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IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

BENJAMIN H. LEE,

Petitioner,

Case No: _____

vs.

(L.T. Case No.: 01-2015-MM-5033)

STATE OF FLORIDA, and THE
CITY OF GAINESVILLE POLICE
DEPARTMENT,

Respondents.

_____ /

PETITION FOR WRIT OF MANDAMUS

To review an Order from the County Court of the Eighth
Judicial Circuit, in and for Alachua County, Florida

Filed Pursuant to Florida Rule of Appellate Procedure 9.100(f)

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I. BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction over this Petition pursuant to Article V, § 5(b) of the Florida Constitution, and Rules 9.030(c)(3) and 9.100(f) of the Florida Rules of Appellate Procedure, which provide for writs of mandamus directed to non-discretionary judicial acts of the county courts, and non-judicial acts of local officials.¹

II. FACTS

On November 17, 2015, Petitioner, Benjamin Lee (“Mr. Lee”) was arrested in the parking lot of the Oaks Mall for possession of drug paraphernalia, a misdemeanor, alleging that some bags in Mr. Lee’s car contained marijuana residue. Appx. 5. Without a warrant, the officers seized cash from Mr. Lee. On November 18, 2015, the Gainesville-Alachua County Drug Task Force notified Mr. Lee that they had seized the cash pursuant to section 932.703 of Florida’s Contraband Forfeiture Act (“the Forfeiture Act”). Appx. 6.

In accordance with the Forfeiture Act, Mr. Lee was notified of his right to an adversarial preliminary hearing to determine whether probable cause existed to believe the property seized was being used in violation of the forfeiture statute.

¹ Should this Court determine that another writ is appropriate to invoke its original jurisdiction, Petitioner asks this Court to treat this Petition as one for the appropriate writ. *See* Art. V, § 2(a), Fla. Const.; Fla. R. App. P. 9.040(c); *Allen v. McClamma*, 500 So. 2d 146 (Fla. 1987).

Appx. 6; § 932.703(2)(a), Fla. Stat. (2015). Pursuant to the statute, the seizure notice advised Mr. Lee that he had 15 days to request such a hearing. *Id.* Within 15 days, on November 28, 2015, Mr. Lee provided written notice of his request for a preliminary adversarial hearing. Appx. 7.

Under the Forfeiture Act, when such a request for a hearing is timely provided, the seizing agency must set and notice the hearing, which must be held within 10 days after the request is received or as soon as practicable thereafter. Appx. 6; § 932.703(2)(a), Fla. Stat. (2015). On the tenth day after Mr. Lee timely requested a hearing, rather than set and notice the hearing, an assistant city attorney on behalf of the Gainesville Police Department (“the GPD”) as the seizing agency, advised Mr. Lee that it had decided not to initiate forfeiture proceedings against the seized currency. Appx. 8. Nonetheless, the GPD refused to release the cash to Mr. Lee because it was allegedly “being held as evidence.” Appx. 8.

Given the GPD’s refusal to return his property, Mr. Lee filed a Motion for Return of Property on December 9, 2015 with the county court in the pending criminal action (“the Motion”). Appx. 2. The next day, on December 10, 2015, the GPD advised Mr. Lee that the U.S. Government was going to pursue forfeiture proceedings against the currency and that the DEA was now in possession of it. Appx. 9. No adversarial preliminary hearing was set or held. Appx. 3 at p.11.

On December 16, 2015, the Honorable Susanne Wilson Bullard of the county court conducted a hearing on Mr. Lee's Motion. Appx. 3. An attorney for the Office of the State Attorney appeared at the hearing to defend against the Motion, but neither the GPD, nor anyone on its behalf, appeared. Appx. 3 at p.3, 14. The Assistant State Attorney represented that he asked law enforcement to retain the currency and it was his understanding that the Gainesville Alachua County Drug Task Force was holding the cash. Appx. 3 at p.15. The Assistant State Attorney agreed that the currency is not going to be used as evidence in the pending misdemeanor case. Appx. 3, at p.9. Nonetheless, without providing any evidence in support, he asserted that the currency was being held as evidence for another unidentified potential future criminal prosecution. Appx. 3 at pp.9-10, 18. This representation directly contradicted the GPD's statement that the cash had been transferred to the DEA for federal forfeiture proceedings. Appx. 9.

The lower court specifically found that Mr. Lee's Motion, as amended ore tenus at the hearing, was facially sufficient. Appx. 3 at p.18. Nonetheless, the court denied the Motion on the basis of the Assistant State Attorney's representation that the currency was being held as evidence relevant to future criminal proceedings. Appx. 3 at p.20; Appx. 1.

On December 17, 2015, Mr. Lee sent a notice to the GPD expressly demanding the return of his property. Appx. 10. Consistent with its previous

refusals, the GPD has not returned Mr. Lee's seized property. This Petition has been timely filed within 30 days of the lower court's December 16, 2015 order.

III. NATURE OF RELIEF SOUGHT

Mr. Lee seeks a writ of mandamus directing Judge Susanne Wilson Bullard of the county court to quash the Order Denying Motion for Return of Property, grant the Motion, and direct the GPD to return the seized currency to Petitioner Benjamin Lee, through his counsel. The lower court had no discretion to deny the Motion because once the GPD failed to comply with the strict requirements of Florida forfeiture law, the GPD no longer had any legal authority to continue to hold Mr. Lee's property. Mr. Lee further requests that the Court enter a writ of mandamus directing the GPD to immediately return the seized property to Mr. Lee. [Pursuant to section 932.704(10), Mr. Lee also requests that this Court award him attorney's fees and costs incurred in the lower court action and in this proceeding.]²

IV. ARGUMENT

Mr. Lee is entitled to a writ of mandamus upon demonstrating "a clear legal right to the performance of the act requested, an indisputable legal duty on the part of the respondent, and that no other adequate remedy exists." *Turner v. Singletary*,

² Since the GPD is allegedly retaining Mr. Lee's property at the State Attorney's direction, both the GPD and the State are named as respondents in this Petition. The lower court judge is a formal party to this Petition but is named only in the body of the Petition, rather than in the caption, pursuant to Florida Rule of Appellate Procedure 9.100(e).

623 So. 2d 537, 538 (Fla. 1st DCA 1993). All of these elements are present here because under clearly established law Mr. Lee was entitled to the immediate return of his property, and the GPD had an indisputable legal duty to return it, once the GPD failed to comply with the Forfeiture Act pursuant to which the property was seized. The lower court therefore had an indisputable legal duty to grant Mr. Lee's Motion for return of the property. Mr. Lee has no other adequate remedy as the GPD is unlawfully withholding his property for an indefinite period of time, based on unsupported representations about unidentified, speculative future legal proceedings that might never occur, in contravention of Mr. Lee's constitutional due process right to *immediate* return of his property.

A. Mr. Lee Has an Established Legal Right to the Return of His Property; the GPD Has an Indisputable Legal Duty to Immediately Return It; and Mr. Lee Has No Other Adequate Remedy.

The GPD seized this property from Mr. Lee pursuant to Florida's Forfeiture Act. Appx. 6. As such, it was obligated to comply with the Forfeiture Act. "Forfeitures are not favored in law or equity, thus forfeiture statutes are strictly construed." *Murphy v. Fortune*, 857 So. 2d 370, 371 (Fla. 1st DCA 2003). "Due process mandates that the provisions of the forfeiture act be strictly interpreted in favor of the persons being deprived of their property." *Id.* at 372 (quoting *Town of Oakland v. Mercer*, 851 So. 2d 266, 269 (Fla. 5th DCA 2003)). "Florida law is clear. Once a post-seizure adversarial hearing is requested, the seizing agency *must* set and

notice the hearing, and the hearing *must* be held within ten days after the request is received or as soon as practicable thereafter.” *Id.* at 371 (emphasis in original); *see also* § 932.703 (2)(a), Fla. Stat. (2015). Once that ten days expires, the “**lawful authority to retain the seized currency expired.**” *Murphy*, 857 So. 2d at 372 (emphasis added).

There is no dispute here that Mr. Lee timely requested a hearing under the Forfeiture Act and that no such hearing was set or held within 10 days. Accordingly, the GPD’s lawful authority to retain Mr. Lee’s seized currency expired when a timely hearing was not held as required by statute. As such, the GPD had a duty to immediately return the property to Mr. Lee and neither the GPD nor the lower court had the discretion to refuse Mr. Lee’s request for the return of his property.

As the First District Court of Appeal in *Murphy* specifically recognized, the fact that the federal government might wish to pursue forfeiture proceedings, as the GPD represented to Mr. Lee, is irrelevant. *See* Appx. 9; *Murphy*, 857 So. 2d at 372. As the *Murphy* court explained, “the Sheriff’s Department advised [the owner] that his money was being seized pursuant to Florida law. Therefore, the Sheriff’s Department was required to strictly comply with Florida law. They failed to do so.” *Murphy*, 857 So. 2d at 372. The same is true in this case. The GPD advised Mr. Lee that his money had been seized pursuant to Florida law. Appx. 6. Therefore the GPD was required to strictly comply with Florida law but it failed to do so. The

ramifications of the GPD's failure to comply with the Forfeiture Act are clearly established:

[Respondent's] failure to act prior to the expiration of the applicable time period left them with **only one option** – to immediately return the money to [the owner]. To hold otherwise would result in a denial of [the owner's] right to due process.

Murphy, 857 So. 2d at 372 (emphasis added); *see also State Dep't of Highway Safety & Motor Vehicles v. Metiver*, 684 So. 2d 204 (Fla. 4th DCA 1996) (5 day delay between tenth day after property claimant's requested hearing on forfeiture and date on which hearing occurred did not comply with requirements of forfeiture act and thus Department was required to return seized cash).

Accordingly, as of December 8, 2015, the GPD had no legal right to continue to retain Mr. Lee's property. Instead it had an indisputable legal duty to immediately return it to Mr. Lee. Therefore the lower court had no discretion to deny Mr. Lee's Motion and mandamus should be issued directing the lower court to quash its order and directing the GPD to return Mr. Lee's seized property. Mr. Lee has no adequate legal remedy. He is not obligated to file a separate civil action; instead mandamus is the appropriate relief. *See Coon v. Florida*, 585 So. 2d 1079, 1080 (Fla. 1st DCA 1991) (court has power to return seized property to criminal defendant and if it refuses to act it is unnecessary to commence separate civil suit, proper remedy is mandamus, citing *Moore v. State*, 533 So. 2d 924, 925 (Fla. 2d DCA

1988)).³ Moreover, given the GPD's and the State's conflicting representations, Mr. Lee does not even know where his property is, when or if it will be returned, or whether it has been transferred to persons or entities against which Mr. Lee may have no legal remedy due to immunities or otherwise. The State has already conceded it will not be using the property as evidence in Mr. Lee's pending misdemeanor case. Appx. 3 at p.9. Nor did it or the GPD identify the nature of other future proceedings, if any, that might be brought against Mr. Lee to which the property could be relevant, or even what entity might be bringing such an action, so as to enable Mr. Lee to pursue any other theoretical remedies.

It was a clear violation of Mr. Lee's constitutional due process rights for the GPD to continue to withhold his property after December 9, 2015. Mr. Lee had both a statutory and constitutional right to the *immediate* return of his property as of that date. *See Murphy*, 857 So. 2d at 372. Any other potential remedy that Mr. Lee may or may not be able to pursue would take months, if not years to resolve. Such a proceeding cannot constitute an adequate remedy in the face of Mr. Lee's constitutional right to immediate return of his property, which is required as a matter

³ The Forfeiture Act specifically forbids any other action to recover an interest in seized property except where forfeiture proceedings are not initiated within 45 days of the seizure. § 932.703(3), Fla. Stat. (2015). In this case, the GPD did initiate forfeiture proceedings within a day of the seizure and thus the statute precludes Petitioner from attempting to immediately recover his property in any other separate proceeding.

of due process to balance the harshness of the government's forfeiture rights. *See id.* (due process mandates that Forfeiture Act be strictly interpreted in favor of persons being deprived of their property); *Sanchez v. City of West Palm Beach*, 149 So. 3d 92, 96 (Fla. 4th DCA 2014) (describing owner's compelling interest to be heard at the initiation of forfeiture proceedings against their property rights, which are among the most basic substantive rights expressly protected by the Florida Constitution). The property owner has a due process right to litigate the issue of probable cause at an adversarial preliminary hearing. *See id.* "[I]f the State cannot establish probable cause of a statutory violation early in the proceedings, its seizure of the property ends without the delay that would accompany a forfeiture trial." *Id.* This is so whether the seizing agency failed to establish probable cause due to a failure of proof at the hearing or because no hearing was held at all.

Unless the seizing agency strictly complies with all of the requirements of the Forfeiture Act after seizing property pursuant to that Act, it must immediately return the property. *Id.* It is undisputed that the GPD did not follow the Forfeiture Act and Mr. Lee is therefore entitled to mandamus relief directing the immediate return of his property.

- B. The State's Claim that the GPD Can Retain the Property as Evidence is Without Legal or Factual Foundation and Does Not Defeat Petitioner's Established Legal Rights.

The GPD cannot avoid its indisputable legal obligation to return Mr. Lee's seized property by having the State claim, without any evidentiary support whatsoever, that the GPD is holding the property as evidence. If Mr. Lee's property had initially been recovered as evidence in the criminal proceedings, the lower court would have had jurisdiction to determine questions of ownership over the property. *See, e.g., Eight Hundred, Inc. v. State*, 781 So. 2d 1187, 1192 (Fla. 5th DCA 2001) (upon motion for return of property, trial court with jurisdiction over criminal proceedings is laden with responsibility to determine whether proper basis exists to return property to owner).

In this case, however, the GPD seized the property pursuant to Florida's Forfeiture Act, not as evidence. Appx. 6. As such, it was obligated to comply with the Forfeiture Act or return the property. *Murphy*, 857 So. 2d at 372. No question about the lower court's inherent power to determine ownership of the property was ever properly at issue in this case.

Nonetheless, even if the lower court could have ignored the GPD's failure to comply with the Forfeiture Act, any determination about ownership of the seized property under the court's inherent powers "requires notice to the owner of the property and a hearing where all interested parties are given an opportunity to present evidence and argument to the trial court." *Id.*; *see also Bolden v. State*, 875 So. 2d 780, 783 (Fla. 2d DCA 2004) (when defendant files facially sufficient motion for

return of property, court must conduct evidentiary hearing to ascertain if property was confiscated by law enforcement agency in connection with criminal prosecution and whether property still in agency's possession; if state unable to connect items to specific criminal activity, it should be returned to defendant or his designee).

Upon a proper evidentiary showing, the court in such a case might refuse to order return of property if it was, for example:

- admitted into evidence in the criminal proceeding and the time for direct appeal has not expired;
- post-conviction proceedings are anticipated where the evidence may be needed;
- the state intends and is able to pursue forfeiture against the property;
- the property is needed in other criminal proceedings;
- or if the motion is untimely because the property is considered unclaimed evidence or property seized in a lawful investigation that has vested permanently in a law enforcement agency pursuant to section 705.105, Florida Statutes

Eight Hundred, Inc., 781 So. 2d at 1192 (bullet-point formatting added).

In this case, however, the State Attorney conceded that the State would not be using the property as evidence in the current misdemeanor action. Appx. 3 at p.9. The GPD already stated it does not intend to pursue forfeiture against the currency, nor could it given the expiration of the deadline under section 932.703 of the Florida Statutes. Appx. 8; *see Murphy*, 857 So. 2d at 372. Nor did the State Attorney indicate that post-conviction proceedings are anticipated in which the evidence may

be needed. Nor was Mr. Lee's Motion an untimely one for unclaimed evidence under section 705.105 of the Florida Statutes.

Although the State Attorney claimed that the currency is needed in other criminal proceedings, there was absolutely no evidence to support that suggestion. The GPD did not present any evidence to support its continued retention of the property; it did not even appear at the hearing. The State Attorney's representations about the intended use of the property are not evidence. *See Justice v. State*, 944 So. 2d 538, 540 (Fla. 2d DCA 2006) (if defendant's allegations regarding return of property are sufficient, court is obligated to provide full evidentiary hearing to determine whether property is in custody of seizing agency and should be returned to defendant; "The requirement for an evidentiary hearing was not obviated nor satisfied by the circuit court's reliance on the Polk County Sheriff's Office property and evidence receipt. 'Representations by an attorney for one of the parties regarding the facts . . . do not constitute evidence.'").

Moreover, the GPD's own documents contradict the State Attorney's representations. In one letter, without elaboration, the GPD stated that Mr. Lee's cash is being held as "evidence," but two days later it said that the cash has been transferred to the DEA and that "the U.S. Government is going to initiate forfeiture proceedings." Appx. 8, 9. Forfeiture is not an "other criminal proceeding," it is a civil action. *Kern v. State*, 706 So. 2d 1366, 1369 (Fla. 5th DCA 1998) ("A forfeiture

proceeding is a civil *in rem* action that is independent of any factually related criminal action.”; state not permitted to indefinitely retain items seized from defendant following acquittal on charge of delivering drug paraphernalia; state would be required, if it wished to retain items, to timely file forfeiture proceedings or make showing that it intended in good faith to bring another criminal prosecution for which items would be admissible).⁴ Furthermore, any belated attempt by the federal government to seek forfeiture of the property did not excuse the GPD’s failure to comply with the Forfeiture Act and its duty to immediately return Mr. Lee’s property. *See Murphy*, 857 So. 2d at 372. Thus even if this case called for an evidentiary hearing to determine ownership of the property (which it did not) there was no evidence upon which to base a refusal to return Mr. Lee’s property.

The Forfeiture Act necessarily contains critical due process protections that require the seizing agency to prove there is probable cause to believe a nexus exists between the seized property and criminal activity. The property owner is entitled to an expedited opportunity to litigate that issue or else his property must be returned immediately. Permitting the GPD to continue to retain Mr. Lee’s property (or

⁴ Nor does it appear that the currency would be admissible in any other criminal proceeding as it was seized after a positive alert by a drug dog to Mr. Lee’s car. *See Appx. 5; State, Dep’t of Highway Safety & Motor Vehicles v. Jones*, 780 So. 2d 949, 951-52 (Fla. 4th DCA 2001) (generally, positive alert by drug dog to narcotics on currency, standing alone, does not constitute evidence that money was used in drug transaction).

transfer it to someone else) under the circumstances of this case effectively permits the GPD (and the State, which through its attorney directed the GPD to retain the cash) to bypass the Forfeiture Act, thereby rendering it useless. Statutes are not to be interpreted in a manner that renders them useless. *See State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002). The lower court and the GPD should be directed to return Mr. Lee's seized property to him immediately as required by law.

C. Mr. Lee is Entitled to an Award of Attorney's Fees and Costs.

Section 932.704 of the Florida Statutes provides for an award of attorney's fees and costs incurred in the lower court and in this proceeding should Mr. Lee prevail. *See* § 932.704(10), Fla. Stat. (2015). Given clearly established law, the GPD and the State did not proceed in good faith in attempting to retain Mr. Lee's property. Mr. Lee's is entitled to attorney's fees and costs even though the forfeiture proceedings that the GPD instituted never reached the trial stage. *See Gay v. Beary*, 758 So. 2d 1242, 1244 (Fla. 5th DCA 2000).

V. CONCLUSION

Petitioner, Benjamin Lee, respectfully requests that this Court issue a writ of mandamus directing Judge Susanne W. Bullard of the county court to quash the Order Denying Motion for Return of Property, grant the Motion, and direct the Gainesville Police Department to return the seized currency to Petitioner Benjamin Lee, through the undersigned counsel, immediately, and issue a writ of mandamus

to the Gainesville Police Department to immediately return the seized currency to Petitioner Benjamin Lee, through the undersigned counsel, and that this Court award Petitioner his attorney's fees and costs or direct the lower court to issue such an award.

Respectfully submitted,

ROBERT A. RUSH, P.A.

/s/ Robert A. Rush

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this Petition was furnished by email to Michael Becker, Esq., of the Office of the State Attorney, 120 West University Ave., Gainesville, FL 32601, via eservice@sao8.org, and to the Honorable Susan Wilson Bullard, County Court Judge, Alachua County Criminal Justice Center, 220 S. Main St., Gainesville, FL 32601 at mitola.a@circuit8.org, this 15th day of January, 2016, and that the City of Gainesville Police Department is being served with this Petition by service of process.

I further hereby certify that this Petition is submitted in 14 point, Times New Roman font, and complies with the requirements of Rule 9.100(1) of the Florida Rules of Appellate Procedure.

/s/ Robert A. Rush
Robert A. Rush, Esq.

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