

SPECIAL LEGAL BULLETIN

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Florida District Court of Appeals’ opinions & interpretations of the ‘Innocent Owner’ provision of the Florida Contraband Forfeiture Act as applied to Adversarial Preliminary Hearings

‘Innocent owner’ issues may arise whenever property is seized for forfeiture from a non-owner of the property. The most frequent scenario involves the seizure of a motor vehicle from a driver whose Florida license has been suspended or revoked. The suspended/revoked driver cannot legally title or drive a vehicle in Florida. Nonetheless, experience has shown that the family, spouse or friends of the suspended/revoked driver will frequently allow the driver to use their vehicles. In most cases, if the non-owner driver of the vehicle is committing a felony by driving the vehicle (or uses the vehicle to commit a felony), then the vehicle is subject to seizure (and possibly forfeiture) under the Florida Contraband Forfeiture Act (hereinafter, ‘Act’).

Section 932.703(6)(a) of the Act, known as the “innocent owner” provision, provides:

Property may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a preponderance of the evidence that the owner knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity.

This section appears straight-forward on its face. However, three of Florida’s five district courts of appeal have interpreted the statute differently, creating differing standards that govern the seizing agency’s burden of proof at the Adversarial Preliminary Hearing (hereinafter “APH”) stage of the forfeiture proceeding. Accordingly, the evidence which must be presented by the seizing agency to rebut the ‘innocent owner’ defense at the APH varies depending on where the seizure occurs.

The most recent and noteworthy case in this regard is Gomez v. Village of Pinecrest, 2009 WL 1872476 (Fla. 3rd DCA 2009) from the Third District (11th and 16th Circuits). In Gomez, the 3rd DCA addressed the issue of “whether section 932.703(2)(a) of the Act requires the seizing agency to present some evidence at the adversarial preliminary hearing stage that the property owner knew or should have known that her property was employed or likely to be employed in criminal activity, in addition to establishing probable cause to believe the property was used in violation of the Act.” Id. at 1.

In order to resolve the issue, the 3rd DCA did an extensive analysis of sections 932.703(2) and 932.703(6) of the Act. The court reasoned that:

The unambiguous language of subsection (2), the subsection dealing with the **seizure/adversarial preliminary hearing** stage of the process, clearly focuses on the property. If law enforcement establishes probable cause to believe that the property was used in violation of the Act, the court shall authorize the seizure or continued seizure of the property and order that the property be restrained by the least restrictive means to protect against its disposal or illegal use pending disposition of the forfeiture proceeding.

Stage two of the process is the subsequent **forfeiture** proceeding; subsection 932.703(6) deals with this stage of the process,

Property may not be **forfeited** under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a preponderance of the evidence that **the owner either knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity.**

... A careful review of section 932.703 reveals that the focus at the first stage of the process, the seizure stage, is on the property and whether there exists probable cause to believe that the property was used in violation of the Act (to conceal, transport, or possess contraband). At the second stage, the forfeiture stage, however, the seizing agency must not only prove that the property was in fact being used to conceal, transport or possess contraband, it must also prove that the owner or owners knew or should have known that the property was being used or was likely to be used for an illegal purpose.

Id. at 3 (emphasis in the original). The court held therefore that "...based on the plain language of the Act ... *the seizing agency was not required to demonstrate at the adversarial preliminary hearing, conducted under section 932.703(2), that ... the property owner, either knew, or should have known after a reasonable inquiry, that her property was employed or was likely to be employed in criminal activity.* Id. at 4 (emphasis added). Accordingly, in the Third District, the Department does not need to address the 'innocent owner' issue at the APH. Instead, the Department's burden is limited to showing probable cause to believe that the seized property was used in violation of the Act.

In the First District (1st, 2nd, 3rd, 4th, 8th and 14th Circuits), the controlling case is In Re Forfeiture of 1993 Lexus ES 300; DHSMV v. Karr, 798 So.2d 8 (Fla. 1st DCA 2001). In Karr, the Department appealed an order finding no probable cause that was entered by the trial court at the APH, after the Department failed to introduce evidence at the APH showing that the owner knew or should have known the property was to be used in violation of the Act. The Department argued that the evidence it had produced demonstrated that the property had been used in violation of the Act, and thus the lower court's order was in error. However, the First District Court of Appeals agreed with the trial court and held that in order for the seizing agency to establish probable cause to believe that the seized property was used in violation of the Act, a preliminary showing of owner knowledge was required. Accordingly, the First District held that *the seizing agency must make a preliminary showing of a basis for the belief that the owner*

knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity. Id. at 10.

Thus, at an APH in the First District, in addition to establishing probable cause to believe that the property was used in violation of the Act, the seizing agency must also address the innocent owner issue. This is obviously a more onerous burden than that which exists in the Third District. However, it's not as onerous as the burden faced by the seizing agency in the Fifth District (5th, 7th, 9th and 18th Circuits), where the controlling law is found in the recent opinion of Brevard County Sheriff's Office v. Baggett, 4 So.3rd 67 (Fla. 5th DCA 2009). (The Baggett decision was released during the pendency of the appeal in Gomez).

In Baggett, the Fifth District Court of Appeals considered the same issue addressed by the First District Court of Appeals in Karr after the lower court found no probable cause following an APH: The trial court found the seizing agency failed to present evidence to prove the owner knew or should have known the vehicle was being used to facilitate a felony. On appeal, the seizing agency argued that it was only required to show probable cause that the vehicle was used in violation of the Act. The Fifth District rejected this argument, and also rejected the “*basis for belief*” standard adopted by the First DCA in Karr. Instead, the 5th DCA held:

[W]e do not adopt this “basis for belief” standard because we believe the proper quantum of proof is *probable cause*. Thus, when an owner requests an adversarial preliminary hearing and asserts she did not know the property was being used in criminal activity, the seizing agency must show *probable cause* to believe that the owner knew or should have known, after a reasonable inquiry, the property was employed or was likely to be employed in criminal activity. Id. at 69 (emphasis added).

Accordingly, in the Fifth District, the seizing agency must be able to demonstrate, at the APH, that there is *probable cause* to believe that the owner knew or should have known after a reasonable inquiry that the property was employed or likely to be employed in criminal activity. Id.

Neither the Second District, nor the Fourth District, has issued a ruling on this issue. At any APH in the Second or Fourth District where an ‘innocent owner’ issue is raised, the seizing agency should argue for the adoption of the sound, well-reasoned opinion of the Third DCA in Gomez, but be prepared to show probable cause to believe that the owner knew or should have known (per the 5th DCA in Baggett).

Although the seizing agency faces a tougher hurdle in the Fifth DCA than elsewhere in the State, an earlier opinion by the Fifth District Court of Appeals gives the seizing agency an assist. See, City of Daytona Beach v. Bush, 742 So.2d 335 (Fla. 5th DCA 1999). In City of Daytona Beach, following a forfeiture trial, the lower court refused to enter an order of forfeiture for the seizing agency because it interpreted section 932.703(6)(a) to mean that the seizing agency had to prove that the ‘innocent owner’ had actual knowledge that the property was being employed or likely to be employed in criminal activity. Id. at 355. The seizing agency appealed the lower court’s refusal to enter a final order of forfeiture, and the Fifth DCA reversed the lower court. In doing so, the Fifth stated that “[A] person cannot avoid being charged with constructive knowledge ... by hiding her head in the sand like an ostrich, and proclaim lack of knowledge.”

Id. at 337. The Fifth held that proof of constructive knowledge, which was present on the facts in that case, was sufficient to defeat an owner’s ‘innocent owner’ defense.’ As such, the Fifth District remanded the case with directions for the lower court to enter an award of forfeiture to the seizing agency. (Interestingly, it should be noted that the court was dealing with this innocent owner issue following the *trial* phase of the forfeiture proceeding).

In the Gomez decision, the Third DCA noted that the First DCA had reached a contrary decision in Karr and that the Fifth DCA had reached a different decision in Baggett. The Court in Gomez has asked the Florida Supreme Court to accept review of the cases and issue *its* opinion: if the Florida Supreme Court *does* agree to weigh in, then its opinion would establish a statewide standard regarding the ‘innocent owner’ defense and the seizing agency’s burden of proof at APH. However, until the Supreme Court steps in, law enforcement officers and their agencies need to be aware of the differing proof standards in the various districts in order to conduct their forfeiture investigations in a manner that will allow the seizing agency to prevail at the APH.

To re-cap, the following standards apply in the following districts:

- 1st DCA:** The seizing agency must show probable cause to believe that the seized property was used in violation of the Act. If there is an ‘innocent owner’ issue, the seizing agency must also make a *preliminary showing of a basis for the belief* that the owner knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity. (See, Karr).
- 2nd DCA:** No opinion on point: argue that the ‘Innocent Owner’ issue should be addressed at the trial stage of the proceeding and *not* at the APH. (See, Gomez).
- 3rd DCA:** The seizing agency must show probable cause to believe that the seized property was used in violation of the Act. *The seizing agency does not need to address the ‘innocent owner’ issue at the APH.* (See, Gomez).
- 4th DCA:** No opinion on point: argue that the ‘Innocent Owner’ issue should be addressed at the trial stage of the proceeding and *not* at the APH (See, Gomez).
- 5th DCA:** The seizing agency must show probable cause to believe that the seized property was used in violation of the Act. If there is an ‘innocent owner’ issue, the seizing agency must show *probable cause* to believe that the owner knew or should have known, after a reasonable inquiry, the property was employed or was likely to be employed, in criminal activity. (See, Baggett).



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