SUPREME COURT OF FLORIDA

Case No. SC08-750
L.T. Case No. 3D01-3050

CITY OF MIAMI,

Petitioner,

vs.

SIDNEY S. WELLMAN, ET AL.,

Respondents.

RESPONDENTS' ANSWER BRIEF TO PETITIONER'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Previously this cause was before this Court, upon the re-worded certified question of "Does the Florida Contraband Forfeiture Act (FCFA), sections 932.701-707, Florida Statutes (2002), preempt a municipality from adopting an ordinance that authorizes the seizure and impoundment of vehicles used in the commission of certain misdemeanor offenses?"

The court answered that question in the negative, however remanded the case back to the Fourth District Court of Appeal, stating that "Although we find that the differing procedures employed by the FCFA and the ordinance do not create a conflict necessitating the invalidation of the ordinance, we agree with the Fourth District that *the ordinance's procedures raise serious constitutional concerns.* However, we do not address these concerns because (1) these constitutional concerns are independent of whether the FCFA and the ordinance are in conflict with each other, and (2) no constitutional issues were raised before us. The Fourth District is free to address these issues on remand, if appropriate." (Emphasis supplied.) *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1247 (Fla. 2006).

In the case at bar, as they did in the *Mulligan* case, this court granted the petition for review, and on the authority of their decision in *City of Hollywood v. Mulligan*, 934 So.2d 1238 (Fla. 2006), the decision of the Third District Court of

Appeal in this cause was quashed, and the matter remanded for reconsideration by the Third District Court of Appeal upon application of the Florida Supreme Court's decision in *Mulligan, supra. City of Miami v. Wellman*, 944 So.2d 251, (Fla. 2006).

On remand the Third District Court of Appeal held as follows: (1) the notice requirements in ordinances were inadequate under the due process provision of State Constitution; (2) the authority granted to special masters to decide whether there was probable cause and impose monetary sanctions did not violate separation of powers doctrine of the State Constitution; (3) the clear and convincing evidence standard is appropriate for impoundment cases; and (4) the due process procedures in the ordinances were inadequate because the ordinances did not allow for an innocent owner defense. *City of Miami v. Wellman,* 976 So.2d 22 (Fla. 3rd DCA 2008).

SUMMARY OF ARGUMENT

The respondent submits that the petitioner's application for discretionary review should be denied because the opinion at issue in no way expressly construes a provision of the state or federal constitution.

Additionally, the petitioner's application for discretionary review should be denied because the opinion at issue is not in express and direct conflict with the final decision of another District Court of Appeal.

ARGUMENT

I.

THE PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW SHOULD BE DENIED BECAUSE THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY CONSTRUE A PROVISION OF THE STATE OR FEDERAL CONSTITUTION.

The petitioner contends in their brief that the Third District Court of Appeal's opinion in the instant case expressly construes a provision of the state or federal Constitution. *City of Miami v. Wellman*, 976 So.2d 22 (Fla. 3rd DCA 2008).

First, with regard to the *notice* provisions of the ordinances, the petitioner asserts in their brief that the Third District Court of Appeal expressly construed a provision of the state or federal Constitution by holding that although the ordinances provide notice to persons in control of the vehicle, they deny due process under Article I, Section 9, because they do not provide notice to owners not on the scene, such as co-owners, lessors, renters, and lienors.

Second, with regard to the *standard of proof* provided for in the ordinances, the petitioner asserts in their brief that the Third District Court of Appeal expressly construed a provision of the state or federal Constitution by holding that although an impoundment is not a forfeiture, pursuant to *Department of Law Enforcement v. Real Property,* 588 So.2d 957, 967 (Fla. 1991), proof by "clear and convincing evidence" is required under Article I, Section 9.

Third, with regard to the lack of an *innocent owner defense* provision in the ordinances, the petitioner asserts in their brief that the Third District Court of Appeal expressly construed a provision of the state or federal Constitution by holding that such a defense was necessary pursuant to the reasoning of this court in *Department of Law Enforcement v. Real Property,* 588 So.2d 957, 967 (Fla. 1991), and by holding that they did not believe that an ordinance that does not allow for an innocent owner to be immune from loss of property and additional monetary penalties can satisfy due process.

The respondent respectfully submits, that the Third District's opinion does not expressly construe a provision of the state or federal Constitution, but merely applies a clear-cut constitutional provision to the facts of this case. Therefore, the respondent respectfully requests that this Court deny the petitioner's application for discretionary review on this basis.

This Court may invoke discretionary jurisdiction to review opinions of the district courts of appeal which "expressly construe a provision of the state or federal Constitution." Fla. R. App. P. 9.030(a)(2)(A)(ii). As this Court explained in *Armstrong v. City of Tampa,* 106 S.2d 407, 409 (Fla. 1958), in order for a lower court to be considered to have construed a constitutional provision, the lower court: "must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient

merely that the [lower court] examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution." *See also Ogle v. Pepin*, 273 So.2d 391 (Fla. 1973) (holding that the court lacked jurisdiction because the lower court's decision failed to explain or define any constitution terms or language).

The Third District Court of Appeal's opinion in *City of Miami v. Wellman*, 976 So.2d 22 (Fla. 3rd DCA 2008) does not expressly construe any provision of the state or federal Constitution. The district court merely examined whether the subject ordinances adequately protect the due process rights of the individual. The district court never undertook to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision itself.

Instead, the court merely "examine[d] into the facts of a particular case and then appl[ied] a recognized, clear-cut provision of the Constitution." *Armstrong v. City of Tampa*, 106 S.2d at 409 (Fla. 1958), (holding that the trial court did not "construe" constitutional language by examining whether Avon employees were engaged in transactions that would require the application of interstate commerce provisions of the federal Constitution, or the Declaration of Rights of Florida).

As the Third District's opinion does not expressly construe the state or federal Constitution, the respondent respectfully requests that this Court deny the instant petition for discretionary review on this basis.

II.

THE PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW SHOULD BE DENIED BECAUSE THE DECISION OF THE LOWER COURT IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE FINAL DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

The entire balance of petitioner's jurisdictional brief is based upon the premise that the opinion in *City of Miami v. Wellman,* 976 So.2d 22 (Fla. 3rd DCA 2008) is in express and direct conflict with the decision of the Fourth District Court of Appeal in *Mulligan v. City of Hollywood,* 33 Fla. L. Weekly D783 (Fla. 4th DCA March 19, 2008).

Although, this Court may invoke discretionary jurisdiction to review opinions of the district courts of appeal which are in express and direct conflict with the decision of another district court of appeal pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), at this time there is no final decision in the *Mulligan* case. This lack of finality exists because the City of Hollywood's Motion for Rehearing, Rehearing *En Banc*, Clarification, and Motion for Certification of Direct Conflict with Other District Court's Opinion and of Matter to be of Great Public Importance, has yet to be ruled upon by the Fourth District Court of Appeal.

Therefore, it is submitted, that asserting that there is a conflict between the decision in the *Wellman* case and the *Mulligan* case is premature, and the exercise of the "express and direct conflict" discretionary jurisdiction of this court would be inappropriate at this time. Until the Fourth District Court of Appeal rules on the

City of Hollywood's pending motions, there is no way to determine if a conflict exists. Only when that court rules on these motions can their opinion be analyzed to make the determination as to whether or not there is truly a conflict among these districts.

CONCLUSION

Based on the foregoing argument and authorities, the respondent submits that the petitioner's application for discretionary review by this Court should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Respondents' Answer Brief to City of Miami's Brief on Jurisdiction was mailed this ____ day of May, 2008, to: Robert S. Glazier, Esquire, 540 Brickell Key Drive, Suite C-1, Miami, Florida 33131, Warren Bittner, Assistant City Attorney, Office of City Attorney Julie Bru, 945 Miami Riverside Center, 444 S.W. 2nd Avenue, Miami, Florida 33130-1910, Arthur Spiegel, Esq., 9100 South Dadeland Boulevard, Suite 400, Miami, Florida 33156-7819, Judson L. Cohen, Esq., 1 S.E. 3rd Avenue, Suite 2900, Miami, FL 33131, and John E. Morrison, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125-1609.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, that this Respondents' Answer Brief to City of Miami's Brief on Jurisdiction has been submitted in Times New Roman 14-point font in compliance with the Florida Rules of Appellate Procedure.

Respectfully submitted,

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