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By _____
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IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

IN RE: Forfeiture of 1985 Ford Ranger Pickup Truck,
VIN #1FTBR10S7FUB74784, Florida License
#802-DPU

_____ /

78,456

ON CONFLICT REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

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DUE PROCESS

THE TAKING OR DEPRIVATION OF USE OF PRIVATE
PROPERTY WITHOUT COMPENSATION FOR REASONS
OTHER THAN TO PROTECT THE HEALTH, SAFETY AND
WELFARE OF THE PUBLIC VIOLATES DUE PROCESS.

EQUAL PROTECTION

A GOVERNMENTAL POLICY WHICH DISCRIMINATES
AMONG DIFFERENT CLASSES OF PROPERTY OWNERS
INFRINGES ON A FUNDAMENTAL RIGHT AND IS
SUBJECT TO STRICT SCRUTINY ANALYSIS.

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OTHER AUTHORITIES:

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PRELIMINARY STATEMENT

The State of Florida was the Petitioner in the lower court, the First District Court of Appeal and will be referred to herein as Petitioner or the State. Alan R. Barry and Alvin R. Barry, co-owners of the 1985 Ford Ranger Pickup Truck were Respondents below but only the father Alvin R. Barry remains a party to this action and shall be referred to as Respondent or by his name in this brief.

STATEMENT OF CASE AND FACTS

Petitioner's statement of case and facts accurately reflects the history of the case and stipulations of the parties. There are only three factors relevant to this case: (1) Respondent is an owner of the subject property, (2) Respondent did no wrong and knew of no wrong, and (3) Florida Statute 932.703(2) (1989) prohibits forfeiture of an innocent person's property.

SUMMARY OF ARGUMENT

The First District Court of Appeal was correct in finding that an innocent owner as conceived in §932.703(2), Florida Statutes (1989) need not be the sole owner of the whole property. The defense to forfeiture is available to co-owners who are innocent of knowledge of the felony crime giving rise to a course of forfeiture. The law abhors forfeiture and the courts must strictly construe forfeiture statutes against the party seeking to take property. One who has done no wrong, knew of no wrong and had no reason to anticipate wrong doing should not lose his property because of the nature of his ownership. The reading of §932.701 to §932.704, Florida Statutes (1989), which would allow the State to take the property of innocent co-owners, would violate equal protection and due process as established by the Constitution of the State of Florida, Article I §2,9. The Legislature could not have meant to discriminate against co-owners and cause the resulting policy, which the Petitioner, the State, maintains is the intent of the statute.

ARGUMENT

§932.703(2), FLORIDA STATUTES (1989)
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INTEREST.

This case presents a simple problem which requires this court to approve the decision of the First District Court of Appeal in In re Forfeiture of 1985 Ford Ranger Pickup Truck, 582 So.2d 3 (Fla.1st DCA 1991). That decision is the only construction of §932.703(2), Florida Statutes (1989) which can maintain the constitutionality of the statute in view of the equal protection and due process provisions of the Constitution of the State of Florida, Article I, §2, 9. In doing so this Court should overrule the decision of the Second District in In re Forfeiture of 1978 BMW Automobile, 524 So.2d 1077 (Fla. 2d DCA 1988). The two aforementioned cases are strikingly similar in their facts yet arrived at virtually opposite results, necessitating resolution of this conflict by this Court.

The two courts dispute the meaning of the "reasonably innocent owner" exception to the contraband forfeiture statute, which reads:

No property shall be forfeited under the provisions of §932.701 - §932.704 if the owner of such property establishes that he neither knew, nor should have known after a reasonable inquiry, that such property was being employed or was likely to be employed in criminal activity. §932.703(2), Florida Statutes (1989).¹

The First District holds,

An "innocent owner" under the Statute need not be the owner of the whole property where the ownership is divisible and the property is susceptible of division in kind or sale and division of proceeds. 1985 Ranger, 582 So.2d at 4.

This holding allows for the protection of property interests of co-owners as well as sole owners from unjust forfeiture as envisioned by §932.703(2). Thus the statute does not create discrimination between different classes of property owners which would violate equal protection. This Court has long held that all persons have a right to acquire, possess and protect property without respect to amount. Hamilton v. Williams, 200 So.2d 80, 82 (Fla. 1941).

The Second District holds that:

[T]he guilty knowledge of one conjunctive co-owner is a sufficient basis to justify forfeiture. 1978 BMW, 524 So.2d at 1081.

¹The second sentence of §932.703(2), Florida Statutes (1989), added in 1985 and commonly known as the "innocent spouse" exception does not apply to the question before this court and is immaterial to the definition of what an owner is and what constitutes ownership under the statute.

This holding admittedly discriminates among different classifications and affords the "innocent co-owner" no remedy at law to protect his property rights under §932.703(2), Florida Statutes (1989). The First District declined to follow 1978 BMW because of these equal protection and due process considerations 1985 Ranger, 582 So.2d at 4. The resolution of this conflict pleads for a decision which preserves the "innocent owner" exception, respects and abides the Constitution of the State of Florida and does justice for the innocent party deprived of his property.²

Petitioner seeks to have this Court allow total forfeiture contrary to the First District's saving construction of the statute. Petitioner admits such a result would be harsh on an innocent co-owner, but maintaining that any ruling resulting in less than total forfeiture of the innocent co-owner's interest in the property must be explicitly provided for by legislative statute. The full exception from forfeitability for property held as marital property by the entirety was judicially recognized a year before it was codified by the Legislature. Smith v. Hindery, 454 So.2d 663 (Fla. 1st DCA 1984). Respondent contends such legislative action is

²Alan R. Barry, son of Respondent, Alvin R. Barry, claims no right of interest in the subject matter of this forfeiture litigation, one 1985 Ford Ranger pickup truck. However the son's abandonment of an interest in no way lessens the father's property right in the aforementioned vehicle asserted herein.

unnecessary because his property rights are already contemplated by the statute. He, Alvin R. Barry, is an owner of the property, and his interests are not subject to forfeiture because of the innocent owner clause of §932.703(2), Florida Statutes (1989).

The First District's saving construction of §932.703(2) does not in any way deprive the Panama City Police Department of its forfeiture rights.³ The last sentence of §932.703(1), Florida Statutes (1989) provides the seizing agency a remedy in situations such as the instant case:

If any property described in this subsection:

- (a) Cannot be located;
- (b) Has been transferred to, sold to, or deposited with, a third party;
- (c) Has been placed beyond the jurisdiction of the court;
- (d) Has been substantially diminished in value by any act or omission of the defendant; or
- (e) Has been commingled with any property which cannot be divided without difficulty,

the Court shall order forfeiture of any other property of the defendant up to the value of any property subject to forfeiture under this §932.703(1), Florida Statutes (1989).

³Respondent's son, Alan R. Barry, who was a co-owner of the 1985 Ford Ranger pickup truck, was arrested in connection with a reverse sting for purchase and possession of less than one gram of rock cocaine. Panama City Police Department seized the vehicle and proceeded with forfeiture action. Alan R. Barry negotiated a plea, was fined and placed on probation.

The First District held that under circumstances such as these in the instant case the seizing agency should either compensate the innocent co-owner or allow the innocent co-owner to find a new co-owner thus having someone buy out the seizing agency's interest in the property. 1985 Ranger, 582 So.2d at 4. In either event, the Panama City Police Department would receive the full value of the property subject to forfeiture, the son's prior interest in the truck.

DUE PROCESS

THE TAKING OR DEPRIVATION OF USE OF PRIVATE PROPERTY WITHOUT COMPENSATION FOR REASONS OTHER THAN TO PROTECT THE HEALTH, SAFETY AND WELFARE OF THE PUBLIC VIOLATES DUE PROCESS.

This Court has been prudent to base its decisions on the Constitution of the State of Florida, the Florida Statutes and Florida decisional law. Department of Law Enforcement v. Real Property, 16 FLW S497 (August 15, 1991). Governmental taking or deprivation of property falls into two categories, eminent domain requiring full compensation and police power which does not require compensation because the taking is to protect the health, safety or welfare of the public. The First District denied forfeiture in part for due process considerations without expressly stating what those are. Respondent, Alvin R. Barry, contends that the due process violation he suffers results from Petitioner's confusion of the proper use of police power and an eminent domain style taking. There can be no doubt that the

Panama City Police Department has taken the property of an innocent owner and intends to use that property for its own benefit.

Whether the deprivation of property is a valid exercise of police power or a compensable taking depends on the circumstances of the case. Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981). The facts as applied to the test propounded in that case reached these results. There has been a total invasion of Respondent's property, wiping out his property value. The taking provides a public benefit by endowing the Panama City Police Department with another vehicle for its use, but does not prevent a public harm in the traditional sense.⁴ Petitioner, on page eleven of its brief, supports the traditional view of police power taking which requires the destruction of harmful and offensive objects, but there is no indication Petitioner wishes to destroy the truck. To the contrary, Petitioner wishes to use Respondents interest in the truck or sell it for a profit.

⁴The traditional exercise of police power has been to protect the public health, safety, morals or welfare. Government has taken properties such as sick cattle or infested citrus trees and destroyed them to prevent spread of the contagion. See State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959); and Campoamor v. State Livestock Sanitary Board, 136 Fla. 451, 182 So. 277 (1938). The State has also prevented planned use of property if that planned use would cause a public harm. See Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981). No tangible benefit flows to the Government from the valid exercise of police power deprivation of a property right.

Thus, Respondent maintains his property has been taken by the State for a public purpose without just compensation in violation of Article I, Section 9 of the Constitution of the State of Florida.⁵

EQUAL PROTECTION

A GOVERNMENTAL POLICY WHICH DISCRIMINATES
AMONG DIFFERENT CLASSES OF PROPERTY OWNERS
INFRINGES ON A FUNDAMENTAL RIGHT AND IS
SUBJECT TO STRICT SCRUTINY ANALYSIS.

When a governmental action, such as forfeiture, discriminates against a certain class of property owners, such as co-owners, that policy must be subjected to strict scrutiny. In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980). Here the Government policy unjustly deprives Respondent of his constitutionally protected property rights. This careful examination of Petitioner's policy rests on whether the Government's interest justifies discriminating against co-owners, whether the Government's interest is compelling, whether the policy is precisely drawn to achieve the legislative goal, and whether there is not a less restrictive means to further the Government's interest. Id. In the instant case, Respondent contends that the Government's policy is in conflict with the statute. While the Government has a compelling interest in

⁵Respondent does not want his truck sawed in two like the mother of the dead infant in I Kings 3:16-28. Respondent merely wants compensation for that which was taken from him.

acquiring assets, it does not follow that Petitioner may read the statute so broadly as to seize property of one who did no wrong and knew of no wrong. Petitioner's policy can be tailored to comply with the innocent owner provision of the statute by following the First District's ruling in this case. Compensate Respondent for his interest in the property. 1985 Ranger, 582 So.2d at 4. It is not the statute which is unconstitutional but it is Petitioner's implementation which is unconstitutional and opposite the intent of the statute itself.

PROCEDURE

FORFEITURE STATUTES ARE NOT FAVORED IN LAW OR IN EQUITY AND ARE INTENDED TO BE APPLIED ONLY AGAINST THOSE WHO ARE SIGNIFICANTLY INVOLVED IN CRIMINAL ENTERPRISE.

Forfeiture statutes are to be strictly construed against the party which seeks the forfeiture. Department of Law Enforcement v. Real Property, 16 FLW S497 (Fla. 1991). In re Forfeiture of 1976 Kenworth Truck, 576 So.2d 261 (Fla. 1990); Smith v. Hindery, 454 So.2d 663 (Fla. 1st DCA 1984); Tingle v. Hornsby, 111 So.2d 274 (Fla.1st DCA 1959); General Motors Acceptance Corporation v. State, 11 So.2d 482 (Fla. 1943). The State has stipulated that Respondent, Alvin R. Barry, is innocent of any wrong doing in connection with the forfeiture of his son's interest in their co-owned property. Under §932.703(2), Florida Statutes (1989), there is no way Petitioner may take Alvin R. Barry's property without just compensation.

Petitioner wishes this Court to entertain a hypothetical. Petitioner's hypothetical on page nine of its brief is taken from a foreign state's case.⁶ Petitioner's reasoning does not comport with the intent of the statute nor does it relate to Respondent's position. It presupposes that a guilty party anticipating arrest and seizure could re-register his property under two or more names thus frustrating forfeiture. The guilty party could not, under §932.703(2), Florida Statutes (1989) avoid forfeiture of his interest in the property. Nor is there any showing that Alan R. Barry intended to do this. Respondent, Alvin R. Barry, has shown his innocence in compliance with the statute and the State has stipulated to this. If two or more conspired to frustrate forfeiture none would be able to show this. Respondent, Alvin R. Barry, merely asserts his fundamental property rights protected by the Constitution of the State of Florida.⁷

An example closer to the case at bar is Petitioner's reading of §932.703(2), Florida Statutes (1989) as it applies to property co-owned by several members of a family. For example, a

⁶People v. Garner, 732 P.2d 1194 (Colo. 1987).

⁷Respondent does not attempt to assert his son Alan R. Barry's forfeited property right, and doubts he could maintain standing to do so.

farmer dies and leaves a 160 acre homestead to his widow which results in a life estate and a remainder in fee simple to his two children. Unbeknownst to the widow and one sibling, who might be away at school or in the military, the other remainder interest child plants one marijuana plant on a distant corner of the family farm. Under the State's policy, the widow would lose her life estate and be evicted and the innocent co-owning sibling would lose his or her remainder. Respondent asserts that the Legislature did not intend for innocent owners, be they owners of the whole or co-owners, to lose their fundamental property rights. To achieve this, the Legislature passed §932.703(2), Florida Statutes (1989) to protect innocent owners.

CONCLUSION

Based on the aforementioned arguments and authority,
Respondent requests this Honorable Court to affirm the decision
below making it the law of the State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been delivered
by U.S. Mail to CHARLES A. FINKEL, Assistant Attorney General,
The Capitol, Suite 1501, Tallahassee, FL 32399-1050, on this
27th day of December, 1991.

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