a Petition for Forfeiture (R-1-1), supported by Affidavit and Appendix (R-1-12-13, 14-15) of the above-styled Piper Navajo Aircraft. The trial court issued its Rule to Show Cause why the forfeiture should not be awarded on May 24, 1988 (R-1-20). Claimant, ANACAOLA TRADING, the Appellee herein, presented its Amended Motion to Dismiss, which sought dismissal of the Petition on the basis that, among other reasons, the statute upon which the forfeiture Petition was based, was unconstitutional because it violated the Claimant's federal due process rights. (R-1-40-41).

After the submission of memoranda by the Appellant and Appellee on the constitutionality of the statute (R-1-44-48 and $-1-53-58), the Court issued its Order granting the Motion to Dismiss on constitutional grounds on January 11, 1989. (R-1-58 (a)(f). Thereafter, the Court rendered its Final Order of Dismissal on May 8, 1989. (R-1-61)

From the Final Order of Dismissal, Appellant filed his timely Notice of Appeal. Oral argument was heard on March 28, 1990. On December 5, 1990, the Fourth District issued its opinion, per curiam, which essentially incorporated and adopted the trial court's order granting the Motion to Dismiss. Judge Warner separately concurred and concluded that Section 330.40 of the Florida Statutes

violated the supremacy clause because it attempted to regulate an area preempted by a federal regulatory scheme, but rejected the view that the statute violated the federal requirement of substantive due process.

The Court's Mandate was issued on December 21, 1980. A timely Notice of Appeal, was filed December 7, 1990, as authorized by Rule 9.030 (a)(1)(A)(ii), because a District Court of Appeal had declared a state statute invalid.

SUMMARY OF THE ARGUMENT

Appellant's argument is that F.S. 330.40 is validly enacted statute which properly authorized the government's exercise of its police powers to protect its citizen's right to be free from dangerous aircraft.

Further, regulations never were enacted on how the State should enforce this policy power or which state agency should administrate these powers, specially without interfering Federal regulations on Federal Aviation Administration, Interstate Commerce or the Supremacy clause.

Appellee's argument accepted by the Lower Court and in the Fourth District Court of Appeals, is that F.S. 330.40 is violative of Federal and Florida Constitutional due process, the Federal Interstate Commerce clause, the Federal Aviation Administration, as the sole agency in this County giving unity to the standards of airworthiness and its enforcement, and above all, the Supremacy clause, preempting the scheme given by federal regulations on the subject and precluding the State to interfere.

ISSUE I

DOES F.S. 330.40 VIOLATE DUE PROCESS RIGHTS AS GUARANTEED BY FEDERAL AND FLORIDA CONSTITUTION, PENALIZING INNOCENT ACTIVITIES, LACKING SUBSTANTIAL RELATION TO THE OBJECT SOUGHT TO BE ATTAINED?

I. F.S. 330.40: Said statute provides in pertinent part:

> In the interest of the public welfare, it is unlawful for any person, firm, corporation, or association to install, maintain, or possess any aircraft which has been equipped with, or had installed in its wings or fuselage, fuel tanks, bladders, drums, or other containers which will hold fuel if such fuel tanks, bladders, drums or other containers do not conform to federal aviation regulations or have not been approved by the Federal Aviation Administration by inspection or special permit .... Any aircraft in violation of this section shall be considered contraband, and said aircraft may be seized as contraband by law enforcement agency and shall be subject to forfeiture pursuant to ss 932.701-932.704.
> (Emphasis added)

The last sentence of the statute was added by the legislature during its 1987 session and became effective on October 1, 1987. The statute was in effect at the time of the seizures. The Lower Court rejected respondent's argument that the applicable statute is the preamended version in effect at the time of the installation of the fuel tanks rather than the above cited which was in effect at the time of the seizure. Elliot v. Aircraft Engineering Inc., 13 FLW 2374 (2DCA 1988).

By its amendment to section 330.40, the legislature has made a declaration that all nonconforming aircraft are contraband per se and has subjected such aircraft to forfeiture proceedings under the "Florida Contraband Forfeiture Act." Civil forfeiture statutes are considered to be quasi-criminal and penal in nature. In re Forfeiture of $48,000.00 in U.S. Currency, 432 So.2d 1382 (4DCA). Thus, said statutes are to be strictly construed in favor of those against whom the penalty is to be imposed. Crenshaw v. State, 521 So. 2d 138 (1DCA 1988); Hotel and Restaurant Commission v. Sunny Seas No. One, 343 So. 2d 570 (Fla. 1958).

The "Florida Contraband Forfeiture Act" was passed by the legislature pursuant to the state's police power in an effort to stem trafficking in illicit drugs. In re Forfeiture of 1979 Toyota Corolla, 424 So.2d 922 (DCA 1982). Therein lies the problem. While the legislature has wide discretion to exercise its power to act for the general welfare, the means selected in its exercise thereof must have a resonable and substantial relation to the object sought to be obtained.

If a statute is unreasonable, arbitrary, and capricious, it violates substantive due process rights guaranteed by the United States and Florida Constitutions. Nebbia v. People of State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940; State v. Saiez, 489 So.2d 1125 (Fla. 1986).

The appellant claims that the statute serves to protect one from the risk that airplanes with unsafe fuel tanks may "drop into the living rooms of Florida citizens." However, appellant concedes that the statute is utilized as a law enforcement tool. It seems apparent that the main use of this statute is for the seizure and forfeiture of any aircraft that has the capability to transport illegal drugs, regardless of whether or not the tanks are actually used for that purpose. While stopping the transportation of illegal drugs within the state is certainly a legitimate legislative concern, laws passed to achieve such means cannot go so far as to criminalize otherwise non-criminal behavior, as would be simply to get a longer range of flight.

Under the guise of air safety, and under the glare of the war on drugs, the statute provides for the automatic confiscation and forfeiture by the Sheriff of any nonconforming aircraft. It permanently deprives its owner of possession and use simply upon a showing that the aircraft's tanks do not meet statutory requirements. Moreover, these requirements are directly and explicityly tied to federal regulations already focused on aircraft safety and inspection. 14 CFR 25.963, 14 CFR 25.951.

The Florida Supreme Court has consistently read the due process clauses of the United States and Florida Constitutions to require that the purpose of a penal statute passed in ex-

ercise of the State's police power be for the general welfare and that the means selected to exercise the police power have a reasonable and substantial relation to the object sought. Further, the Court has held that such a statute not be so broad as to reach out beyond its intended scope. Robinson v. State, 393 So.2d 1076 (Fla. 1981).

In State v. Saiez, 489 So.2d 1125 (Fla. 1986) the Court reviewed a statute making it unlawful to possess a credit card embossing machine. The penal statute was the result of an attempt by the legislature to curtail credit card fraud. It was enacted pursuant to the state's "police power" as derived from its sovereign right to protect its citizens. The Court recognized that such power is confined to acts which are reasonable and that while the due process clauses do not prevent legitimate interference with individual rights under the police power, there are limits on such interference.

The Court found that there was no question that the curtailment of credit card fraud is a legitimate goal within the state's police power. However, the Court held that the means selected by the legislature, prohibiting even the legitimate and innocent possession and use of credit card embossing equipment did not bear a rational relationship to the concededly proper goal.

The Court stated; "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 non-criminal activities." Id at 1129.

In State v. Walker, 461 So2d 108 (Fla. 1984), the Court reviewed a statute requiring that a lawfully dispensed controlled substance be kept in the container in which it was originally delivered. The Court adopted the 2DCA opinion, 444 So.2d 1137 (2DCA 1984), that the statute did not bear a reasonable relationship to the legislative objective of expanding the state's control over the manufacture and distribution of dangerous drugs where the statute lent itself to criminalizing something that was in essence innocent.

In support of the statute, the state claimed that because the possession of controlled substances without a prescription is unlawful, a law enforcement officer would be able to easily identify illegal possession of controlled substances simply by looking at the container. The Court found that because the purpose of the statute was to convict persons who illegally possessed controlled substances, and not those who removed their prescription drugs from their original containers, application of the statute to those who simply did not carry their drugs in the original container, was an irrational means to achieve the stated goal. In a footnote to the decision, the Court stated: "While we agree with the need for effective law enforcement, we respectfully submit that other, less drastic alternatives are available." Id at 1140.

The Court further stated:

"Simply because one does not carry drugs in

> a proper container does not mean that he unlawfully possesses a controlled substance. The police can properly arrest an individual in possession of a controlled substance without this section...Without evidence of criminal behavior, the prohibition of this conduct lacks any rational relation to the legislative purpose of controlling drug distribution." Id.

The statute at issue in the instant case is similarly infirmed. Simply because one possesses an airplane equipped with nonconforming fuel tanks does not mean that one is using the tanks for criminal purposes, as contemplated within the forfeiture act. In the case subjudice the fuel tanks are legitimate adaptations, and were approved by the FAA. Likewise, a law enforcement officer inspecting the aircraft can, without the need of this statute, easily make an arrest, and later initiate forfeiture proceedings pursuant to the forfeiture statute, if drugs or other contraband or evidence thereof are found in the plane.

As Judge Grimes phrased it in Walker, "without evidence of criminal behavior, the prohibition of this conduct lacks any rational relation to the legislative purpose and criminalizes activity that is otherwise inherently innocent. (Emphasis added)." Id.

Furthermore, 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 was unable to make a determination as to whether there existed the criminal intent to put the tanks to an improper use.

The Lower Court did find 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 FAA 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.

The statute fails to make any distinction between inadvertent neglect of FAA regulations and intentional subterfuge for the purposes of concealment. Forfeiture is too harsh a penalty for the former, and an already existing remedy for the latter. The Lower Court did find F.S. 330.40, as it relates to the "Florida Contraband Forfeiture Act" to be unreasonable, arbitrary and capricious and lacking a substantial relation to the object sought to be attained. As such, it violates due process rights guaranteed by the United States and Florida Constitution.

I S S U E II

FLORIDA STATUTE 330.40 IS VAGUE, OVERLY BROAD, AND VIOLATES DUE PROCESS AS APPLIED IN THIS CASE WORKING AS AN EX POST FACT LAW. IT IS ALSO AGAINST U.S. CONSTITUTION'S COMMERCE CLAUSE.

I. F.S. 330.40 is Unconstitutionally Vague and Overy Broad

Ample case law holds that forfeitures are considered odious and harsh exactions, and that to avoid them, statutes will be strictly construed. See Section 121.091(5)(f), Fla. Stat., and Williams v. Christian, 335 So.2d 358 (1st DCA 1976). The general rule that to afford relief from forfeiture, statutes providing for forfeiture are strictly construed is also found in federal law. See 21 U.S.C. 881; U.S.v. One 1977 Cadillac Coupe de Villa 644 F.2d 500 (5th Cir. 1981); and United States v. $38,000 in United States Currency, 816 F2d 1538, 1547 (11th Cir. 1987). Not only are forfeiture statutes not favored in both law and equity, they are also discretionary rather than mandatory. Smith v. Hindery, 454 So.2d 663 (1st DCA 1984).

In Lester v. Dept. of Professional Regulation, 348 So.2d 923 (1st DCA 1977), the Court held that notwithstanding the statement of the legislature that Florida Statutes 458, dealing with denial, suspension and revocation of a physician's medical license, was enacted in the interest of the public welfare but as a statute that is penal in nature.

> In construing the language and import of this statute we must bear in mind that it is, in effect, a penal statute since it imposes sanctions and penalties in the nature of denial of license, suspension from practice, private of public reprimand, or probation, upon those found guilty of violating its proscriptions. This being true the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it. Furthermore, if there are any ambiguities included, such must be construed in favor of the applicant or licensee. Lester v. Dept. of Prof. & Occ. Regulations, supra 925.

The language of Florida Statute 330.40 states, in part, that:

> "It is unlawful for any person, firm,"
> "corporation, or association to...possess"
> "any aircraft which has been equipped with"
> "or had installed in its wings or fuselage"
> "fuel tanks, bladders, drums or other con-"
> "tainers if such containers do not conform"
> "to federal aviation regulations or have not"
> "been approved by the Federal Aviation Ad-"
> "ministration by inspection or special per-"
> "mit.

The statute, strictly construed, concerns only the approval of the tank itself, not the installation of the tank in an aircraft. An examination of the record in this case and the exhibits provided by the Appellee shows that the tanks themselves do conform to federal aviation regulations. (See Air America, Inc. FAA Approved Airplane Flight Manual Supplement, FAA Approved by G.M. Baker

for Manager, Aircraft Certification Office and which was filed by the Petitioner on 17th of May, 1988.

Even if the statute did require approval of the installation of the tanks, it would be impossible for the Federal Aviation Administration to approve the installation by inspection or special permit, except through its Authorized Inspectors, since the Federal Aviation Administration does not itself inspect aircraft. (See deposition of Ronald Schmidt, p. 15).

And even if inspection of the installation were required, Appellee has filed copies of the Aircraft Log showing that the aircraft was inspected on two occasions by two different Federal Aviation Administration Authorized Inspectors and that both inspectors approved and certified the aircraft as being airworthy with the tanks installed and that the aircraft with the tank installation was in conformance with Federal Aviation Regulations. (See also deposition of Ronald Schmidt, pp. 7, 9, 11, 12, 15, 48, and the Affidavit of Dennis Martin, filed with the Lower Court.)

Therefore, strictly construing the statute as required, it is clear that the aircraft is not in violation of the statute and is not "contraband per se".

The Appellant alleges that the seized aircraft is subject to forfeiture because it is deemed "contraband" pursuant to the dictates of Section 330.40 Fla. Stat. (1987). Said law renders as contraband any aircraft which has "installed in its wings or fuselage, fule tanks, bladders, drums, or other containers which will hold fuel tanks, bladders, drums, or other containers do not conform to federal aviation regulations or have not been approved by

the Federal Aviation Administration by inspection or special permit". It also makes it a criminal third degree felony offense for anyone to install such fuel tanks.

Section 330.40 is unconstitutionally overbroad because legal, constitutionally protected activities, are criminalized as well as illegal, unprotected activities and the Legislature has set a net large enough to catch all possible offenders, not just those who are the target of the legislation and whose activities the legislature has a legitimate purpose to prevent, that is, the illegal smuggling of controlled substances into the state.

In Schultz vs. State, 361 So. 2d 416 (Fla. 1978), the Supreme Court held as follows:

> A statute is overbroad when legal, constitutionally protected activities are criminalized as well as illegal, unprotected activities, or when the legislature sets a net large enough to catch all possible offenders and leaves it to the courts to step inside and determine who is being lawfully detained and who should be set free.

Id. at 418.

It is admitted that the Court must give construction to a statute that would render it constitutional as opposed to a construction that would render it in conflict with the United States or Florida Constitutions. Id. at 419. However, in the instant circumstances, the statute leaves little room for interpretation. It simply states that any aircraft that does not meet F.A.A. re-

quirements with regard to fuel tanks constitutes "contraband". Such a construction does not have any logical relationship to whether or not the airplane is being used for unlawful activity, such as the transportation of illegal drugs. It is a matter of common sense that an aircraft with properly installed extra fuel tanks could be utilized for many, many lawful purposes. It therefore affords the opportunity for harsh punishment to those, as in the instant case, whose ownership and/or use of the aircraft is completely innocent. See also State v. Wershow, 343 So.2d 605 (Fla. 1977).

II-Appellant's Actions Deprive Appellee of Constitutional Due Process of Law By Applying an Ex Post Facto Law.

There can be an unconstitutional application of a valid statute if it deprives one of its property without due process of law. See Westwood Lake, Inc. vs. Dade County, 264 So.2d 7 (Fla. 1972). In the case at hand, should the statute be found not to be in violation of the Constitutions of the United States and the State of Florida, it is unconstitutional to apply the statute in the instant case because the wing-tip fuel tanks on the subject aircraft were installed (1984) prior to the effective date of the amendment (1987) to the statute which deems said aircraft to constitute contraband subject to forfeiture and there was no opportunity to bring the aircraft in compliance with Federal Aviation Administration regulations between the time the aircraft was returned to the United States and the time that it was seized by officers and agents of the Appellant. As a matter

of fact, as set forth in the previously filed motions for summary judgment, the aircraft had already been "tagged" by the Federal Aviation Administration at the time it was seized by the Appellant's deputy. To forfeit Appellee's aircraft under such circumstances would deprive the Appellee of its property without due process of law.

Generally, a statute which is merely remedial or procedural may be applied retroactively, but when a law imposes a new duty or inflicts a new penalty, it is presumed to operate only prospectively. Gordon v. John Deere Co., 320 F.Supp. 293 (N.D. Fla. 1970). Absent clear legislative intent to the contrary, a law is presumed to operate prospectively. Gulfstream Park v. Division of Pari-Mutuel Wagering, 407 So.2d 263 (3rd DCA 1981).

Article I, Sectioin 10, Fla. Const. 1968 provides that no ex post facto law shall be passed, and it is obvious that the forfeiture statute herein sought to be applied, ought not apply to aircraft with wing-tip fuel tanks installed prior (1984) to the effective date of the amendment to the statute (1987). To permit such application in the instant case would impair claimants vested right in the aircraft, and thus the statute should be declared invalid as to its present application. See Dade County v. Wiseheart, 198 So.2d 94 (3rd DCA 1967).

III-Section 330.40 Violates the United States Constitution's Interstate Commerce Clause.

Each state must exercise its police power subject to constitutional limitations. Miami Shores Village v. Brockway Post No. 124 of American Legion, 24 So.2d 33 (Fla. 1945).

The claimants argue that the seizure and forfeiture of an aircraft pursuant to Section 330.40, Fla. Stat. (1987) constitutes an impermissible local activity interfering with the free flow of interstate commerce and have a distinct economic effect on interstate commerce. Because of the undue burden placed upon interstate commerce, state power must yield to the power of Congress to regulate through Article I, Section 8, Clause 3, U.S. Constitution, commonly known as the Commerce Clause. See Hill v. State ex rel. Watson, 19 So.d 857 (Fla. 1945). A state may not unjustifiably discriminate or unduly burden interstate commerce. Trescott v. Conner, 390 F. Supp. 765 (N.D. Fla. 1975).

While the state may have been seeking to further a valid policy in enacting Sec. 330.40, Fla Stat., the exercise of the state's police power, by means of seizure and forfeiture of "contraband" aircraft discriminates against interstate commerce and conflicts with the commerce clause. See Canton Poultry, Inc. v. Conner, 263 F.Supp. 1008 (N.D. Fla. 1967). The Supreme Court has held that a state may exercise its police power even though interstate commerce may be affected. The Court distinguishes between state statutes that burden interstate transactions only incidentally and those that affirmatively discriminate against such transactions. Statutes in the second group are subject to more demanding scrutiny. See Maine v. Taylor, 106 S.Ct. 2440, 2447 (1986).

The appellee suggests to the Court that since the state statute in question imposes a harsh penalty for its violation, i.e. the loss of one's property merely because it was possessed, while

mere possession of an otherwise innocent item of property in other states is not restricted, that Section 330.40 does affirmatively, without question, discriminate against such property which, although entering the state innocently enough, immediately becomes "contraband".

In conclusion, Section 330.40 Fla. Stat. is an impermissible burden upon interstate commerce, and thus should be found void as an unconstitutional exercise of police power.

I S S U E III

THE AIRCRAFT CANNOT BE THE INSTRUMENTALITY OF ITS OWN FELONY AND APPLICATION OF THE STATUTE MUST BE PROSPECTIVELY ONLY.

Under Florida law the aircraft cannot be the intrumentality of its own felony. "An intrumentality provides a means or assists in the commission of an offense; it is ancillary to the commission of the offense rather than an element of the offense itself". City of Indian Harbor Beach v. Damron, 465 So.2d 1382, 1383 (5th DCA 1985).

The Damron Case involved the seizure, under Florida Statutes 329.10, of an aircraft as an intrumentality of a felony. Florida Statutes 330.40 parallels that statute, and the aircraft may not be seized for containing improper fuel tanks since the installation of the tanks "is the essence of the crime itself".

See also In Re Forfeiture of One Cessna 337H Aircaft, City of Pompano Beach v. Enroute Ltd., Inc, 475 So.2d 1269 (4th DCA 1985), in which the Court held that "forfeiture is not an authorized sanction for violation of section 329.10". In this case, even though the statute contained two separate sections, one making possession of the aircraft a third degree felon and the other making the aircraft contraband, the court chose to treat the entire statute as one which made seizure of the aircraft improper. Any argument that the instant stautute created a definition of the aircraft as contraband per se must also fail. It is apparent that the fuel tank statute does not make the aircraft contraband per se but rather applies only to the seizure of the aircraft as an instrumentality of a felony because the legisla-

ture drafted both the felony creating sentence and the contraband sentence in one section of the statute rather than in two separate sections as it did in the aircraft registration statute.

But even were it not clear, and if it were merely ambiguous, since the statute is penal in nature, any doubt should be resolved in favor of the rights of individuals alleged to have come in conflict therewith. "The statute is penal in nature, and the rule is that penal statutes are to be construed strictly, and are never to be extended by implication". Texas Co. v. Amos, 81 So 471, 472 (Fla. 1919).

Application of the Statute Must Be Prospective Only

The provision of Florida Statutes 330.40 which permits the seizure of an aircraft as contraband by a law enforcement agency became effective on 1 October, 1987. It is uncontroverted in this case that the Air America fuel tanks were installed in mid-1984. (See Affidavit of Dennis Martin and the Aircraft Lot). It is further uncontroverted that Claimant became the owner of the aircraft by Bill of Sale dated 31 October, 1985, which ownership became registered with the FAA on 16 December, 1985. (See Bill of Sale and Registration Certificate filed with the Court).

> A strict rule of statutory construction indulged in by the courts is the presumption that the legislature, in the absence of a positive expression, intended statutes or amendments enacted by it to operated prospectively only, and not retroactively. A law is troactive if it takes away or impairs vested rights acquired under existing law, or if it creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. Heberle v. P.RO. Liquidating Company, 186 S9.2d. 280, 282 (1st DCA 1966).

"The rule that statutes are not to be construed retrospectively unless such construction was plainly intended by the Legislature applies with peculiar force to those statutes the retrospective operation of which would impair or destroy vested rights". In Re: Seven Barrels of Wine, 83 So. 627, 632 (Fla. 1920). It is clear that retrospective operation of the statute in this case would destroy the vested rights of the Claimant aircraft owner.

But more dispositive is that "(t) he law not requires 'a declaration of retroactive application be made expressly in the legislation under review.'" Fleeman v. Case, 342 So2d 815,817 (Fla. 1977), cited in Lewis v. Creative Developers, Ltd., 350 So. 2d 828,829 (1st DCA 1977).

Nowhere in the instant statute is there any express declaration that it is to apply retroactively, and therefore it must be applied prospectively only, and the aircraft must be returned to the Appellee.

Therefore, based upon the above factors, the aircraft is not contraband within the meaning of the statute and has not been used in the commission of a felony, and the Appellee prevailed in its Motion to Dismiss.

I S S U E IV

A LOWER COURT'S FINDING OF FACT SHOULD HAVE BROUGHT A SIMILAR FINAL ENDING FOR THE APP-ELLEE, AS WELL AS IN THE CONSTITUTIONALITY FINDING ON THE F.S. 330.40 BROUGHT ABOUT.

The Lower Court focused its attention on the Constitutional issue presented by F.S. 330.40 grounding its Final Order only in a finding of Law. If the F.S. 330.40 is unconstitutional, why enter into findings of fact ....?

The Appellants argument is that F.S. 330.40 is covered by the State Police Power in care of the public welfare because the existance of the auxiliary tanks in the wings presented the danger of falling down" ... possessing destructive capabilities similar to a V-2". (See Appellant's Brief at 4th DCA, pg. 12), going to the Statute's purpose as " ... designed to assume that dangerous aircraft do not crash into this state's communities thereby reducing entire residential blocks to infernos which evolve into rubble covered graveyards". (Appellant Brief, at 4th DCA, Pag. 12).

If fact the arbirarily seized plane satisfied all safety requirements requested by the FEDERAL AVIATION ADMINISTRATION (FAA), which is the top Federal authority in this field:

A) The original PIPER AIRCRAFT MODEL PA-31-31- unable to receive auxiliary fuel tanks in the wings, was converted in 1984 into a PANTHER MODE apt for the reception of said wing tanks. The works were done by an FAA approved Repair Station (See log book copied pages at "T" pp. 34-39), with an

airworthy certificate given on the security conditions met by the seized plane.

B) The plane was again inspected on 11/9/87 by an FAA Repair Station and found in airworthy conditions with the auxiliary fuel tanks on the wings approved for security purposes ("T" pp. 36-39). A new airworthy certificate was issued.

The Appelant admitted these facts in its response to Appellee's Motion at the Lower Court for Summary Judgment, ("T" pp. 42-43), contesting only the capability of MODEL PA-31-310 for the installation of the questioned tanks overlooking that the plane since 1984 was converted to a PANTHER MODEL,and PA-31-310 was remaining only for this plane's history.

The public welfare and safety interests jealously cared by the Appellant in compliance with F.S. 330.40 were fully satisfied and a finding of these facts should have brought the case to a similar final ending for the Appellee, as the Lower Court did with the sole finding of Law and Constitutionality. Appellee's Motion to Dismiss in the Lower Court could have ended in a Summary Judgment for Appellee's genuine issue of fact.

I S S U E V

F.S. 330.40 IS VIOLATIVE OF THE FEDERAL SUPREMACY CLAUSE.

The statute is preempted by federal legislation under the Supremacy Clause of the federal constitution. 49 U.SC.A S 1472 (b)(1)(G) provides that it is unlawful to operate a plane with nonconforming fuel tanks. Criminal penalties are imposed, and the plane is subject to forfeiture. The Appellee holds that this act preempts state legislation on the subject. Where the federal interest in area of regulation is so dominant, the federal system will be assumed to preclude enforcement of state laws on the same subject. Hillsborough County, Fla. v. Automated Medical Laboratories, 105 S.CT. 2371 (1985). The nation's airwars are indeed an area of particular federal interest. City of Burbank v. Lockheed Air Terminal, 93 S.C.t. 1854 (1973). Indicative of that is the extensive scheme of regulation through the Federal Aviation Administration. But most telling of a congressional intent to preempt this area of aircraft regulation is 49 U.S.C.A. S 1472 (b)(5) - Effect on State Law. That section provides:

> Nothing in this subsection or in any other provision of this chapter shall preclude a State from establishing criminal penalties, including providing for forfeiture or seizure of aircraft, for a person who --
>
> (A) knowingly and willfully forges, counterfeits, alters, or falsely makes an aircraft registration certificate;
>
> (B) knowingly sells, uses, attempts to use, or possess with intent to use fraudulent aircraft registration certificate;
>
> (C) knowingly and willfully displays or causes to be displayed on any aircraft any marks that are false or misleading as to the nationality or registration of the aircraft; or

> (D) Obtains an aircraft registration certificate from the administration by knowingly and willfully falsifying, concealing or covering up a material fact, or making a false, fictitious, or fraudulent statement or representation, or making or using any false writing or document to contain any false, fictitious, or fraudulent statement or entry.

Notably absent from the permitted offenses in the use of a plane with nonconforming fuel tanks. Therefore, the Appellee concludes that having legislated on this subject, and having specified the areas in which the state may still enforce its laws, Congress has preempted this area of aviation regulation of planes with nonconforming fuel tanks so that section 330.40, Florida Statutes (1987) is unconstitutional for violation of the Supremacy Clause.

CONCLUSION

WHEREFORE Appellee respectfully request that the Fourth District Court of Appeal's Order affirming the Trial Court's Order granting dismissal be affirmed and a mandate issued for execution.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY mailing a true and correct copy of the foregoing this 27th day of February, 1991 to: JOHN W. JOLLY, JR. attorney for Appellant 1322 S.E. Third Avenue, Fort Lauderdale, Florida 33316 and WALTER M. MEGINNISS, Assistant Attorney General The Capitol, Room 907, Tallahassee, Florida 32399-1050.

By: _____
MIGUEL SAN PEDRO, ESQ.