NORTH CAROLINA

ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 08CR54434

STATE OF NORTH CAROLINA

vs.

BRIEF

ISAIAS ROMERO,
Defendant.

NOW COMES the Defendant, by and through his attorney Marcus E. Hill of Durham County, North Carolina, and submits the following brief, supporting his motion to dismiss or stay all further proceedings.

STATEMENT OF FACTS

Isaias Romero was arrested on the 24th of August, 2008 and charged with driving while impaired and driving while license revoked. His initial court date was set for September 30, more than 30 days after the seizure of his vehicle that occured as a result of these charges.

His case was continued several times without AOC-CR337 being filled out and signed as required by statute.

STATEMENT OF THE LAW

Is a Forfeiture of A Motor Vehicle for Impaired Driving, pursuant to NCGS 20-28.2 et seq., a civil penalty, a civil forfeiture or a tax, or punishable constituting jeapardy.

The U.S. Supreme Court has established that civil penalties, civil forfeitures and tax impositions may constitute double jeopardy for a defendant in certain circumstances.

Civil Penalty

The United States Supreme Court has found that a defendant in certain circumstances is deprived of property without due process when an additional civil penalty is assessed after a defendant's underlying conviction. Thus, the state can be prevented from further prosecution by the double jeopardy clause of the United States Constitution.

For example, the Court in United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104

L.Ed.2d 487 (1989), held that a disproportionate civil fine imposed after defendant's conviction constituted punishment for double jeopardy purposes. In Halper the Court noted that the fine was more than 220 times greater than the government's damages. In a later case the Court again acknowledged that a civil penalty may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment for double jeopardy purposes.. U.S. v. Ursery, 518 U.S. 267, 280, 116 S.Ct. 2135, 2143 (1996).

The Court in Ursery emphasized that whether a civil fine subjects an already prosecuted defendant to double jeopardy is determined on a case-by-case basis. In the present case the motor vehicle was seized pursuant to NCGS 20-28.2(a1)(1a). The Government has not specified the damages actually suffered by it in this case. In this case the defendant should be entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment. 518 U.S. at 282.

Any money left over after the vehicle's sale and payment of lienholders should have been released to the North Carolina Board of Education. "Civil penalties are designed as a rough form of 'liquidated damages' for the harms suffered by the Government as a result of a defendant's conduct." 518 U.S. 283-4. In this case, it is arguable whether the money from the vehicle sale was a civil penalty because it was not a fixed amount. However, if it was a penalty, this penalty apparently bears no rational relation to the goal of compensating the Government for its loss but rather appears to qualify as "punishment" in the plain meaning of the word.

Civil Forfeiture

In U.S. v. Ursery, the Court recognized that at common law in many cases the right of forfeiture does not attach until the offending person has been convicted and the record of conviction produced. 518 U.S. at 275. In our system, the defendant is presumably innocent until proven guilty. In this case this presumption was turned on its head.

In U.S. v. Ursery, the Supreme Court used the two prong test propounded in United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099 (1984). to determine whether the taking at issue was a civil forfeiture. First, the Court asked whether the Congress intended the proceedings at issue to be criminal or civil. The Court noted that Congress' intent in this regard is most clearly demonstrated by the procedural mechanisms established for enforcing forfeitures under the statutes. In support of its determination that a civil forfeiture was at issue, the Court noted that one such procedural mechanism in 18 U.S.C. 981 is entitled "Civil Forfeiture."

In the present case, the forfeiture statutes are set forth in Chapter 20 of the NCGS, the Uniform Driver's License Act, which provides criminal penalties for those not complying with its laws. NCGS 20-28.2 et seq is not entitled "Civil Forfeiture." NCGS 28.3(l) does provide for a "civil judgment" against the defendant if the motor vehicle sale proceeds do not cover the towing, storage and sale costs. However, this statute only comes in effect if the defendant is *convicted* of an impaired driving offense.

In U.S. v. Ursery, the Court also found another reason buttressing their conclusion that the forfeiture at issue was civil. The forfeiture statutes provided that actual notice of the impending forfeiture is unnecessary when the Government cannot identify any party with an interest in the seized property and such seized property is subject to forfeiture through a summary administrative procedure if no party files a claim to the property.

In the present case, NCGS 20-38.5(a) provides that notice of sale of the impounded vehicle "shall be given by first-class mail to all motor vehicle owners of the vehicle to be sold at the address shown the records of the Division . . . at least 10 days prior to the date of the sale" NCGS 20-38.5(a) never states that in certain circumstances notice is unnecessary. As noted above, the State did not provide notice to the defendant as required.

Another reason to consider the forfeiture as civil in U.S. v. Ursery was that the burden of proof in such forfeiture proceedings shifted to the defendant once the Government had shown probable cause that the property was subject to forfeiture.

In the present case, pursuant to NCGA 20-28.2(d), once the judge determines the motor vehicle is subject to forfeiture *at a sentencing hearing* and proper notice of the hearing has been given, the judge shall order the motor vehicle forfeited. Any remaining proceeds after paying off lienholders shall be paid to the county board of education. Under the North Carolina forfeiture scheme, the burden of proof never shifts to the defendant unless defendant can prove that his license was not revoked pursuant to an impaired driving license revocation as provided for in NCGA .

The second prong of the test as to the issue of the forfeiture's being civil or criminal is whether the forfeiture proceedings are so punitive in fact as to establish that they may not legitimately be viewed as civil in nature, despite any congressional intent to establish a civil remedial mechanism.

As established above, the sale of the motor vehicle at a public sale at a much lower price than the fair market value without any notice to the defendant in violation of the statutes is so punitive in fact as to establish that it may not be legitimately viewed as civil in nature, but criminal. The vehicle would have been sold and irretrievable even if the defendant were later found innocent of all driving while impaired charges. In fact, any forfeiture orders are stayed pending a hearing to superior court for a hearing de novo on the forfeiture issue and then even to the North Carolina Court of Appeals, pursuant to NCGS 20-28.6(e).

In the present case the forfeiture was so punitive in fact as to establish that it may not be legitimately viewed as civil, despite any legislature's intent. The forfeiture in practice is criminal. In any event, whether the forfeiture is deemed criminal or civil, its imposition subjects the defendant to jeopardy.

A Punitive State Tax

NCGS 20-28.2(a1)(1a) provides that the fair market value of the seized motor vehicle is basically its tax value, pursuant to NCGS 105-187.3. Furthermore, such motor vehicle shall be sold not even for its low tax value but at a presumably lower price determined at a public sale by advertisement for sealed bids, negotiated offer, advertisement, and upset bid, or public auction, pursuant to NCGS § 160A-266.

If found innocent, the defendant receives the return of the vehicle minus the towing and storage costs if the vehicle has not already been sold to cover such costs, NCGS 20-28-4.. If found guilty, the defendant is prohibited from buying the vehicle at the sale, pursuant to NCGS 20-28-5(a).

In Department of Revenue of Mont. v. Kurth Ranch, 518 U.S. 267, 282, 116 S.Ct. 2135 (1994), the Court considered whether a state tax imposed on marijuana was invalid under the Double Jeopardy Clause when the taxpayer had already been criminally convicted of owning the marijuana that was taxed.

> "We first established that the fact that Montana had labeled the civil sanction a 'tax' did not end our analysis. We then turned to consider whether the tax was so punitive as to constitute a punishment subject to the Double Jeopardy Clause. Several differences between the marijuana tax imposed by Montana and the typical revenue-raising tax were readily apparent. The Montana tax was unique in that it was conditioned on the commission of a crime and was imposed only after the taxpayer had been arrested: Thus, only a person charged with a criminal offense was subject to the tax. We also noted that the taxpayer did not own or possess the taxed marijuana at the time that the tax was imposed. From these differences, we determined that the tax was motivated by a " 'penal and prohibitory intent rather than the gathering of revenue.' . . . Concluding that the Montana tax proceeding 'was the functional equivalent of a successive criminal prosecution,' we affirmed the Court of Appeals' judgment barring the tax.

In the present case, the forfeiture is conditioned on the commission of a crime and imposed only after the taxpayer had been arrested. Thus, only a person charged with a criminal offense was subject to the tax

Certainly, the defendant in the present case did not possess the motor vehicle at the time it was sold. It is clear that the tax is motivated by a penal and prohibitory intent rather than the gathering of revenue.

Conclusion

In summary, whether the forfeiture in the present case is labeled a civil penalty, a civil forfeiture or a punitive state tax, its application in the present case is surely penal and subjects the

defendant to double jeopardy

This the 16th day of March, 2009.

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