ORIGINAL

IN THE SUPREME COURT OF APPEAL OF FLORIDA

CASE NO. 95,506

FOURTH DISTRICT CASE NO. 97-2256

CEDRIC FRASER,

Petitioner,

vs.

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

AMENDED BRIEF OF RESPONDENT ON JURISDICTION

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CERTIFICATE OF TYPE SIZE AND STYLE

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INTRODUCTION

Respondent, THE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, (hereafter "DHSMV") was the Plaintiff in the trial court and the Appellee in the Fourth District Court of Appeal. The Petitioner, CEDRIC FRASER, was the potential claimant in the trial court and the appellant in the District Court. The parties, in this brief, will be referred to as they stand before this court. The symbol "App.," together with the date of the order concerned will designate the Appendix to the Petitioner's Jurisdictional Brief.

STATEMENT OF JURISDICTION

The Petitioner claims that this Court has jurisdiction because the Opinion of the Fourth District Court of Appeals allegedly expressly and directly conflicts with decisions of the Third District Court of Appeals and of the Florida Supreme Court on the same question of law.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Facts not only contains statements of fact not supported by the appendix provided, it contains statements of fact not supported by any record before any court. Therefore, it must be rejected by the Respondents, whose Statement of the Case and Facts follows:

The facts relevant to standing, as set forth in the opinion, are as follows:

> In this forfeiture proceeding, appellant made a claim to the subject money by filing an affidavit which simply

stated that the seized money belonged to him. The trial court determined that standing was a preliminary issue to be decided by the court and that the appellant's affidavit, alone, was insufficient to establish standing. While we agree that standing is a preliminary issue to be decided by the court and that appellant's affidavit was insufficient to establish standing, appellant is entitled to present evidence on this issue. We therefore reverse for an evidentiary hearing on this issue.

* * *

During the discovery phase of the litigation, the Department took Fraser's deposition and inquired as to why he claimed that the $41,500 recovered from the bumper of McNaughton's car was his money. The following colloquy took place during the deposition:

> THE WITNESS: What's he say?
>
> MR. LIDA: (Fraser's attorney): He wants to know if the $41,500 that was found in the bumper of Murph McNaughton's car was your money.
>
> A: Yes, It was my money.
>
> Q (Department's attorney): How did it get in the bumper of Murph McNaughton's car, Mr. Fraser?
>
> A: It was parked in my garbage (sic), and it was in the bumper unbeknown to me.
>
> MR. LIDA: Can I have two minutes alone outside?
>
> MR. FAHLBUSCH: Okay.
>
> (Whereupon, a brief recess was taken.)
>
> A: I put it there.

Q: Where was the car when you put it there?

A: My garage.

. . . .

Q: Do you remember how long prior to the seizure of the money it was?

A: I put it there -- The car was parked in there for a while. I never know (sic) [McNaughton] was going to take it out. He take (sic) it out because the key was hanging right there.

Q: How long prior to the seizure did you put it in the car?

MR. LIDA: Listen to his question. He wants to know how long prior to Murph getting stopped you put the money in the car, it you remember.

A: I don't remember.

. . . .

Q: Do you know Murph McNaughton?

A: Yes, He's my stepson.

. . . .

Q: Where did you get the $41,500?

A: It was my money.

Q: Where did you get it?

A: I work for my money.

Fraser claimed that he had packaged the money with rubber bands and duct tape, but he could not recall whether he had wrapped it in fabric softener sheets, conceding that he did not "normally" engage in this practice. During the deposition, Fraser objected, through his counsel to the following questions of Fifth Amendment grounds:

> (1) "What led you to put $41,500 cash in the bumper of the car?"; (2) "Where did you get the $41,500?"; (3) "Why did you put the money in that specific car?"; (4) What's the name of any person or corporation from whom you got the $41,500 or any portion thereof?"; (5) "Does anyone other than yourself know where you got the $41,500?" and (6) "Other than Elegant Man [Fraser's business] or the purchase and sale of cars that we've talked about, have you had any other source of income withing the last two years?"

(App. 2/17/99, 1-2).

The Court ruled that, although this was insufficient for Mr. Fraser to establish that he had a bona fide interest in untitled property, as required by Byrom v. Gallagher, 609 So. 2d 24, 27 n. 3 (Fla. 1992), he should be given an opportunity to meet his burden upon remand. (App. 2/17/99, 4).

Petitioner's Motion for Rehearing was denied. (App., 3/30/99).

POINT(S) ON APPEAL

THE DECISION OF THE FOURTH DISTRICT IN THIS CASE DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH ANY DECISION OF ANOTHER DISTRICT COURT OR THIS COURT. (Restated).

SUMMARY OF THE ARGUMENT

The Petitioner has failed to demonstrate, even arguably, that the decision of the of the district court expressly or directly conflicts with the decision of any other district court or of this court.

Petitioner contends that a forfeiture Plaintiff must, under Florida Law, establish it's entire case by clear and convincing evidence before any potential claimant may be

required to present any evidence of standing, whatsoever, other than stating, "the money is mine." No court has ever so held and no conflict has been demonstrated.

ARGUMENT

THE DECISION IN THIS CASE DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT. (Restated).

The Petitioner claims that requiring a claimant in a forfeiture case to do any more than simply say, "the money is mine," in order to establish standing is in express and direct conflict with Munoz v. City of Coral Gables, 695 So. 2d 1283 (Fla. 2d DCA 1997) and Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991). Although he has quoted extensively from Fraser v. Department of Highway Safety and Motor Vehicles, 727 So. 2d 1021 (Fla. 4th DCA 1999) (See, Jurisdictional Brief of Petitioner, 4), Petitioner has been unable to set forth any language from either of the allegedly conflicting cases with which it conflicts.

The Petitioner has created his allegations of conflict by utilizing the tried and true technique of inferring holdings that simply do not exist in the cited cases.

It is certainly true that Munoz requires sworn proof of a possessory or ownership interest, but there is no declaration that such evidence is required to be held sufficient to establish standing, especially in the actual forfeiture proceeding. What the opinion actually says is:

> We similarly do not find Munoz's unsworn oral statements to the seizing officers that the money was his to be

> sufficient to establish his standing to contest the proceeding. At a bare minimum, we conclude that a claimant to seized currency must come forward with sworn proof of a possessory and/or ownership interest in the same to acquire standing to contest the forfeiture proceeding. (emphasis added).

Munoz at 1288.

Thus, what the Third District considered the bare minimum to show standing, in a case in which that minimum did not exist, the Petitioner contends is the absolute maximum that any court can possibly require. It is respectfully submitted that the terms "minimum" and "maximum" are opposites, not equivalents.

Second, the Fourth District, being fully aware of the Petitioner's allegations, specifically distinguished the Munoz opinion:

> [2] We distinguish *Munoz v. City of Coral Gables*, 695 So. 2d 1283 (Fla. 3d DCA 1997). While *Munoz* stated that "[a]t a bare minimum, we conclude that a claimant to seized currency must come forward with sworn proof of a possessory and/or ownership interest in the proceeding," the case involved the standing requirement at an adversarial preliminary hearing, not the actual forfeiture proceeding. *See City of Fort Lauderdale v. Baruch*, 718 So. 2d 843, 846 (Fla. 4th DCA 1998) (discussing *Munoz*).

(App. 2/17/99, 4, n. 2).

Thus, the Fraser opinion and Munoz are clearly distinguishable on two different bases and no expressly conflicting language exists. There is no express or direct conflict with Munoz.

Petitioner's claim that, "[i]t is undisputed on this record, the claimant had

standing in the court below to litigate the adversarial preliminary hearing and to win a summary judgment in his favor," rather foreseeably without citations to either the Appendix or the record, is unsupported and, at least in part, flatly refuted where his summary judgment was reversed, at State Dep't of Highway Safety and Motor Vehicles v. Fraser, 673 So. 2d 570 (Fla. 4th DCA 1996), without ever mentioning the standing issue. It was not undisputed that the Petitioner had standing, rather clearly, it simply wasn't the dispositive issue.

However, the Petitioner also claims that no claimant can be made to establish standing because Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991) has ruled that, "the burden of proof laid squarely with the seizing agency." (Jurisdictional Brief of Petitioner, 5). Thus, according to the Petitioner, Department of Law Enforcement v. Real Property is totally inconsistent with the position that, "[o]nly those who have standing to be heard in a judicial proceeding may participate in it." Trawick, Fla. Prac. & Proc. §4-15." Byrom v. Gallagher, 578 So. 2d 715, 717 (Fla. 5th DCA 1991), quashed on other grounds, 609 So. 2d 24 (Fla. 1992). Thus, were Petitioner's position adopted, Florida would be unique among all the jurisdictions in that there would be no threshold standing requirement in order to litigate a claim against property the subject of forfeiture. Any person off the street could come in, say "the money is mine" and, unless all elements of forfeiture were established by clear and convincing evidence, the property would be awarded to them. Certainly better

odds than the lottery! Such a position would also appear to be in derogation of the requirements of the statute concerned which states:

> (h) "Claimant" means any party who has proprietary interest in property subject to forfeiture and has standing to challenge such forfeiture, including owners, registered owners, bona fide lienholders, and titleholders.

§932.701(2)(h), Florida Statutes (1992 Supp.).

According to the Petitioner, such a definition is virtually useless since all anyone has to do is say, "the property is mine" and the court is without power to determine otherwise.[1]

Finally, the entire underlying basis of the Petitioner's argument is the fallacious assumption that "innocent owner" and "bona fide purchaser" are equivalent terms. This is simply not the case. The "innocent owner" defense to a forfeiture action is established by the Act, itself, which states:

> (6)(a) No property shall be forfeited under the provisions of the Florida Contraband Forfeiture Act if the owner of such property establishes by a preponderance of the evidence 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(6)(a), Fla. Stats. (1992 Suppl.); See also, Forfeiture of 1985 Fort Ranger Pickup Truck, 598 So. 2d 1070 (Fla. 1992); Forfeiture of 1989 Isuzu Pickup Truck,

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[1]Creating an interestingly problematic situation should there be multiple claimants, each of whom said "the money is mine," but invoked the 5th Amendment as to any further information, as this one did. Such situations would appear inevitable, should the Petitioner prevail, given the ease of making claim to forfeited property.

VIN 1AACL11L7K202483, 612 So. 2d 695 (Fla. 1st DCA 1993). This is entirely consistent with the definition of "innocent party," "Person who did not consciously or intentionally participate in event, transaction, etc." Black's Law Dictionary 788 (6th ed. 1990).

This contrasts nicely with "bona fide purchaser," the term used in the opinion concerned herein and by this Court in Byrom v. Gallagher, 609 So. 2d 24 (Fla. 1992):

> A "bona fide purchaser" is defined as follows: (1) a purchaser, (2) for value, (3) in good faith and without notice of any adverse claim . . . Section 678.302(1)(a), Fla. Stat. (1991).

First Nat. Bank of Florida Keys v. Rosasco, 622 So. 2d 554 (Fla. 3d DCA 1993). Although the above definition concerns securities, it certainly appears to be a reasonable working definition of the phrase grounded in Florida Law.

If a potential claimant could be a "bona fide purchaser" and yet not be an "innocent owner," then the entire assumption upon which the Petitioner's argument is based crumbles. However, one could clearly have purchased currency for value, such as receiving it as a paycheck, and still not be an innocent owner, where, for example, one were using that money to purchase narcotics at the time it was seized. Thus, such a person would have no difficulty establishing that they had standing under the requirements of the Fraser opinion, but would be unable to prove innocent ownership. Obviously, requiring that evidence of standing be shown is not equivalent to demanding that the claimant prove he or she is an innocent owner.

Therefore, there is no direct conflict with the cited cases, there is no express conflict with the cited cases, and the Petitioner's underlying assumption is incorrect.

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully submitted that this court should decline to accept jurisdiction of this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing AMENDED JURISDICTIONAL BRIEF OF RESPONDENT was furnished by mail to CARL H. LIDA, ESQ, 8181 West Broward Boulevard, Plantation, FL 33324, on this 27 day of May, 1999.

CHARLES M. FAHLBUSCH
Assistant Attorney General