DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2008

COLON B. MULLIGAN,
Appellant,

v.

CITY OF HOLLYWOOD, FLORIDA,
Appellee.

No. 4D02-3626

[March 19, 2008]

ON REMAND FROM THE SUPREME COURT OF FLORIDA

FARMER, J.

This case returns to us from the Supreme Court on its Mandate quashing our decision in this case. *City of Hollywood v. Mulligan*, 934 So.2d 1238 (Fla. 2006), *quashing Mulligan v. City of Hollywood*, 871 So.2d 249 (Fla. 4th DCA 2003). We had reversed a trial court judgment upholding a municipal impoundment ordinance upon our conclusion that the ordinance was pre-empted by the Florida Contraband Forfeiture Act. But plaintiffs had challenged the ordinance on other grounds as well. The Supreme Court remanded the case to us to consider the "serious constitutional concerns" raised by the procedures adopted in the ordinance's impoundment of vehicles used in the commission of certain misdemeanor offenses. We granted the parties leave to file supplemental briefs on all remaining issues, which they have since done. Upon consideration of this further briefing, we proceed to consider the remaining constitutional issues.

Plaintiffs essentially argue that the impoundment ordinance violates due process and the separation of powers in two ways. The impoundment ordinance relegates the issue of the propriety of any impoundment to a municipal agency without affording the aggrieved person any right to trial by jury in a court. Second, they argue that the ordinance creates a police court exercising judicial powers in violation of the separation of governmental powers required by the state constitution. The agency construct thus fails to insure a neutral magistrate to preside over an impoundment case and minimizes the quantum of evidence

necessary to sustain any impoundment. In this regard, they argue, the ordinance also fails to provide specific criteria for the agency to apply in fixing the amount of the "administrative fee" to impose for a return of the impounded vehicle.

Plaintiffs argue that even the temporary seizure of the vehicle by way of impoundment instead of a forfeiture is protected by the due process requirements. *See Fuentes v. Shevin*, 407 U.S. 67 (1972) (temporary nonfinal deprivation of property is nonetheless a deprivation in terms of the Fourteenth Amendment). As the Court said in *North Georgia Finishing. v. Di-Chem*, 419 U.S. 601 (1975), in relying on *Fuentes*:

> "That the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause. The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause."

419 U.S. at 606.

The nature of the process that is constitutionally due depends on the nature of the property involved and the interests protected. At a minimum, however, procedural due process requires a hearing before a neutral decision-maker after adequate notice and an opportunity for the aggrieved person to present his case. *Fuentes*, 407 U.S. at 80.

The opinion of the Florida Supreme Court described the procedures of the impoundment ordinance as follows:

> "An owner or operator may request a preliminary hearing, and, if requested, the hearing must be held within ninety-six hours. This preliminary hearing is held before a code enforcement official called a special master who, according to the City, is appointed pursuant to chapter 162, Florida Statutes, in lieu of appointing a local government code enforcement board. *See* § 162.03, Fla. Stat. (1999). The City bears the burden of showing that the seizure was supported by probable cause. § 101.46(D), Ord. If probable cause is shown, the owner can regain possession of the vehicle only by paying an administrative fee of up to $500 plus towing and storage costs or by posting a bond in the same amount. *Id*. If probable cause is not shown, the vehicle is released,

> and the vehicle owner is not liable for any costs. *Id.*
>
> "If the owner does not request a preliminary hearing, or if the special master finds probable cause for the seizure at the preliminary hearing, the City schedules a final hearing and notifies the vehicle owner. § 101.46(E), Ord. The final hearing must occur no later than forty-five days after the date that the vehicle is impounded. *Id.* At the final hearing, the City must establish by a preponderance of the evidence that the vehicle was (1) properly impounded pursuant to the ordinance and (2) that the owner of the vehicle either knew or should have known that the vehicle was used or was likely to be used in violation of the ordinance. *Id.* If the City fails to establish either of these elements, the vehicle is returned to the owner without penalty. *Id.* If the special master finds that the vehicle is subject to impoundment, an order is then entered finding the record owner of the vehicle civilly liable to the City for an administrative fee, not to exceed $500, as well as towing and storage costs. *Id.* The vehicle remains impounded until the administrative fees are satisfied. The funds recovered are allocated, first, as reimbursement to the police department for costs incurred in enforcing the ordinance (towing and storage), and second, as surplus to the City's general fund. § 101.46(G), Ord. Unclaimed vehicles are subject to Florida's provisions for the disposition of lost or abandoned property contained in chapter 705, Florida Statutes (1999). § 101.46(F), Ord."

934 So.2d at 1242-43. Although plaintiffs challenge the form of notice provided under the impoundment ordinance as being deficient because of the failure to include written notice to co-owners, lessors and lienors, we conclude (without further discussion) that notice to the owner or person in control of the vehicle is sufficient. *See Bennis v. Michigan*, 516 U.S. 442 (1996) (wife's claim that she was entitled to contest the impoundment of auto jointly owned with husband by showing that she did not know that her husband would use the car to violate state law is defeated by a long and unbroken line of cases in which the Court has held that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use). We thus pass on to the hearing provided under the ordinance.

The impoundment ordinance makes no provision for judicial review of the propriety of the impoundment to obtain its return free from charges and fees imposed under the Ordinance. Instead it provides only that the

person whose vehicle was seized must request a hearing before an official appointed by the City seizing the vehicle. The City's appointed official determines whether the City police had probable cause to impound the vehicle. If the official upholds the impoundment, the issue then becomes what amount of administrative fee will be charged for the return of the vehicle. The impoundment ordinance provides no criteria for fixing the amount of the fee.

Plaintiffs argue that the ordinance violates their right to have the issue of probable cause for impounding the vehicle and the amount of any "fee" charged to obtain a return of the vehicle determined by a neutral decision maker — in a court by a judge. They argue that relegating these determinations to a City official violates the separation of judicial power from the executive branch of government. They rely on *Broward County v. La Rosa*, 505 So.2d 422 (Fla. 1987).

In *La Rosa*, Broward County had created an administrative agency to try alleged violations of its Human Rights Ordinance. The agency could not only find liability for violations but it could also determine money damages for humiliation and embarrassment. A person accused of violating the ordinance was afforded no right to a trial in a court before a jury. The Supreme Court explained why the ordinance was invalid:

> "Article II, section 3, of the Florida Constitution mandates a separation of power between the three branches of state government. As the district court correctly pointed out, although the legislature has the power to create administrative agencies with quasi-judicial powers, the legislature cannot authorize these agencies to exercise powers that are fundamentally judicial in nature. An administrative agency conducts a quasi-judicial proceeding in order to investigate and ascertain the existence of facts, hold hearings, and draw conclusions from those hearings as a basis for their official actions. Admittedly, the boundary between judicial and quasi-judicial functions is often unclear. Nevertheless, we cannot imagine a more purely judicial function than a contested adjudicatory proceeding involving disputed facts that results in an award of unliquidated common law damages for personal injuries in the form of humiliation and embarrassment." [c.o.]

505 So.2d at 423-24. The Court emphasized that there is "substantive meaning" to the distinction between judicial and quasi-judicial powers. A local government may not avoid that distinction merely by labeling the

powers given to its own tribunal as quasi-judicial.

In *La Rosa* the Court found that determinations of unliquidated money damages for humiliation and embarrassment under the County's Human Rights Ordinance were quintessentially judicial in nature, rather than quasi-judicial. Similarly, it appears to us that the determination as to whether a police officer had probable cause for finding that an owner's automobile was being used in solicitation for prostitution and could therefore be impounded by police is essentially a judicial function. The term "probable cause" is understood as connoting a determination constitutional in nature, marking the constitutional limits for a warrantless seizure of an automobile. *See Florida v. White*, 526 U.S. 559 (1999) (holding that Fourth Amendment did not require police to obtain warrant before seizing automobile from public place if they had probable cause to believe that it was forfeitable contraband). Such constitutional determinations are settled not by executive branch authorities in the exercise of their administrative authority but by the judiciary. It is exclusively the province of the judiciary to say what the law is. As the Court reasoned in *La Rosa*, if the legislature lacks the power to create administrative tribunals to try issues given by the constitution to the judicial branch, then surely local governments also lack the power to do so.

We therefore hold that so much of the Ordinance as provides for administrative hearings before City officials on whether there was probable cause to impound a vehicle and the amount of any fee to obtain a return of it is unconstitutional as violating the separation of powers and due process.

POLEN and MAY, JJ., concur.

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Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch IV, Judge; L.T. Case No. 00-1887 CACE 11.

Ronald S. Guralnick, Miami, for appellant.

Daniel Abbott, City Attorney, and Robert Oldershaw, Chief Litigation Counsel, Hollywood, for appellee.

Not final until disposition of timely filed motion for rehearing.