

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

KAREN S. WARSHAW,

Petitioner/Intervenor,

DONALD H. WARSHAW,

Appellant,

-vs-

THE CITY OF MIAMI FIREFIGHTERS'
AND POLICE OFFICERS' RETIREMENT
TRUST,

Respondent/Appellee.

_____ /

PETITIONER/INTERVENOR'S JURISDICTIONAL BRIEF

On Discretionary Review from the District Court

of Appeal, Third District

State of Florida

Case No. 3D03-2719

Karen S. Warshaw, Pro Se
8351 Southwest 124 Avenue, Unit 105
Miami, FL 33183
305/598-7087

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STATEMENT OF THE CASE AND FACTS

Petitioner, KAREN S. WARSHAW, begs this Court's indulgence in the reading of this Jurisdictional Brief as it is being filed in Proper Person. Petitioner (INTERVENOR), as ex-wife of former City of Miami Police Chief, DONALD H. WARSHAW (WARSHAW), requested and was granted permission to intervene in the District Court below because of her vested financial interest¹ in the outcome of the proceedings.

As stated by Judge Cope in his dissenting opinion below:

The majority opinion is contrary to decisions of the Florida Supreme Court, other district courts of appeal and this court which mandate a strict construction of forfeiture statutes. The majority opinion fails to address, much less apply, the correct legal standard.

The appellee Pension Board² has ordered forfeiture of the pension of the former City of Miami Police Chief, Donald H. Warshaw. Warshaw pled guilty in federal court to one count of mail fraud in violation of 18 U.S.C. § 1341.

Under Florida law, a public employee's pension may be forfeited if the public employee is convicted of an offense specified in paragraph

¹ Order Distributing Marital Interest in a Public Employee Retirement Plan entered March 19, 1996; and Agreed Amended Income Deduction Order entered May 7, 2003, by the Honorable Judge Gerald D. Hubbart, Miami-Dade County Circuit Court Case No. 95-03713 FC07, directing payment directly by PENSION BOARD to KAREN S. WARSHAW of \$1,200 monthly support through June 15, 2011.

² The Board of Trustees of the City of Miami Firefighters' and Police Officers' Retirement Trust ("the Pension Board").

112.3173(2)(e), Florida Statutes (1993).³ The question presented by this appeal is whether the crime of which Warshaw was convicted falls within the scope of the statute.

When the possibility of a forfeiture of Warshaw's pension was first presented to the Pension Board, the Board's attorney advised the Board that Warshaw's conviction did **not** fall within the scope of the statute and that the pension could **not** be forfeited. The Board appointed outside counsel to serve as special prosecutor. The special prosecutor concluded that Warshaw's crime fell within the scope of the statute. The Board accepted the special prosecutor's view of the statute and, after a hearing, declared (by a 5-3 vote) that Warshaw's pension would be forfeited. (COPE, J. dissenting opinion).

Forfeiture of WARSHAW's pension by the Pension Board effectively stripped INTERVENOR of her vested right⁴ to pension assets based on a long-term marriage of 17 years, which would have otherwise been protected pursuant to the innocent Spouse Rule⁵. See In Re Forfeiture of 1985 Ford Ranger Pickup Truck, 598 So.2d 1070 (Fla. 1992) (wherein this Court held that although the state can

³ The applicable version of the pension forfeiture statute is the one in effect on the date of the criminal acts. See, Busbee v. State Division of Retirement, 685 So.2d 914, 916-917 (Fla. 1st DCA 1996). The criminal charge to which WARSHAW pled guilty was set forth in a Superseding Information filed April 27, 2001. The Superseding Information charged that the criminal scheme occurred between May, 1993 and October, 1995. Thus, the 1993 version of the statute is applicable. As relates to the issue herein, there is no material difference between the 1993 statute and the present version.

⁴ At the time WARSHAW's pension was forfeited by the Pension Board INTERVENOR was actually receiving monthly checks directly from the Pension Board of \$1,200 pursuant to the trial Court's Agreed Amended Income Deduction Order.

⁵ Employer's, City of Miami, pension plan system failed to qualify for entry of a QDRO.

secure forfeiture of a criminal's interest in co-owned property, the interest of **innocent** co-workers (**innocent spouse**) are protected from forfeiture.)⁶ See also Retirement Board of the Employees' Retirement System of the State of R.I. v. DiPrete, 845 A.2d 270 (R.I. 2004) (wherein the supreme court held that an **innocent spouse** (ex-wife) had an interest in the pension, and if justice is to be done, no court can overlook an innocent spouse's (ex-wife) entitlement to retirement benefits.)⁷

WARSHAW appealed the forfeiture. On September 15, 2004, the Third District Court of Appeal, in a split opinion, affirmed the finding of the PENSION BOARD. INTERVENOR's motion for rehearing and motion for rehearing en banc were denied December 3, 2004. Notice to invoke the discretionary jurisdiction of this Court was timely filed January 3, 2005.

SUMMARY OF THE ARGUMENT

“The majority opinion is contrary to decisions of the Florida Supreme Court, other district courts of appeal and this court which mandate strict construction of

⁶ “The state can secure forfeiture of the interest of the person involved in criminal activity, but we agree that subsection 932.703(2) should be interpreted to protect the interest of innocent co-owners [**innocent spouse**] from forfeiture.”

⁷ § 36-10.1-3(d) provides in pertinent part: “If the superior court determines that the retirement or other benefits of payments of a public official or public employee should be revoked or reduced under this chapter, it may, in its discretion and after taking into consideration the financial needs and resources of any **innocent spouse**,*** order that some or all of the revoked or reduced benefits be paid to any **innocent spouse** *** as justice may require.”

forfeiture statutes. The majority opinion fails to address, much less apply, the correct legal standard.” (COPE, J. dissenting opinion).

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with decisions of the Supreme Court and other District Courts of Appeal on the same point of law. Art. V, § 3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

The majority opinion of the Third District Court of Appeal in this case expressly and directly conflicts with decisions of this Court in Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991); General Motors Acceptance Corp. v. State, 11 So.2d 482, 484 (Fla. 1943); City of Miami v. Miller, 4 So.2d 369 (Fla. 1941); Byrom v. Gallagher, 609 So.2d 24 (Fla. 1992); Boyle v. State, 47 So.2d 693 (Fla. 1950); In re Forfeiture of 1985 Ford Ranger Pickup Truck, 598 So.2d 1070 (Fla. 1992); and with decisions of other District Courts of Appeal in Busbee v. State of Florida Division of Retirement, 685 So.2d 914 (Fla. 1st DCA 1996); Williams v. Christian, 335 So.2d 358 (Fla. 1st DCA 1976); Mulligan v. City of Hollywood, 871 So.2d 249 (Fla. 4th DCA 2003); and Board of Trustees of the Orlando Police Pension Plan v. Langford, 833 So.2d 230 (Fla. 5th DCA 2002).

The four corners of the Third District Court of Appeal majority opinion is contrary to the law as established by this Court and other District Courts of Appeal. The majority opinion completely ignores the threshold question of what rule of construction to apply in interpreting the applicable statute. This Court has stated that “forfeitures are considered harsh exactions, and as a general rule they are not

avored either in law or equity. Therefore, contrary to the majority opinion below, this court has long followed a policy that it must be **strictly construed.**” Department of Law Enforcement v. Real Property, 588 So.2d 957, 961 (Fla. 1991) citing General Motors Acceptance Corp. v. State, 11 So.2d 482, 484 (Fla. 1943); City of Miami v. Miller, 4 So.2d 369, 370 (Fla. 1941) (emphasis added)); see also Byrom v. Gallagher, 609 So.2d 24, 26 (Fla. 1992).

“Forfeiture statutes are not favored and are strictly construed in favor of the party against whom the penalty is sought to be imposed.” Cabrera v. Department of Natural Resources, 478 So.2d 454, 455-456 (Fla. 3d DCA 1985) citing Boyle v. State, 47 So.2d 693 (Fla. 1950).

The First District, in writing about the pension forfeiture statute to be interpreted herein, stated:

No citation of authority is required to support the rule that forfeitures are not favored in law. They are considered hard exactions, odious, and to be avoided when possible. **Statutes imposing forfeiture will be strictly construed in a manner such as to avoid the forfeiture and will be liberally construed as to avoid and relieve from forfeiture.**

Williams v. Christian, 335 So.2d 358, 361 (Fla. 1st DCA 1976) (footnote omitted; emphasis added); see Mulligan v. City of Hollywood, 871 So.2d 249, 252-253 (Fla. 4th DCA 2003) (citing Williams v. Christian).

Thus, “[t]he determinative analysis of the question before the Court begins, proceeds and ends with the particular terms of the authorizing statute which,

because the law is said to abhor forfeitures, must be strictly construed.” Flam v. City of Miami Beach, 449 So.2d 367, 368 (Fla. 3d DCA 1984) (citations omitted) (Schwartz, C.J.). In authoring the majority opinion below, Judge Schwartz, in this case, broadly, rather than strictly, construed the forfeiture statute!

The issue at hand is whether WARSHAW’s crime (*‘conviction’*) falls within the terms of the forfeiture statute. In order to exact forfeiture of WARSHAW’S pension, the *‘conviction’* must be of a “specified offense” within the terms of Florida Statute § 112.3173. Any doubt about whether the crime (*‘conviction’*) is a statutorily “specified offense” must be resolved in favor of WARSHAW and against forfeiture.

The majority opinion contends, contrary to well established forfeiture law, that the Pension Board may consider facts outside the contours of the federal court record. Florida law holds that the statute must be “strictly construed in favor of the party against whom the penalty is sought to be imposed.” Cabrera, *supra*; *see*, Williams, *supra* at 361.

Under the statute, a “specified offense” includes “1. The committing, aiding, or abetting of an embezzlement of public funds[.]” § 112.3173(2)(e)1. Fla. Stat.⁸ (i.e. money in the City public treasury). The Third District majority opinion

⁸ The statute does not contain a definition of “public funds.” Public funds means “[t]he revenue or money of a governmental body.” Black’s Law Dictionary, 682 (7th ed. 1999).

herein incorrectly contends that, in deciding whether WARSHAW should forfeit his pension, the Pension Board could consider evidence outside the Plea Agreement and Agreed Statement of Facts executed by both WARSHAW and the United States, which explicitly stated that the money taken by WARSHAW in committing the offense was not public funds and that his crime involved a violation of a private, not a public, trust. Pursuant to the plea bargain, the only crime⁹ for which WARSHAW was 'convicted' was mail fraud involving embezzlement of funds belonging to Do The Right Thing (DTRT), a **private nonprofit corporation**. (Superseding Information 3-4) The Third District majority opinion is contrary to decisions of the Florida Supreme Court and other district courts of appeal which mandate a strict construction of forfeiture statutes. Applying the correct legal standard to the facts in this case, the forfeiture cannot be upheld on the theory that WARSHAW embezzled public funds. Any doubt as to the character of the funds would have to be resolved in favor of WARSHAW. See, Williams, supra.

Section 112.3173(2)(e)1 authorizes forfeiture if, and only if, the employee committed "an embezzlement of **public funds**." The majority opinion is contrary to the applicable rule requiring narrow construction of the definition of "public

⁹ "It was stipulated at the outset of the Pension Board proceedings that WARSHAW was convicted of one count of mail fraud..." (Final Administrative Order Forfeiting Retirement Benefits at 2)

funds” in dealing with a forfeiture statute. Under well established forfeiture law, the forfeiture statute must be “strictly construed in favor of the party against whom the penalty is sought to be imposed.” Cabrera, supra; see Williams supra.

This case construes a forfeiture statute. The crime for which WARSHAW was ‘*convicted*’ clearly is not a “specified offense” set forth in the forfeiture statute. In the United States an individual cannot be ‘*sentenced*’¹⁰ for a crime for which he has not been ‘*convicted*.’ In this case WARSHAW was not ‘*convicted*’ of a specified offense pursuant to the forfeiture statute, and, therefore, cannot be ‘*sentenced*’ to pension forfeiture. Proper construction of the forfeiture order requires reversal.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the INTERVENOR’s arguments, including INTERVENOR’s unique standing in this matter as the “innocent spouse.” If justice is to be done, no court can overlook the rights of an “innocent spouse” within the context of pension revocation proceedings.

¹⁰ Sentence means “[t]he judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, awarding the punishment to be inflicted.” Black’s Law Dictionary, 1528 (7th ed. 1999).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 7th day of January, 2005, to Martin B. Goldberg, Esq., LASH & GOLDBERG LLP, Attorney for WARSHAW, Suite 1200, Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131; Stephen Cypen, Esq., CYPEN & CYPEN, 825 Arthur Godfrey Road, Miami Beach, FL 33140; and to Bruce L. Udolf, RUDEN McCLOSKEY, 200 East Broward Boulevard, Fort Lauderdale, FL 33301 by United States Mail.

KAREN S. WARSHAW, pro se

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

KAREN S. WARSHAW, pro se