IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00846 COA

ONE 1993 CHEVROLET S-10 PICKUP, VIN # 1GCCS14R5P8113590 — **APPELLANT**

v.

STATE OF MISSISSIPPI, EX REL MISSISSIPPI DEPARTMENT OF WILDLIFE, FISHERIES AND PARKS — **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	07/06/95
TRIAL JUDGE:	HON. JOSEPH H. LOPER JR.
COURT FROM WHICH APPEALED:	GRENADA COUNTY CIRCUIT COURT
FOR APPELLANT:	A. E. (GENE) HARLOW SR.
ATTORNEY FOR APPELLEE:	JOAN MYERS
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	TRUCK ORDERED FORFEITED
DISPOSITION:	AFFIRMED - 12/02/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Dudley Woods was convicted of head-lighting deer, hunting from a public road, and hunting from a motorized vehicle. At the time of Dudley's arrest, the Department of Wildlife, Fisheries and Parks seized his 1993 Chevrolet S10 pickup and a Winchester 7mm rifle which had been used in the head-lighting offense. Following Dudley's conviction, the Department filed a petition seeking forfeiture of the pickup and rifle. Woods answered, claiming ownership of the pickup, but denying any interest in the rifle. The Circuit Court of Grenada County granted the Department's motion for summary judgment and ordered the forfeiture of the pickup and rifle. Woods appeals.

On appeal, Woods argues that he had valid affirmative defenses of (1) double jeopardy, (2) excessive fines, (3) that the statutory scheme mandated an improper burden of proof applicable to the case, (4) unlawful taking and detaining of the subject pickup in violation of his right to due process of law, (5) legal coercion by the State, (6) his innocence of the alleged offense upon which the forfeiture proceedings were commenced, (7) a right to trial by jury, and (8) the trial court erred in denying Dudley's motion for summary judgment and in dismissing his counterclaim with prejudice. We find all his issues without merit and affirm the forfeiture.

FACTS

On the night of December 20, 1994, Conservation Officers Keith Carver and Larry Deloach with the Department of Wildlife, Fisheries and Parks set out a deer decoy on Grant Road in Grenada County. At approximately 11:00 p.m. Officer Deloach saw a vehicle heading east on Grant Road with a spotlight shining from one side of the road to the other. The vehicle stopped when the decoy deer was spotted and a shot was fired from the vehicle.

Officers Carver and Deloach arrested Dudley and the two passengers in his truck. One passenger was in the cab and the other, Paul D. Woods, was in the pickup bed. In searching the truck, Officer Carver found a hand-held spotlight plugged into the cigarette lighter. Officer Deloach found a loaded Winchester 7mm rifle on the shoulder of the road approximately 10-15 feet behind the truck. In the bed of the truck he found a spent 7mm casing identical to that of the live ammunition in the rifle.

Woods and the other men were charged with head-lighting deer, hunting from a public road, and hunting from a motorized vehicle. Woods was tried and convicted in the Justice Court of Grenada County on January 19, 1995. As a result of his conviction of head-lighting deer, Woods was fined $1000 and his hunting, fishing and trapping privileges were forfeited for a period of three years. Woods was also fined $155 and $80 for hunting from a public road and hunting from a motorized vehicle. Woods did not appeal his convictions.

On February 27, 1995, the Department filed a petition in circuit court seeking forfeiture of the 1993 Chevrolet S10 pickup and the Winchester rifle. Woods answered, claiming ownership of the pickup but denying any interest in the rifle. Woods asserted an innocent owner defense by contending that he was unaware that Paul was even contemplating shooting deer at night.

On May 23, 1995, the Department filed a motion for summary judgment. On June 14, 1995, Woods filed a counter motion for summary judgment, along with a counterclaim seeking $5000 in compensatory damages, payment of all costs of restoring possession of the vehicle to him and at least $50,000 in punitive damages. Woods also sought to have his conviction in justice court declared null and void and his hunting, fishing and trapping privileges restored.

After hearing arguments on the Department's motion, the court entered an order granting the Department's motion for summary judgment and ordering forfeiture of the pickup and rifle. Wood's motion for summary judgment was denied and the counterclaim dismissed. Woods appeals from the circuit court's judgment, except as to the forfeiture of the Winchester rifle.

DISCUSSION

Miss. Code Ann. § 49-7-103 (Rev. 1990) provides as follows:

> Any firearm, equipment, appliance, conveyance or other such property used directly or indirectly in the hunting or catching or capturing or killing of deer at night with any headlight or any other lighting device, . . . including but not limited to any truck, automobile, motor vehicle, jeep, . . . or any other device or contrivance or other vehicle, or which may be used in the transportation of any dead or live deer taken, captured or killed at night with or by means of a headlight or other lighting device, . . . shall be seized by any employee of the Department of Wildlife Conservation or other office of the law including any sheriff or deputy sheriff. Upon seizure of such property proceedings shall be instituted pursuant to Sections 49-7-251 through 49-7-257.

This statute, in effect at the time of Wood's offense, was amended in 1995 and no longer provides for the forfeiture of "any truck, automobile, motor vehicle, or jeep."

1. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." **U.S. CONST. amend. V.** The Mississippi Constitution, Article 3, Section 22, provides similar protections. Woods argues that, since he has already been punished for the head-lighting conviction, the forfeiture of his vehicle is barred by the Double Jeopardy Clause of the federal and state constitutions.

While this case was on appeal, the United States Supreme Court decided the case of ***United States v. Ursery,* 116 S.Ct. 2135 (1996).** The Court analyzed its earlier case law on the relationship between the Double Jeopardy Clause and civil forfeitures. In ***Various Items of Personal Property v. United States,* 282 U.S. 577 (1931),** a corporation convicted of criminal violations was forced to forfeit a distillery, warehouse, and denaturing plant; the Supreme Court unanimously held that "[t]he forfeiture is no part of the punishment for the criminal offense. The provisions of the Fifth Amendment to the Constitution in response of double jeopardy do not apply." ***Id.* at 581.** The Court "drew a sharp distinction between *in rem* civil *forfeitures* and *in rem* civil *penalties* such as fines: Though the latter could, in some circumstances, be punitive, the former could not." ***Id.***

Ursery addressed whether that was still good law. The court noted that the holding of ***Various Items*** **was upheld in *United States v. One Assortment of 89 Firearms,* 465 U.S. 354 (1984). *Ursery,* 116 S.Ct. at 2141.** In *89 Firearms*, the Court held that the forfeiture was not barred by a prior criminal proceeding and set out a two-part test to determine whether a civil forfeiture constituted punishment. ***Id.* (citing *89 Firearms,* 465 U.S. at 362).** The first part is a determination whether in the legislative history there was an intent for the civil forfeiture to serve a remedial purpose or a punishment purpose. ***89 Firearms,* 465 U.S. at 365.** The second step involves an analysis of whether the forfeiture was "so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism." ***Id.*** After a review of its more recent decisions, the Supreme Court held that this test remained the proper one. ***Ursery,* 116 S.Ct. at 2147.**

Legislative history is not usefully recorded in most states, and Mississippi is no exception. However, it would be impossible to conclude that forfeiture for violation of the game laws does not in part

serve the purpose of compensating the government with property directly related to the criminal activity, prevents the illicit use of property and divests the owner of the instrumentality of the offense. It is a civil proceeding against the property and not against a person. That is sufficient under *Ursery*. ***Id.* at 2147-2148.** As for the second part of the test, there is not the "clearest proof" necessary to show that the forfeiture proceedings "are so punitive as to render them criminal" despite the legislative purpose to have them be remedial. ***Id.* at 2148.**

This forfeiture was neither "punishment" nor criminal for purposes of the Double Jeopardy Clause. We therefore find that there is no merit to Woods' argument.

2. Excessive Fines

Woods alleges that the forfeiture was excessive under the Eighth Amendment to the United States Constitution: "[e]xcessive bail shall not be required, nor excessive fines imposed . . . ." U.S. CONST. amend. VIII. What was said concerning *Ursery* above indicates that "punishment" can arise with a civil forfeiture, but only as to application of the excessive fines clause of the Eighth Amendment and not with reference to double jeopardy under the Fifth Amendment.

The United States Supreme Court in other opinions has required that at least some forfeitures be tested by the requirements of the Eighth Amendment. ***Austin v. United States*, 509 U.S. 602, 621-622 (1993).** The State argues that *Austin* should be limited to cases in which an innocent owner defense is permitted, as the State believes that such a statutory defense limits traditional forfeiture flexibility. Since the *Austin* court discussed that the statute being reviewed required that the owner have some "guilt" and therefore the focus was not solely on the "guilt" of the property, the State alleges that this is what invokes excessive fine principles. ***Id.*** In other words, unless some person is being "punished," there is no "fine" that can be "excessive."

It is true that *Austin* refers to the innocent owner defense that was available under that statute, but it also relies on the "historical understanding of forfeiture as punishment" when the Court required that excessive fine analysis be applied. ***Id.*** The concurring opinion found the discussion of innocent owner to be dictum, which it may well have been. ***Id.* at 626-627** (Scalia, J., concurring). Nonetheless, the *Austin* majority stated that the Court "consistently has recognized that forfeiture serves, at least in part, to punish the owner." ***Id.* at 618.** We are constrained to follow the direction such statements point, whether the statements are dictum or not. Thus we hold that excessive fine analysis is applicable. The *Austin* majority explicitly refused at that time to adopt a measure for excessiveness. ***Id.* at 622-623.** A concurring opinion stated that the only question should be the relationship between the property and the offense. ***Id.* at 628** (Scalia, J., concurring).

Multi-factor tests have a way of becoming ends in themselves, i.e., a ritualistic stating of the three or five or other number of factors is first made by a trial court, and then an appellate court quotes the same list and holds that the lower court did/did not abuse its discretion. What is obvious about a constitutional requirement that a fine not be "excessive," is that applying that requirement will be a subjective exercise. A list of factors may be a set of guideposts for excessiveness, but the resulting conclusion will have to be a discretionary one.

Our starting point is the theoretical justification for forfeitures. What is being forfeited is an instrumentality of a criminal offense, some "thing" that has a connection to a crime. If the property is

contraband, i.e., property such as certain kinds of drugs or dangerous weapons that are illegal to own, then confiscation instead of forfeiture may better describe the action of the government in seizing the property. Unquestionably legal property can also be seized, such as automobiles, legal weapons, and even real property, under the theory that the property is guilty (without any mens rea, of course) of criminal conduct. ***See generally, Austin,* 509 U.S. at 623-625 (Scalia, J., concurring).** Thus the requirement for a forfeiture is that the property have a nexus, a connection to a crime for which forfeiture is statutorily authorized. The majority in *Austin* implied that for Eighth Amendment purposes the owner of the property must also be "guilty," at least to the extent of negligence in allowing others to use his property illegally. ***Id.* at 615-618.**

Thus "guilt" of the property must be part of the test for determining whether a civil forfeiture is an excessive fine. We hold that some rough measure of the value of the forfeited property against the nature of the offense must also be a factor. The two components of the analysis could be seen as complementary -- the "guiltier" the property, the greater the permissible value of the forfeited property. Various courts have struggled with the task delegated by the Supreme Court in *Austin,* namely, to be the initial architects of the structure by which excessive fine principles are joined to civil forfeitures. We find a particularly persuasive merger to be from the Second Circuit:

> a court must apply a three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder. In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following factors: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spacial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. No one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended.

***United States v. Milbrand,* 58 F. 3d 841, 846 (2d Cir. 1995).**

With these guidelines, we turn to the property forfeited in the present case, a 1993 Chevrolet S10 pickup (no appeal issue is made of the forfeiture of a rifle, the ownership of which Woods denied). Even if head-lighting of deer is not as serious an offense to the safety and well-being of society as some other offenses, there has been a long-standing and well-understood public policy decision not to permit so fundamentally unfair a method of hunting. ***Pharr v. State,* 465 So. 2d 294, 297-299 (Miss. 1984).** Head-lighting of deer is considered a Class I violation of the game laws, punishable by a fine as high as $5,000. **Miss. Code Ann. §§ 49-7-95, 49-7-141(1) (Supp. 1997).** There was a strong nexus between the truck, an indispensable element for head-lighting deer, and the offense. The use

was deliberate, planned, and important to the success of the enterprise. The owner, Woods, was driving the truck at the time. Not clear from the record is how long Woods was engaged in the use of the truck for the illegal purpose on the night in question, the frequency of previous illegal use, and whether the principal purpose for Woods' ownership was other than to headlight deer.

We add as a final factor to that of the Second Circuit, that there is nothing severable about some offending part of the truck and the remainder, as there might have been had there been a trailer unconnected to the offense but connected to the truck.

The truck had an estimated value at the time of forfeiture of approximately $9,000. A $9,000 forfeiture for the offense is not excessive under this test.

3. Coercion

Woods argues that he was forced to surrender his right to appeal from his criminal conviction in order to preserve his double jeopardy argument in the civil forfeiture proceedings. He contends that had he appealed from his criminal conviction, former jeopardy would not have attached. There is no merit to this contention, as former jeopardy attached upon his conviction in justice court, ***see Beckwith v. State* 615 So. 2d 1134, 1137 (Miss. 1992)**, and the taking of an appeal would not have suspended or vacated the judgment against him. ***Ex parte Caldwell*, 62 Miss. 774 (1884).**

As the State notes, Woods could have requested a continuance in the forfeiture proceedings until an appeal from his criminal conviction could be heard in circuit court. ***See* Miss. Code Ann. § 49-7-253(1) (Rev. 1990).** There is nothing to suggest that the statutory scheme in any way coerced Woods to forgo an appeal. There is no merit to his argument.

4. Burden of Proof

In his argument, Woods claims that forfeiture under the statute is criminal in nature and therefore the burden of proof should be "beyond a reasonable doubt."

Miss. Code Ann. § 49-7-253 provides "[t]he standard of proof placed upon the petitioner in regard to property forfeited under the provisions of this article shall be a preponderance of the evidence." Similarly, the state supreme court in ***Erevin v. State ex rel Mississippi Bureau of Narcotics*** defined the burden of proof in a civil forfeiture under the drug forfeiture statutes as "by a preponderance of the evidence" where the legislature failed to articulate the burden of proof.

Woods' brief argument cites ***Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994).** There the Supreme Court stated that the civil forfeiture statutes may in certain constitutional contexts be punitive. The Court notes that "[a] government may not impose criminal fines without first establishing guilty beyond a reasonable doubt." ***Id.*** (citations omitted). There is, however, nothing in this case or the other under scrutiny which suggests that the same burden of proof should be imposed in a civil forfeiture proceeding. We do not impose that burden.

5. Due Process

Woods argues that his vehicle was taken and retained without due process of law, in particular that he was not allowed by statute any means to bond or to otherwise regain possession of his pickup.

Woods' contention is that the constitutional provision providing for bail pending trial has equal application to property. He, however, cites no cases which support this contention.

In ***Stringer v. State*****, 229 Miss. 412, 91 So. 2d 263 (1956),** the Mississippi Supreme Court interpreted the statute allowing for the forfeiture of an automobile seized for illegal transporting intoxicating liquors as allowing the owner, *who claimed no knowledge of any illegal activity*, to post bond to regain possession of the vehicle prior to a hearing. The court stated "that due process of law prvided for under Section 14 of our State Constitution and Section 1 of the Fourteenth Amendment to the Constitution of the United States entitled him to regain possession of his automobile pending a hearing as to his ownership thereof, and as to whether or not he had knowing permitted it to be used for an unlawful purpose in violation of the highly penal statutes providing for its seizure and confiscation." ***Stringer*****, 91 So. 2d at 268.** However, in ***Tax Com'n v. One 1984 Black Mercury*****, 568 So. 2d 707, 712 (Miss. 1990),** the court held that where the defendant admitted knowingly using the car to transport intoxicating liquor in a dry county, the defendant was not within the protection afforded in *Stringer* and that the court erred in returning the vehicle to the defendant.

In the present case, there is no indication that Woods attempted to post bond to recover his vehicle. As will be discussed next, Woods was not entitled to argue that he was unaware of the illegal activity or that he was an innocent owner; consequently, the holding in *One 1984 Black Mercury* is applicable. There is no merit to his argument.

6. Innocent Owner

Woods contends that he was entitled to an "innocent owner exception" defense to the forfeiture of his property. He cites as support ***Threlkeld v. Miss. Dept. of Wildlife*****, 586 So. 2d 756 (Miss. 1991).** In *Threlkeld*, the supreme court held, by virtue of the due process clause of the Mississippi Constitution, that an innocent owner exception exists under the forfeiture statutes for illegal hunting and fishing. ***Id.*** **at 759.** In that case the son of the record owner of the pick-up truck was convicted of head-lighting deer. Bonnie Threlkeld argued that State failed to prove that she had any knowledge that the vehicle would be used for illegal purpose and the trial court denied her motion for a directed verdict. The supreme court reversed and remanded the case for further proceedings.

The problem with this argument is that Woods had been convicted of head-lighting deer prior to the forfeiture proceedings. The factual question of his guilt or innocence had been established and he is barred under the doctrine of collateral estoppel from relitigating the fact question of whether he was guilty of head-lighting deer. ***Jordan v. McKenna*****, 573 So. 2d 1371, 1374-75 (Miss. 1990).**

While there is an innocent owner exception to the forfeiture, Woods was not entitled to benefit from it. There is no merit to his argument.

7. Right to Jury Trial

In a brief paragraph asserting that he was entitled to a jury trial, Woods cites no authority to support his argument. We find no support either. The forfeiture statute provides only for a forfeiture hearing, not a jury trial. **Miss. Code Ann. § 49-7-253 (Rev. 1990).** Under **Article 3, Section 31 of the Mississippi Constitution,** the right to trial by jury exists only in all cases where that right existed at common law. ***See In re Extension of Boundaries of City of Meridian*****, 237 Miss. 486, 115 So. 2d**

323 (1959); M.R.C.P. 38 cmt. There was no common law right to jury trial in forfeiture cases. There is no merit to Wood's unsupported argument.

8. Policy Argument

In his final argument Wood argues that the forfeiture action by the State was "frivolous" and that he should have been entitled to relief on his counterclaim. To the contrary, we have determined that the forfeiture was justified and should be affirmed. We now do so.

THE JUDGMENT OF THE GRENADA COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.