IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC09-2075

DELTA PROPERTY MANAGEMENT, INC.,

Petitioner,

vs.

PROFILE INVESTMENTS, INC.,

Respondent.
_____/

DCA CASE NO. 1D05-396

PETITIONER'S BRIEF ON JURISDICTION

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I

THE CASE

This tax sale forfeiture case initially came before this Court nearly six years ago. *See* Delta Property Mgmt., Inc. v. Profile Investments, Inc., 875 So. 2d 443 (Fla. 2004), *quashing*, 830 So. 2d 867 (Fla. 1st DCA 2002). At issue were notices of tax sale sent to petitioner, the property owner, at an outdated address and to the mortgagee in care of the wrong company. Id. Several months before the notice was sent, petitioner notified the tax collector of a change in address, yet the tax collector did not post the change. Id. at 445. Both notices were returned as "undeliverable." The clerk did nothing further to locate petitioner or the mortgagee, and initially on appeal the First District found that the clerk had no duty to look beyond the tax collector's statement. Id. This Court disagreed with the First District's analysis and reversed. Id. at 446-48.

After the mandate was issued by this Court in 2004, two intervening tax sale notice decisions were rendered, namely Jones v. Flowers, 547 U.S. 220 (2006) and Vosilla v. Rosado, 944 So. 2d 289 (Fla. 2006). Those cases clarified what due process requires when a notice of tax sale is returned to the clerk as undelivered. In Jones, the Court said:

> We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. 547 U.S. at 225.

Relying on Jones, this Court in Vosilla added that where notices are returned, the additional steps to be taken by the clerk are defined by the circumstances of the particular case:

> Such circumstances include unique information about an intended recipient that might require the taxing authority to make efforts beyond those required by the statutory scheme under ordinary circumstances. ....
>
> [D]ue process required that the clerk of court take additional reasonable steps to notify the [property owners] of the tax deed sale prior to selling their property, *such as checking to determine whether a change of address had been submitted*. 944 So. 2d at 299-301 (emphasis added).

Surprisingly, the First District determined that Jones and Vosilla were not applicable. Relying on the judicially created doctrine of "law of the case," it reasoned that the mandate announced in this Court's 2004 decision limited the scope of the trial court's inquiry on remand to a single question: whether petitioner's current address appeared on the most recent tax assessment roll. *See* Profile Investments, Inc. v. Delta Property Management, Inc., 19 So. 3d 1013 (Fla. 1st DCA 2009). (A: 1-11)

II

THE FACTS

When petitioner failed to pay its 1997 taxes, a tax certificate was issued by the City of Jacksonville/Duval County Tax Authority. (A: 2) Respondent purchased the tax certificate in April of 1998. (Id.) In December of 1999, petitioner provided the tax collector with a new address. 875 So. 2d at 444 n.4. Due to unexplained delays in the tax collector's office, however, the new address was not posted by May 30, 2000, the date on which the tax collector provided the clerk of the circuit court with the tax roll for the purpose of giving the statutory notice of sale. Id. at 444. The clerk then waited over three months before preparing a notice of tax sale, which was mailed to petitioner in September of 2000 at the old address. Id. The problem was compounded when the clerk sent notice of the pending sale to the mortgagee in care of the wrong company name. Both notices were returned to the clerk as undeliverable. Id. It is undisputed that the clerk took no further steps to provide any form of notice either to petitioner or the mortgagee. The property was consequently forfeited. Id.

After the tax sale, respondent brought this action to quiet title. (A: 3) Petitioner counterclaimed asserting that it was still the titleholder because the clerk had failed to provide

proper notice. (Id.) Cross motions for summary judgment were filed and respondent prevailed, with the trial court concluding that the clerk was not required to look beyond the statement submitted by the tax collector to determine whether the names and addresses of the parties were correctly listed. (Id.) The First District affirmed. *See* Delta Property Mgmt., Inc. v. Profile Invests., Inc., 830 So. 2d 867 (Fla. 1st DCA 2002). Petitioner then sought review in this Court which accepted jurisdiction and reversed. *See* Delta, 875 So. 2d at 443. Speaking for a unanimous Court, Justice Quince said that while the clerks ought to use the tax collector's statement when preparing the tax sale notices, "*circumstances may warrant some additional action by the clerk.*" Id. at 448 (emphasis added). For example, there can come a time when *based on various conditions* the tax collector's statement no longer represents those entitled to notice. Id.

After remand, Jones and Vosilla were decided. Relying on the constitutional requirements of those cases, the Duval County circuit judge in this case, the Honorable Karen Cole, held that the clerk's failure to take any additional steps to notify the owner and the mortgagee violated due process. (A: 6)

On appeal once again, the First District reversed. This petition followed.

SUMMARY OF ARGUMENT

In this case, petitioner forfeited a piece of commercial real property valued at over $1 million because it inadvertently failed to pay its 1997 property taxes. As evidence of petitioner's inadvertence, the taxes for years both before *and* after were timely paid. The dispute in this case arose because the notice of tax sale was sent to petitioner, as owner, at an outdated address and to the mortgagee in care of the wrong company. The notices were returned to the clerk as "undeliverable." No further attempts were made to notify either party. Despite the manifest injustice which resulted, in multiple instances the First District has rubber-stamped the clerk's inaction.

After this Court quashed the First District's approval of the tax sale in 2004 based on due process concerns, two intervening decisions were issued by the United States Supreme Court and by this Court which clarified what due process requires in connection with notices of tax sale. Both Courts held that where a notice of tax sale is returned, the state *must* take additional steps, if practicable, to locate the owner. The trial court applied those decisions and set aside the tax deed. The First District, however, failed to recognize the binding effect of the intervening decisions and ruled that the tax sale

was valid. Justifying its failure to apply those principles on the basis of the law of the case doctrine, the First District improperly reinstated the tax deed. In so ruling, the First District has created direct conflict with this Court's recent decision regarding due process in this context. It has also created conflict with other cases which have recognized and applied a "manifest injustice" exception to the law of the case doctrine when relevant intervening decisions have been issued by higher courts. In addition, the decision under review affects a class of constitutional officers by condoning actions which this Court and the United States Supreme Court have disapproved.

ARGUMENT

I

GROUNDS FOR JURISDICTION

Review is sought because the decision of the First District expressly and directly conflicts with a decision of this Court as well as decisions of district courts of appeal on the same point of law, and because it expressly affects a class of constitutional or state officers. Fla. Const. Art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iii) & (iv).

A. Conflict With Vosilla and Its Progeny.

In Vosilla, this Court said that due process requirements are not to be viewed too narrowly. 944 So. 2d at 297. A

unanimous Court determined that even though Florida Statutes § 197.332 "imposes an affirmative duty on all property owners to know of and to pay their current and delinquent taxes ... 'knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.'" 944 So. 2d at 297-98. Referring to its 2004 ruling in this case, the Court said that the clerk must look to the latest assessment roll to determine if the property owner has filed a change of address. But recognizing that Jones adds a new dimension to the notice analysis, the Court added that circumstances may warrant *additional* steps to be taken. 944 So. 2d at 298.

> Due process requires that the clerk look beyond the tax collector's statement when there is reason to believe that the statement no longer reflects those who are entitled to notice ... or ... the statement no longer reflects the titleholder's correct address. Id. at 299.

The point is made -– due process is not a static concept to be applied narrowly when fundamental property rights are at risk of being forfeited. The manner in which this case was decided by the First District, however, conflicts with both Vosilla and recent district court decisions which have applied the due process principles in Vosilla. See Patricia Weingarten Associates, Inc. v. Jocalbro, Inc., 974 So. 2d 559 (Fla. 5th DCA 2008) (invalidating tax sale and remanding for entry of judgment

for property owner); see also Singleton v. Eli B. Investment Corp., 968 So. 2d 702 (Fla. 4th DCA 2007).

B. Conflict Regarding Law of the Case.

The law of the case doctrine gives way to intervening decisions of higher courts on the same point of law where application of the doctrine would create a manifest injustice. In State v. Owen, 696 So. 2d 715 (Fla. 1997), for example, this Court stated that the doctrine is "not an absolute mandate" and that the issuance of an intervening decision by a higher court is "one of the exceptional situations" when the doctrine should *not* be applied. Thus, where reliance on a prior decision "would result in manifest injustice," the doctrine yields to the concept of fairness. Id. at 720.

To the same effect is Strazzulla v. Hendrick, 177 So. 2d 1 (Fla. 1965). Observing that the law of the case should not be applied "where manifest injustice will result from a strict and rigid adherence to the rule," this Court said:

> Another clear example of a case in which an exception to the general rule should be made results from an intervening decision by a higher court contrary to the decision reached on the former appeal, the correction of the error making unnecessary an appeal to the higher court. 177 So. 2d at 4.

See also State v. McBride, 848 So. 2d 287, 291 (Fla. 2003); Dougherty v. City of Miami, 2009 WL 3190382 (Fla. 3d DCA Oct. 7,

2009) (citing Strazzulla). One recent decision has taken the position that "[w]here ... a manifest injustice has occurred *it is the responsibility of the court to correct that injustice,* if it can." *See* Lago v. State, 975 So. 2d 613 (Fla. 3d DCA 2008) (emphasis added). Cases involving forfeitures of real property fall within a well-defined category of unfairness. Jones, 547 U.S. at 230. Despite that, the First District in this case took an inflexible approach to the law of the case doctrine that perpetuates injustice and unfairness.

C. Effect on Classes of Constitutional Officers.

The decision under review interprets the procedures regarding the constitutionally mandated "notice" when real property is at risk of being forfeited in a tax sale. These procedures are, by virtue of strictly construed statutes, implemented through the joint efforts of the clerks of the circuit courts and tax collectors throughout the state. *See* Florida Statutes §§ 197.502(4) (a) & 197.522(1). This Court has already recognized the impact of this matter on constitutional officers. *See* Delta, 875 So. 2d at 443-44.

II

JURISDICTION SHOULD BE EXERCISED

Tax sales are not statutory traps for the unwary. In this case the State through its own shortcomings failed to notify

both the owner and the mortgagee that property was about to be forfeited. As the United States Supreme Court said in Jones:

> No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman. 547 U.S. at 229.

Like the clerk in Jones, the clerk in this case may have had a reasonable calculation on how to reach the owner, but once the notices were returned, there was likewise good reason to suspect that the owner was "no better off than if the notice had never been sent." Id. at 230. What could be more unjust than a government which dilly-dallies in updating its own records, then permits property to be taken as a consequence? This Court should not countenance such a ruling.

CONCLUSION

This Court is urged to permit the matter to be briefed on the merits in order to allow petitioner to demonstrate that the law of the case doctrine is not a safe harbor for the courts or the clerks where due process has been denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 30th day of December, 2009, to Robert M. Quinn, Esq., Carlton Fields, P.O. Box 3239, Tampa, FL 33601; Edward P. Jackson, Esq., 255 North Liberty Street, 1st Floor, Jacksonville, FL 32202; Robert E. Biasotti, Esq., Carlton Fields, P.A., Post Office Box 2861, St. Petersburg, FL 33731, and William S. Graessle, Esq., 219 Newnan Street, 4th Floor, Jacksonville, FL 32202.

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

The undersigned hereby certifies that the font of this brief is Courier New 12.

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