IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,
Appellant

V.

RAYMOND G. MULLER
Defendant, Appellee

Case No. 88,221

2d DCA Case No. 94-02958
Pasco Co. No. 94-10571XTWS-16

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE SECOND
DISTRICT COURT OF APPEAL

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SUMMARY OF ARGUMENT

Defendant's Brief does not address the Issue as raised by the State's Brief nor in the Opinion of the Second District.

As the owner of the vehicle driven, Defendant lacks standing to raise lack of notice and opportunity to be heard by non-defendant owners. Section 316.193(6)(d), Fla. Stat. (1993), does provide notice and the opportunity to be heard prior to physical impoundment and comports with requirements of due process for the temporary taking of personal property.

The statute is not violative of equal protection but has a rational basis in targeting for temporary impoundment of their vehicles, owners whose cars were used to commit the offense of Driving Under the Influence. It is Defendant's burden to show that there is no rational basis for the classification, and Defendant has not met that burden.

ARGUMENT

ISSUE I: THE COURT ERRED IN FINDING SECTION 316.193(6)(d), FLA. STAT. (1993), TO BE UNCONSTITUTIONALLY VAGUE.

Defendant's Answer Brief does not address the Issue as raised by the State, nor in the Opinion of the Second District. Both the State and Defendant rely on the case of Department of Law Enforcement v. Real Property, 588 So. 2d 957, 966 (Fla. 1991) in Issue I. Defendant relies on the case to raise the inapplicable issues of notice and the opportunity to be heard as due process requirements.

By relying on Department of Law Enforcement v. Real Property, Defendant seeks to raise claims of others such as "the non-defendant owner/lienholder" and "a nonresident owner/lienholder" referred to on page 4 of Defendant's Brief. The Second District's Opinion specifically stated that it did "not reach the due process issues relating to innocent third-party owners because this defendant, as the owner of the vehicle, has no standing to raise these questions. See State v. Summers, 651 So. 2d 191 (Fla. 2d DCA 1995) ; State v. Ginn, 660 So. 2d 1118 (Fla. 4th DCA 1995), review denied, 669 So. 2d 251 (Fla. 1996)." Muller slip op. p. 2. The State's Initial Brief relied on State v. Ginn, but Defendant's Answer Brief does not address Ginn.

Defendant's Brief admits that Defendant, who was convicted of DUI for driving his own car, had notice prior to the impoundment hearing. "Unless the owner/lienholder of the vehicle is the defendant convicted of DUI, the owner/lienholder has no notice prior to the order of impoundment at the time of conviction and sentencing." Defendant's Brief p. 4.

The Second District's Opinion specifically did not address due process issues applicable to anyone other than the defendant owner. The State argued in briefing to the Second District that the trial court erred in considering owner non-defendants for lack of standing and argued on the merit's that the statute provides adequate notice even as to such owner non-defendants. The impoundment pursuant to Sec. 316.193(6)(d) does not occur prior to notice to the owner, even if the owner is a non-defendant. Unlike

forfeiture proceedings, the vehicle is not seized at the time of arrest and held for forfeiture proceedings. Rather, the physical impoundment is to occur only after the probationary and/or incarcerative portions of the sentence and the owner receives notice at the time of the order of impoundment at sentencing, prior to the physical impoundment. The owner, non-defendant has the right to be heard prior to the physical impoundment.

The use of an automobile in such criminal activities as driving under the influence of controlled substances obviously implicates the police power of the state and outweighs the rights of the owner, either in driving the car unlawfully or in authorizing its use by another who used it unlawfully. The owner's right to a hearing, as provided in Sec. 316.193(6)(d), satisfies due process under these circumstances of regulation in the public interest. Immediate seizure of personal, as contrasted with real, property with the right to be heard at a later time is not violative of due process in the context of either the operation of the police power or of forfeiture legislation. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1994); Larson v. Warren, 132 So. 2d 177 (Fla. 1961); Department of Law Enforcement v. Real Property, supra at 965.

Defendant's reliance on case law of State ex rel. Gore v. Chillingworth, 126 Fla. 645, 657-58, 171 So. 649, 654 (1936), is similarly misplaced as addressing procedural due process of notice and the opportunity to be heard.

Defendant additionally raises in the first Issue another claim not addressed by the Second District, that the statute is silent as to which county and which court division has jurisdiction over an owner/lienholder's complaint to an order of impoundment. Jurisdiction of the courts is otherwise established than within individual regulatory or penal statutes, and is governed by the Constitution, Art. V, and statutes Ch. 25, 26, 34 and 35, Fla. Stats. Logically, one would expect to file a complaint of the impoundment to the court which issued the notice.

ISSUE II: WHETHER THE COURT ERRED IN FINDING SECTION 316.193(6)(d), FLA. STAT. (1993), VIOLATIVE OF EQUAL PROTECTION.

The State did not raise this Issue in the Initial Brief because the Second District did not reach this Issue. The Second District did not find the statute violative of equal protection. This was an issue in the Second District's review of the trial court order and briefed to the Second District.

When a statute is challenged as violative of equal protection, the standard of review is whether there is a rational basis for the legislation, if the right at issue is not fundamental, as not one guaranteed by the Constitution, nor affecting a suspect class. In re Estate of Greenberg, 390 So. 2d 40 (Fla. 1980); The Florida Hish School Activities Assoc., Inc. v. Thomas, 434 So. 2d 306, 308 (Fla. 1983). The burden is on the one challenging the statute "To show that there is no conceivable factual predicate which would

rationally support the classification under attack." Id. at 308, emphasis by the Court; Gluesenkamp v. State, 391 So. 2d 192, 200 (Fla. 1980).

Defendant's reliance on Haber v. State, 396 So. 2d 707 (Fla. 1981), does not avail the Defendant. The State prevailed in Haber on a claim that the two different classifications of accessories before the fact to premeditated and felony murder violated equal protection as arbitrary and capricious, The persons within the two different classifications were held to be treated alike within their respective classifications. The Court cited Haber in State v. Garner, 402 So. 2d 1333, 1335 (Fla. 2d DCA 1981), to reverse the trial court's finding Sec. 318.18(3), Florida Statute (1980), unconstitutional as applying a $25 fine for speeding only in a posted 55 mile per hour speed zone, and as possibly subjecting a person not appearing in court to a higher fine than one electing to appear. The Court found the classification permissible, "reasonably related to the subject," and applied equally to all persons within that class of speeders. Id. The Court found it immaterial that another "or no classification might appear more reasonable." Id. The Court found the trial court's reasoning that the regulation should apply as well to other posted speeds to be logical but irrelevant in light of the legislature's right to "attack any part of an evil without addressing the entire problem." Id.

The legislature may rationally target owners of vehicles for temporary impoundment if their vehicle is used to commit the

offense of Driving Under the Influence. The class created is not the class of those convicted of DUI, but is owners whose cars were used to commit DUI. In Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311 (Fla. 1984), this Court upheld a fuel tax statute applicable to airlines and not to railroads or vessels, noting that the class was air carriers and not all common carriers and not totally arbitrary.

A rational basis was found in Van Oster v. State of Kansas, 272 U.S. 465, 47 S.Ct. 133 (1926), upholding the Kansas statute declaring a vehicle used to transport intoxicating liquors a nuisance and subject to forfeiture and sale, even as to an owner who had loaned the car to another. Such a rational basis was found in Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959), noting that it arose from common law that an owner remained liable for personal injury caused by his vehicle by another who was authorized to use it.

It is not a new concept in law that the owner of a vehicle is responsible for its safe operation even if it has been loaned to another person. In Van Oster, supra, the court recognized this vicarious liability doctrine as familiar in admiralty, bailment, contract and tort law, noting that these examples "suggest that certain uses of property may be regarded so undesirable that the owner surrenders his control at his peril." Van Oster at 467. Van Oster upheld the Kansas statute authorizing forfeiture and sale of an automobile which was declared to be a nuisance for transporting intoxicating liquor. The court refused to hear the defense of

innocence of the owner who had loaned the automobile to the convicted driver.

The courts' discretion pursuant to Section 316.193(6)(d) to apply leniency for transportation needs of families or nonconvicted owners does not render the statute violative of **equal protection.** So long as it is not maliciously applied, discretion is a recognized component of the law. For example, the state attorney's discretion to decide which juveniles to seek to indict or which drug traffickers may be afforded substantial assistance was held not to render the applicable statute unconstitutional. State v. Werner, 402 So.2d 386 (Fla. 1981); Johnson v. State, 314 So.2d 573 (Fla. 1975). That punishment includes discretion by the court is presumed to be beneficial in American jurisprudence. For example, that one convicted of DUI was required, as a condition of probation to publish his photo in the local newspaper with the caption "DUI convicted," and others convicted of DUI were not required to do so, was not violative of equal protection. Lindsay v. State, 606 So.2d 652, 657-58 (Fla. 4th DCA 1992).

This case law demonstrates that auto owners are not a suspect class, and the choice to drive or to loan one's auto to another does not involve a fundamental right. Cf. State Department of Health and Rehabilitative Services v. Cox, 627 So.2d at 1218 (Fla. 2d DCA 1993). The classification of owners whose cars are used to commit the offense of Driving Under the Influence of Intoxicating Substances is not an arbitrary classification, but one reasonably

regulated by the state's police power in the interest of public safety*

Defendant has not overcome the presumption of constitutionality of Sec. 316.193(6)(d), Fla. Stat. (1993). See L.L.N. v. State, 504 So. 2d 6 (Fla. 2d DCA 1986).

CONCLUSION

Wherefore, Defendant has not shown that the Second District's Opinion is correct nor answered the State's Argument showing that the Opinion is in error. The Second District's Opinion should be reversed and the statute held to be constitutional.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the above Appellant's Reply Brief on Appeal from the Second District Court of Appeal has been furnished by U.S. mail to Anne M. Sylvester, Esquire, Office of the Public Defender, West Pasco Judicial Center, 7530 Little Road, New Port Richey, Florida 34654, counsel for Defendant, Appellee, RAYMOND G. MULLER, this 14 day of January, 1997.

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