POLICE

Police: Forfeiture of Seized Property

***Brevard County Sheriff's Office v. Baggett*,**
4 So. 3d 67 (Fla. 5th Dist. App. 2009)

During a forfeiture proceeding brought under Florida's Contraband Forfeiture Act, an agency must establish in the adversarial preliminary hearing that the owner knew or should have known that the property was being or likely would be used in criminal activity.

FACTS AND PROCEDURAL HISTORY

The Brevard County Sheriff's Office (Sheriff) arrested William Baggett for cultivating and selling marijuana and seized thousands of dollars in cash and a pickup truck. Baggett indicated that he had purchased the truck but had registered it in his daughter's name. When the Sheriff filed a forfeiture claim under the Contraband Forfeiture Act, registered owner Rebecca Baggett was notified in accordance with the law. She requested an adversarial preliminary hearing and testified that she did not know that the truck had been used in violation of the Act. Because the Sheriff did not establish by a preponderance of the evidence that Rebecca Baggett knew or should have known that the truck was being used in criminal activity, the trial court held that the Sheriff must release the property.

On appeal, the Sheriff argued that the owner's knowledge of the illegal activity need not be established until the subsequent forfeiture proceeding. The Fifth District agreed with the trial court that the seizing agency must make a preliminary showing that the owner is not innocent before moving to the second phase. However, the Court reversed because the Sheriff need only show probable cause that the owner is not innocent, and remanded the case in order to determine whether Rebecca Baggett was indeed the true owner of the truck.

ANALYSIS

Florida law prescribes a two-step process for the forfeiture of seized property—an adversarial preliminary hearing followed by a forfeiture proceeding. Prior to 1995, owners of seized property commonly employed the so-called "innocence defense" to prevent forfeiture under the Contraband Forfeiture Act. The Florida legislature amended the Act in 1995, placing the burden on the seizing agency to show that an owner knew or should have known that the property was being or likely would be used in illegal activity before it can be forfeited. *See* Fla. Stat. § 932.703(6)(a) (2007). The question before the Court in this case was whether such a showing must be made in the adversarial preliminary hearing or in the subsequent forfeiture proceeding.

The Fifth District noted that public policy demands strict interpretation of the statute in order to avoid the harsh penalty of forfeiture. The Court found the statutory language and legislative intent to be clear: "If property is not subject to forfeiture unless the seizing agency proves the owner is not innocent, we do not see how a forfeiture proceeding can be maintained if this showing is not made at the adversarial preliminary hearing." *Baggett*, 4 So. 3d at 70.

The Fifth District thus agreed with the First District that a seizing agency must establish in the preliminary hearing that the owner is not innocent. However, the Court held that the burden of proof is probable cause and not the "basis for belief" standard established in *Department of Highway Safety and Motor Vehicles v. Karr*, 798 So. 2d 8, 10 (Fla. 1st Dist. App. 2001).

The Court reversed because the trial court used the incorrect legal standard, noting that the question of whether or not the owner is innocent may be moot if true ownership is not established.

SIGNIFICANCE

In *Baggett*, the Fifth District joined the First District in holding that the burden lies with the seizing agency to prove that the property owner knew or should have known that the property was used in violation of the Contraband Forfeiture Act and that this must be done in an adversarial preliminary hearing. However, the Fifth District departed from the First District in holding that

the burden of proof is probable cause and not the "basis for belief" standard.

RESEARCH REFERENCE

- 14 Fla. Jur. 2d *Criminal Law* § 873 (2009).

Cheryl Cooper

Police: Forfeiture of Seized Property

***Gomez v. Village of Pinecrest*,**
17 So. 3d 322 (Fla. 3d Dist. App. 2009)

Upon seizing property under Florida's Contraband Forfeiture Act, an agency must notify the property owner and establish, in an adversarial preliminary hearing, that the property was used in criminal activity. At this phase, the seizing agency does not have to show that the owner knew or should have known that the property was being or likely would be used in violation of the Act.

FACTS AND PROCEDURAL HISTORY

Responding to a call reporting suspicious activity and finding a broken window, the Village of Pinecrest Police Department (Pinecrest) entered a house and found marijuana being cultivated. Pinecrest seized the property and notified the owner, Zenaida Gomez. She requested an adversarial preliminary hearing.

The responding officer testified that nothing from the exterior of the house suggested that it was being used for marijuana cultivation. Gomez's counsel asked the officer if he had evidence that Gomez knew about the illegal activity. Pinecrest's attorney objected on the grounds that her knowledge was not relevant at this stage of the proceedings, and the court sustained the objection. Gomez testified that she had rented the house to a Rolando Herrera, whom she had never met, and that she had noticed nothing unusual that would lead her to suspect criminal activity.

Pinecrest asked the court to authorize the continued seizure of the property on the grounds that it had shown probable cause that the property had been used in violation of the Contraband Forfeiture Act. Gomez's attorney argued that Pinecrest was required at this stage to establish that the owner had knowledge of

the illegal activity. The court ruled in favor of Pinecrest and Gomez appealed.

On appeal, the Third District upheld the trial court's ruling and certified its conflict with earlier First District and Fifth District opinions requiring seizing agencies to establish in the adversarial preliminary hearing that the property owner was not innocent. The Court further disagreed with the dissent that the opinion conflicted with a prior Third District ruling supporting that requirement.

ANALYSIS

The Contraband Forfeiture Act creates a two-phase process for the forfeiture of seized property—an adversarial preliminary hearing followed by a forfeiture proceeding. Subsection (2) of the Act describes the procedures an agency must follow in seizing property involved in illegal activity and notifying the owner of his or her right to an adversarial preliminary hearing, while Subsection (6) pertains to the forfeiture proceeding. *See* Fla. Stat. §§ 932.703(2)(a), (6)(a) (2007).

The Third District found nothing in the statutory language to suggest that the seizing agency was required to establish in the first phase that the owner knew or should have known about the criminal activity. Rather, at the seizure stage, the seizing agency is required to establish that probable cause exists to believe the property was used to conceal, transport, or possess contraband in violation of the Act. The Court bolstered its argument by noting that Section (4) of the Act establishes penalties for agencies that seize property based upon insufficient evidence. *See* Fla. Stat. § 932.703(4).

The Court acknowledged that its opinion conflicts with the First District's ruling in *Department of Highway Safety & Motor Vehicles v. Karr*, 798 So. 2d 8 (Fla. 1st Dist. App. 2001), as well as the Fifth District's holding in *Brevard County Sheriff's Office v. Baggett*, 4 So. 3d 67 (Fla. 5th Dist. App. 2009), which was issued while the *Gomez* appeal was pending. The Court argued that the other districts "failed to consider that property seized, after demonstrating probable cause that the property was used in criminal activity, is not forfeited at this initial stage of the proceedings." *Gomez*, 17 So. 3d at 327.

Judge Shepherd issued a dissent in which he noted that the Third District had previously joined with the First District in its interpretation of the statute in *Department of Highway Safety & Motor Vehicles v. In re Forfeiture of a 2003 Mercedes-Benz*, 902 So. 2d 192 (Fla. 3d Dist. App. 2005) (per curiam), and that the Court was bound by principles of stare decisis to honor this precedent. The majority distinguished *Mercedes-Benz* from *Gomez* on grounds that it involved the second phase of the forfeiture process, while the dissent argued that the Court had artificially subdivided the forfeiture proceeding into two distinct phases.

SIGNIFICANCE

Gomez departs from earlier rulings in the First District and Fifth District, which held that a seizing agency must show in an adversarial preliminary hearing that the property owner knew or should have known that the property was used in violation of the Contraband Forfeiture Act. In *Gomez*, the Third District reasoned that at this phase the seizing agency need only show probable cause that the property was used in criminal activity in order to justify continued seizure. The agency did not have to establish that the owner was not innocent until the subsequent forfeiture proceeding.

RESEARCH REFERENCE

- 2 Fla. Jur. 2d *Criminal Law* § 873 (2009).

Cheryl Cooper

Police: Forfeiture of Seized Property

***Hernandez v. City of Miami Beach*,**
23 So. 3d 163 (Fla. 3d Dist. App. 2009)

An agency must establish in an adversarial preliminary hearing probable cause that seized property was used in violation of the Contraband Forfeiture Act. The hearing must be held within ten days of the property owner's request, with delay allowed only if the court cannot immediately accommodate the hearing in its schedule. If delay is caused by the seizing agency's unjustified

failure to promptly request the hearing, the forfeiture action will be dismissed.

FACTS AND PROCEDURAL HISTORY

The City of Miami Beach notified the appellants that cash, jewelry, and a vehicle had been seized under the Contraband Forfeiture Act and that they were entitled to an adversarial preliminary hearing to establish probable cause that the property had been used in violation of the Act. Fla. Stat. § 932.703(2)(a) (2007). The appellants sent a written request for a hearing, which the City received on January 22, 2008. Florida law requires that the hearing be held within ten days of the seizing agency's receipt of the request "or as soon as practicable thereafter." *Id*. In this case, the hearing should have been held no later than February 1.

The City incorrectly calculated that the hearing would have to be held on or before February 4, and filed its request for a hearing with the circuit court clerk on January 30. The next day, the City hand delivered a request for an emergency hearing to the judge's chambers. Because the judge held forfeiture proceedings on Wednesdays, the hearing was scheduled for February 6—sixteen days after the City received the appellants' request.

Appellants filed a motion to dismiss on grounds that the adversarial preliminary hearing was not held within the ten days required by law. The City argued that it had made its request within ten days, and that the court had scheduled the hearing "as soon as practicable." The trial court denied appellants' motion to dismiss but acknowledged that additional clarity from the appellate court regarding the statutory requirements would help resolve such matters. The court then found probable cause for the seizure. On appeal, the Third District reversed, holding that the City waited so long to file its request that the court could not have scheduled the hearing within the ten-day deadline. The court remanded the case for dismissal of the forfeiture action.

ANALYSIS

The Third District began its discussion by noting that forfeiture statutes are to be interpreted strictly because forfeiture is a harsh penalty disfavored by law and public policy. The court found that the Contraband Forfeiture Act requires that an adversarial preliminary hearing be held within ten days of a property

owner's request "unless there is good cause to go beyond the ten-day deadline." *Hernandez*, 23 So. 3d at 165. The court reasoned that a court's scheduling delay represented good cause but a seizing agency's failure to promptly request a hearing did not.

The court noted that it had previously defined forfeiture proceedings as "emergencies" due to the short statutory deadline. *Chuck v. City of Homestead Police Dept.*, 888 So. 2d 736, 754 (Fla. 3d Dist. App. 2004). The court agreed with the Fourth District in *State Dept. of Hwy. Safety & Motor Vehicles v. Metiver*, 684 So. 2d 204, 205–206 (Fla. 4th Dist. App. 1996) that the flexibility afforded by the statute's "as soon as practicable" language was designed to accommodate a court's calendar, not a seizing agency's unjustified delay. "It is impermissible for the seizing agency to consume all or most of the ten-day period before making the request for a hearing." *Hernandez*, 23 So. 3d at 166.

The court concluded that a seizing agency sets in motion a series of events with statutory deadlines when it sends notice to property owners advising them of their right to an adversarial preliminary hearing. The agency should be aware of its responsibilities and be prepared to promptly request an emergency hearing so that the court has adequate time to schedule the hearing before the ten-day deadline expires. If the ten-day deadline is not met due to the court's delay, the agency will not be penalized.

Based upon this analysis, the court reversed and directed that the forfeiture action be dismissed.

SIGNIFICANCE

Hernandez holds that a forfeiture action may be dismissed if the seizing agency fails, without justification, to promptly ask a court to schedule an adversarial preliminary hearing under the Contraband Forfeiture Act. The seizing agency must not wait so long to make its request that it becomes impossible for the court to schedule the hearing within the ten-day timeframe established by law.

RESEARCH REFERENCE

- 14A Fla. Jur. 2d *Criminal Law—Procedure* § 942 (2009 & Supp. 2010).

Cheryl Cooper

Police: Payment of Attorney's Fees

***City of Sweetwater v. Alvarez*,**
14 So. 3d 1210 (Fla. 3d Dist. App. 2009)

Florida law requires an employing agency to provide a law enforcement or correctional officer with legal representation upon request when the officer faces criminal charges for actions taken in the line of duty under certain circumstances. However, the law does not give an officer an unconditional right to counsel of his choosing at government expense.

FACTS AND PROCEDURAL HISTORY

Sweetwater Police Officers George Alvarez and Allen St. Germain faced criminal charges of felony battery and wrongful use of force in conjunction with a 2003 arrest. The officers did not ask the City of Sweetwater to provide them with an attorney but instead won their case with the assistance of private counsel. They submitted their attorney's fees to the City for reimbursement according to procedure.

The officers were awarded attorney's fees in accordance with Florida Statutes Section 111.065 (2004). The City appealed the award, claiming that the officers were required to ask the City to provide representation before retaining their own counsel. Florida's Third District Court of Appeal reversed the award, holding that the officers must first give the employing agency the opportunity to provide counsel before requesting reimbursement for attorney's fees under the statute.

ANALYSIS

Prior to 2004, Florida law gave municipalities and law enforcement agencies the option to pay the attorney's fees of an officer who successfully defended against a civil or criminal action arising from the performance of his or her duties. *Id.* at § 111.065(2). In 2004, the Florida legislature amended the statute to require these agencies to provide counsel and pay reasonable attorney's fees for any officer facing criminal charges for actions taken in the line of duty. *Id.* at § 111.065(3). For the statute to apply, certain conditions must be met. The officer must have reasonably believed that his or her actions were a necessary response

to an emergency or were required to protect the lives of others, or were taken place in the pursuit or apprehension of a violent suspect or escapee. *Id.* at § 111.065(3)(a). The officer must also have followed proper procedures. *Id.* at § 111.065(3)(c).

The Third District noted that the statute plainly states that an agency must provide legal representation and pay reasonable attorney's fees. The word "and" indicates that both obligations must be met. Thus, the court concluded that the statute represents "a legislative compromise between protecting law enforcement officers from being impoverished and the employer's need to protect the public fisc." *City of Sweetwater*, 14 So. 3d at 1213. While the legislature has mandated that employing agencies reimburse law enforcement officers for certain legal costs, an officer must give the employing agency the opportunity to provide representation before retaining private counsel.

The court found only one other case addressing a statute with similar wording. In *Township of Edison v. Mezzacca*, 370 A.2d 511, 513 (N.J. Super. App. Div. 1977), the court held that a law enforcement officer could seek reimbursement for attorney's fees only if the employing agency declined to provide an attorney and consented to the officer's retention of private counsel. Furthermore, the court in *Mezzacca* found that the employing agency's obligation arose at the outset of legal action. *Id.* at 513–514.

Based upon this analysis, the Third District reversed the statutory fee award.

SIGNIFICANCE

City of Sweetwater represents the first interpretation of the Florida statute requiring municipalities and law enforcement agencies to provide defense counsel for officers who face criminal charges arising from certain actions occurring in the line of duty. The court found that the statute balances this obligation with concern for expenditure of the public funds. Law enforcement and correctional officers may not seek reimbursement for attorney's fees without first requesting that the employing agency provide counsel.

RESEARCH REFERENCE

- 2 Fla. Jur. 2d *Government Tort Liability* § 24 (2008 & Supp. 2009).

Cheryl Cooper