IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

LENA G. AGRESTA, PERSONAL, ETC.,

Appellant,

v. Case No. 5D13-3577

CITY OF MAITLAND, ETC.,

Appellee.

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Opinion filed September 12, 2014

Appeal from the Circuit Court
for Orange County,
Walter Komanski, Judge.

Rodger Scott, Jr. and Catherine A. Medling, of Scott & Medling, P.A., Orlando, for Appellant.

Clifford B. Shepard, of Shepard, Smith & Cassady, P.A., Maitland, and Erin L. DeYoung, Maitland, for Appellee.

PER CURIAM.

This case involves a civil forfeiture of a home used in marijuana cultivation. The underlying issue is whether this forfeiture violates the Excessive Fine Clause of both the United States and Florida Constitutions. The Excessive Fines Clauses limit the government's powers to extract payment as punishment for some offenses. *Austin v. United States*, 509 U.S. 602, 609-10 (1993). Resolving this issue requires a

determination of whether the Florida Contraband Forfeiture Act ("the Act") is remedial or is intended for punishment.

Joseph Farley, was convicted of several offenses, most of which related to manufacturing and selling marijuana from the subject home. Based on his convictions, Farley was subject to a maximum sentence of forty-seven years and a maximum fine of $37,000.

Farley's negotiated plea deal netted him twelve months community control, twenty-four months supervised probation, drug evaluation and treatment, and 100 hours of alternative community service. No fine was imposed against him.

The City of Maitland brought this forfeiture proceeding against the home implicated in the underlying marijuana cultivation and distribution operation. The trial court valued the subject home between $238,000 and $295,000. The court granted summary judgment permitting the forfeiture. The trial court ruled that the home's forfeiture was remedial under the forfeiture provision and thus proportionality was not an issue. In an abundance of caution, however, the trial court also ruled that should proportionality be implicated, the forfeiture met the standard set forth in *Gee v. Gainous*, 9 So. 3d 709 (Fla. 2d DCA 2009).

Appellant, Farley's estate, contends that the trial court erred in determining that (1) the forfeiture was remedial and thus not subject to the excessive fines provision, and (2) that the forfeiture was proportional. The trial court relied on our opinion in *State v. Sobieck*, 701 So. 2d 96 (Fla. 5th DCA 1997) in holding the forfeiture remedial in nature. We hold that the trial court took our previous ruling out of context.

In *Sobieck,* the defendant was charged with various offenses including RICO violations. 701 So. 2d at 98. While the action was pending, the State filed a complaint for forfeiture of various business properties and sought a civil penalty. *Id*. Without opposition, the State prevailed. *Id*. at 99. Sobiek then used the judgment to claim that the ongoing criminal case was barred by the prohibition against double jeopardy. *Id*. The trial court agreed, finding that the forfeitures and civil penalties constituted punishment for purposes of the double jeopardy clause and dismissed the criminal proceeding. *Id*. This Court reversed, holding that the forfeiture was not punitive in a double jeopardy situation. *Id.* at 101-02.

In *United States v. Ursery,* 518 U.S. 267, 287 (1996), the United States Court stated:

> We acknowledged in *Austin* that our categorical approach under the Excessive Fines Clause was wholly distinct from the case-by-case approach of *Halper* [a double jeopardy case] and we explained that the difference in approach was based in a significant difference between the purpose of our analysis under each constitutional provision.

The analysis to be employed in determining whether the Excessive Fine Clause applies is to look at the legislative authority for the forfeiture and not on the individual facts of the case. In *Austin v. United States,* 509 U.S. 602, 621-22 (1993) the United States Supreme Court held:

> In light of the historical understanding of forfeiture as punishment, the clear focus of [the federal statute] on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and punish, we cannot conclude that forfeiture [under the federal statute] serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense", and, as such,

> is subject to the limitation of the Eighth Amendment's Excessive Fines Clause.

(internal citation omitted).

As Florida's forfeiture provision also has a clear focus on the culpability of the owner (by providing an "innocent owner" exception), and because the legislature made an express finding that the Act serves to deter and to punish, it is also subject to the excessive fines limitation.

The next issue is whether the forfeiture in this case was sufficiently proportional to satisfy the excessive fines provision. The Eleventh Circuit in *United States v Browne* 505 F.3d 1229, 1281 (11th Cir. 2007) had identified three factors in evaluating whether a fine is excessive. Those factors are: (1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature; and (3) the harm caused by the defendant.

Applying those factors to the instant facts leads to the conclusion that the forfeiture in this case is excessive. First, Farley falls within the class of persons whom the Act was principally directed. Second, the maximum penalty Farley faced in this case, based on his charges could have been forty-seven years imprisonment. Under the Florida Criminal Punishment Code, he could have received as few as eleven years of prison time. Farley also faced a maximum fine of $37,000. The value of the property sought to be forfeited is between $238,000 and $295,000. Third, the Eleventh Circuit has recognized the difficulty of putting a money value on the gravity of the offense and suggests that a consideration of the fines approved by the legislature indicates the monetary value society places on the harmful conduct. *See United States v. 817 N.E.*

29th Drive, Wilson Manors, Fla., 175 F. 3d 1304, 1309-10 (11th Cir. 1999). Farley received no prison time. Apparently, since Farley's sentence was approved in a plea agreement, the harm he caused was not considered too great by the trial court.

There appears to be no bright-line rule, but no case has been cited in which an appellate court has approved a forfeiture in excess of six times the maximum fine. We decline to be the first. Accordingly, we find the forfeiture in this case violates the Excessive Fine provision and

REVERSE.

SAWAYA BERGER, JJ., and HARRIS, C.M., Senior Judge, concur.