SUPREME COURT OF FLORIDA

STEPHEN L. RUTH, etc.
et. al.

Petitioners,

v. CASE NO. 86,872

DEPARTMENT OF LEGAL AFFAIRS,

Respondent.
_____/

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

The State is correct in its assertion that both parties *initially* agreed that the Polk County Circuit Court had jurisdiction over the case (Respondent's Reply Brief, p. 2, second paragraph). Ruth, et.al. simply made an inadvertent misstatement of fact in this regard in its brief (Initial Brief, p. 1, second paragraph).

Repeatedly the State's "Additional Statement of the Case and Facts" refers to a record-on-appeal that is non-existent insofar as Ruth, et.al. has knowledge. The matter was brought before the Second District Court of Appeal by a Petition for Writ of Certiorari pursuant to Rule 9.100, Florida Rules of Appellate Procedure and an Appeal from a Non-final Order pursuant to Rule 9.130, Florida Rules of Appellate Procedure. Both rules require that the matter be presented with an Appendix. Rule 9.100(g), Rule 9.130(e). Both rules expressly provide that a record shall not be transmitted to the Court unless ordered. Rule 9.100(g), Rule 9.130(d), Florida Rules of Appellate Procedure. No record was ordered by the Second District Court of Appeal and to the knowledge of Ruth, et.al no record has been ordered by this Court. Succinctly, the "additional facts" related by the State were not before the Second District Court of Appeal and they are not properly before this Court.

The State's "Additional Statement of the Case and Facts", in addition to not being a matter of record on this appeal, represents nothing more than a blatant attempt to prejudice the Court against Ruth, et.al. They do not even remotely address the jurisdictional issues that are presented by this appeal.

ARGUMENT

I

The Polk County Circuit Court did not have jurisdiction to determine whether the State or Ruth, et.al. had the right to the real property sought to be forfeited because it did not have territorial jurisdiction over the real property which is located in Charlotte County and Sarasota County, Florida.

The State's argument on the first point simply is that the local action rule is not applicable in this case because a RICO forfeiture proceeding is in personam, not in rem. This contention is based squarely on the proposition that "every federal decision has held that under the *federal counterpart* of Florida's RICO act forfeiture proceedings are in personam and not in rem... RICO forfeitures, unlike other statutes... are not a judgment against the property". (Reply Brief, p. 5, emphasis added). On this premise the State apparently concludes that the Polk County Circuit Court had jurisdiction over the subject matter of the forfeiture claims made in the case now under consideration.

The flaw in the State's misleading argument is that the federal statute under which all of the federal cases relied on by the State was brought *is not the federal counterpart* of Section 895.05(2), Florida Statutes, under which this case was brought. Every case cited by the State in support of this part of its argument was brought under or bottomed on 18 U.S.C. § 1963 which provides *criminal* penalties for RICO violations. It is not necessary to analyze every case here to make this point.

The rationale behind the federal RICO cases is best illustrated by United States v. Conner, 752 F.2d 566 (11th Cir. 1985), cert.denied, 106 S.Ct. 72, 474 US. 821. The defendant argued that the government had to show that the property being forfeited had been used and was

acquired as a result of the criminal enterprise. The court said:

> The RICO forfeiture is *in personam*: a punishment imposed on a guilty defendant...the forfeiture penalty incorporated in Section 1963 differs from other presently existing forfeiture provisions and federal statutes. Under other statutes, the forfeiture proceeding is *in rem* against the property, since the property being forfeited is itself considered the offender, and the forfeiture is no part of the punishment for the criminal offense. By enacting Section 1963, however, Congress revised the concept of forfeiture as a criminal penalty against the individual, since the proceeding is *in personam* against the defendant *and the forfeiture is part of the punishment.* (emphasis added)

The same view was advanced in United States v. Ginsberg, 773 F.2d 798 (7th Cir.1985), cert.denied, 475 U. S. 1011, 106 S.Ct. 1186, 89 L.Ed. 2d 302, another criminal case wherein the issue was whether the government had to prove the defendant's interest in the illicitly gained property beyond a reasonable doubt. In holding that it did not, the court opined:

> RICO forfeiture is punishment imposed on a guilty defendant. It deprives that defendant of all of the profits or proceeds that he has acquired through racketeering activity regardless of whether those assets are 'tainted' by use in connection with the illicit activity...

In United States v. Anguilo, 897 F.2d 1169 (1st Cir.1990), cert.denied, 498 U.S. 846, 111 S.Ct. 130, 112 L.Ed. 2d 98, a criminal case which posed the question of whether an automobile lease was "property" that could be forfeited, the court stated:

> ... RICO forfeitures, unlike forfeitures under other statutes, is a sanction against the individual rather than a judgment against the property itself.

In reaching this conclusion the court opined that a RICO forfeiture is in personam rather than in rem.

In sum, the federal cases cited by the state in support of its claim that a Florida Civil RICO action is in personam, not in rem, are all cases arising under 18 U.S. C. § 1963 which delineates the criminal penalties available for federal RICO violations. The cases are all based

on the idea that *criminal prosecutions* are in personam and the forfeitures in question were part of the punishment of the criminal that accompanied a finding of guilt.

At this point it is worth noting that 18 U.S.C. § 1964 the true federal counterpart to Section 895.05, Florida Statutes (1995), although it has tremendous differences, provides for civil actions in which only equitable relief can be granted. There is no provision for forfeitures. Relief authorized by that section is remedial not punitive and is of a type traditionally granted by courts of equity. United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), cert.denied, 420 U.S. 925, 95 S.Ct. 1121, 43 L.Ed 2d 395; U. S. v. Bonnano Organized Crime Family, 683 F.Supp. 1411, 1451 (E.D.N.Y. 1988).

The reasoning vis-a-vis the in personam nature of criminal RICO forfeitures developed by federal courts cannot be applied to a civil RICO forfeiture case brought under Section 895.05, Florida Statutes (1995), such as the case under consideration, for the reasons that follow.

Section 895.03, Florida Statutes (1995) and 18 U.S.C. § 1962 each define "prohibited activities" under each jurisdiction's RICO statutes. Except for (i) the fact that the 18 U.S.C. § 1962 contains interstate commerce language and specific provisions relating to open-market securities transactions and (ii) the fact that Florida statute specifically requires criminal intent, the two sections are essentially the same. Therefore, it is correct to say, as the State has done, that the Florida RICO statute is patterned on the federal statute and that Florida courts should look to federal decisional law for guidance in interpreting that statute. That principle must be limited to deciding what are prohibited activities, however, at least in the context of this case. That is because the penalty and the remedy provisions of the state and federal statutes are vastly different, and the federal judicial gloss to the effect that RICO criminal actions are in personam

is bottomed squarely on the penalty provisions of the federal statute.

Section 895.04, Florida Statutes (1995), which sets forth criminal penalties for persons convicted of Florida RICO violations, provides that a RICO violation is a first degree felony; and that in addition to any other fine prescribed by law one found guilty "... may be *sentenced* to pay a fine that does not exceed 3 times the gross value gained or 3 times the loss caused, whichever is greater." (emphasis added) *No mention is made of forfeiture as a criminal penalty.* On the contrary, the federal statute prescribing criminal penalties for RICO violations, 18 U.S.C. § 1963 provides for a $25,000 fine and up to twenty years imprisonment. It is at this point that the similarity between the two statutes ends because § 1963 goes on to provide that one who is convicted "... shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind..." Subsection (c) authorizes the U. S. Attorney General to "seize all property or other interest declared forfeited..."

Continuing the comparison, 18 U.S.C. § 1964, which establishes civil remedies for RICO violation, authorizes orders of divestiture, but it *does not mention forfeitures.* The Florida counterpart, Section 895.05 (2), Florida Statutes (1995) which delineates RICO civil remedies expressly provides for the forfeiture of property *used in the course of or derived from prohibited activities.* This requirement presents a clear departure from federal RICO criminal forfeitures because in the latter case the government is not required to show that the property to be forfeited is "tainted". United States v. Conner, supra; United States v. Ginsburg, supra. Moreover, in another manifest departure from federal decisional law vis-a-vis criminal penalties the Florida

statute provides that upon the entry of a final judgment of forfeiture in a civil RICO case the state's title to real property ordered forfeited will relate back to either (i) the date that a RICO lien notice is filed "... in the official records of the county where the real property... is located"; or, if no RICO lien notice was filed (ii) the date of filing of a notice of lis pendens "... in the official records of the county where the real property... is located"; or if neither is filed (iii) the date of recording the final judgment of forfeiture "in the official records of the county where the real property... is located". There is no corresponding provision in § 1964, the federal civil remedies section. And, federal decisional law holds that the government's interest in the forfeited property vests when the criminal act occurs. The reason for this distinction is obvious: forfeiture is an in personam RICO criminal *penalty* available under federal law and forfeiture is an in rem civil *remedy* under Florida RICO law. Again, an in personam criminal *penalty* is not available under Florida RICO law.

The state blatantly asserts (Reply Brief, p. 6, third line) without explanation that whether a proceeding is in personam or in rem is not "dependent on whether the proceeding is brought criminally or civilly, but is dependent on whether or not the government *brings the action* in personam or in rem. The State plainly is saying that it's simply a matter of choice, left in the hands of the prosecutor or Attorney General. What is glaringly wrong is that the choice *necessarily* hinges on whether the action is civil or criminal. Forfeiture is not available as a *penalty* in a Florida criminal RICO case. Section 895.04, Florida Statutes (1995). Therefore, the State of Florida cannot elect to bring an in personam RICO criminal prosecution and obtain a forfeiture order as a penalty as is done in federal RICO prosecutions. Its only option *if it seeks*

forfeiture of property is to bring a civil action and if it brings a RICO civil action seeking a forfeiture it must bring it pursuant to Section 895.05(2), Florida Statutes (1995) as it has done in this case. And, that section shows clearly that the legislature intended for RICO civil forfeiture action to be in rem.

Several things in the Florida law point to the in rem nature of such action. First, unlike under federal criminal RICO, Section 895.05 allows for civil forfeiture only of "tainted" property. I.e. only property "... used in the course of, intended for use in the course of, derived from, or realized through..." a violation of the RICO Act is forfeitable. This means that the suit must be aimed at the tainted property itself rather than at *any* property a convicted felon might have or might have had. Second, the state acquires title to forfeited real property not from the date of the offense as under federal criminal RICO law but from the date a RICO lien notice or a lis pendens is filed in the county where the property is located. In the absence of a RICO lien notice or lis pendens, it attaches when the judgment is filed in the county where the property is located. All of this smacks of an in rem local action.

Think of it this way. Federal decisional law holds that RICO forfeitures are different from other forfeitures under federal law because under RICO a forfeiture is a *penalty* that accompanies an in personam criminal action. Forfeiture is not available under Florida law as a *penalty* for an in personam RICO criminal action. Why then should a RICO forfeiture be treated different than any other forfeiture case? Florida has uniformly held that forfeitures are in rem. In re Forfeiture of 1986 Pontiac Firebird, 600 So.2d 1178 (Fla. 2d DCA 1992); Navolio v. Dickey, 579 So.2d 328, 329 (Fla. 5th DCA 1991); Doersana v. Brescher, 468 So.2d 427 (Fla. 4th DCA 1985); Forfeiture of Approximately Forty Eight Thousand Nine Hundred Dollars, 432 So.2d

1382, 1384 (Fla. 4th DCA 1985); In re forfeiture of a 1981 Ford Automobile, 432 So.2d 732, 733 (Fla. 4th DCA 1983).

Every cause of action the object of which requires the court to act directly on the property or on the title to the property, i.e. the res, is an in rem action. Publix Super Markets, Inc. v. Cheesbro Roofing, Inc., 502 So.2d 484 (Fla. 5th DCA 1987). In the only case counsel for Ruth, et.al. has uncovered dealing with civil forfeitures under the Florida RICO Act, Butterworth v. Caggiano, 605 So.2d 56, 59 (Fla.1992), this Court noted that in the term "forfeited" is used in the context of the Florida RICO Act it means that property is "... *taken* from the owner, *through court process* without the owner's consent". There is no way that a court, when ordering a forfeiture in a civil RICO case *taking* property from the owner without his consent, can be doing anything other than acting directly on the property or the title to the property.

Again summarizing, Florida law does not provide for *forfeiture as a penalty for a RICO criminal violation*, Section § 95.04, Florida Statutes (1995). Contrawise, federal law *mandates the forfeiture* of any interest that a person who is convicted of a RICO violation has in property he has acquired or maintained in violation of the RICO prohibitions whether it be specifically identified or not, 18 U.S.C. § 1963(a)(c), because criminal prosecutions are in personam and forfeiture is a part of the criminal penalty. There is simply no room under Florida law to hold that forfeiture is nothing more than a criminal penalty imposed upon an adjudication of guilt in an in personam case.

Even though it is not styled as such it is clear that the main thrust of the complaint in the case now under consideration is the in rem forfeiture of the property in Charlotte and Sarasota Counties. The complaint requests the court to put the specifically identified property under court

supervision; to order forfeiture of the property; to order lessors of the property to deposit rents into the registry of the court; and to retain jurisdiction to direct the proper distribution of the proceeds of forfeiture.

Even if it is conceded arguendo that the court was empowered to impose in personam equitable remedies against the defendants, and award damages (there are no allegations to justify a damage award), the court still did not have jurisdiction over the forfeiture causes of action and for reasons advanced in Part II of the argument of Ruth, et.al. they should have been dismissed instead transferred.

In closing this part of the Argument Ruth et.al must reiterate the point made in the Initial Brief (pp. 18-20) that *if* the claims made by the State are in personam, as the State now urges, the transfer of the case to Charlotte and Sarasota Counties was error because if subject matter jurisdiction is not involved the question becomes merely one of *venue* and from that standpoint venue was proper in Polk County, the forum chosen by the state. There have been no changes that justify a change of venue. "In the interest of justice" simply is not a ground for a change of venue.

II

The Polk County Circuit Court did not have the jurisdictional power to order the transfer of the in rem forfeiture cause of action to Charlotte County and Sarasota County.

Should the court conclude, as Ruth, et.al urge it must, that insofar as the complaint in this case may state a cause of action for the forfeiture of real property in Charlotte County and Sarasota County it is in rem, the cause of action must be dismissed because the Polk County

Circuit Court did not have jurisdiction to order the transfer of the action.

Ruth, et.al. rely on the reasons set forth in their Initial Brief. In brief summary, the local action rule is a rule of subject matter jurisdiction, not a rule of venue. The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Mobil Oil Corporation, 455 So.2d 412 (Fla. 2d DCA 1984). Subject matter jurisdiction is the court's power to act; the authority to adjudicate the subject matter; State Department of Highway Safety and Motor Vehicles v. Scott, 583 So.2d 785, 787 (Fla. 2d DCA 1993). Subject matter jurisdiction must be properly invoked by *pleading and service of process* and when the cause of action is in rem the court must have judicial power or control over the res. Lovett v. Lovett, 93 Fla. 611, 112 So. 768, 776 (1927). When a complaint containing an in rem cause of action is filed in a court that doesn't have territorial subject matter jurisdiction, a summons that is issued by that court cannot seize the res. Accordingly, it doesn't bring the res before the court and the court doesn't acquire subject matter jurisdiction over the cause of action. When a court lacks subject matter jurisdiction it has no power to adjudicate or determine any issue or cause submitted to it. Capricorn Marble Company v. George Hyman Construction Company, 462 So.2d 1208 (Fla. 4th DCA 1985). It has no power to do anything but dismiss the case. (See cases cited on page 23 and 24 of the Initial Brief).

In Caudell v. Leventis, 43 So.2d 853 (Fla.1950) the sole question before this Court was whether the Circuit Court of Dade County had the power and authority to *transfer* an action for damages of less than $5,000 to the Civil Court of Record of Dade County. The latter court had jurisdiction of all cases involving an amount up to $5,000. The circuit court had jurisdiction of all such actions not cognizable by lower courts. The Court observed that the matter in

controversy was one over which the circuit court was entirely without jurisdiction because the amount claimed was not sufficient and said:

> So far as we are advised, there is no constitutional provision or statute vesting the Circuit Court of Dade County with power to transfer to an inferior court for further proceedings a case at law improperly instituted in said circuit court over which it has no jurisdiction because the amount demanded or involved is less than the necessary jurisdictional amount. *In the absence of some such authority the only lawful order which could have been entered by the trial judge was an order of dismissal.* (emphasis added)

The authority to transfer that was absent in Caudell now has been given by Rule 1.060, Florida Rules of Civil Procedure, which allows an action that is pending in the wrong court in a county be transferred to the proper court *within said county*. That rule does not justify the transfer ordered by the Polk County Circuit Court in the instant case, however. The territorial boundaries of Florida Circuit Courts were established by the constitution and the legislature. The legislature has not seen fit to provide that a court which does not have subject matter jurisdiction over an in rem action because the res lies outside its territory has jurisdiction to transfer the action to a court having jurisdiction. In the absence of such legislation the holding of Caudell remains absolutely viable. See also Tonkin v. Sonnenberg, 539 So.2d 1143 (Fla. 5th DCA 1989) wherein the Fourth DCA acknowledged this truth, although it cannot properly be called a "holding" of that court.

The State's assertion (Reply Brief p. 12) that transfers are preferred over dismissals in "promoting the ends of justice" does not cure the jurisdictional problem nor does its self-serving contention a reversal "would defeat the purpose of the RICO act and six years diligent effort on behalf of the State". Further, the State's unnecessary and unsupported assertion (Reply Brief, p. 12) that the attempt to defeat the RICO liens and the order escalating rental payments is "a

disingenuous attempt to pay for legal services" is wrong, unnecessary, unprofessionally contentious, and irrelevant. Even persons who have been convicted of crimes have a right to defend themselves and their property from the State. And, they have a right to counsel to help them do so. The shallowness of the State's argument on this point of the appeal should help demonstrate the validity of Ruth's position. It simply does not directly address the argument made in the Initial Brief.

CONCLUSION

Under Florida's RICO act the forfeiture of property that is proven to have been used in the course of or derived from prohibited activities is an available *civil remedy.* It is not a *criminal penalty.* As in the case of forfeitures under other Florida laws a RICO civil forfeiture results in property being taken from the owner through court process without the owner's consent. Therefore it is an in rem action subject to the local action rule. The Polk County Circuit Court simply did not have subject matter jurisdiction over the forfeiture cause of action.

The only course available to the Polk County Circuit Court was to dismiss or strike the forfeiture cause of action. This is because the Polk Court did not have the judicial power to issue the process necessary to seize the res and initiate the forfeiture action against it. That being true it did not have subject matter jurisdiction over the cause of action. That, in turn, means that, in the absence of a statute or rule allowing it to do so, it had no power to issue an order of transfer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, to Jeanne Clougher, 2002 N. Lois Ave., Suite 520 Tampa, Florida 33607, this 13th day of February, 1996.

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