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SID J. WHITE
AUG 28 1991
CLERK, SUPREME COURT
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Chief Deputy Clerk

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;
and $453.00 U.S. Currency.

CASE NO.: 78,456

PETITIONER'S BRIEF ON JURISDICTION

On Petition for Review of a Decision
of the First District Court of Appeal

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TABLE OF CONTENTS

PAGES

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL IN HOLDING THAT THE GUILTY KNOWLEDGE OF ONE CO-OWNER IS AN INSUFFICIENT BASIS TO JUSTIFY A FORFEITURE OF THE ENTIRE PROPERTY. 4

A. The decision conflicts with prior decisions of the Second and Third District Courts of Appeal. 4

B. Statement as to why the Supreme Court should accept jurisdiction and review this appeal on its merits. 5

CONCLUSION 8

CERTIFICATE OF SERVICE 8

APPENDIX 9

TABLE OF CITATIONS

CASES **PAGES**

City of Clearwater v. Malick, 429 So. 2d 718 (Fla. 2d DCA 1983) 4, 5

Duckham v. State, 478 So. 2d 347 (Fla. 1985) 7

Griffis v. State, 356 So. 2d 297 (Fla. 1978) 7

In Re Forfeiture of 1978 BMW automobile, 524 So. 2d 1077 (Fla. 2nd DCA 1988) 2, 4, 6

In Re 1979 Lincoln Continental, etc., 405 So. 2d 249 (Fla. 3rd DCA 1981) 5, 6

FLORIDA STATUTES

Florida Statute Section 932.701(2)(e) 2

Florida Statute Section 932.703(2) 4

Florida Statute Section 932.704(1) (1989) 6

STATEMENT OF THE CASE AND FACTS

On July 1, 1989, officers of the Panama City Police Department and the Bay County Sheriff's Department conducted a reverse sting in a parking lot in Panama City, Florida. Alan R. Barry, driver and co-owner of the 1985 Ford pickup approached Investigator Ben Moore and purchased an individually wrapped rock of crack cocaine for twenty dollars ($20.00). Officers then approached Mr. Barry to arrest him for possession of cocaine. Mr. Barry attempted to run over the officers and left the parking lot. Mr. Barry was apprehended and charged with possession of cocaine, tampering with evidence, and two counts of aggravated assault upon a police officer. The Panama City Police Department seized the 1985 Ford Ranger pickup truck.

The title to the motor vehicle sought to be forfeited was registered to Alvin R. Barry and his son Alan R. Barry. The parties agreed by stipulation that the father was an innocent owner with his son and that the father neither knew or should have known by reasonable inquiry that such property was employed or likely to be employed in criminal activity.

The State filed a petition for rule to show cause and for final order of forfeiture against the 1985 Ford Ranger pickup truck. Alan R. Barry filed an answer and asserted the affirmative defense that the vehicle in question is the subject of joint ownership by the respondent and his father, Alvin R. Barry. The trial court subsequently issued an

order declaring that Florida Statute 932.701(2)(e) is unconstitutional and denied the forfeiture. On appeal the First District Court of Appeal reversed and remanded the case to the trial court for appropriate disposition of the property consistent with the Court's opinion.

The majority of the Court declined to follow In Re Forfeiture of 1978 BMW automobile, 524 So. 2d 1077 (Fla. 2nd DCA 1988), because the result reached in that case appeared to establish constitutional impediments arising from both equal protection and due process considerations. The majority opinion further indicated that the concept of imputed knowledge, or imputed criminality, was created by the Second District Court's decision, not the legislature, and held that an "innocent owner" 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 the proceeds.

SUMMARY OF ARGUMENT

The Florida Legislature has created a specific exemption to the property forfeiture statute where the innocent co-owner of jointly held property sought to be forfeited is the spouse of the wrongdoer. The legislative intent of this statute is to prevent the economic ruin of the family unit by the irresponsible criminal action of one spouse at the expense of the other and remaining family dependents. The Legislature and the Courts have long recognized the necessity and desirability of preserving the marital relationship through protection of the innocent owner, who as a spouse serves this important goal. However, the protection of an innocent co-owning parent from the wrongdoing of his adult son would only allow frustration of the forfeiture statute without advancing any important legislative goal or preserving any inherent property right.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL IN HOLDING THAT THE GUILTY KNOWLEDGE OF ONE CO-OWNER IS AN INSUFFICIENT BASIS TO JUSTIFY A FORFEITURE OF THE ENTIRE PROPERTY.

A. The decision conflicts with prior decisions of the Second and Third District Courts of Appeal.

The First District Court of Appeal declined to follow the precedent of two cases out of the Second District Court of Appeal which have ruled contrary to the co-owners position herein. The Forfeiture of the 1987 BMW Auto, 524 So. 2d 1077 (Fla. 2d DCA 1988), a father and son were co-owners. The Court discussed the history of the reasonable innocent owner exception to forfeiture and stated:

> Appellants could find no cases determining the effect of conjunctive ownership as opposed to alternative co-ownership.. Neither could we. Appellants argue that there should be a difference. We disagree. The meaning of the Legislature's amendment to section 932.703(2) is clear when the co-owners are husband and wife, it makes no difference how the property is titled or registered. If one of them is a reasonably innocent owner, then the property is not to be forfeited. The Legislature expressly limited this amendment to **husband and wife co-owners** and we will not extend it to all co-owners. Expressio unius est exclusio alterius.

Id. at 1080.

The Second District certified the question as one of great public importance but the parties did not bring the matter to the Supreme Court. Similarly in City of

Clearwater v. Malick, 429 So. 2d 718 (Fla. 2d DCA 1983), a father and son were co-owners, with the vehicle titled in the alternative. The son admitted that he was preparing to snort cocaine in the subject van. The city stipulated that the father had no knowledge of the criminal activity. The Court held that where the vehicle is titled in the alternative, the guilty knowledge of one co-owner is a sufficient basis to justify forfeiture.

The Malick case was consistent with the decision of the Third District Court of Appeal in In Re 1979 Lincoln Continental, etc., 405 So. 2d 249 (Fla. 3rd DCA 1981). In that case Robert Brown was driving a Lincoln Continental registered in the name of "Robert Brown or Mae Frances Brown" when it was stopped and a kilo of cocaine was seized from the back seat by Miami police officers. Mrs. Brown contended that her interest in the vehicle should not be forfeited because she was unaware of the criminal purpose for which it was employed. The Court held that each of the named parties is deemed the "owner" of property titled in the alternative so that the undisputed guilty knowledge of Robert Brown was sufficient to justify forfeiture even if the "other owner", Mrs. Brown, was shown to have been entirely innocent.

B. Statement as to why the Supreme Court should accept jurisdiction and review this appeal on its merits.

The decision by First District Court of Appeal creating divisible ownership and declining to impute the guilty knowledge of one owner to an entirely innocent co-owner, is

contrary to and in direct conflict with In Re Forfeiture of 1978 BMW Automobile, 425 So. 2d 1077 (Fla. 2nd DCA 1988) and In Re 1979 Lincoln Continental, etc., 405 So. 2d 249 (Fla. 3rd DCA 1981). This decision will have a major effect on forfeiture proceedings in the first district, due to the fact that 932.704(1) Fla. Stat. (1989) requires that the seizing agency shall promptly proceed against a contraband article by rule to show cause in the circuit court within the jurisdiction in which the seizure or the offense occurred. This result will not only cause inconsistent results for contraband articles that are jointly owned but may additionally encourage forum shopping where the offense occurred in counties subject to the jurisdiction of the Second and Third District Courts of Appeal when the seizure occurred in counties subject to the law of the First District Court of Appeal.

It is unquestionable that Florida possesses some of the worst problems in the nation in dealing with drug related activity. Among the goals sought by the state under the Florida Contraband Forfeiture Act are elimination of the instrumentalities used to facilitate a crime, removal of the weapons of the drug trade, prevention of immediate and future personal and economic losses, and to obtain reimbursement of any cost to the State in connection with drug related activity. The harms and costs associated with drug related activities include, but are not limited to, illicit profits from actual drug sales, severe collateral

consequences such as drug addition, increased drug violence, drug prevention and education, and the state's investigative, enforcement and incarceration costs.

By providing for the forfeiture to be *in rem*, the Legislature clearly manifested its intent to provide uniform civil sanctions. The Act was originally enacted by Ch. 73-331, Laws of Florida. See Griffis v. State, 356 So. 2d 297 (Fla. 1978); Duckham v. State, 478 So. 2d 347 (Fla. 1985). The legislative intent of the Statute is contained in the introductory language to the enactment, which notes the signing into law by the President of the Comprehensive Drug Abuse Prevention and Control Act of 1970, and expresses the intent of the Legislature to create uniformity between the laws of Florida and the laws of the United States. The decision below has the effect of reducing one of the tools available to law enforcement in its fight against drug activity and other related crimes in this district. This decision will have a major effect on forfeiture proceedings in the first district and may in fact create a haven for additional criminal activity. The above-stated issue is of great public importance and should be reviewed by the Supreme Court of Florida.

CONCLUSION

Because the decision below conflicts with several decisions of other Florida appellate courts, this Court should accept jurisdiction to review and quash the District Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 28th day of August, 1991, to John F. Daniel, Esq., Post Office Box 2522, Panama City, FL 32402.

CHARLES A. FINKEL
Assistant Attorney General

INDEX TO APPENDIX

		PAGE
1.	IN RE: Forfeiture of 1985 Ford Ranger Pickup Truck, VIN #1FTBR10S7FUB74784, Florida License # 802-DPU; and $453; U.S. Currency; DCA, Case No. 89-03063; Opinion filed April 18, 1991.	1
	Dissent	5

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

IN RE: Forfeiture of 1985 Ford Ranger Pickup Truck, VIN #1FTBR10S7FUB74784, Florida License #802-DPU; and $453 U.S. Currency.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 89-03063.

RECEIVED
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Criminal Appeals
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Opinion filed **April 18, 1991.**

An Appeal from the Circuit Court for Bay County.
N. Russell Bower, Judge.

Robert A. Butterworth, Attorney General, and Gary L. Printy, Assistant Attorney General, Tallahassee, for appellant.

John F. Daniel of Daniel and Komarek, Panama City, for appellees.

BARFIELD, J.

Appellant, the State of Florida, contends that the trial court erred in denying the forfeiture of a 1985 Ford Ranger pickup truck on the grounds that the "innocent spouse" exception contained in section 932.703(2), Florida Statutes (1989),

rendered the statute unconstitutional. We reverse the decision of the trial court and remand for further proceedings.

On July 1, 1989, the State seized the 1985 Ford Ranger pickup truck pursuant to sections 932.701-.704, Florida Statutes. The seizure was based on Alan R. Barry's use of the truck to obtain cocaine and to attempt to run over a police officer while fleeing the scene of a sting operation. The title to the truck is registered in the names Alvin R. Barry, and his son, Alan R. Barry.

The court denied forfeiture and ordered the truck returned to appellees, the Barrys, after finding that the father was an innocent owner. The trial court ruled that section 932.703(2), Florida Statutes (1989), violates due process and equal protection in that it exempts from forfeiture certain co-owned vehicles and not others.

We agree with the State that section 932.703(2), Florida Statutes (1989), does not violate either the due process or equal protection clauses of the state or federal constitutions; however, we decline to follow In Re Forfeiture of 1978 BMW Automobile, 524 So.2d 1077 (Fla. 2d DCA 1988), because the result reached in that case appears to establish constitutional impediments arising from both equal protection and due process considerations. That decision would allow a sole owner of property to escape forfeiture although the owner's permissive use of the property resulted in the targeted criminal conduct, while a joint owner of property, equally innocent, who could not forbid

the use of the property, would suffer loss by forfeiture. The concept of imputed knowledge, or imputed criminality, was created by the Second District Court's decision, not the legislature.

In our view the statute is susceptible of a construction which fairly comports with constitutional constraints of due process and equal protection. 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. The statutory exception for husband and wife conforms the statute to the definition of property held by the entireties which ownership is singular and indivisible. The statute is definitive in eliminating the proof requirements that the owners intended to create a tenancy by the entirety and overcomes the provisions of section 319.22(2)(a)1, Florida Statutes (1989). Smith v. Hendry, 454 So.2d 663 (Fla. 1st DCA 1984); Crawford v. United States Fidelity and Guaranty Co., 139 So.2d 500 (Fla. 1st DCA 1962).

The State certainly should have the right to proceed against the property; however, the State is not entitled to take the property of one who did no wrong and knew of no wrong. The greatest impediment that one who owns property with another under these circumstances should suffer is the loss of the property in exchange for fair consideration or the association of a new partner.

The judgment of the trial court is REVERSED and the case is REMANDED for the trial court to conduct an evidentiary hearing to

determine whether the father had the requisite knowledge of the criminal activity of the son.

ERVIN, J., CONCURS. BOOTH, J., DISSENTS, WITH WRITTEN OPINION.

BOOTH, J., DISSENTING.

Section 932.73, Florida Statutes, provides, in part, as follows:[1]

> (2) No property shall be forfeited under the provisions of ss. 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. Property titled or registered jointly between husband and wife by use of the conjunctives "and," "and/or," or "or" shall not be forfeited if the coowner establishes that he neither knew, nor should have known after a reasonable inquiry, that such property was employed or was likely to be employed in criminal activity.
>
> (3) No bona fide lienholder's interest shall be forfeited under the provisions of ss. 932.701-932.704 if such lienholder establishes the he neither knew, nor should have known after a reasonable inquiry, that such property was being used or was likely to be used in criminal activity; that such use was without his consent, express or implied; and that the lien had been perfected in the manner prescribed by law prior to such seizure.

We should reverse the judgment below. On In Re Forfeiture of 1978 BMW Automobile, 524 So.2d 1077, 1080-1081 (Fla. 2d DCA 1988), the court held:

> Applying and extending our reasoning in [City of Clearwater v. Malick, 429 So.2d 718 (Fla. 2d DCA 1983)], to this case, we hold that if the co-owners are not husband and wife, the guilty knowledge of one conjunctive co-owner is a sufficient basis to justify forfeiture.

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[1] Exemption was added by amendment effective October 1, 1985. Ch. 85-316, § 1, Laws of Fla.

In the 1978 BMW case, supra, as in City of Clearwater v. Malick, 429 So.2d 718 (Fla. 2d DCA 1983), the court upheld the forfeiture of a vehicle titled in the names of parents and son, where the son, without actual knowledge of the parents, used the vehicle for illegal purposes.

The "innocent spouse" exception in the Act is based on the doctrine of tenancy by the entireties. Under that doctrine, neither spouse can, by his or her unilateral act, alienate, encumber, or forfeit property held jointly by husband and wife. See Parrish v. Swearington, 379 So.2d 185 (Fla. 1st DCA 1980); United States v. One Parcel of Real Estate at 11885 S.W. 46 Street, etc., 715 F.Supp. 355, 359 (S.D. Fla. 1989). Property held jointly by husband and wife is thus not subject to rules applicable generally to jointly-held property. The BMW case, supra, holds that where the Legislature has expressly limited the forfeiture exemption for a coowner to property held by husband and wife coowners, the court would not extend it to other coowners, applying the maxim "expressio unius est exclusio alterius."