O&7 w/app

FILED
SID J. WHITE
SEP 18 1991
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Butterworth

Petitioner,

vs. Case No. 78,377

LOUIS A. CAGGIANO,

Respondent.

PETITIONER'S INITIAL BRIEF

On Discretionary Review from the District Court of Appeal, Second District of Florida

---

ROBERT A. BUTTERWORTH
Attorney General

ROBERTA FOX
Assistant Attorney General
Florida Bar No. 0234745

DEPARTMENT OF LEGAL AFFAIRS
135 West Central Blvd., Suite 250
Orlando, Florida 32801

KEITH P. VANDEN DOOREN
Assistant Attorney General
Florida Bar No. 0209260

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, Florida 32399-1050

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

Page

TABLE OF CONTENTS....................................i

TABLE OF CITATIONS..................................ii

PREFACE..1

STATEMENT OF THE CASE AND FACTS......................2

SUMMARY OF THE ARGUMENT..............................5

ARGUMENT

ISSUE

ARTICLE X, § 4, FLORIDA CONSTITUTION DOES NOT BAR FORFEITURE OF HOMESTEAD PROPERTY UNDER THE FLORIDA RICO ACT..........................7

CONCLUSION..27

CERTIFICATION OF SERVICE............................28

TABLE OF CONTENTS

CASES Page(s)

Bessemer v. Gersten,
381 So.2d 1344 (Fla. 1980)..................10

Caggiano v. Butterworth,
16 F.L.W. D1642
(Fla. 2d DCA June 21, 1991)...............3,18

Caggiano v. State,
505 So.2d 482 (Fla. 2d DCA 1987)............14

City of Sanford v. McClelland,
121 Fla. 253, 163 So. 513 (1935)............17

Clark v. Cox,
80 Fla. 63, 85 So. 173 (1920)...............15

Clutter Construction Corporation v. Clutter,
173 So.2d 761 (Fla. 3d DCA 1965)............10

Delisi v. Smith,
423 So.2d 934 (Fla. 2d DCA 1982),
review denied, 434 So.2d 887
(Fla. 1982)...............................8,9

DeRuyter v. State,
521 So.2d 135 (Fla. 5th DCA 1988).......*Passim*

Frase v. Branch,
362 So.2d 317 (Fla. 2d DCA 1978).............9

Gepfrich v. Gepfrich,
16 F.L.W. D1805
(Fla. 4th DCA July 10, 1991).......9,10,11,13

Hillsborough Inv. Co. v. Wilcox,
15 Fla. 889, 13 So.2d 448 (Fla. 1943).......9

Hospital Affiliates of Florida v. McElroy,
393 So.2d 25 (Fla. 3d DCA 1981).............9

In re Henry Gherman,
103 B.R. 326 (B.C. S.D. Fla. 1989).........12

TABLE OF CONTENTS

(Continued)

CASES Page(s)

In the Matter of a Parcel of Real Property known as 1632 North Santa Rita, Tucson,
801 P.2d 432 (Ariz. App. 1990)...........7,19

In the Matter of Property Seized From Bly,
456 N.W.2d 195 (Iowa 1990)..............18,19

Isaacson v. Isaacson,
504 So.2d 1309 (Fla. 1st DCA 1987).........10

Jetton Lumber Co. v. Hall,
67 Fla. 61, 64 So. 440 (Fla. 1914)..........9

Jones v. Carpenter,
90 Fla. 407, 106 So. 127 (Fla. 1925)....11,12

LaMar v. Lechlider,
135 Fla. 703, 185 So. 833 (Fla. 1939)....4,10

Lanier v. Lanier,
95 Fla. 522, 116 So. 867 (1928)............15

Mansell v. Carroll,
379 F.2d 682 (10th Cir. 1967)..............12

Marshall v. C.S. Young Construction Co.,
94 Fla. 11, 113 So. 565 (1927).............17

Milton v. Milton,
68 Fla. 533, 58 So. 718 (Fla. 1912).........9

Monson v. First National Bank of Bradenton,
497 F.2d 135 (5th Cir. 1974)................9

People v. Allen,
767 P.2d 798 (Colo. App. 1988).........7,8,19

Phillips v. Atwell,
76 Fla. 480, 80 So. 180 (1918).............16

TABLE OF CONTENTS

(Continued)

CASES — Page(s)

Slatkoff v. Dezen,
76 So.2d 792 (Fla. 1954) 9

Tullis v. Tullis,
360 So.2d 375 (Fla. 1978) 5,10,13

Vandiver v. Vincent,
139 So.2d 704 (Fla. 2d DCA 1962) 9

STATUTES AND CONSTITUTIONS

Florida Constitution

Article X, §4 .... *passim*

Florida Statutes

Chapter 895 (RICO Act) .... *passim*

Colorado Revised Statutes

Section 38-41-201 7

OTHER SOURCES

Black's Law Dictionary
(6th Ed. 1990) 16,17

Federal Rules of Civil Procedure

Rule 70 17

TABLE OF CONTENTS

(Continued)

OTHER SOURCES Page(s)

Florida Rules of Civil Procedure

Rule 1.570(d) 17

Laws of Florida

Chapter 77-334 8

PREFACE

The Petitioner is the Attorney General of the State of Florida. The Respondent is Louis A. Caggiano.

There is no record on appeal prepared as yet for this case.

STATEMENT OF THE CASE AND THE FACTS

In the civil proceeding before the lower court, the PETITIONER STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS (hereinafter "Petitioner") sought forfeiture of Defendant Caggiano's (hereinafter "Respondent") residence and homestead alleging that said real property, located at 4507 Longfellow Avenue, Tampa, Hillsborough County, Florida, was "used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of the Florida RICO Act." Chapter 895, Florida Statutes. Respondent, a single man and sole titleholder to the property involved herein, was convicted in a separate criminal prosecution of one count of racketeering and sixteen counts of bookmaking. Three of the bookmaking incidents for which Respondent was convicted took place at his personal residence. In the civil proceeding, the circuit court found that the homestead had been "used" by Respondent in the course of racketeering activity and granted Final Summary Judgment in favor of the Petitioner. The court held that the property was not subject to the homestead exemption of Art. X, §4 of the Florida Constitution consistent with the decision of the Fifth District Court of Appeal decision in <u>DeRuyter v. State</u>, 521 So.2d 135 (Fla. 5th DCA 1988).

Respondent appealed to the Second District Court of Appeal and raised six issues for review. The District Court in its opinion stated that "since we find merit in his [Respondent's] argument regarding the constitutional protection

afforded homestead and that issue is dispositive of the case, we do not reach the other issues." Caggiano v. Butterworth, 16 F.L.W. D1642 (Fla. 2d DCA June 21, 1991). The Court went on to find that forfeiture of homestead property cannot be permitted, and that to do so would be in direct conflict with Article X, § 4 of the Florida Constitution.

This ruling has created a conflict of decisions at the appellate level and has resulted in the certification to this court of the following question:

> WHETHER FORFEITURE OF HOMESTEAD UNDER THE RICO ACT IS FORBIDDEN BY ARTICLE X, § 4 OF THE FLORIDA CONSTITUTION?

SUMMARY OF ARGUMENT

The certified question should be answered in the negative. The Second District Court of Appeal was incorrect in finding that Article X, § 4 of the Florida Constitution bars forfeiture of homestead property under the Florida RICO (Racketeer Influenced and Corrupt Organization) Act. This provision of the Florida Constitution is designed to protect the family home from forced sale for debts which arise from the financial vicissitudes of life and not to protect the home used in a criminal enterprise or acquired from the proceeds of a criminal enterprise. The courts of Florida have consistently held that homestead may not be used to shield fraud or other reprehensible conduct. LaMar v. Lechlider, 135 Fla. 703, 185 So. 833, 837 (Fla. 1939).

Contrary to the Second District Court of Appeal's decision, RICO forfeiture is neither a forced sale nor a judgment that acts as a lien against a homestead. Rather, it is a court imposed alienation of title to property based on its illegal use or acquisition. There is no judicially supervised sale involved, nor can a forfeiture judgment, which immediately conveys title to the state, create a lien against property.

ARGUMENT

ISSUE

ARTICLE X, § 4, FLORIDA CONSTITUTION DOES NOT BAR FORFEITURE OF HOMESTEAD PROPERTY UNDER THE FLORIDA RICO ACT.

A. THE INTENT AND SPIRIT OF ART. X, §4, FLORIDA CONSTITUTION, IS TO PROTECT HOMESTEAD PROPERTY OF HONEST DEBTORS FROM THEIR CREDITORS, NOT TO SHIELD HOMESTEAD PROPERTY OF AN OWNER ENGAGED IN CRIMINAL CONDUCT.

RICO forfeiture falls totally outside the ambit of protection afforded by the homestead provisions of Article X, § 4 of the Florida Constitution.[1] This Court stated in Tullis v. Tullis, 360 So.2d 375, 377 (Fla. 1978), that "[t]he purpose of

---

[1] **Section 4. Homestead; exemptions.-**
(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality to the extent of one-half acre of contiguous land, upon which the exempption shall be limited to the residence of the owner of his family;
(2) personal property to the value of one thousand dollars.
(b) These exemptions shall insure to the surviving spouse or heirs of the owner.
(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, maay by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

the homestead exemption provision in our state constitution is to protect the family home from forced sale for the debts of the owner and head of the family." (Emphasis added). It is clear from this court's language and the history of Art. X, §4, that the homestead provisions were designed to protect the family home from forced sale for the owner's debts arising from the financial vicissitudes of life, such as loss of employment, medical debts, and even the property owner's own improvidence, and to protect the surviving family members.

Forfeiture of homestead property under the Florida RICO Act has nothing to do with the financial debts of the owner. Instead, it is predicated upon the illegal use or acquisition of the property in the course of racketeering activity -- exactly the type of activity the Florida RICO Act was expressly designed to reach and remedy. The Fifth District Court of Appeal considered this identical issue in DeRuyter v. State, 521 So.2d 135, 138 (Fla. 5th DCA 1988), and declared:

> No appellate decisions on this question have been cited and none have been found by our research. However, we view forfeiture of property due to its use in a criminal enterprise, to be entirely different from the "forced sale" language in the constitution. The purpose of the constitutional provision is to protect homestead property from forced sale for debts of the owner. Tullis v. Tullis (citation omitted). Forfeiture here is not predicated upon the debts incurred by the owner but rather is based solely upon the illegal uses to which the property is being put. Article X, Section 4, Florida Constitution, was simply not designed to immunize real property for use in a criminal enterprise. (Emphasis added).

An Arizona appellate court, persuaded by the reasoning of the DeRuyter court, explicitly adopted its rationale, asserting "that it would be against public policy to hold that the homestead prevails over the forfeiture provisions." (Emphasis added). In the Matter of a Parcel of Real Property known as 1632 North Santa Rita, Tucson, 801 P.2d 432, 437 (Ariz. App. 1990). In that case, the defendant had used homestead property to cultivate and process marijuana. The Arizona court agreed with the logic of DeRuyter and echoed its language:

> The purpose of the homestead statutes is to save exempt to the family the amount of money designated as the value of a homestead by protecting the family from a forced sale to satisfy the debts of the owner. The forfeiture here is not predicated upon the debts incurred by the owner but rather is based on the illegal uses to which the property was put. The homestead statutes were not designed to immunize real property for use in a criminal enterprise. See DeRuyter v. State, (citation omitted).
>
> 1632 North Santa Rita at 437.

A similar conclusion was reached by a Colorado Court of Appeals in an action brought by the State of Colorado to forfeit a homestead residence. A Colorado statute declares property used in certain criminal activity to be a Class I nuisance and therefore forfeitable to the State. People v. Allen, 767 P.2d 798 (Colo. App. 1988). One of the defendant's arguments on appeal included a claim that the subject property was exempt from forfeiture under the provisions of Colorado's homestead statute. That statute, §38-41-201, C.R.S., provides that homesteads are

exempt from execution and attachment "arising from any debt, contract or civil obligation. . . ." Noting that the execution and attachment in that case arose not from a debt, contract, or civil obligation but from the adjudication of the property as a nuisance (for its use in criminal activity), the Court rejected the defendant's argument citing the decision in DeRuyter, *supra*, for the proposition that a homestead exemption does not protect property used in a criminal enterprise. Allen, 767 P.2d at 800.

The forfeiture provisions of the Florida RICO Act have a purpose clearly different from the intent to protect the honest debtor from unmitigated financial disaster accorded by Art. X, §4 of the Florida Constitution. Civil forfeiture actions under the RICO Act were enacted to remedy the damage to society and cost to the government brought about by criminal racketeering activity. With that in mind, the Second District Court of Appeal has held that the forfeiture provisions of the Florida RICO Act are civil and remedial in nature. Delisi v. Smith, 423 So.2d 934, 937 (Fla. 2d DCA 1982), *review denied*, 434 So.2d 887 (Fla. 1982). The Delisi court, in examining the legislative findings of fact made in conjunction with passage of the RICO Act (Ch. 77-334, Laws of Florida), observed that the Act impairs the ability of those engaged in criminal activity to camouflage their illegal operations, attempts to reduce the profits of those engaged in illegal enterprises and thereby discourage further migration to Florida of organized crime "families" and, rather than imposing a totally unrelated forfeiture, is designed to recover for society the ill-gotten gains of those engaged in criminal activity.

Delisi v. Smith, 432 So.2d at 937-8. It is the use of property in criminal activity which results in its forfeiture, not honest debts.

The idea that certain uses of property are outside the scope and intent of homestead protection has been adopted by that body of case law which has imposed equitable liens beyond those exceptions provided for in Art. X, §4, in instances of fraud or other reprehensible conduct. Florida courts have repeatedly held that great care should be taken to prevent homestead laws from becoming an instrument of fraud, an unjust imposition upon creditors, or a means to escape honest debts. *See*, Hillsborough Inv. Co. v. Wilcox, 15 Fla. 889, 13 So.2d 448 (Fla. 1943); Jetton Lumber Co. v. Hall, 67 Fla. 61, 64 So. 440 (Fla. 1914); Milton v. Milton, 68 Fla. 533, 58 So. 718 (Fla. 1912); Frase v. Branch, 362 So.2d 317 (Fla. 2d DCA 1978); Vandiver v. Vincent, 139 So.2d 704 (Fla. 2d DCA 1962); Hospital Affiliates of Florida v. McElroy, 393 So.2d 25 (Fla. 3d DCA 1981); and Monson v. First National Bank of Bradenton, 497 F.2d 135 (5th Cir. 1974).

Florida courts have consistently held that homestead protection is not absolute and is intended for the benefit of honest debtors. (Emphasis added). Slatkoff v. Dezen, 76 So.2d 792 (Fla. 1954). Where the court finds fraud or other reprehensible conduct on the part of the beneficiary of the constitutional protection, Florida courts have consistently imposed equitable liens, even against homestead property. *See*, Gepfrich v. Gepfrich, 16 F.L.W. D1805 (Fla. 4th DCA July 10,

1991); Isaacson v. Isaacson, 504 So.2d 1309 (Fla. 1st DCA 1987); Clutter Construction Corporation v. Clutter, 173 So.2d 761 (Fla. 3d DCA 1965). In LaMar v. Lechlider, 135 Fla. 703, 185 So. 833, 837 (Fla. 1939), this court placed an equitable lien on the homestead property for the amounts given to defendants, announcing that, "[t]o say that a lien could not be decreed against the homestead under the facts in this case would be to make the homestead an instrument of fraud." This court recently reaffirmed the enforceability of liens imposed for fraud or other reprehensible conduct after homestead protection has been established. Bessemer v. Gersten, 381 So.2d 1344, 1347, n. 1 (Fla. 1980).

A second line of cases allowing the partition and forced sale of homestead property is based upon ensuring the beneficial enjoyment of one with a titleholder's interest in the property. In Tullis v. Tullis, *supra*, the plaintiff wife moved out of the homestead residence and obtained a divorce. The divorce judgment awarded exclusive possession of the property to neither the wife nor husband. The wife subsequently sued for partition and forced sale of the home; the husband cited homestead as a defense. The Florida Supreme Court allowed the sale finding that forced sale was the only means by which the ex-wife could obtain the beneficial enjoyment of her one-half undivided interest in the property.

Gepfrich, *supra*, blends these two lines of cases imposing equitable liens on homestead property and demonstrates their

present vitality. The Fourth District Court of Appeal affirmed the trial court's order that the ex-husband pay alimony arrearages to his ex-wife, that he sell his home, and that the arrearages be paid from the proceeds. Mr. Gepfrich argued that Art. X, §4 specifically exempted his homestead property from forced sale and that the court was prohibited from forcing him to sell his homestead to meet his alimony obligations. As the appellate court noted:

> [t]he trial court also expressly found, inter alia, that the husband's defenses to his former wife's motion for contempt constituted a complete lack of "clean hands." . . . We certainly agree that the trial court should not sanction such a blatantly defrauding scheme by permitting the former husband to hide behind the homestead exemption laws. (Emphasis added).
>
> Gepfrich, at 1805.

As noted in the concurring opinion in Gepfrich, *supra*, at page 1805, "[t]he trial court's finding that Petitioner's defenses to the contempt charge 'constitute a complete lack of clean hands' establish for me the functional equivalent of fraud or reprehensible conduct sufficient for an equitable lien."

In Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (Fla. 1925), Carpenter, as president, surreptitiously embezzled monies from his company, and used the sums for improvements to his house which he and his family occupied. Thereafter, the company went bankrupt and the creditors of the company sought to acquire an equitable lien in Carpenter's homestead property. This Court held:

> A homestead in this country is for the benefit of the family where it can be sheltered and live beyond the reach of financial reverses. It is one of the issues of our republican government designed to encourage freeholders, those citizens who are the prop and mainstay of all free government. <u>It is designed to keep sacred and inviolate the home of a family regardless of the amount of indebtedness or the numbers of creditors of the head of the family</u>. It cannot be alienated except as the law directs and when the parties are sui juris and dealing at arm's length, it is notice to the world of all these facts and more; <u>but it cannot be employed as a shield and defense after fraudulently imposing on others</u>. (Emphasis added).
>
> <u>Jones</u>, 106 So.2d at 130.

The Bankruptcy Court for the Southern District of Florida has approved the impressing of a constructive trust on property claimed as exempt under Art. X, §4 of the Florida Constitution, where the three residences at issue had been purchased with embezzled funds. <u>In re Henry Gherman</u>, 103 B.R. 326, 332-33 (B.C. S.D. Fla. 1989). The court's opinion states:

> The homestead exemption is for the benefit of the family and the protection of the family home. It was never intended as a device to effectuate frauds and a court of equity should not countenance any wrongful use of the homestead right.

(quoting <u>Mansell v. Carroll</u>, 379 F.2d 682 [10th Cir. 1967]).

The Second District Court of Appeal misapprehended the Fifth District Court of Appeal's decision in <u>DeRuyter</u>, *supra*, when it opined that its sister court had stated the purpose of the

homestead exemption too narrowly. This characterization ignores the logic of the line of Florida cases from Gepfrich to Tullis, *supra*, holding that homestead protection is not absolute and is only intended to benefit honest debtors. These cases are the logical ancestors of the DeRuyter opinion, and the DeRuyter court's conclusion that homestead property is subject to forfeiture under the RICO Act is their natural consequence. The Second District Court of Appeal ignored numerous rulings by the Florida Supreme Court and other courts finding that the homestead provisions are designed to protect a property owner and his family from debts to creditors but may not be employed as a shield and defense after fraudulently imposing on others.

To construe the Florida homestead exemption as shielding a residence from forfeiture if used in a racketeering enterprise would be to establish a forfeiture-free zone for criminal activity and the investment of criminal proceeds. Its effect would be that criminals would tend to focus on homestead property as the preferred situs of criminal behavior, knowing that the homestead location would be a non-forfeitable criminal asset. The family home would become the location of choice for the hatching of criminal conspiracies, stashing of contraband, and innumerable other illegal activities. Because there are no monetary limits as to the value of the homestead exmption to a real property owner, any amount of money may be invested in a homestead by an owner engaged in criminal activity. The homestead exemption was never intended to have the effect of promoting criminal activity in the family home by, in effect,

making it the only privately held real property location completely immune from forfeiture. Nor was it intended to provide a safe haven for monies derived from such activity.

Respondent was convicted of racketeering based on bookmaking violations. Caggiano v. State, 505 So.2d 482 (Fla. 2d DCA 1987). He used his homestead property in the course of his racketeering activity on at least three occasions. Respondent certainly does not come before this court with clean hands when he requests this court to shield property he used for criminal racketeering purposes from forfeiture. Respondent seeks to be spared the consequences provided by the RICO Act for property used in the course of racketeering activities. But, like Mr. Gepfrich, Respondent is guilty of the functional equivalent of fraud or reprehensible conduct -- criminal racketeering. It would be manifestly unjust to allow Respondent to escape the consequences of his criminal actions, as well as contrary to the liberal application of civil remedies afforded under the RICO Act. Such a result would also contradict the expressed intent behind the homestead provisions and the body of equitable lien case law.

The State urges this court to follow the logic of the Fifth District Court of Appeal in DeRuyter, *supra*, and rule that the homestead protection afforded by Art. X, §4 of the Florida Constitution does not shield property used in the course of racketeering activities and is not a bar to forfeiture under the Florida RICO Act.

Alternatively, this Court could hold that the Respondent has constructively abandoned or relinquished his right to claim a homestead exemption in the subject property. This Court has previously recognized that a homestead, once acquired, can be abandoned by the homestead owner. Clark v. Cox, 80 Fla. 63, 85 So. 173 (1920)(interpreting Art. X, §1, Fla. Const. [1885]), and that a permanent abandonment of the homestead strips it of its homestead character. Lanier v. Lanier, 95 Fla. 522, 116 So. 867, 868 (1928). Should this Court hold that a judgment or order of forfeiture is a "forced sale" or constitutes "a lien thereon" for the purposes of the homestead exemption, the homestead owner/claimant in this case has constructively abandoned or relinquished or otherwise voluntarily waived the protection of the homestead exemption provided in Art. X, §4, of the Florida Constitution, by using the subject property in a course of conduct in violation of the Florida RICO Act.

B. FORFEITURE OF HOMESTEAD PROPERTY UNDER THE RICO ACT IS NEITHER A FORCED SALE FOR THE DEBTS OF THE OWNER NOR A JUDGMENT LIEN AND, THEREFORE, FALLS OUTSIDE THE PROTECTION OF THE HOMESTEAD PROVISION OF ART. X, §4, FLORIDA CONSTITUTION.

The Second District Court of Appeal erred in its characterization of forfeiture as a judgment that acts as a lien on, or as a forced sale of, homestead property. RICO forfeiture is neither, rather, it is a court imposed alienation or divestiture of title based on its illegal use or acquisition.[2]

Black's Law Dictionary 845 (6th ed. 1990) defines a judgment lien as:

> An encumbrance that arises by law when a judgment for the recovery of money is docketed and that attaches to the debtors real estate located in the county where the judgment is docketed. A lien binding the real estate of a judgment debtor, in favor of the holder of the judgment, and giving the latter a right to levy on the property for the satisfaction of his judgment to the exclusion of other adverse interests subsequent to the judgment. Right to subject property of judgment debtor to satisfaction of judgment. A charge on or attachment of property of one who owes a debt and is subject to a judgment thereon.

This court has previously defined the term "lien" in the following ways: "A lien is a charge upon property for the payment of a debt or duty." Phillips v. Atwell, 76 Fla. 480, 80 So. 180, 182 (1918)(citing 1 Jones on Liens §§2,3); "A lien is a

[2] Forfeiture is "a comprehensive term which means a divestiture of specific property without compensation; it imposes a loss by the taking away of some preexisting valid right without compensation." Black's Law Dictionary 650 (6th ed. 1990).

charge upon property, which exists in favor of a person to whom another owes a debt or duty." Marshall v. C.S. Young Construction Co., 94 Fla. 11, 113 So. 565, 566 (1927), "[a] lien is a qualified right or proprietary interest, which may be executed over the property of another. It is a right which the law gives to have a debt satisfied out of a particular thing." City of Sanford v. McClelland, 121 Fla. 253, 163 So. 513, 514 (1935).

Unlike the money judgments referred to above, a forfeiture judgment does not act as a lien on real property, but in and of itself, acts as a conveyance of title to the State. *See*, Fla.R.Civ.P. 1.570(d). It is a direct divestment of title rather than a lien on property. *See also*, Fed.R.Civ.P. 70 on which Rule 1.570(d) is partially based. Committee notes, Fla.R.Civ.P. 1.570.

Furthermore, a judicial sale is a "[s]ale conducted under a judgment, order, or supervision of a court as in a sale under a petition for partition of real estate or an execution or a foreclosure sale. One which must be based upon an order or a decree of a court directing the sale." Black's Law Dictionary, 849 (6th ed. 1990). A forced sale is "[a] sale made at the time and in the manner prescribed by law, in virtue of execution issued on a judgment already rendered by a court of competent jurisdiction; a sale made under the process of the court, and in the mode prescribed by law." Black's Law Dictionary 645 (6th ed. 1990). Forfeiture of property contemplates none of this and

therefore is not a sale within the meaning of Art. X, §4, of the Florida Constitution.

In the only opinion supportive of Caggiano v. Butterworth, *supra*, the Iowa Supreme Court held that forfeiture of homestead property is a judicial sale under Iowa law. In the Matter of Property seized from Bly, 456 N.W.2d 195 (Iowa 1990). The Iowa court nevertheless recognized that, "an order of forfeiture is less a sale to the State than a commandeering by the State". Bly, *supra*, at 199.

Bly may be readily distinguished on several grounds. First, the court noted that the parties seem to have assumed that an order of forfeiture is a judicial sale. In the controversy before this court, Petitioner vigorously asserts that RICO forfeiture is not a judicial or forced sale, but a divestiture of title. Secondly, the Iowa court drew on Iowa case law to define judicial sale. That court made no reference to, or was not able to find specific language in, either the legislative history or case law indicating the intent of the state's homestead provision to aid honest debtors, as is demonstrably the case in Florida. Third, the Iowa legislature included in the homestead statute the requirement that only a "special declaration of statute to the contrary" could override the homestead protection. No such limiting language is found in Art. X, §4 of the Florida Constitution.

The value of Bly is further undermined when it is noted that the Iowa Supreme Court stated in its opinion, "[w]e have

found no case in any jurisdiction which has considered whether a homestead may be forfeited under a statute which simply allows forfeiture of real property. Bly, *supra*, fn. 4 at 197. However, the cases cited above, DeRuyter, *supra*; 1632 N. Santa Rita, *supra*; and Allen, *supra*, were all decided prior to the Bly decision, and each approved the forfeiture of homestead property. Importantly, those courts which have cited the DeRuyter opinion have accepted the reasoning of that decision. 1632 N. Santa Rita, *supra*, at 437; Allen, *supra*, at 800.

The Second District Court of Appeal was mistaken in its characterization that forfeiture acts as a forced sale. DeRuyter never considered RICO forfeiture as a forced sale for purposes of the homestead exemption. The DeRuyter court's rationale for affirming the RICO forfeiture is that "[f]orfeiture here is not predicated upon debts incurred by the owner but rather is based solely on the illegal uses to which the property is being put. (Emphasis added). DeRuyter, at 138. Accordingly, this court should ratify the logic of DeRuyter, *supra*, in its unequivocal ruling that Art. X, §4 does not shield from forfeiture homestead property used by its owner in racketeering activity.

CONCLUSION

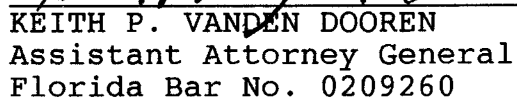
Based on the above cited legal authorities, Petitioner prays this Honorable Court answer the certified question in the negative and reverse and remand the decision of the District Court with instructions to reinstate the order granting Petitioner a final summary judgment.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

ROBERTA J. FOX
Assistant Attorney General
Florida Bar No. 0234745

DEPARTMENT OF LEGAL AFFAIRS
135 West Central Blvd., Suite 250
Orlando, Florida 32801
(407) 423-6733



KEITH P. VANDEN DOOREN
Assistant Attorney General
Florida Bar No. 0209260

DEPARTMENT OF LEGAL AFFAIRS/RICO
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-9105

Counsel for Petitioner

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that the original and seven copies of the foregoing Brief of Petitioner, **ROBERT A. BUTTERWORTH,** Attorney General of the State of Florida have been hand delivered this 3rd day of September, 1991, to the **CLERK OF THE SUPREME COURT,** and a true and correct copy of the foregoing has been sent by U.S. mail this 3rd day of September, 1991, to **JOSEPH A. EUSTACE, JR., ESQ.,** Anthony J. LaSpada, P.A., 1802 North Morgan Street, Tampa, Florida 33602.

KEITH P. VANDEN DOOREN
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 78,377

LOUIS A. CAGGIANO,

Respondent.

APPENDIX TO
PETITIONER'S INITIAL BRIEF

OPINION OF THE SECOND DISTRICT COURT OF APPEAL

prohibition to the imposition of a harsher sentence when the defendant has committed fraud upon the court. Because the trial court imposed Goene's harsher sentence within sixty days of the original sentence, it still had jurisdiction under rule 3.800 to modify the sentence in addition to its inherent power to modify a sentence at any time if the sentence was a product of fraud upon the court.

There is a federal case which discusses the relationship between the court's inherent power to modify a sentence procured by fraud and a rule which limits the period of time for modification of a sentence. In *United States v. Bishop*, 774 F.2d 771 (7th Cir. 1985), Bishop filed a motion to modify his federal prison sentence wherein he intentionally misrepresented the amount of state prison time he was serving. The federal trial court granted Bishop's motion and entered an order which modified Bishop's sentence to run concurrently with his state sentence. The federal trial court later learned that Bishop had misrepresented the length of time that he was serving for the state conviction. Upon the government's motion to vacate the modification order, the federal trial court granted the motion and reimposed the original sentence, which the court had imposed three years earlier. Bishop appealed the order, arguing that the court did not have jurisdiction to reimpose his original sentence because the 120-day time limit set forth in Federal Rule of Criminal Procedure 35(b)[2] had expired.

In affirming the trial court's action of setting aside the order modifying Bishop's sentence and reimposing Bishop's original sentence, the appellate court relied upon the civil case of *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944) which recognized a court's inherent power to correct judgments obtained through fraud or intentional misrepresentation. The *Bishop* court, quoting from *Hazel-Atlas Glass Co.*, stated:

> Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in the situations.

Bishop, 774 F.2d at 774 (quoting *Hazel-Atlas Glass Co.*, 322 U.S. at 248). The *Bishop* court found that the rule of law concerning equitable relief against fraudulent civil judgments pertained similarly to fraud perpetrated upon a court during a criminal sentencing proceeding. The court noted:

> The fact that this case involves a fraud perpetrated upon the court during the criminal sentencing process rather than during a civil proceeding, such as in *Hazel-Atlas*, does not change the result. It is the power of the court to correct the judgment gained through fraud which is determinative and not the nature of the proceeding in which the fraud was committed. Thus, in the analogous situation of revocation of a sentence of probation, courts have used their inherent power to revoke a sentence of probation and impose a jail term where a defendant's sentence of probation was gained through his intentional misrepresentation made to the court. *See Trueblood Longknife v. United States*, 381 F.2d 17 (9th Cir. 1967), *cert. denied*, 390 U.S. 926, 88 S.Ct. 859, 19 L.Ed.2d 987 (1968); *cf. United States v. Evans*, 459 F.2d 1134 (D.C.Cir. 1972).

Bishop, 774 F.2d at 774 n.5.

Our supreme court's analysis in *Goene* concluded that judgments which are the product of fraud or deceit may be vacated at any time. The federal court's analysis in *Bishop* determined that a rule limiting the time a trial court can modify a judgment does not preclude a modification of judgment when fraud or intentional misrepresentation upon the court occurs. The trial court's description of McCoy's memory lapse as a "farce at best" convinces me that McCoy did commit a fraud or intentional misrepresentation upon the court. I, therefore, concur with the result reached in this case and to the certified question.[3]

---

[1]That rule states:
RULE 3.800. CORRECTION; REDUCTION AND MODIFICATION OF SENTENCES

(a) A court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guidelines scoresheet.

(b) A court may reduce or modify to include any of the provisions of chapter 948, Florida Statutes, a legal sentence imposed by it within sixty days after such imposition, or within sixty days after receipt by the court of a mandate issued by the appellate court upon affirmance of the judgment and/or sentence upon an original appeal, or within sixty days after receipt by the court of a certified copy of an order of the appellate court dismissing an original appeal from the judgment and/or sentence, or, if further appellate review is sought in a higher court or in successively higher courts, then within sixty days after the highest state or federal court to which a timely appeal has been taken under authority of law, or in which a petition for certiorari has been timely filed under authority of law, has entered an order of affirmance or an order dismissing the appeal and/or denying certiorari.

This section of the Rule shall not, however, be applicable to those cases in which the death sentence is imposed or those cases where the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion.

Fla. R. Crim. P. 3.800.

[2]Federal Rule of Criminal Procedure 35(b) has been amended and no longer contains the 120-day limitation.

[3]Judge Lehan's reliance on Brown v. State, 367 So.2d 616 (Fla. 1979), does not aid me in resolving this dilemma. *Brown* is distinguishable because Brown was never sentenced following his negotiated plea until after his refusal to testify against a codefendant. Therefore, no time period under rule 3.800 had begun to run.

* * *

Criminal law—Forfeiture—Real property—Forfeiture of homestead under Racketeer Influenced and Corrupt Organization Act is forbidden by Article X, Section 4 of the Florida Constitution—Question certified—Conflict

LOUIS A. CAGGIANO, Appellant, v. ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, Appellee. 2nd District. Case No. 90-02026. Opinion filed June 21, 1991. Appeal from the Circuit Court for Hillsborough County; James A. Lenfestey, Judge. Joseph A. Eustace, Jr. and Anthony J. LaSpada, P.A., Tampa, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ann P. Corcoran, Assistant Attorney General, Tampa, for Appellee.

(HALL, Judge.) The appellant presents six issues for review; however, since we find merit in his argument regarding the constitutional protection afforded homestead and that issue is dispositive of the case, we do not reach the other issues.

The appellant was convicted of one count of racketeering and sixteen counts of bookmaking. Three of the bookmaking incidents for which the appellant was convicted took place at his personal residence. Consequently, the state sought forfeiture of the appellant's homestead pursuant to section 895.05(2)(a), Florida Statutes (1989), on grounds the property was "used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of" chapter 895, Florida Statutes, the Florida RICO Act. After striking the appellant's homestead defense, among others, the trial court entered a final summary judgment of forfeiture in favor of the state. The appellant contends the trial court erred in striking his homestead defense and finding, pursuant to *DeRuyter v. State*, 521 So.2d 135 (Fla. 5th DCA 1988), that homestead property is subject to forfeiture under the RICO Act. We agree.

Article X, section 4 of the Florida Constitution provides homestead property will not be subject to forced sale or any court judgment that acts as a lien on such property. In the instant case, a forfeiture is certainly a judgment that acts as a lien on homestead property and, as the court impliedly held in *DeRuyter v. State*, a forced sale.

The state does not dispute that the property at issue is homestead property; however, it asserts *DeRuyter* as authority for the

proposition that there is an exception to homestead protection in instances where the homestead is used in a criminal enterprise. The state therefore asks us to agree with the *DeRuyter* court and hold that the purpose of the homestead provision is to protect such property from forced sale for the debts of the owner and not to immunize real property for use in a criminal enterprise.

Florida homestead exemption laws have always been liberally construed in favor of the claim in order to acknowledge the beneficial purpose for which those laws were created, i.e., to preserve home and shelter for the family, so as to prevent the family from becoming public charge. *In the Matter of Hersch*, 23 Bankr. 42 (M.D. Fla. 1982). *See also Deem v. Shinn*, 297 So.2d 611 (Fla. 4th DCA 1974).

Article X, section 4 provides three exceptions to the protection of homestead property. Those exceptions relate only to: (1) taxes and assessments on the property; (2) obligations for the purchase, improvement, or repair of the property; and (3) labor performed on the property.

Based on the foregoing authority, we cannot agree with the holding of our sister court in *DeRuyter*. In addition to stating the purpose of the homestead exemption too narrowly, *DeRuyter* fails to reconcile that forfeiture of homestead as a result of criminal enterprise does not fall within any of the exceptions enumerated in our constitution.

Since we note conflict with the Fifth District's holding in *DeRuyter*, we certify the following question to the supreme court:

WHETHER FORFEITURE OF HOMESTEAD UNDER THE RICO ACT IS FORBIDDEN BY ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION?

Accordingly, we reverse the trial court's entry of summary judgment in favor of the state and remand the cause for further proceedings consistent herewith. (DANAHY, A.C.J., and LEHAN, J., Concur.)

* * *

Criminal law—Lewd, lascivious, or indecent assault—Sentencing—Guidelines—Scoresheet—Error to score victim injury points for penetration rather than contact

KENNETH SCOTT LaFLAMME, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 89-02343. Opinion filed June 19, 1991. Appeal from the Circuit Court for Collier County; Charles T. Carlton, Judge. Sara V. Fielding, Ft. Meade, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Richard E. Doran, Director of Criminal Appeals, Department of Legal Affairs, Tallahassee, for Appellee.

(PER CURIAM.) We affirm the defendant's two convictions without discussion. We reverse his sentence on the lewd, lascivious, or indecent assault conviction because the trial court scored forty points for penetration under victim injury when it should have scored only twenty points for contact. *See Daum v. State*, 544 So. 2d 1035 (Fla. 2d DCA 1989); *O'Bright v. State*, 491 So. 2d 310 (Fla. 4th DCA 1986). On remand, the trial court may reimpose the same sentence because, even with the twenty fewer points, the defendant's total points will still fall within the same permitted range.

Affirmed in part, reversed in part, and remanded. (HALL, A.C.J., and THREADGILL and ALTENBERND, JJ. Concur.)

* * *

Criminal law—Search and seizure—Officer lacked authority to arrest for loitering and prowling defendant who was standing in group of males in residential area known for its drug-related activity and who took flight and hid in some bushes thirty to forty feet from nearest residence—Speculation that defendant might rob or kidnap passersby if allowed to remain in bushes insufficient to raise reasonable alarm or immediate concern for safety of persons or property in the vicinity—Error to deny motion to suppress crack pipe containing cocaine residue found in search incident to invalid arrest

ARTHUR LEE WOODY, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-00508. Opinion filed June 19, 1991. Appeal from Circuit Court for Lee County; William J. Nelson, Judge. Gary R. Gossett, of McCollum & Gossett, P.A., Sebring, for Appellant. Robert A. Butterwo Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attor General, Tampa, for Appellee.

(DANAHY, Acting Chief Judge.) Arthur Lee Woody appe from his convictions for loitering and prowling, possession cocaine, and possession of drug paraphernalia. The convictio were entered upon his plea of nolo contendere in which he served his right to appeal the trial court's denial of his motion suppress. Woody contends that the arresting officer did not ha probable cause to arrest him for the crime of loitering and prov ing. We agree and, accordingly, reverse.

At the hearing on the appellant's motion to suppress, Serge Busbee of the Lee County Sheriff's Department testified that 6:40 p.m. he was in a marked patrol unit and entered a resident area known for its drug-related activity. He noticed a gatheri of several males who immediately took flight. One of them, t appellant, entered and hid himself in an area of dense folia thirty to forty feet from any residence. The sergeant approach the appellant and asked him to come out and explain what he w doing. The appellant replied that he was "just hanging out This explanation did not satisfy the sergeant so he arrested t appellant for loitering and prowling. In the ensuing search in dent to this arrest, a crack pipe containing cocaine residue w found on Woody's person. The sergeant stated that he arrest the appellant because he was hiding in the bushes and the serge was concerned for the safety of passersby who might be robb or kidnapped by the appellant. The previous week the serge had warned the appellant that he could go to jail for loitering a prowling in this area.

No circumstance here suggests that either of the two eleme of a proper arrest for loitering and prowling is present. The in vidual must loiter or prowl in a place, at a time, or in a mann not usual for law-abiding individuals and the circumstances m warrant a reasonable alarm or immediate concern for the saf of persons or property in the vicinity. *B.A.A. v. State*, 356 So. 304 (Fla. 1978); *State v. Ecker*, 311 So. 2d 104 (Fla.), *cert. d nied sub nom., Bell v. Florida*, 423 U.S. 1019, 96 S.Ct. 455, L.Ed.2d 391 (1975); *State v. Freeman*, 542 So. 2d 483 (Fla. DCA 1989); *Chamson v. State*, 529 So. 2d 1160 (Fla. 3d DC *review denied*, 539 So. 2d 476 (Fla. 1988). The sergeant's c cern for the potential robbery or kidnapping of a pedestrian if appellant were allowed to remain in the bushes was not suppor by any articulable facts which could reasonably warrant suc concern. Rather, any such concern was based on pure specu tion; there was nothing to suggest any independent criminal tivity afoot. *Cf. B.A.A.* (if officer believed defendant was soli ing prostitution by repeatedly approaching drivers stopped intersection, officer should have arrested her for that instead loitering and prowling); *Freeman* (nothing in description of tivities preceding arrest was evidence of criminal activity wh defendant was part of group gathered on street corner which d persed at officers' approach). Contrary to the dictates of *B.A.* the sergeant here used the loitering and prowling statute, secti 856.021, Florida Statutes (1989), as a catchall provision to det a citizen and prosecute him where there was insufficient basis convict on some other charge.

Reversed with directions to discharge the appellant. (LEH and PARKER, JJ., Concur.)

* * *

Criminal law—Sentencing—Error to impose consecutive m datory minimum sentences for armed robbery and kidnappi with a firearm where offenses occurred during single crimi episode—Armed robbery and kidnapping in instant case con tuted single, continuous episode

WILLIAM REED, Appellant, v. STATE OF FLORIDA, Appellee. 2nd I trict. Case No. 89-00769. Opinion filed June 21, 1991. Appeal from the Cir Court for Sarasota County; Lee E. Haworth, Judge. Frank W. Scott, Saras