IN THE SUPREME COURT OF FLORIDA
CASE # SC09-1401

THIRD DISTRICT COURT OF APPEALS
Case No. 3D08-394

ZENAIDA GOMEZ,
Petitioner

v.

VILLAGE OF PINECREST,
Respondent

ZENAIDA GOMEZ' AMENDED PETITION TO INVOKE DISCRETIONARY JURISDICITION OF THE FLORIDA SUPREME COURT BASED ON A CERTIFIED CONFLICT BETWEEN A DECISION OF THE THIRD DISTRICT COURT OF APPEALS AND THE FIFTH AND FIRST DISTRICT COURTS OF APPEALS

Petitioner's Amended Jurisdictional Brief

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Statement of the Case and Facts

In 2006, Petitioner, Zenaida Gomez ("Mrs. Gomez") purchased an investment property located at 9101 S.W. 69th Court, Pinecrest, Florida ("the property"). She initially leased the property for one year to a third party, and upon expiration of that lease, she again marketed it for rent in late 2007. Mrs. Gomez received a telephone call from Martha Herrera ("Mrs. Herrera"), Rolando Herrera's wife who was responding to the "For Rent" sign. They negotiated a one year lease and the property was leased to the Herreras.

On January 17, 2008, the Village of Pinecrest ("Village") police department received an anonymous phone call of an armed burglary in progress at the property. Responding Village police officers entered the property and found marijuana plants growing inside the property, but found no burglars therein.

The Village sealed the property and initiated a forfeiture action against it, where Mrs. Gomez was served as owner of the property. Mrs. Gomez responded by demanding an adversarial preliminary hearing ("APH")[1]. At the APH, Village Police Officer J. Paez, was questioned by counsel for Mrs. Gomez:

Q: "Did you find and [sic] evidence inside the residence, any evidence whatsoever inside the residence that would associate Ms. Gomez with the activities that are photographed in Exhibits 1-24?"

[1] Pursuant to Section 932.703(2)(a) Florida Statutes, under the Florida Contraband & Forfeiture Act ("The Act").

A: "*I didn't*"

Mrs. Gomez also testified at the APH hearing. She stated that she owned the property and that she had no knowledge or reason to believe that the property was being used for any criminal purpose. The Village argued that probable cause for seizure had been established since Mrs. Gomez's property had been used to cultivate marijuana. Mrs. Gomez argued that, at an APH, there had to be at least *some* showing that the owner of the property knew or should have known that the property was being used for an illegal purpose, relying on *In re: Forfeiture of a 1993 Lexus ES 300, Vin: JT8VK13T9P0196573*, 798 So.2d 8 (Fla. 1st DCA 2001). The trial court refused to follow the reasoning of *In re: Forfeiture of a 1993 Lexus ES 300,Vin: JT8VK13T9P0196573*, 798 So.2d 8 (Fla. 1st DCA 2001) and ordered Mrs. Gomez' property seized. It did so, notwithstanding that no evidence was presented, nor existed to support that Mrs. Gomez knew or should have known that the property was being utilized by her tenants for an illegal purpose. Mrs. Gomez then appealed that order to the Third District Court of Appeals (the "Third DCA").

While the Third DCA was considering Mrs. Gomez' appeal, the Fifth district Court of Appeals ("Fifth DCA") decided *Brevard County Sheriff's Office v. Baggett*, 4 So.3d 67 (Fla. 5th DCA 2009). In *Bagget*, the issue was whether the seizing agency was required to show that the owner of a pick-up truck used for an illegal purpose knew or should have known that the truck was being used for such

a purpose. In its opinion, the Court noted that in 1995 the Act was amended to require that the seizing agency prove that the owner of the property was not innocent. The Court applied that same reasoning to require *some* owner knowledge at the APH. The Court said, "we do not see how a forfeiture proceeding can be maintained if this showing is not made at the adversarial preliminary hearing". *Id.*

The Third DCA affirmed the lower court, but certified conflict with *In re: Forfeiture of a 1993 Lexus ES 300, Vin: JT8VK13T9P0196573,* 798 So.2d 8 (Fla. 1st DCA 2001) and with *Brevard County Sheriff's Office v. Baggett,* 4 So.3d 67 (Fla. 5th DCA 2009). *Zenaida Gomez v. Village of Pinecrest,* 34 Fla. L. Weekly D1340 (Fla. 3rd DCA 2009).

Issue on Appeal

Whether, at an APH, a seizing agency must make some showing that an owner (or claimant) of seized property, knew, or should have known, that the property was employed, or was intended to be employed, in criminal activity.

Standard of Review

The Florida Supreme Court has discretion to review *Zenaida Gomez v. Village of Pinecrest,* 34 Fla. L. Weekly D1340 (Fla. 3rd DCA 2009) pursuant to Art. V § 3(b)(4), Fla. Const. Conflict between *Zenaida Gomez v. Village of Pinecrest* , 34 Fla. L. Weekly D1340 (Fla. 3rd DCA 2009) and the opinions of *In re: Forfeiture of a 1993 Lexus ES 300, Vin:JT8VK13T9P0196573*, 798 So.2d 8 9

(Fla. 1st DCA 2001) and *Brevard County Sheriff's Office v. Baggett*, 4 So.3d 67 (Fla. 5th DCA 2009) has been certified by the Third DCA.

Summary of the Argument

This Court should exercise its discretionary jurisdiction and accept Mrs. Gomez' Petition for Certiorari because there exists a conflict in the District Courts of Appeal relating to the interpretation of the Act, (sometimes called the forfeiture statute). The conflict arises over whether under the Act, at an APH, the seizing agency must prove either owner knowledge or some indicia of owner knowledge that the property subject to forfeiture was involved in an illegal purpose in order to obtain a seizure order.

This Court should settle this conflict in favor of Mrs. Gomez and hold that a seizing agency must establish at an APH that the owner knew or should have known that the property subject to forfeiture was involved in criminal activity, because otherwise, an innocent owner's property can be seized and held for an indefinite period of time regardless of whether the seizing agency can prove that the owner ever knew or had reason to know that the property was being used for any illegal purpose.

Argument

The Third DCA opinion in *Zenaida Gomez v. Village of Pinecrest*, 34 Fla. L. Weekly D1340 (Fla. 3rd DCA 2009) directly conflicts with the First and the Fifth

DCA opinions in *In re: Forfeiture of a 1993 Lexus ES 300, Vin: JT8VK13T9P0196573*, 798 So.2d 8 9 (Fla. 1st DCA 2001) and in *Brevard County Sheriff's Office v. Baggett*, 4 So.3d 67 (Fla. 5th DCA 2009), respectively. This issue should be resolved by this Honorable Court because it affects a fundamental, constitutional right of Florida citizens against improper taking of their legitimately owned property.

As a threshold matter, it is plain that forfeitures are harsh extractions, not favored in the law or equity. *Brevard County Sheriff's Office v. Baggett*, 4 So.3d 67 (Fla. 5th DCA 2009). The Third DCA opinion results in a property owner's loss of all substantive due process rights at an APH. Notice and opportunity to be heard at an APH are meaningless because the first stage of a forfeiture proceeding – the seizure part – has a strict liability standard. If the property has a nexus to a crime, it gets seized regardless of a seizing agency's total inability to prove at an APH, any indicia of owner knowledge. An owner's true innocence and total lack of knowledge are totally irrelevant and immaterial at an APH, rendering notice to the owner and any opportunity to be heard, totally perfunctory and illusory. This strict liability standard at the APH stage turns due process on its head.

Florida Statute 932.703 (1)(c) vests all rights to, interest in, and title to any property *seized* with the seizing agency, here, the Village. Thus, as soon as the Village prevailed at the APH (by only showing probable cause that a crime

occurred at the property), the Village became the de facto owner of the property until a final hearing can be held at some later unknown date. Yet, since the initial seizure, until a year later, today, the Village has not made *any* mortgage, insurance, or property tax payment(s) on the property, which is now in serious default. The only "maintenance" the Village has done is to periodically cut the grass. Ironically, the Village has even cited Mrs. Gomez for "code violations".

To compound this problem, Florida Statute 932.703(1)(c) gives all rights title and interest to the property to the seizing agency *as soon as probable cause is found at an APH*. An owner automatically loses his or her property from the date seizure is ordered even if he/she is totally innocent of fault or knowledge of a third party's earlier unlawful use of the property, with absolutely no relief until there is a final trial on the merits, sometimes, many years later. By then, irreversible damage is already done because a prevailing owner's statutory relief is limited.

There are also many sound *policy* reasons justifying a uniform requirement of some indicia of owner knowledge at an APH. A Florida citizen should not be subjected to a different standard of proof than his neighbor in an adjacent county when the taking of property rights is at risk. Because the Act is a very powerful, threatening, property-taking law enforcement tool, that affects all citizens in the state, there should be uniform interpretation and application of the Act throughout the state.

A forfeiture action, particularly one involving real property, affects more than just the innocent property owner. It also affects many innocent third parties (private and public institutions, neighbors, lien holders, mortgagees, insurance companies, counties and municipalities). Seizure of real property can affect real estate prices in the surrounding neighborhood, especially when the seized property is not maintained and/or becomes vacant or abandoned. An owner cannot lease the property because it is seized and controlled by the seizing agency. If the owner cannot rent the property, any mortgage on it, insurance payments and property taxes will likely go unpaid. The lender is then put at risk because the accruing defaulting debt may ultimately exceed the value of the property. The city and/or county lose the ability to collect property taxes on the property. The property may also go uninsured unless the lender "force-places" insurance on it, placing the lender at even greater risk than otherwise.

The Third DCA, in its opinion, reasoned that at an APH, no owner knowledge or indicia of owner knowledge need be shown because even if could not be later proven at the final hearing, the owner had a statutory remedy against the seizing agency. However, this reasoning fails to take into account several problems that occur with a flawed initial seizure.

The statute *only* gives the owner "reasonable loss of value of the seized property" and "payment to the claimant for any loss of income *directly* attributed

to the continued seizure of income producing property during the trial or appellate process". Florida Statute §932.704(9)(b). Respectfully, the Third DCA's view overlooks the limitations of these two remedies for a prevailing owner and the damage that can still be visited on innocent third parties who have *no* statutory remedy against the seizing agency, even if the owner prevails at a final forfeiture trial. For example, as to the owner, any recovery for loss of income from the property will not reverse a mortgage foreclosure which finalizes before a successful final forfeiture trial for the owner, resulting in the owner losing his/her own home – a loss which for many people cannot simply be recovered with a check from the seizing agency. Nor will it cure the owner's ruined credit as a result of the mortgage foreclosure. As to third parties, a mortgage company can lose, an insurance company can lose, neighbors can lose and the taxing authority can lose (if real property is involved). And, there is still the issue of the prevailing owner's attorney's fees.

Offers of judgment do not apply to forfeiture cases. See, *Rosado v. Bieluch*, 827 So. 2d 1115 (Fla. 4th DCA 2002). This eliminates any pressure on a seizing agency to settle a forfeiture case because if/when it rejects a reasonable offer from a claimant (who later prevails at a final forfeiture hearing), there is no attorney's fee remedy. This problem is compounded by the fact that there is no *automatic* statutory award of attorney's fees for a prevailing claimant at trial, either. Rather, a

claimant can *only* get a statutory award of attorney's fees following a trial in one of two, difficult-to-prove situations; that the initiation of the forfeiture was an abuse of discretion, or that *after* the forfeiture action was commenced, the seizing agency continued it in bad faith. If the property owner does not prove one of the two situations noted above, he cannot recover any attorney's fees he incurred in litigating a forfeiture action against his own property.

If we assume that an average forfeiture proceeding takes 100 attorney hours to bring to a trial, at an average hourly rate of $350.00 per hour, a successful claimant in a forfeiture proceeding, on the average, who cannot meet the statutory threshold to recover attorney's fees, will still lose *about* $35,000.00. That number can easily double if the owner has to invoke the appellate process.

With such a high standard for a statutory attorney's fees award and no offer of judgment rule/statute, a seizing agency, without even a minimal showing of owner knowledge at an APH, can seize property for years, later lose on the merits at trial, leaving a very limited recourse to the owner, who still has to pay his/her attorney's fees. Such innocent owners will *never* be made whole. And as stated, there is zero recourse for innocent third parties. None of these real-life, practical side effects of an ill-fated APH seizure order were considered by the Third DCA in its "prevailing- claimant recovery analysis".

Forfeitures are not favored in law or equity and forfeiture statutes must be strictly construed. See, *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla. 1991). At an APH, a seizing agency should have to prove some guilty knowledge on the part of the owner for the property to be seized.

When an express conflict exists between two or more district courts of appeal concerning an issue of law, it is incumbent upon the Florida Supreme Court to announce a single rule, thereby resolving the conflict. See *Finney v. State,* 420 So. 2d 639 (Fla. 3rd DCA 1982).

Conclusion

This Court should accept jurisdiction of Mrs. Gomez' petition because the Act, as interpreted by the Third DCA, constitutes an unconstitutional taking of property rights without even any indicia of owner knowledge at an APH. If property is not subject to forfeiture unless the seizing agency proves the owner is not innocent, then forfeiture proceedings should not be maintained if this showing is not made at the APH. A Floridian's right to redress from the courts when his or her property is being threatened to be forever taken by a seizing agency, should not depend upon which side of a county line the initial seizure took place. This Honorable Court should accept discretionary jurisdiction of the Third DCA opinion which has certified conflict with the First and Fifth DCAs and settle this critical legal issue.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was mailed this ___ day of August, 2009, mailed to: Cynthia Everett, Esq., Village of Pinecrest City Attorney, 7700 North Kendall Drive, Suite 703, Miami, FL 33156.

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Certificate of Compliance with Font Requirements

WE HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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