

SPECIAL LEGAL BULLETIN

PROVIDING HIGHWAY SAFETY AND SECURITY THROUGH EXCELLENCE IN SERVICE, EDUCATION, AND ENFORCEMENT

ELECTRA THEODORIDES-BUSTLE, EXECUTIVE DIRECTOR

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SO WHAT EVIDENCE IS ADMISSIBLE AT THE ADVERSARIAL PRELIMINARY HEARING?

Recently a case came up, which caused us to examine how we seize contraband and reinforced how important it is to follow-up on the initial investigation. The day may come when a judge decides that the State does not have probable cause for an initial seizure and we end-up losing \$210,000 located in an inventory search, or some other secondary search, because the judge deems the initial seizure illegal. Here's what happened.

Recently, a Trooper stopped a vehicle for an illegal window tint violation and, after talking to the occupants, decided that things did not add-up. The driver provided a false name and identification and the passenger, who is also the owner of vehicle, told a different story regarding what they were doing and where they were going. The driver was subsequently arrested and during a search of the vehicle incident to arrest, the Trooper located an envelope that contained approximately \$24,000 in cash inside the vehicle. The Trooper called for a certified K-9 unit and the drug dog "hit" on the envelope and the money, however no controlled substance(s) were found in the vehicle. Due to weather conditions (Tropical Depression Faye), the Trooper impounded the car and the money and continued his investigation. Later, another

Trooper saw the driver and passenger "hanging around" the impound lot so he sent for another drug dog which again hit on the car, this time in a specific location. Thereafter, another \$210,000 was found in a secret compartment located between the trunk and the backseat. Since the car was already seized and impounded, if the judge decides that FHP did not have enough evidence to impound the car in the first place, does that make the subsequent search (where \$210,000 was found) fruits of an illegal seizure?

The standard of proof required to seize a criminal's property for forfeiture is different than the standard required to make a valid arrest. Two of the significant differences are in how much time we have to gather relevant evidence related to the seizure and what is actually seized, whether it is a person or property. In either regard, a Preliminary or Initial Hearing is required. If a person is seized (arrested), the Hearing shall occur within 24 hours. If property is seized for forfeiture, the Hearing *may* occur within 10 days, but even then only if a claimant comes forward and requests a hearing.

The probable cause standard for law enforcement to make an arrest is whether the officer has reasonable grounds to believe the person has committed a crime. The standard of conclusiveness and probability is less than required to support a conviction. Blanco v. State, 452 So 2d 520, 523 (Fla.1994), 469 U.S. S.Ct. 940, 83 L.Ed.2d 520, 523 (Fla.1984). In another

case the First DCA went on to say that "...probable cause exists where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed. City of Jacksonville v. Alexander, 487 So.2d 1144, 1146 (Fla. 1st DCA 1986).

The standard of proof required to seize property is less rigorous than that required to prove criminal conduct. For forfeiture, the question is not whether, **in fact**, the currency or property was used in (or the proceeds of) criminal activity. Rather, the question is whether there is **sufficient probability** to warrant a **reasonable belief** that the currency or property was connected to criminal activity. U.S. v Motor Yacht Named Tahuna, 702 F2d at 1276, 1282 (9th Cir. 1983).

To determine whether the State showed probable cause for forfeiture of property under the Florida Contraband Forfeiture Act, the issue is whether information relied on by the state was *adequate and sufficiently reliable to warrant belief by a reasonable person that a violation has occurred*; belief must be more than mere suspicion, but can be created by less than prima facie proof, and probable cause may be established by circumstantial and hearsay evidence. §932.703(2)(a) Fla. Stats.

When it comes to currency, the rules change a bit. Currency (or other means of exchange) that was used, attempted to be used, or intended to be used in violation of any provision of the narcotics statutes (Chapter 893) can clearly establish probable cause between the article seized (i.e. currency, vehicle, etc.) and the narcotics activity and may be seized. This

is true even if the contraband article cannot be traced to a specific narcotics transaction. §932.701(2) Fla. Stats.

In the present case, the claimant requested an Adversarial Preliminary Hearing and it was attempted to be scheduled within 10 days of the request. This gave FHP a total of 15 days to gather evidence of criminal activity and to tie the money to a violation of the Florida Comprehensive Drug Abuse Prevention and Control Act (§893.1-893.155, Fla. Stats.). Imagine getting 15 days to establish probable cause to substantiate an arrest. Nonetheless, the question is whether the initial impoundment of the car was a seizure. If so, and the judge decides FHP did not have sufficient probable cause to seize the car in the first place, the discovery of the additional \$210,000 in a secret compartment is irrelevant, as is the ion scan and any other evidence gathered after the initial seizure and impoundment.

There is no case law on point, however the Fourth Amendment protects all of us against unreasonable searches and seizures. The first clause of the Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." This text protects seizures and "...a seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed. 2d 85 (1984). Clearly, impounding a car and subjecting it to a forfeiture proceeding is a 'meaningful interference of an individual's possessory interest.' Therefore, at first blush, the gathering of additional evidence would not seem to be admissible at the Adversarial Preliminary Hearing. However, in a Forfeiture Action, this is not the case.

Probable cause for civil forfeiture purposes is not identical to probable cause for criminal purposes. The United States Supreme Court has stated that it is error to apply the criminal standard of proof in weighing the circumstantial evidence to forfeiture actions. "Instead, it is a civil standard which weighs evidence available *at the time of the forfeiture proceeding* rather than the evidence available at the time of any search or arrest. United States v. \$144,600.00, 757 F.Supp. 1342 (M.D.Fla. 1991). Therefore, probable cause may be based on evidence, which may include facts learned after the seizure of the money.

Assuming the State has an obligation to continue to investigate all crimes and procedures against its citizens, the continuing investigation and discoveries by the second Trooper should be admissible in the Adversarial Preliminary Hearing. Apparently, the legislature determined that due process and the meaningful interference of an individual's possessory interest do not bar the State from continuing to gather evidence and even present it at the Adversarial Preliminary Hearing.

In conclusion, the State is not limited to presenting the evidence that is gathered at the time of the initial seizure. We have at least another ten days to gather additional facts and/or evidence that may be admitted at an Adversarial Preliminary Hearing to establish probable cause. All law enforcement officers are extremely busy and we are often left with only the facts gathered at roadside. However, we should all keep in mind that any evidence gathered after the initial seizure may be the difference between giving the property back and taking it away from someone that has abused his or her privileges.

Written by:

James K. Fisher, Assistant General Counsel

Orlando Office

Approved by:

Robin F. Lotane, General Counsel