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

APPELLANT'S INITIAL BRIEF

John W. Jolly, Jr., Esquire
Shailer, Purdy & Jolly, P.A.
Attorneys for Appellant
1322 S.E. Third Avenue
Fort Lauderdale, Florida 33316
(305) 462-3200
Fla. Bar No. 291961

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

The Appellant, NICK NAVARRO, as Sheriff of Broward County, was the 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 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)

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 supremecy 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, 1990. 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.

STATEMENT OF THE 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 which did not comply with regulations of and which were not approved by the Federal Aviation Administration.

A Petition For Forfeiture of said aircraft to the Broward Sheriff's Office was filed within the ninety day period contemplated by the statute. Appellee "Anacaola Trading" moved to dismiss the Complaint. The Petition alleged that the aircraft was subject to forfeiture because it was "contraband" as defined in Florida Statute 330.40 (1987). Appellee's Motion To Dismiss challenged the constitutionality of that statutory subsection.

On January 11, 1989, without oral argument, the trial court granted the Appellee's Motion To Dismiss, and found F.S. 330.40 to be unconstitutional in that it was "...unreasonable, arbitrary, capricious and lack[ed] a substantial relation to the object sought to be attained." The trial court made this determination after erroneously determining that:

> "...the main purpose of this statute is for the seizure and forfeiture of any aircraft that has the capability to transport large quantities of illegal drugs in empty non-conforming fuel tanks (emphasis supplied) regardless of whether or not the tanks are actually used for that purpose."

SUMMARY OF THE ARGUMENT

F.S. 330.40 is a validly enacted statute which properly authorizes the government's exercise of its police powers to protect its citizen's right to be free from dangerous aircraft. This statutory subsection neither violates the Supremacy Clause of the United States Constitution, nor its commerce, nor due process clauses as well.

Accordingly, because the statute exists for the lauditory and rational purpose of protecting the public from dangerously modified aircraft, the remedy of forfeiture is reasonably related to the accomplishment of that goal. Further, because F.S. 330.40 neither conflicts with a federal regulatory scheme, nor is it expressly prohibited by a federal system of regulation, and does not target a subject area where state regulation is implicitly prohibited it is not an unconstitutional instrusion on an area where a state is preempted from parallel regulation.

Therefore, the state should be upheld against challenge. The District Court's order and opinion affirming the trial court should be reversed.

ARGUMENT

1. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT F.S. 330.40 IS UNCONSTITUTIONALLY VIOLATIVE OF CITIZEN'S RIGHT TO DUE PROCESS.

INTRODUCTION

On January 11, 1989, the Honorable Constance Nutaro, Circuit Judge, declared Section 330.40, Florida Statutes, unconstitutional, finding that it violated substantive due process as guaranteed by the United States Constitution. The Court essentially concluded, with which the District Court agreed, that any statute which authorized forfeiture of valuable aircraft because the aircraft failed to comply with F.A.A. requirements concerning fuel tanks bore no rational relation to a legitimate governmental purpose. The Court concluded the statute authorized "...too harsh a penalty." (R-1-58).

On two prior occasions District Courts Of Appeal had been confronted with trial level determinations that aircraft forfeiture provisions violated due process rights. Previously, the District Courts had declined to reach the constitutional question in either case.

The Fourth District had previously, in In Re: Forfeiture of One Cessna 337H Aircraft, 475 So.2d 1269 (4th DCA 1987), reviewed Judge Andrews' dismissal on constitutional grounds of Section 329.10, Florida Statutes, as it existed at that time. That subsection, then, and in its present form, was a companion to the

provision sub judice, which authorized forfeiture of improperly registered aircraft. The Court, consistent with doctrines of constitutional analysis, was able to resolve the case without resolution of constitutional questions. The Court recognized that the statute, as it existed at that time, by its own language, did not authorize forfeiture. The trial court's decision was affirmed.

The Second District Court Of Appeal, in Cook v. State, 528 So.2d 1311 (2nd DCA 1988), also chose not to address the constitutionality of §330.40 raised on a criminal appeal simply by reversing the conviction, in part, on insufficiency of evidence.

The statutory deficit commented upon by the Fourth District in Cessna 337H, supra, was remedied by the Florida Legislature in Chapter 87-243, Laws Of Florida, which added the following language to Section 330.40, Florida Statutes:

> "Any aircraft in violation of this section shall be considered contraband, and said aircraft may be seized as contraband by a law enforcement agency and shall be subject to forfeiture pursuant to §§932.701-932.704."

The determination by the Fourth District below is the first appellate court to directly address the constitutional issue as applied to F.S. 330.40. Therefore, there being no other basis upon which the Motion To Dismiss was granted, and any deficiency in the statutory authority having been eliminated by the Florida Legislature, the constitutional issue was ripe for determination,

and is appropriate for review here pursuant to Rule 9.030(a)(1)(A)(ii).

The Honorable Constance Nutaro determined that Section 330.40, Florida Statutes, violates substantive due process rights guaranteed by the United States Constitution because, as it relates to the Contraband Forfeiture Act, it is "...unreasonable, arbitrary and capricious and lacks a substantial relation to the object sought to be obtained." (R-1-58(f)) The trial court made material errors in the application of legal principles and made fundamental misassumptions of fact which require that the trial court's determination of the constitutionality of the statute as adopted by the Fourth District Court of Appeal, be reversed.

Florida Statute 330.40 provides in pertinent part:

> "In the interests of the public welfare, it is unlawful for any...firm...to possess any aircraft which has been equipped, or had installed in its wings or fuselage, fuel tanks, bladders, drums, or other containers which will hold fuel if such...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 subsection shall be considered contraband, and said aircraft may be seized as contraband by a law enforcement agency and shall be subject to forfeiture pursuant to §§932.701-932.704."

Appellant filed his "Petition For Rule To Show Cause And For Final Order Of Forfeiture' (R-1-1) which alleged that the aircraft which is the subject of this appeal had non-conforming

and non-F.A.A. approved fuel tanks. Appellee's Amended Motion To Dismiss (R-1-40-41) challenged the constitutionality of Section 330.40, Florida Statutes, because, it was claimed, the field of aircraft regulation had been preempted and was precluded by the Supremacy Clause, that the statute advanced no public interest and therefore violated the substantive component of the due process requirement, and that the statute violated the commerce clause by posing "an unreasonable restraint on commerce."

The trial court's analysis was tainted by the factual assumption that these illegal fuel storage systems were the place where illegal narcotics were hidden. This factual assumption was specifically rejected by the Fourth District despite the fact that otherwise the opinion was adopted in its entirety. The court noted:

> "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 large quantities of illegal drugs in empty non-conforming fuel tanks , regardless of whether or not the tanks are actually used for that purpose." (R-1-58(c))

This erroneous conclusion of fact when coupled with the erroneous application of legal principles, combined to lead both courts to their incorrect determinations of unconstitutionality. Both courts mistakenly applied the anti-narcotics rationale behind the contraband forfeiture statute generally to this provision. The court, relying on In Re: Forfeiture of 1979 Toyota

Corolla, 424 So.2d 922 (4th DCA 1987), concluded that the only purpose of the Contraband Forfeiture Act was to "stem trafficking in illicit drugs." (R-1-58(b)). This narrow and restrictive reading of the Contraband Forfeiture Act defies its specific language. If the Legislature had intended to limit contraband forfeiture to circumstances solely involving narcotics activity, it would have only enacted F.S. 932.701(2)(a) and declined to enact subsections (b) - (e), and the other forfeiture provisions located elsewhere in the Florida Statutes.

The trial court then apparently concluded and the District Court adopted the conclusion that every forfeiture provision, regardless of its placement in the Florida Statutes, must further that anti-drug goal. Judge Nutaro too narrowly and literally applied the doctrine espoused in the Toyota case in the first instance, and then improperly applied that doctrine to a substantively unrelated statute, specifically F.S. 330.40.

It is an axiomatic principle that every statute is strongly presumed constitutional. Peoples Bank of Indian River County v. Department of Banking and Finance, 395 So.2d 521 (Fla. 1981). Further, it is equally axiomatic that the burden is upon the one who challenges the statute to demonstrate any constitutional infirmity beyond a reasonable doubt. State v. Kinner, 398 So.2d 1360 (Fla. 1981) and Bunnell v. State, 453 So.2d 808 (Fla. 1984). A fairly effective argument can be made that if one of three learned and knowledgeable appellate judges sees no "due process"

based constitutional infirmity, then the moving force seeking such a declaration has failed in his burden to demonstrate the infirmity beyond a reasonable doubt. Further, even where doubts about a statute's constitutionality remain, they should be resolved in favor of the statute. Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977).

The fundamental principles discussed above apply with equal vitality where the nature of the alleged constitutional infirmity is "substantive due process". In Department Of Insurance v. Dade County Consumer Advocates Office, 492 So.2d 1032 (Fla. 1986), this court commented:

> "In considering the validity of a legislative enactment, this court may overturn an act on due process grounds only when it is clear that it is not in any way designed to promote the people's health, safety or welfare, or that the statute has no reasonable relationship to the statute's avowed purpose." (Id., at 1034)

More recently, the Fourth District described the inquiry as follows, in Potts v. State, 526 So.2d 104 (4th DCA 1987):

> "In considering whether or not a statute violates substantive due process, the basic test is whether the state can justify the infringement of its legislative activity upon personal rights and liberties (cites omitted). The statute must bear a reasonable relationship to the legislative objective and must not be arbitrary. Id. If there is a legitimate state interest which the legislation aims to effect, and if the legislation is reasonably related to achieve the

intended end, it will be upheld."

It is within that analytical context that both courts should have conducted their inquiries into the constitutionality of F.S. 330.40. In support of its burden, at the trial level, Appellee submitted no evidentiary materials. Obviously, none were offered at the Fourth District. Further, the Appellee's Memorandum Of Law In Support Of Its Motion To Dismiss (R-1-53-58) did not raised the issue of substantive due process in any context other than "overbreadth".

However, the trial court sua sponte rejected F.S. 330.40 finding that the statute boar no "...rational relation to the Legislative purpose" (R-1-58(f)) after determining without any record support that:

> "...it seems apparant that the main use of the statute is for the seizure and forfeiture of any aircraft that has the capability to transport large quantities of illegal drugs in empty non-conforming fuel tanks, regardless of whether or not the tanks are actually used for that purpose."

Had the trial court compelled the Appellee's to attempt to prove the statute's unconstitutionality beyond a reasonable doubt, it would have learned what the Fourth District was apparently willing to take judicial notice of: that the prohibited fuel tanks, bladders, drums or other containers have never been thought to be hiding places for illegal narcotics. Instead, among those who combat the influx of narcotics on a daily basis,

it is known that such make-shift fuel container modifications are installed to carry fuel to substantially extend the range of the modified aircraft. This then allows the aircraft to cover bodies of water beyond the aircraft's normal limits or to choose circuitous flight paths which evade law enforcement surveillance and monitoring. The court would also have been informed that aircraft are carefully engineered, delicately balanced devices which if modified by those more interested in quick profit than sound engineering, become very unstable and inherently unsafe. One need only picture a small twin engine aircraft whose entire passenger cabin is stuffed with 55 gallon drums and which also has supplementary non-approved wing and winglet fuel tanks to realize that such an aircraft is an overweight, improperly balanced, buzz bomb possessing destructive capabilities similar to a SCUD missile.

The "police power" and legislation to implement the valid exercise thereof has traditionally been exercised to protect the health and welfare of members of a society. It extends to matters as pedestrian as mere commercial welfare. Appellant would suggest that there is no more compelling and valid governmental exercise of the police power than one which is designed to assure that dangerous aircraft do not crash into this state's communities thereby reducing entire residential blocks into rubble covered graveyards. Appellant would also respectfully suggest that the more grave the potential harm, the harsher a legislative response may be, and yet still pass constitutional muster.

Both courts, nonetheless, concluded that the statute lacked a rational relation to the legislative purpose and further concluded that forfeiture, pursuant to a statute designed to combat drugs, obscene materials, and gambling equipment, was "too harsh a penalty". The court made this determination despite an obvious indication that the Legislature specifically disagreed.

This fact is demonstrated by the Legislature's response to In Re: Forfeiture Of One Cessna 337H Aircraft, 475 So.2d 1269 (4th DCA 1985), wherein the 1987 Legislature specifically engrafted the forfeiture authority that exists in the present statute, at the same time that it modified the companion statute which was under review in Cessna 337H, supra. It is conceded that forfeiture is a harsh remedy. However, death from above is a harsh penalty as well, suffered by innocent citizens, if the state is willing to allow such aircraft to be owned.

One could theoretically argue that less harsh legislative alternatives could be employed than outright forfeiture. The question sub judice is not whether a reviewing court can imagine a less drastic alternative, but instead whether the alternative chosen by the Legislature can reasonably be argued to advance a valid governmental goal. Certainly, one must agree that simple excision of such an aircraft from the skies protects the citizens from that specific aircraft. Further, once it becomes known among aircraft owners and service personnel that such modified aircraft, when discovered, will be confiscated, then there will

be a noteworthy disincentive to install such modifications, by both owners and potentially liable aircraft mechanics. It is possible the legislature's assessment is imprudent, but its assessment is far from irrational.

From the trial court's Order granting the Motion To Dismiss, and the District Court's adoption of it, it is intuitively clear that both courts were of the view that this statute is used by law enforcement agencies to combat narcotics trafficking rather than to protect citizens from unsafe aircraft. Appellant would be less than candid if he did not acknowledge that the seizure of illegal fuel tank equipped aircraft is consciously intended to help combat narcotics importation. Aircraft with such modifications do tend to attract traffickers. However, regardless of the law enforcement agenda being advanced, if the seizing agency pursues forfeiture of an illegally modified aircraft because it is thought that a narcotics trafficker's importation scheme will be thwarted thereby, nonetheless an unsafe aircraft is being removed from Florida's skies. Simply put, when it comes to illegal fuel tanks, there may be innocent owners, but there are no innocent aircraft. To the extent that such innocent owners are truly "innocent", legal remedies for their losses are available to recoup their damages.

The nature of the courts examination of the statute was improperly focused. The courts commented that the statute:

> "...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 activites." (R-1-58(f)) (Emphasis Supplied)

The above-cited paragraph demonstrates the two-pronged erroneous analysis which led to both incorrect determinations of unconstitutionality. First, it reflects the trial court's effort to apply the substantive principles of Chapter 932.701-704, to a wholly separate theory of forfeiture. Second, the court's analysis focuses on the manner of use of the forfeited object rather than its character or nature. It is not the "purpose" of the tanks nor the "activities" of the owner which makes the aircraft forfeitable. It is the existance of the tanks that warrants forfeiture.

By way of more detailed explanation, the main Contraband Forfeiture Act (Section 932.701-704) was aimed primarily, although not exclusively, at helping to combat the illicit drug trade, by making the profits or enabling equipment subject to forfeiture. Generally, this involves the taking of lawful things which are used in an unlawful manner. Only proof of their use in unlawful activity makes them contraband.

However, interspersed throughout the Florida Statutes are numerous provisions which make certain types of items, regardless of their use, subject to forfeiture because they are illegal things, very possibly owned by innocent individuals. Among them

are included vehicles with improper vehicle identification numbers (F.S. 319.33), and vessels with improper hull identification numbers (F.S. 328.07). These statutes have the dual purposes of both protecting the citizens from purchasing unidentifiable and unmarketable items, while at the same time affording a supplemental law enforcement tool.

They are not part of the Contraband Forfeiture Act, however, except to the extent of the procedure by which title transfer is perfected. They were not passed as part of the Contraband Forfeiture Act and have different goals. Therefore, both courts' reliance on the substantive provisions concerning unlawful usage, is without basis.

The aircraft, sub judice, is an inherently illegal thing, regardless of its use, because it is dangerous. Therefore, the court's concern that the statute reaches too far in its effort "...to stem the flow of drugs" simply misses the point. The statutory basis for forfeiture (independent of the goals of individual law enforcement agencies) has nothing to do with narcotics. It has to do with safety. The trial court was evidently convinced, with no evidentary basis upon which to so conclude, that the petitioning agency used this statute as a subterfuge or ruse to seize narcotics planes without evidence of such use. The court was convinced that innocent aircraft owners were at peril. Its remedy was to nullify a statute, because it was not pleased with its application.

However, this was a lawsuit against an airplane, not its owners. It is a lawsuit about the nature of an aircraft, not its use. Within that narrow spectrum, the Legislature has determined that it is "...in the interests of the public welfare" (F.S. 330.40) that aircraft with non-approved fuel tanks not fly. That is good common sense and the forfeiture thereof is a rational means to accomplish that end. The innocent person who buys such an aircraft is not without a remedy should his aircraft be forfeited.

The trial court adopted and approved only the challenge to the statute on substantive due process grounds. However, both raised and preserved[1] were the challenges to the state on supremacy clause (federal preemption) and commerce clause (unlawful restraint on interstate commerce) grounds. Neither the appellee in the Fourth District raised nor any judges opinion considered the commerce clause issue and appellant sees that issue as having no continuing vitality.

The "commerce clause's" challenge can be dispatched summarily. It is facially non-sensical to suggest that a statute which enforces and adopts federally adopted, nationally applicable standards, can in any way restrain the free flow of commerce among the states.

However, in specifically rejecting the "due process" basis for determining Section 330.40 unconstitutional, Judge Warner concluded that the legislation was prohibited because preempted

[1] See Judge Warner's footnote concurring opinion.

by a comprehensive federal regulatory scheme. Curiously, no mention of the preemption theory of unconstitutionality was mentioned in the appellee's brief to the District Court and this theory of unconstitutionality was not even thought worthy of comment in the trial court's order granting the claimant's Motion to Dismiss.

F.S. 330.40 is not preempted by a federal regulatory scheme. Claimant's allegations that state regulation of civil aeronautics is banned by federal preemption of the field is equally without merit.

Federal preemption occurs in any one of three circumstances. In Michigan Canners & Freezers Association v. Agricultural Marketing And Bargaining Board, 104 S.Ct. 2518 (1984), the court held:

> "Federal law may preempt state law in any of three ways. First, by enacting the federal law, Congress may explicitly define the extent to which it intends to preempt state law. Second, even in the absence of express preemptive language, Congress may indicate an intent to occupy an entire field, in which case the states must leave all regulatory activity in that area to the federal government. Finally, if Congress has not displaced state law regulation, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law." [Also see In Re: Cone, 11 B.R. 925 (Fla. 1985) as to application of this test in airplane regulation.]

Simply stated, where Congress has not said it is preempting or where it is not obvious that Congress intended to do so

whether it said so or not, states are free to regulate as long as their regulations do not conflict with federal law.

Clearly the Congress has enacted a comprehensive scheme of civil aircraft regulation. See 49 U.S.C. 1401 et.seq. The Federal Aviation Administration has similarly enacted a comprehensive regulations scheme to implement the Congressional will. Section 14, Code of Federal Regulations §13.17 included summary seizure of aircraft lacking "air worthiness certificates" 49 U.S.C. §1473.

However, neither the United States Code nor the Code of Federal Regulations offers any specific prohibitions against state regulation. Nor have the Courts concluded that the field of civil aeronautics is exclusively federal domain. Although several sub areas have been found to be impliedly preempted (such as state and local attempts to regulate airport noise or pollution) most remain available for concurrent regulation. For example, taxation of airline fuel by state governments was attacked as being an encroachment of federal power but upheld by the United States Supreme Court. Wardair Canada, Inc. v. Florida Department Of Revenue, 106 S.Ct. 2369 (1986).

State regulation where there is a valid state interest in safety is generally upheld. This is true in the heavily regulated auto transport industry [Sims v. Florida Department of Highway Safety and Motor Vehicles, 832 F.2d 1558 (11th Cir. 1987] and in admiralty as well. [Rubin v. Brutus Corp., 487 So.2d 360 (1st DCA 1986].

In the context of aircraft regulation, the cases approve state regulation so long as those regulations are not at cross-purposes with federal standards. Philko Aviation, Inc. v. Shacket, 103 S.Ct. 2476 (1983). Where the regulatory statute has the salutory purpose of protecting the safety of its citizens from unsafe operation of or maintenance of aircraft, it will be enforced. People v. Valenti, 200 Cal.Rptr. 862 (1984), State v. Collins, 480 NE.2d 1132 (Ohio 1984).

There is no conflict with federal law in F.S. 330.40. The statute adopts federal standards as its guide to determination of which aircraft are safe for flight over Florida soil. This statute reflects the State of Florida's willingness to adopt and enforce the Federal Aviation Administration's standards in a context where, frankly, the F.A.A. lacks the manpower to enforce such standards itself. Further, it grants no additional seizure and forfeiture power that the F.A.A. does not have itself. (49 U.S.C. §1473).

Despite the foregoing, Judge Warner concluded that state regulation of aircraft fuel tanks specifically incorporating federal standards was preempted because the federal government pervasively regulates civil aeronautics and concluded that the "most telling" indication of the congressional intent to preempt this area of regulation was contained in 49 U.S.C.A. §1472(b)(5) which 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 administrator 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 knowing the writing or document to contain any false, fictitious, or fraudulent statement or entry.

By observing that §1472(b)(5) contains no forfeiture provision for fuel tanks violations while expressly providing for forfeiture of other non-safety related violations, Judge Warner inferred that if Congress had meant to authorize forfeitures of aircraft with illegal fuel tanks, it would have said so.

Of the three circumstances under which federal preemption can be found to exist, it is clear that there is no federal provision with which §330.40 can be said to conflict. In fact, it simply attempts to enforce and adopt a federal standard. Further, it is equally obvious that Congress has not expressly indicated that aircraft safety regulation is an area of exclusively governmental interest.

Therefore, Judge Warner's conclusion that §330.40 is preempted must fit into the third category: that the field of

regulation is so pervasively regulated that Congress must have intended to preempt legislation but merely did not specifically so provide.

Judge Warner's analysis is not supported by the evidence of congressional intent within the U.S. Code. For example, the concurring opinion's fundamental premise is refuted by 49 U.S.C.A. §1305 which provides:

> "Except as provided in paragraph (2) of this subsection, no state or political sub-division thereof...shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law, relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation."

One may confidently infer then that where Congress wanted to preclude state or local civil aviation it specifically did so. One may then further infer then that where Congress did not specifically so provide, then parallel or supplementary non-contradictory regulation would not run afoul of the supremacy clause.

The inference that such supplementary regulation is not prohibited seems to be supported by this statement by the Congress:

> "Nothing contained in this Chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C.A. §1506.

This then arguably leaves unresolved why, in the overall context of allowing parallel regulation, did Congress see fit to

specifically authorize aircraft forfeiture by states for aircraft violations. (See §1472(b)(5)).

The logical answer is that overall the Congress wanted to encourage state participation in enforcement of F.A.A. regulations but wanted to make that authority specific on matters which were heavily federally regulated but where no obvious separable state interest was at stake. Therefore, a specific forfeiture authorization was needed to notify the states of their authorization to participate and regulate in what is predominantly a federal area of regulation.

Judge Warner concluded that this legislative enactment reflected an effort to cut off state participation rather than to extend it. However, a more logical way of evaluating the significance of these aircraft registration violation forfeiture provisions, is that they each reflect an extension of power to a subject area where such intention was not inherent or obvious.

It is, however, inherent and obvious that states have a vital interest in the safety of their citizens which far transcends concerns about the record-keeping of aircraft ownership information.

When one considers this issue against the backdrop of generally encouraging state and local regulatory participation as aforecited in §1506, and the specific disempowerment when intended (§1305), the best significance to attach to the federal authorization for states to forfeit improperly registered

aircraft is that this scheme reflects a general disinterest in preempting the field of civil aviation regulation.

This is only logical in that it only makes sense that a state which has the power to seize aircraft because the federal paperwork associated with them is fouled although such aircraft may pose no safety risk, must also have the power to protect itself from unsafe aircraft. Accordingly, it is hardly proven beyond a reasonable doubt that this regulatory scheme violates any field of exclusive federal domain and must therefore be declared unconstitutional.

CONCLUSION

WHEREFORE, Appellant requests that the Fourth District Court of Appeals Order affirming the trial court's Order granting dismissal be reversed, and the cause be remanded to the trial court for proceedings and trial consistant with the Court's finding of constitutionality of Florida Statute 330.40.

Respectfully submitted,

SHAILER, PURDY & JOLLY, P.A.
Attorneys for Appellant
1322 S.E. Third Avenue
Fort Lauderdale, Florida 33316
(305) 462-3200

By _____
JOHN W. JOLLY, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY mailing a true copy of the foregoing to: MIGUEL SAN PEDRO, Esquire, attorney for Appellee, 2296 Coral Way, Miami, Florida 33145; and to WALTER M. MEGINNISS, Esquire, Chief, General Civil Litigation, Office of the Attorney General, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050, this 7th day of February, 1991.

SHAILER, PURDY & JOLLY, P.A.
Attorneys for Appellant
1322 S.E. Third Avenue
Fort Lauderdale, Florida 33316
(305) 462-3200

By _____
JOHN W. JOLLY, JR.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1990

IN RE: FORFEITURE OF)
)
1969 PIPER NAVAJO, MODEL)
PA-31-310, S/N-31-395)
U.S. REGISTRATION N-1717G.)
)
) CASE NO. 89-1282.
)

Opinion filed December 5, 1990

Appeal from the Circuit Court for Broward County; Constance R. Nutaro, Judge.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

John W. Jolly, Jr. of Shailer, Purdy & Jolly, P.A., Fort Lauderdale, for appellant.

Miguel San Pedro, Miami, for appellee.

PER CURIAM.

The Sheriff of Broward County appeals an order of the trial court declaring the forfeiture provision contained in section 330.40, Florida Statutes (1987) to be unconstitutional. We affirm.

These consolidated cases involve the seizure of two aircraft. The petition for forfeiture alleged that both aircraft were contraband as defined in section 330.40, Florida Statutes (1987) because they were equipped with fuel tanks not in conformance with federal aviation regulations or not approved by the F.A.A. The owner of the aircraft responded and filed a motion to dismiss alleging the unconstitutionality of the statute

authorizing the forfeiture.[1] After briefing on this issue, the trial court found that the statute was violative of substantive due process and granted the motion to dismiss. We publish in substantial part the late trial judge's order which reasoning we adopt.

> Respondents challenged the forfeiture by means of the above mentioned Motion to Dismiss. In that Motion to Dismiss, the parties challenged the constitutionality of FS 330.40. Said statute provides in pertinent part:
>
> > In the interests 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 a law enforcement agency and shall be subject to forfeiture pursuant to ss 932.701-932.704. [Emphasis added].
>
> * * *
>
> 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

---

[1] In addition the owner claimed that the aircraft was conforming and certified by the F.A.A. and presented affidavits to that effect.

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 Sears 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 (4DCA 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 reasonable 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 petitioner claims that the statute serves to protect one from the risk that airplanes with unsafe fuel tanks may "drop into the living room of Florida citizens." However, Petitioner 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 large quantities of illegal drugs in empty nonconforming fuel tanks, regardless of whether or not the tanks are actually used for that purpose. [We disagree with this statement by the trial court. When used in the drug trade oversized fuel tanks are usually used to store extra fuel, not drugs, for longer trips to avoid law enforcement.] 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.

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 explicitly 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 exercise 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 So.2d 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 [sic]. 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. It is highly plausible that the fuel tanks are

legitimate adaptations, even if they have yet to be 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 tanks.

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

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 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 a harsh penalty for the former, and an already existing remedy for the latter. This Court finds FS 330.40, as it relates to the "Florida Contraband Forfeiture Act" to be unreasonable, arbitrary and capricious and lacks a substantial relation to the object sought to be attained. As such, it violates substantive due process rights guaranteed by the United States and Florida Constitutions.

It is hereby ORDERED AND ADJUDGED that Respondents' motion to Dismiss is GRANTED.

AFFIRMED.

LETTS and DELL, JJ., concur.
WARNER, J., concurs specially.

WARNER, J., concurs specially.

While I concur in the result reached, I respectfully disagree that the statute is unconstitutional because of substantive due process violations. I would hold that the statute passes the two prong test of State v. Saiez, 489 So.2d 1125 (Fla. 1986). I find that the proper legislative purpose that it addresses is air safety, and the means employed are rationally related to the goal of making sure an aerodynamically unsafe plane doesn't fly. I don't think that the statute criminalizes activity which is inherently innocent. What it punishes is the possession of an inherently unsafe plane, and that plane equipped with nonconforming fuel tanks cannot be put to a lawful use. Thus, it is unlike the credit card embossing machine in Saiez which was in itself inherently innocent.

The forfeiture of the plane is explicitly authorized by statute. The statute declares that planes in violation of the statute are contraband per se. The amendment including that language was added for the specific purpose of avoiding the ruling of City of Indian Harbour Beach v. Damron, 465 So.2d 1382 (Fla. 5th DCA 1985) which held that an airplane which was improperly registered was an essential element of the offense itself and therefore was not subject to forfeiture as an instrumentality in the commission of the offense. See Staff of Florida Senate Comm. on Judiciary-Criminal, CS for HB 1467 (1987), Staff Analysis (revised May 25, 1987) (on file with committee). The legislative amendment has now made the plane contraband per se and thus not within the scope of the Damron

ruling. Where the statute is clear and unambiguous, the courts have no discretion but to enforce its terms. See U.S. v. Addison, 260 F.2d 908 (5th Cir. 1958) (forfeiture statute must be enforced where clear and unambiguous). And forfeiture, while extreme, is exceedingly effective in removing an unsafe airplane from use. Thus, I would hold that the statute does not violate due process.

However, I would hold that the statute is preempted by federal legislation under the Supremacy Clause of the federal constitution.[2] 49 U.S.C.A. § 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. I would hold that this act preempts state legislation on the subject. Where the federal interest in the 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 airways are indeed an area of particular federal interest. City of Burbank v. Lockheed Air Terminal, 93 S.Ct. 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. § 1472(b)(5) - Effect on State Law. That section provides:

---

[2] I acknowledge that this was not raised by appellee in its answer brief. It was raised to the trial court by motion, and it allows me to concur in an affirmance of the trial court on a "right for the wrong reasons" analysis.

> 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 administrator 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 knowing the writing or document to contain any false, fictitious, or fraudulent statement or entry.

Notably absent from the permitted state offenses is the use of a plane with nonconforming fuel tanks. Therefore, I conclude 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.