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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case Nos. 2009-CP-26-1281
2009-CP-26-3127
2009-CP-26-3128

J. Gregory Hembree, Solicitor, Fifteenth Judicial Circuit, on behalf of the Horry County Police Department,.....Respondent,

v.

Taurus 38 Special Pistol, SN: SF53109; 1994 Monaco RV, SN: VIN: 1RF120611R1010972; and One Thousand Eight Hundred Forty-Seven Dollars (\$1,847.00), U.S. Currency, Defendant Property, and Michael James Albin;.....Defendant,
Of whom Michaela Albin, as personal representative of the estate of Michael J. Albin, is the Appellant.

BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding the statutory minimum weight of marijuana inapplicable?
2. Did the trial court err in concluding that Judge John's ruling upon a Motion for Summary Judgment was the "law of the case"?
3. Did the trial court err in dismissing the counterclaim for conversion?

STATEMENT OF THE CASE

These forfeiture actions were filed on February 10, 2009, (2009-CP-26-1281), March 27, 2009, (2009-CP-26-3127) and March 27, 2009, (2009-CP-26-3128). Case No. 09-CP-26-1281 (Taurus .38 Pistol) was served by mail on March 16, 2009 and Answered on May 27, 2009, denying that the subject pistol was lawfully seized nor forfeit. Cases numbered 09-CP-26-3127 (\$1,847.00 U.S. Currency) and 3128 (1994 Monaco RV) on March 27, 2009, served by publication and Answered on June 4, 2009. In case number 3127 (\$1,847.00) Appellant's decedent denied the subject currency was lawfully seized and forfeit. Appellant's decedent also counterclaimed for \$15,585.56 alleged to have been converted by Respondent's agents, which Respondent denied by Reply filed June 24, 2009. In case number 3128 (Monaco RV) Appellant's decedent denied the subject vehicle was lawfully seized and forfeit. Appellant's decedent also counterclaimed for conversion of the vehicle, seeking \$94,000.00 damages. Respondent Replied to the Counterclaim denying liability, filed June 24, 2009. Appellant's decedent moved for Partial Summary Judgment as to the 1994 Monaco RV (case number 3128) on June 22, 2009.

The Hon. Steven H. John heard Appellant's decedent's Motion for Partial Summary Judgment and granted it in part by Order dated September 22, 2009, allowing Respondent to proceed against the vehicle despite the lack of the statutory minimum quantity of marijuana for seizure of a vehicle.

Appellant's decedent by Motion filed February 23, 2011 sought to clarify the issues regarding the identity of the Plaintiff, subject matter jurisdiction of the Counterclaims, and the applicability of the statutory minimum quantity of marijuana to seize a vehicle. At trial the Hon. Larry B. Hyman denied the Motion.

The cases were tried together without a jury by Judge Hyman on July 28, 2011. His Order

dated August 12, 2011 followed. Appellant's decedent moved to Alter or Amend the Judgment on August 26, 2011 and the Court denied same by Order dated April 10, 2012. Appellant's decedent filed and served his Notice of Appeal on May 4, 2012 and Amended Notice of Appeal on May 21, 2012. Appellant's decedent died on June 11, 2012. The transcript of record was received on July 16, 2012.

The sum involved in the appeal is, in case number 3127, the sum of \$15,585.56 and, in case number 3128 the sum of \$94,000.00.

FACTS

SLED agents, in response to complaints of gambling in Appellant's decedent's restaurant, wired two female agents for sound and sent them in to procure evidence. SLED obtained a Search Warrant from a local Magistrate which it executed on the night of January 24, 2009. At SLED's request agents of the Horry County Police Department assisted them in executing the warrant.

SLED seized currency and coins totaling \$15,585.56 according to their reports. Agents found just over one quarter pound of marijuana in Appellant's decedent's motor home parked adjacent to the restaurant. Appellant's decedent was then a 65 year old retired U.S. Air Force veteran suffering from prostate cancer and undergoing radiation therapy. He had no criminal record.

ARGUMENTS

- I. ALLOWING THE FORFEITURE OF A CONVEYANCE ABSENT THE STATUTORY MINIMUM DEFEATS PLAINLY EXPRESSED LEGISLATIVE INTENT.

Plaintiff concedes that the quantity of marijuana found in Defendant's motor home is far less than half the statutory minimum for seizure of a conveyance found in S.C. Code Ann § 44-53-520(A)(6). Defendant moved for Summary Judgment on this issue, resulting in a pre-trial ruling striking Plaintiff's claim under (A)(6) but allowing Plaintiff to go forward under subsections (A)(3)(container) and (A)(4)(facilitation).

The General Assembly plainly established a minimum quantity of one pound of marijuana to justify or support the seizure of a motor vehicle:

"No motor vehicle may be forfeited to the State under this item unless it is used, intended for use, or **in any manner facilitates** a violation of S.C. Code Ann §

44-53-370(A), involving at least one pound or more of marijuana, ...”

(emphasis added). S.C. Code Ann § 44-53-520(A)(6). Plaintiff contends that the use of the term “this item” frees him to seek forfeiture under subsection (A)(3) in that the motor vehicle is a “container” of the marijuana. Such an interpretation plainly defeats the legislative intent in that all motor vehicles are “containers” and therefore the legislated minimum quantity would never have effect. A plainly absurd result.

Plaintiff next contends that he may prevail because the motor vehicle was used to “facilitate” distribution of marijuana. Plaintiff concedes there was “no drug-buy” from the Defendant (R. p. 107, ll. 7-9, p. 109, ll. 17-18) and bases his claim on the testimony of a SLED agent that at some future time Defendant would smoke marijuana with her in the motor home. Here it is noteworthy that despite the seizure of a large number of items of personalty from the motor home, including rolling papers, a pipe, a cigarette rolling device, etc. no scales were found nor baggies for packaging marijuana for redistribution. (R. p. 105, ll. 12-21)

In the subsection containing the statutory minimum, (A)(6), is set forth its applicability:

“All...motor vehicles...which are used or intended for use unlawfully to...**facilitate** the unlawful concealment, possession, containment, manufacture or transportation of... at least one pound or more of marijuana...”

(emphasis added)

Accordingly, “facilitation” is included in the provision requiring a one pound minimum quantity of marijuana. As in the case of a “container” to hold that the minimum quantity does not apply plainly defeats the legislative purpose and renders the enactment meaningless.

Forfeiture statutes are penal statutes which must be strictly construed, Ducworth v. Neely, 319 S.C. 158, 162, 459 S.E.2^d 896, 899 (Ct. App. 1995). It is well settled that a specific statute controls over a more general one, Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 628 S.E.2^d 38 (2006). The trial Court’s reliance upon the “facilitation” provision of subsection (A)(4) is misplaced in view of the “facilitation” language of subsection (A)(6).

II. EARLIER DENIAL OF DEFENDANT’S MOTION FOR SUMMARY JUDGMENT DID NOT PRECLUDE THE TRIAL COURT FROM ENFORCING THE STATUTORY MINIMUM.

Appellant’s decedent’s Motion for Partial Summary Judgment as to the forfeiture of the

Monaco RV was denied in part by the Hon. Steven H. John after a Motion hearing on September 22, 2009. Such a ruling does not preclude the Trial Court from addressing the enforceability of the statutory minimum. An order denying Summary Judgment is not immediately appealable. Olson v. Faculty House of Carolina, Inc. 354 S.C. 161, 580 S.E.2^d 440 (2003), citing Wilkins v. Bishop 276 S.C. 156, 276 S.E.2^d 310 (1981). Further, denial of summary judgment is not reviewable even in an appeal from final judgment. Raino v. Goodyear Tire 309 S.C. 255, 422 S.E.2^d 98 (1992), Holloman v. M^cAllister 289 S.C. 183, 345 S.E.2^d 728 (1986).

The Trial Court's characterization of Judge John's ruling as "the law of the case" (R. p. 41, ll. 2-10, p. 51, ll. 7-20, p. 52, ll. 10-13, p. 56, l. 5, p. 57, l. 12, p. 132, ll. 1-9) is misplaced. The concept of "the law of the case" is premised upon an unappealed, appealable ruling. Here there was no ruling appealable by the Defense and therefore "the law of the case" does not apply.

III. DEFENDANT'S COUNTERCLAIMS SHOULD NOT HAVE BEEN DISMISSED.

Undisputed testimony indicated that the Horry County Police Department assisted the State Law Enforcement Division in the execution of a search warrant following the initiation of the investigation by SLED. (R. p. 26, ll. 5-30, p. 74, ll. 19-20, p. 76, ll. 5-6, p. 77, ll. 11-12, 20-24, p. 77, ll. 12-14, p. 82, ll. 4-12, p. 82, l. 18- p. 83, l.4, p. 103, ll. 13-18) The forfeiture statute under which decedent proceeds, S.C. Code Ann § 44-53-520, expressly provides in subsection (H):

"For the purposes of this section, whenever the seizure of any property subject to seizure is accomplished as a result of a joint effort by more than one law enforcement agency, the law enforcement agency initiating the investigation is considered to be the agency making the seizure."

(emphasis added). This fact is corroborated by agents of both agencies, (Tr., supra) the search warrant itself and the affidavit in support thereof. (Respondent's Exhibit 1).

Appellant's decedent alleges SLED seized nearly ten times the sum of money sued for in this raid. Appellant's decedent counterclaimed for these funds more than two years prior to trial. Respondent represents SLED in forfeiture matters in the Fifteenth Judicial Circuit. (R. p. 90, ll. 10-12) SLED, despite the passage of two and one half years, has never sought to confirm the forfeiture (R. p. 84, l. 7-p. 85, l.10). SLED, By statutory definition as the initiating agency, is the agency making the seizure of property which occurred during the January, 2009 raid.

The Attorney General of South Carolina, Respondent's superior and counsel to all State agencies, unequivocally opined that money seized pursuant to the gambling statutes must be

confirmed by an action pursuant to the instant forfeiture statute. See. Op. Attorney General # 09-336, January 2, 2009. Respondent is SLED's agent in these matters as well as an agent of the State.

S.C. Code Ann § 44-53-530(A) expressly provides that forfeiture is accomplished "by the petition of the...circuit solicitor..." It is undisputed that SLED had actual knowledge of the counterclaims (R. p. 30, ll. 18-22), the instant Respondent would be the identical Plaintiff in the new litigation contemplated by the trial court, and, further, the same assistant solicitor who brought this action would defend the proposed action (R. p. 90, ll. 10-20). SLED knew of its duty to confirm the seizure (R. p. 84, l. 25-p. 85, l. 10), did not do so, and has never done so.

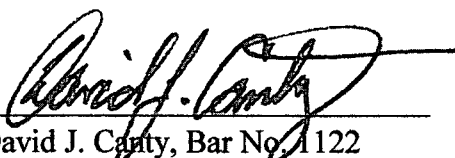
Appellant's decedent sought a ruling on this issue six months prior to trial (Motion in Limine), placing Respondent's counsel on actual notice. Yet Respondent did nothing to confirm SLED's seizure and successfully opposed consideration of the counterclaim (R. p. 94, ll. 6-14). The trial Court's ruling was error as it would appear to call for a cross-complaint against the same Plaintiff (Solicitor Hembree) or a new action against the same Plaintiff. This would appear to violate the language designating the agency initiating the investigation as the seizure agency, S.C. Code Ann § 44-53-520 (H), supra.

CONCLUSION

The trial Court's affirmance of the seizure of the Monaco RV was error in light of the quantity of marijuana involved. The trial Court erred in concluding that the prior Summary Judgment ruling was the "law of the case." The trial Court erred in denying the counterclaim for conversion. The trial Court's Order should be vacated with respect to forfeiture of the RV and the counterclaim for conversion and the matter should be remanded for trial on the issues of conversion and, if found, damages.

Respectfully submitted,

October 29, 2012


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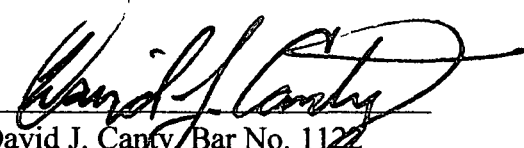
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

November 5, 2012


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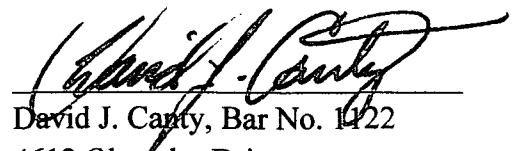
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PROOF OF SERVICE

I certify that I have served the Final Brief on Donna E. Elder, Esq. by depositing a copy in the United States Mail, postage prepaid, on November 5, 2012, addressed to the attorney of record, David P. Caraker, Jr., Esq., P.O. Box 1770, Florence, S.C. 29503.

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