IN THE SUPREME COURT OF FLORIDA

IN RE FORFEITURE OF:
ONE 1988 LINCOLN TOWN CAR,
VIN 1LNBM81F8JY612959 AND
ONE 1986 LINCOLN TOWN CAR,
VIN 1LNBP96F7GY660841
_____

JOSEPH T. DEGREGORIO,

Petitioner,

vs. CASE NO: SC02-1161
LT NO: 2D01-1249

WILLIAM F. BALKWILL, ETC.,

Respondent.
**********/

PETITIONER'S INITIAL BRIEF ON THE MERITS

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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INTRODUCTION

This Brief is submitted on behalf of the Petitioner, JOSEPH T. DEGREGORIO. For the sake of brevity, the Petitioner will be referred to as either Petitioner or DEGREGORIO. The Respondent will be referred to as the SHERIFF, or as he stands before this Court. The two vehicles which are the subject matter of the forfeiture action will be referred to as the 1988 Lincoln or the 1986 Lincoln. References to the Record on Appeal will be as (R.). followed by a page number. Fla. Stat. Secs. 932.701 - 932.707 (1999) will be referred to as the

Florida Contraband Forfeiture Act, unless specific sections therein are referenced. Unless otherwise indicated, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND FACTS

The Petitioner seeks review of Balkwill v. DeGregorio, 27 FLW D979 (Fla. 2d DCA 2002). To the extent that the

decision conflicts with the Fifth District Court of Appeal's decision in In re Forfeiture of One (1) 1994 Honda Prelude, 730 So.2d 334 (Fla. 5th DCA 1999), the Second District certified conflict.

On November 4, 1999, the Sarasota County Sheriff's Office filed a Verified Complaint for Final Order of Forfeiture pursuant to Fla. Stat. Secs. 932.701-932.707 regarding two vehicles which had been in DEGREGORIO's possession. (R. 2-5). The 1988 Lincoln and the 1986 Lincoln were described in the Complaint. Although the Complaint alleged that the vehicles were seized on September 24, 1999, in actuality, there is no dispute that they had been seized from DEGREGORIO's possession on July 12, 1999. July 12, 1999 is reflected as the recovery date of the vehicles on the Sarasota County Sheriff's Office Supplemental Property Vehicle Document Report. (R. 32). On September 24, 1999, a Notice of Seizure of the property was issued. (R. 33). The forfeiture complaint was not filed until 115 days after the seizure of the vehicles.

The Complaint, relying upon information

provided by Detective Sarney of the Sarasota County Sheriff's Office, alleged that the VIN plate from the 1986 Lincoln was attached to the 1988 Lincoln. (R. 3-4). DEGREGORIO had obtained a tag from the Department of Highway Safety and Motor Vehicles (DHSMV) for the 1986 vehicle. The DHSMV did not have a record of the 1988 Lincoln as being titled or registered in Florida. (R. 4).

The trial court found that the SHERIFF had probable cause to maintain the forfeiture action and DEGREGORIO responded to the Complaint. (R. 6, 9-13). DEGREGORIO denied that the vehicles were contraband, aserting that he had bills of sale dated November, 1996 from the dealer, Tommy G's Auto Sales, Inc., from whom he purchased the vehicles. (R. 9). He paid sales tax for both vehicles and gave the dealer $175 each to have each of the vehicles titled and registered. (R. 9). He denied knowing anything about VIN numbers being transferred. (R. 9-10).

The SHERIFF moved to strike DEGREGORIO's answer as to

the 1988 Lincoln for lack of standing, since DEGREGORIO did not produce a current title for that vehicle. (R. 20). To establish ownership of the cars, DEGREGORIO produced a copy of the bill of sale for the 1988 vehicle. (R. 21). He also had the keys to both vehicles and they were both in his possession.

Before the SHERIFF's motion to strike was ruled on, DEGREGORIO filed a motion for summary judgment on the grounds that the SHERIFF failed to promptly proceed in its forfeiture action by filing the Complaint in the trial court more than 45 days after seizure and no extension of time had been applied for by the SHERIFF. (R. 29-33). The Court denied the SHERIFF's motion to strike DEGREGORIO's answer. (R. 153). The hearing on the motion for summary judgment was continued at DEGREGORIO's request because at that point in time criminal proceedings were pending against DEGREGORIO related to the subject vehicles, and he did not want to relinquish his Fifth Amendment rights. (R. 94-95, 153).

After hearing argument on DEGREGORIO's motion for

summary judgment, on February 1, 2001, the trial court entered an order granting the motion based upon the SHERIFF's failure to comply with the statutory filing requirements to promptly proceed in its forfeiture of the vehicles. (R. 232). The trial court's decision turned on the uncontroverted date of seizure of July 12, 1999 and the commencement of the forfeiture proceeding on November 4, 1999. (R. 232). The SHERIFF moved for a rehearing which was denied. (R. 211-216, 228). The SHERIFF timely appealed to the Second District Court of Appeal. (R. 233-235).

On May 1, 2002, the Second District Court of Appeal issued its decision reversing and remanding the case for further proceedings. The Court reversed the summary judgment in DEGREGORIO's favor, thereby reinstating the forfeiture proceeding. The Court concluded that DEGREGORIO lacked standing to assert a claim to the 1988 vehicle since he did not hold legal title to it. Since he didn't have standing, the Court found that the trial court erred in allowing him to proceed as a claimant with his

motion for summary judgment. The Court further held that the Florida Contraband Forfeiture Act did not bar the seizing agency from initiating a forfeiture action more than forty-five days after seizure. The statute was interpreted as not operating as a jurisdictional bar. The Court stated that to the extent that its decision conflicted with the Fifth District's decision in In re Forfeiture of One (1) 1994 Honda Prelude, 730 So.2d 334 (Fla. 5th DCA 1994), it certified conflict.

DEGREGORIO timely filed his Notice of Intent to Invoke the Discretionary Jurisdiction of this Court on May 15, 2002. On May 28, 2002, this Court entered an Order postponing its decision on jurisdiction and requiring briefs on the merits.

ISSUE ON APPEAL

DOES THE FLORIDA CONTRABAND FORFEITURE ACT BAR A FORFEITURE PROCEEDING IF THE SEIZING AGENCY FAILS TO FILE ITS COMPLAINT WITHIN 45 DAYS OF THE DATE OF SEIZURE?

SUMMARY OF ARGUMENT

The well-established rules of statutory construction compel the conclusion that the trial court correctly terminated the forfeiture proceeding because the SHERIFF failed to timely file its Complaint within 45 days of the seizure of DEGREGORIO's vehicles. To hold otherwise would eviscerate the long-standing rule that forfeiture statutes must be strictly construed against the seizing agency. It would also eviscerate the well-established rule that prohibits courts from interpreting statutes in conflict with their plain meaning. Furthermore, the use of the term "shall" in the Forfeiture Act requiring the seizing agency to promptly proceed in filing a complaint is mandatory by nature.

Florida cases have interpreted several different sections of the Forfeiture Act, including the notice requirement and the necessity of holding a timely hearing on probable cause. In each case, the courts required strict adherence to the statutory mandates.

Many courts in other jurisdictions have also interpreted forefeiture statutes with language similar to Florida's Act and have concluded that a failure to comply with the time limitations contained herein is fatal to the seizing agency's claim. These decisions, while not binding precedent on this Court, are certainly persuasive.

Forfeitures are harsh exactions and are not favored in law or equity. Strict construction of the Florida Contraband Forfeiture Act compels the conclusion that the SHERIFF's failure to comply with the statutory requirement of filing a Complaint within 45 days of the seizure of DEGREGORIO's vehicles was fatal to its claim.

ARGUMENT

THE FLORIDA CONTRABAND FORFEITURE ACT BARS A FORFEITURE PROCEEDING IF THE SEIZING AGENCY FAILS TO

FILE ITS COMPLAINT WITHIN 45 DAYS
OF THE DATE OF SEIZURE.

Preliminary Discussion Regarding Jurisdiction

As a preliminary matter, this Court has jurisdiction over this appeal, in that the Second District Court of Appeal correctly determined that there is a conflict between its decision in this case and the Fifth District Court of Appeal's decision in In re Forfeiture of One (1) 1994 Honda Prelude, 730 So.2d 334 (Fla. 5th DCA 1999). The conflict arises out of the statutory interpretation of Fla. Stat. Secs. 932.704(4), 932.701(2)(c),and 932.703(3), which provide, respectively, as follows:

> "932.704...(4) The seizing agency shall promptly proceed against the contraband article by filing a complaint in the circuit court within the jurisdiction where the seizure or the offense occurred."
>
> "932.701...(2)(c) `Promptly proceed' means to file the complaint within 45 days after seizure."
>
> "932.703...(3) Neither replevin nor any other action to recover any interest in such property shall be maintained in any court, except as provided in this act; however, such action may be maintained if forfeiture proceedings are not initiated

> within 45 days after the date of seizure. However, if good cause is shown, the court may extend the aforementioned prohibition to 60 days."

In In re Forfeiture of One (1) 1994 Honda Prelude, 730 So.2d 334 (Fla. 5th DCA 1999), the Fifth District explicitly held that the statutory time periods for filing a forfeiture complaint began to run as of the date of the seizure of the subject automobile. Assuming the vehicle was contraband, it was initially seized on June 3, 1997. On April 23, 1998, the claimant received a notice of seizure and right to adversarial perliminary hearing. A forfeiture complaint was filed on June 16, 1998. The trial court denied the Claimant's motion to dismiss for failure to promptly proceed with a forfeiture complaint. The Fifth District, treating the Claimant's appeal as a Petition for Writ of Prohibition, issued the Writ and ordered that the trial court could not proceed any further except to cause the return of the subject vehicle to the Claimant. Applying the well-established rule that forfeiture statutes are to be strictly construed, the

Fifth District granted the Writ of Prohibition because the Respondent failed to "promptly proceed" in its forfeiture of the vehicle as required by Sec. 932.704.

The Second District, in Balkwill v. DeGregorio, 27 FLW D979 (Fla. 2d DCA 2002), concluded that the above-quoted statutory provisions do not bar the seizing agency from initiating a forfeiture action more than 45 days after seizure. The Second District correctly noted that this holding conflicts with the Fifth District's holding in the Honda Prelude case, supra.

Since there is an express and direct conflict between two district courts of appeal in the State of Florida as to whether the Florida Contraband Forfeiture Act bars a forfeiture proceeding if the seizing agency fails to file its complaint within 45 days of the date of the seizure, the issue is ripe for a final resolution by this Court. The conflict must be resolved so that the laws of the State of Florida will be of uniform operation throughout.

Strict Construction of Forfeiture Statute Required

In engaging in statutory construction of Florida's Contraband Forfeiture Act, it is a well-established policy that forfeiture statutes must be strictly construed in favor of the one against whom the penalty is imposed and against the seizing agency, and are never to be extended by construction. Hotel and Restaurant Commission v. Sunny Seas No. One, Inc., 104 So.2d 570 (Fla. 1958). Forfeitures, involving the state's abridgement of a person's property rights, are considered harsh exactions, and as a general rule, have been historically disfavored in either law or equity. Cochran v. Jones, 707 So.2d 791 (Fla. 4th DCA 1998). In order to comply with constitutional due process requirements, the government must strictly observe a citizen's constitutional protections when invoking the drastic remedy of forfeiture of a citizen's property. Department of Law Enforcement v. Real Property, 588 So.2d 957, 965 (Fla. 1991). Even when a seizure takes place pursuant to a statutory scheme for forfeiture, a citizen's property is protected by the federal and Florida constitutions against warrantless

seizure. White v. State, 710 So.2d 949 (Fla. 1998).

Plain Meaning of Statute Prevails

Florida law is well-settled that ambiguity is a prerequisite to judicial construction, and in the absence of ambiguity the plain meaning of the statue prevails. Where the wording of a statute is not ambiguous, unreasonable, or illogical, the Court may not go beyond its clear wording and plain meaning to expand its reach. To do so would be to extend or modify the express terms of the statute, which would be an improper abrogation of legislative power. Words of common usage, when employed in a statute, should be construed in their plain and ordinary sense. Metropolitan Dade County v. Milton, 707 So.2d 913 (Fla. 3d DCA 1998); Hott Interiors, Inc. v. Fostock, 721 So.2d 1236 (Fla. 4th DCA 1998).

In this case, the statutory language requiring a seizing agency to promptly proceed, as well as the definition of "promptly proceed", are unambiguous, and the plain meaning of the statute must prevail. In choosing

the statutory terms, the Legislature is presumed to have known their plain and ordinary meaning. A Court is not a super-legislature that second guesses what a legislature really meant to say; rather, the legislated language speaks for itself. Furthermore, to interpret the statutory language as meaning anything other than barring a forfeiture action if a complaint isn't filed within 45 days of seizure would render the statute meaningless. Its existence would serve no useful purpose. "It should never be presumed that the

> legislature intended to enact purpose-less and therefore useless, legislation. Legislators are not children who build block playhouses for the purpose, and with the gleeful anticipation, of knocking them down."

Sharer v. Hotel Corporation of America, 144 So.2d 813, 817 (Fla. 1962). Every word and provision of a statute is presumed to have been intended by the Legislature to have effect and be operative. Fla. Stat. Sec. 932.704(4) requires that the seizing agency **"shall"** promptly proceed against the contraband article by filing a complaint. As a general rule, in the construction of statutes, the word

"shall" is considered mandatory or imperative by nature and inconsistent with the idea of discretion. Stanford v. State, 706 So.2d 900 (Fla. 1st DCA 1998); Psychiatric Institute of Delray, Inc. v. Keel, 717 So.2d 1042 (Fla. 4th DCA 1998).

Under the Plain Language of the Florida Contraband Forfeiture Act, a Forfeiture Proceeding is Barred if the Seizing Agency Fails to File its Complaint Within 45 Days of the Seizure.

Strict construction of the Florida Contraband Forfeiture Act means strict adherence to every material requirement of the Act. The interpretation of the Forfeiture Act that the Petitioner is espousing is consistent with the judicial interpretations of other portions of the same Act. For example, in State Department of Highway Safety and Motor Vehicles v. Metiver, 684 So.2d 204 (Fla. 4th DCA 1996), the Fourth District interpreted Fla. Stat. Sec. 932.703(2)(a) which deals with the time frame during which an adversarial preliminary hearing was to be held. A five day delay

between the tenth day after a claimant's requested hearing on forfeiture and the date on which the hearing occurred did not comply with Sec. 932.703(2)(a) that an adversarial hearing occur either within ten days or as soon as practicable thereafter. Adhering to the the rule that the foreiture statute must be strictly construed, the Fourth District affirmed an Order directing the seizing agency to return the property seized because the agency missed a deadline prescribed by the forfeiture statute. The Court noted that failure to recognize the government's burden to demonstrate the timeliness of the hearing would "effectively neutralize the law's ten-day mandate". See also, Cochran v. Harris, 654 So.2d 969 (Fla. 4th DCA 1995), interpreting the same provision of the Forfeiture Act, and holding that a 23-day delay between a claimant's request for a hearing on probable cause and the occurrence of the actual hearing was too great to avoid a violation of due process.

City of Fort Lauderdale v. Baruch, 718 So.2d 843 (Fla. 4th DCA 1998), also interpreted Sec. 932.703(2)(a), and

held that the notice requirements of the forfeiture statute are significant and therefore mandatory. This case dealt with the requirement that the seizing agency make a diligent effort to notify the person entitled to notice of the seizure of the personal property which was the subject of the proceeding.

Fullwood v. Osceola County Investigative Bureau, 672 So.2d 614 (Fla. 5th DCA 1996), interpreted the statutory requirement contained in Fla. Stat. Sec. 932.704(6)(a) which mandated the seizing agency to provide actual notice of the forfeiture complaint by certified mail to the person having a security interest in the seized property or his attorney. Since the seizing agency did not comply with that requirement, the appellate court reversed the trial court's order denying the claimant's motion to set aside a default judgment against him.

Thus, the above cases clearly demonstrate that Florida courts interpret the Forfeiture Act in a manner consistent with the position taken by the Petitioner herein. If statutory requirements are not strictly adhered to, a

forfeiture will not lie.

Additionally, many other jurisdictions have addressed the effect of untimely filings in the context of forfeiture proceedings; and many have held that failure to comply with the time limitations contained in the forfeiture statutes is fatal to the seizing agency's claim. While not binding on this Court, it is certainly persuasive that other jurisdictions have interpreted similar state statutes in a manner consistent with the position of DEGREGORIO and of the Fifth District in Honda Prelude.

For example, the Supreme Court of Virginia in Haina v. Commonwealth of Virginia, 369 S.E.2d 401 (1988), was faced with interpreting a Virginia statute which provided for the forfeiture of all motor vehicles used in connection with the illegal manufacture, sale, or distribution of controlled substances. The statute also required that within 60 days after receiving notice of the seizure of any such vehicle, the attorney for the Commonwealth was required to file an information against the seized

property. The Supreme Court of Virginia held that the time period prescribed for the filing of an information by the Commonwealth's attorney was jurisdictional, and since the information was filed untimely, the order of forfeiture was reversed and the proceeding was remanded for the entry of such orders as necessary to restore the seized property to its owner. The information of forfeiture was filed 118 days after the Commonwealth's attorney received notice that the vehicle had been seized by police as part of an alleged drug distribution scheme. The Virginia statute at issue provided:

> "Within sixty days after receiving notice of any such seizure, the attorney for the Commonwealth shall file, in the name of the Commonwealth, an information against the seized property, in the clerk's office of the circuit court of the county.... wherein the seizure was made."

Code Sec. 4-56(d).

Likewise, in State v. $1970, 648 A.2d 917 (Conn. Super. 1994), a Connecticut court held that compliance with the 90-day time period specified in the applicable statute, Conn. Gen. Stat. Sec. 54-36h(b), was required to

give the trial court jurisdiction over a civil forfeiture proceeding. Thus, the forfeiture proceeding was dismissed where the petition was filed 109 days after seizure of money in question. The state attorney had argued that the untimely filing did not effect the jurisdiction of the court. He argued that the phrase "not later than 90 days" was directory, not mandatory. The Court relied upon the well established principles of statutory construction, finding the language plain and unambiguous. It meant what it said. Noting that the Legislature created the in rem forfeiture proceeding, the Court went on to state:

> "Where...a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter... In such cases, the time limitation is not to be treated as an ordinary statute of limitation, but rather is a limitation on the liability itself, and not of the remedy alone... Under such circumstances, **the time limitation is a substantive and jurisdictional prerequisite,** which may be raised by the court at any

> time, even by the court sua sponte, and may not be waived." (Citations omitted."

State v. $1970, 648 A.2d 917, 921. The Court ultimately dismissed the forfeiture proceeding because its commencement was 109 days after the seizure of the money at issue.

The State of Georgia came to a similar conclusion in State v. Ellis, 275 S.E.2d 361 (Ga. App. 1980), when the State failed to comply with the provisions of a statute requiring the district attorney or drug inspector to file an action within 30 days from the date he or she received notice of seizure. The appellate court refused to find any error in the trial court's granting of the Defendant's motion for return of the seized property. The Court held that the State could not be heard to complain of the grant of the Defendnat's motion where it had failed to comply with the specific statutory prerequisites for the forfeiture of seized property.

In State v. Hampton, 817 S.W.2d 470 (Mo. App. 1991),

the Court was faced with the argument by the State that the language in the Criminal Activity Forfeiture Act of Missouri requiring the police to report a seizure to the prosecuting within three days of the seizure was merely directive, as opposed to mandatory. The Court firmly rejected the State's argument, holding that the statutory time limitations were mandatory. See also, State v. Rosen, 240 So.2d 168 (Wis. 1976), holding that the 60-day time period within which to set a hearing subsequent to a seizure of contraband prescribed by the Wisconsin statute was mandatory, not directory. Since mandatory statutory provisions affect subject matter jurisdiction of the court, the failure to set the hearing within 60 days deprived the trial court of jurisdiction to hear the matter. In State v. 1978 LTD II, 701 P.2d 1365 (Mont. 1985), the Supreme Court of Montana was faced with interpreting a forfeiture statute which required that proper notice of seizure and intention to institute forfeiture proceedings had to be sent to the owner within 45 days of the seizure. A notice had been timely sent to

the owner of a seized vehicle, but it was deficient, in that it did not inform him that he needed to respond to the notice wtihin 20 days. A default was entered against the owner, but the county attorney agreed that the notice was deficient and filed an amended notice after more than 45 days had passed since the vehicle was seized. The trial court dismissed the forfeiture proceedings and the appellate court affirmed, relying on the language of the statute which provided that the seizing agency **shall, within 45 days of the seizures,** file a notice of the seizure and intention to institute forfeiture proceedings. The language was found to be mandatory. The Court was also persuaded by the fact that since the nature of forfeiture proceedings involve seizures of property ex parte, the statutory safeguards should be rigidly adhered to. The Second District relied on the language of Sec. 932.703(3), quoted above at page 9, in concluding that the Act does not bar the seizing agency from initiating a forfeiture action more than 45 days after seizure. It held that the time period operates only as a

temporary prohibition or limitation on replevin actions and other claims by third parties and not as a jurisdictional bar. The Petitioner respectfully disagrees. The language in Sec. 932.703(3) merely allows a replevin or other action to recover any interest in seized property by interested parties if a forfeiture proceeding is not initiated by the seizing agency within 45 days after the date of seizure. The Petitioner respectfully submits that Sec. 932.703(3) does not have any effect on the mandatory duty of the seizing agency to timely file a forfeiture complaint.

In conclusion, as with all provisions of the forfeiture statute, the filing requirements must be strictly construed against the seizing agency. Florida's Forfeiture Act provides a mandatory time frame within which a seizing agency must file a Complaint. The SHERIFF's violation of the filing requirement of the Act deprived the trial court of jurisdiction except to return the seized property. To hold otherwise would allow seizing agencies to violate the statutory time limitations

with impunity.

The numerous cases from other jurisdictions cited herein are extremely persuasive. They apply the same rules of statutory construction long recognized by the courts of Florida to statutes which contain language similar to the Florida Contraband Forfeiture Act. They all conclude that the failure of the seizing agency to comply with the time requirements of its state forfeiture statute deprived the Court of subject matter jurisdiction.

This Court must reverse the Second District's decision in that it impermissibly altered the reach of the Florida Contraband Forfeiture Act by judicial construction.

CONCLUSION

The Second District's opinion expressly and directly conflicts with the Fifth District's opinion in Honda Prelude. Based upon the foregoing arguments and citations of authority, this Court must find that the Fifth District

was correct in its interpretation of the Florida Contraband Forfeiture Act. The forfeiture proceeding is barred by the failure of the SHERIFF to file its Complaint within 45 days of the date of the seizure of the subject vehicle. The trial court is without jurisdiction to proceed except to return the vehicle to the Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by United States Mail, postage prepaid, to Sarah E. Warren, Esq., 100 Wallace Avenue, Suite 380, Sarasota, Florida 34237, on this _____ day of July, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the undersigned has complied with Fla. F. App. P. 9.210(a) by submitting this Brief in Courier New 12-point font.

_____

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