IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT OF FLORIDA

APPEAL NUMBER 5D08-2381

DERREL LAFFIET HANNAH
Appellant-Petitioner

v.

JAMES MANRE, SHERIFF OF FLAGLER COUNTY, FLORIDA
Appellee-Respondent.

APPEAL OF A DENIAL OF A MOTION FOR RELIEF FROM FINAL JUDGMENT ON AN ORDER OF FORFEITURE FROM THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT FLAGLER COUNTY, FLORIDA

BRIEF OF APPELLANT (ORIGINAL)

WILLIAM MALLORY KENT
Fla. Bar No. 0260738
SUSAN STROMBERG MATTHEY
Fla. Bar No. 0815470
1932 Perry Place
Jacksonville, FL 32207
(904) 398-8000 Telephone
(904) 348-3124 Fax
kent@williamkent.com

Counselors for Appellant
DERREL LAFFIET HANNAH

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STATEMENT OF THE CASE AND OF THE FACTS

On March 13, 2003, in Flagler County, law enforcement officers stopped Derrel Hannah while he was driving his personal vehicle, and conducted a search of that vehicle. [R.15][1] The search revealed a small amount of marijuana and money, U.S. currency, in the amount of $92,740.10. [R.16] The law enforcement officers conducting the search seized the marijuana and money, and released Hannah. [R.16] On March 20, 2003, Hannah's sister in Miami received a certified letter providing her brother with a Notice of Forfeiture of the money seized, and notifying him of his right to request a post-seizure adversarial hearing. [R.16] On April 2, 2003, Hannah timely mailed a letter to Sidney Nowell, attorney for Flagler County Sheriff's Office (FCSO), requesting a post-seizure adversarial hearing, and requesting specifically to be notified at his Miami address of the time and date for the hearing. [R.22] On April 8, 2003, law enforcement arrested Hannah in St. Johns County, Florida, on an unrelated matter, and placed him in the custody of the St. Johns County Sheriff's Office, where he remained until he bonded out on June 4, 2003. [R.17, 28-29]

FCSO filed a Complaint for Forfeiture on April 10, 2003, and, on April 11, 2003, filed a Notice of Hearing for an adversarial preliminary hearing to take place

[1] For clarification purposes, references to pages from the Record on Appeal shall be indicated by "R." and references to the supplemental Appendix attached to this brief shall be indicated by "A."

on April 14, 2003. [R.1; A.6] Despite Hannah's specific request to have notice of this hearing sent to his Miami address, the notice was instead faxed and mailed to a lawyer, Jerome Rosenblum, of Hollywood, Florida. [R.22; A.6] No notice of this hearing was sent to Hannah at his Miami address or to the St. Johns County Detention Facility where he was then incarcerated. [A.6] On April 14, 2003, Rosenblum, though not Hannah's attorney of record, purported to cancel the hearing and waive Hannah's statutory right to have the adversarial preliminary hearing set within a ten (10) day time frame. [R.23] This letter explained that Rosenblum had not filed any formal notice of appearance in Hannah's case, and stated that Hannah was currently incarcerated in St. Johns County. [R.23] The adversarial preliminary hearing Hannah requested was never rescheduled, and Hannah was not made aware of any of these events. [R.23, 28-29]

On April 15, 2003, Judge Kim Hammond sent a letter to FCSO attorney Nowell outlining the notice requirements of Florida's Contraband Forfeiture Act, and informing him that, "[h]aving reviewed the complaint for forfeiture in [Hannah's] case, the Court has been unable to verify that the notice required by the statute has taken place." [A.4-5]

On April 23, 2003, FCSO filed with the court a copy of a summons allegedly served on Hannah on April 14, 2003, at 3:43 p.m. [R.34] There is no signature from

Hannah indicating that he received service, and he has stated in his affidavit that he was not served with this summons. [R.34, 28-29]

On May 8, 2003, FCSO filed a Motion for Default, and provided a copy of the Motion to Rosenblum. [R.7] The Motion was not provided to Hannah. [R.7] On May 9, 2003, Rosenblum informed FCSO attorney Nowell that he had not had any contact with Hannah or anyone in his family and that he did not represent Hannah in this matter. [R.26] Following receipt of this letter, FCSO obtained an Order finding probable cause (dated May 15, 2003), a Notice of Filing Proof of Publication (dated May 16, 2003), and an order of Default (dated May 21, 2003). [R.8, 9; A.6] Despite being informed by Rosenblum that he did not represent Hannah, all of these documents were sent to Rosenblum, and not to Hannah. [R.8, 9; A.6] At no time was Hannah noticed of any of these events. [R.8, 9; A.6] Upon receiving these filings, Rosenblum again contacted Nowell to remind him that he had not filed a notice of appearance in Hannah's case, and did not represent him in this matter. [R.27] On June 2, 2003, FCSO moved for an entry of Default Final Order of Forfeiture, which the court granted on June 16, 2003. [R.12-14]

On or about February 11, 2008, Hannah, pursuant to Florida Rule of Civil Procedure 1.540(b), filed a Motion for Relief from Final Judgment seeking an Order vacating the June 16, 2003, Final Order of Forfeiture, and seeking the immediate

release of his seized property. [R.15-21] Specifically, Hannah argued that the Final Order of Forfeiture is void as a result of improper notice, violating Hannah's substantive due process rights. [R.15-21, 48-87] More specifically, Hannah argued that, after he properly requested an adversarial preliminary hearing, FCSO failed to set one or provide him notice of any further proceedings, and communicated only with an attorney not representing Hannah in this matter. [R.15-21, 48-87] Hannah argued also that the summons alleged to have been personally served on him at St. Johns County Detention Facility could not cure the lack of proper notice because it too was insufficient as it did not include the Order of probable cause findings. [R.48-87] Following a hearing on June 9, 2008, the court denied Hannah's Motion for Relief from Final Judgment. [R.87] This timely appeal follows. [R.40]

STANDARD OF REVIEW

On appeal, the "standard of review of an order ruling on a motion for relief from judgment filed under Florida Rule of Civil Procedure 1.540(b) is whether there has been an abuse of the trial court's discretion." *Snipes v. Chase Manhattan Mortgage Corp.*, 885 So. 2d 899, 900 (Fla. 5th DCA 2004).

SUMMARY OF ARGUMENT

A party is entitled to relief on a motion for relief from final judgment if the final judgment is void. In a forfeiture proceeding pursuant to the Florida Contraband Forfeiture Act, the seizing party's failure to comply with the provisions of the Act renders a resulting final order of forfeiture void. Specifically, where the seizing party fails to set an adversarial preliminary hearing within the statutory time frame after one has been properly requested, or where the seizing party fails to provide proper notice of forfeiture proceedings, a final order of forfeiture is void.

Derrel Hannah properly requested an adversarial preliminary hearing following law enforcement's seizure of his $92,740.10. Despite this request, and in violation of the Florida Contraband Forfeiture Act, the seizing agency failed to set this hearing. The seizing agency then directed all notification and communication on Hannah's case not to Hannah as requested, but to an attorney who did not represent Hannah in this matter, and who lacked any authority to act on Hannah's behalf. Because the seizing agency failed to set an adversarial preliminary hearing and failed to provide proper notice to Hannah on his forfeiture proceedings, the seizing agency failed to comply with the Florida Contraband Forfeiture Act, and the court's resulting Order of Forfeiture is void. As the court's Final Order of Forfeiture is void, the lower court abused its discretion in denying Hannah's Motion for Relief from Final Judgment.

ARGUMENT

I. The lower court erred in denying Hannah's Motion for Relief from Final Judgment because the Final Order of Forfeiture is void.

Pursuant to Florida Rule of Civil Procedure 1.540(b)(4), a party may seek relief from a final order of the court if that final order is void. *See* Fl. R. Civ. P. 1.540(b)(4). A party alleging such may do so at any time, as a void order is a nullity that creates no binding obligation on the parties involved. *See Griesel v. Gregg*, 733 So. 2d 1119, 1121 (Fla. 5th DCA 1999). If a final order is void, the trial court has no discretion, and is obligated to vacate the order. *See Horton v. Rodriguez Espaillat y Asociados*, 926 So. 2d 436, 437 (Fla. 3d DCA 2006)(citing *Dep't of Transp. v. Bailey*, 603 So. 2d 1384, 1386-1387 (Fla. 1st DCA 1992). Denial of a motion for relief from a final order that is void warrants reversal and remand by the appellate court. *See Coldiron v. Seminole County Sheriff's Office*, 974 So. 2d 1199, 1200 (Fla. 5th DCA 2008), *Griesel v. Gregg*, 733 So. 2d 1119, 1121 (Fla. 5th DCA 1999).

Flagler County Sheriff's Office (FCSO) failed to comply with the requirements of the Florida Contraband Forfeiture Act by failing to set an adversarial preliminary hearing as properly requested by Hannah, and by failing to provide proper notice of forfeiture proceedings against Hannah. This rendered void the June 16, 2003, Final Order of Forfeiture concerning Hannah's property, in the amount of $92,740.10, U.S. currency. Because that Final Order is void, the lower court erred in denying

Hannah's Motion for Relief from Final Judgment, and reversal and remand of that decision is warranted.

A. The Final Order of Forfeiture is void because Hannah timely requested an adversarial preliminary hearing on the matter, but the seizing agency failed to set the hearing within the statutory time frame.

When property is seized pursuant to the Florida Contraband Forfeiture Act, the person entitled to notice under that Act must be noticed of his right to a post-seizure adversarial preliminary hearing to determine the existence of probable cause to believe that the property has been or is being used in violation of the Act. *See* Fla. Stat. §§ 932.701, 932.703. If such a hearing is requested, the request must occur within 15 days after receiving notice, and must be made in writing to the seizing agency. *See* Fla. Stat. § 932.703. "The seizing agency shall set and notice the hearing, which must be held within 10 days after the request is received or as soon as practicable thereafter." Fla. Stat. § 932.703(2)(a).

Here, the seizing agency, Flagler County Sheriff's Office (FCSO), properly notified Hannah of the Notice of Forfeiture of the money seized and his right to request a post-seizure adversarial preliminary hearing. Upon receipt of that notice, and in full compliance with the requirements of the Florida Contraband Forfeiture Act, on April 2, 2003, Hannah provided his timely written request to FCSO attorney

Sidney Nowell seeking a post-seizure adversarial preliminary hearing. Because Hannah properly requested an adversarial preliminary hearing, FCSO was then obligated to set the hearing within 10 days, or as soon as practicable thereafter. *See* Fla. Stat. § 932.703(2)(a). However, as the record reflects, no such hearing was ever held prior to the court's entry of a Final Order of Forfeiture, much less within 10 days of Hannah's request.

In *Murphy v. Fortune*, the First District Court of Appeal explained the importance of a seizing agency's burden to hold an adversarial preliminary hearing within 10 days of a request for such, or as soon as practicable thereafter:

> Florida law is clear. Once a post-seizure adversarial hearing is requested, the seizing agency must set and notice the hearing, and the hearing must be held within ten days after the request is received or as soon as practicable thereafter. Any exception to the rule that a post-seizure adversarial hearing must be held within ten days of the claimant's request, as contemplated by the language "or as soon as practicable thereafter" is limited to extraordinary circumstances.

Murphy v. Fortune, 857 So. 2d 370, 371 (Fla. 1st DCA 2003)(internal citations omitted).

The Court held that, "at the expiration of the ten days following Murphy's request for a hearing, the Sheriff's Department's lawful authority to retain the seized currency expired.... To hold otherwise would result in a denial of Murphy's right to due process." *Id*. at 372.

In the present case, because FCSO failed to comply with the requirements of

the Florida Contraband Forfeiture Act by failing to hold the requested adversarial preliminary hearing, the Final Order of Forfeiture is void, and Hannah should have been entitled to relief on his Motion for Relief from Final Judgment.

1. Hannah did not waive the statutory time frame in which to have an adversarial preliminary hearing.

After properly requesting an adversarial preliminary hearing, at no time did Hannah waive his statutory right to have that hearing held within 10 days, or as soon as was practicable thereafter. FCSO argued that it relied on a waiver of this time period by attorney Jerome Rosenblum, however that reliance is both misplaced and unreasonable, as Rosenblum had no authority to act on Hannah's behalf.

An attorney has the authority to act on behalf of a client only if that attorney is the attorney of record. *See* Fla. R. Jud. Admin. 2.505(h). To be the attorney of record, the attorney must file a pleading on behalf of the client, file a notice of appearance, or act as substitution counsel with the consent of both the client and the court. *See* Fla. R. Jud. Admin. 2.505(e). If an attorney is not the attorney of record, he lacks authority to act on behalf of a party in court proceedings.

On April 14, 2003, via letter to FCSO attorney Nowell, attorney Rosenblum, purported to cancel Hannah's scheduled adversarial preliminary hearing, and waive

Hannah's right to have that hearing within the statutory time period. However, at no time was Rosenblum ever retained by Hannah, nor did Rosenblum have any authority to act on Hannah's behalf. In that letter, Rosenblum informed Nowell that he had not contacted Hannah or filed a notice of appearance in his case. Based on this, Nowell should have known that Rosenblum was not Hannah's attorney of record, and that he lacked any authority to act on Hannah's behalf. As such, Nowell could not have reasonably relied on Rosenblum's waiver.

Because FSCO cannot reasonably rely on the waiver of a statutory right by an attorney lacking any authority to give such a waiver, there was no waiver of this time period in Hannah's case, and FCSO's failure to set the requested adversarial preliminary hearing within ten days rendered void the Final Order of Forfeiture.

2. Hannah's failure to file any further response after his initial request for an adversarial preliminary hearing does not relieve the seizing agency of its obligation to set an adversarial preliminary hearing as requested.

In section B(2) of this argument, this brief addresses the issue of Hannah's lack of proper notice under the Florida Contraband Forfeiture Act. However, even assuming *arguendo* that FCSO provided proper notice to Hannah of the forfeiture proceedings against him, Hannah's failure to file a response in addition to his initial request for an adversarial preliminary hearing did not relieve FCSO of its obligation

to set such a hearing.

On April 2, 2003, Hannah provided his proper request for an adversarial preliminary hearing. FCSO argued that, because Hannah failed to provide a response to the Complaint of Forfeiture (which it argues it provided to Hannah on April 14, 2003, and which is addressed below in section B(2)), Hannah was not entitled to an adversarial preliminary hearing before the court could enter a final order of forfeiture. Hannah was, however, entirely reasonable in not responding to FCSO's Complaint of Forfeiture.

In its Complaint of Forfeiture, filed on April 10, 2003, FCSO stated that it had requested an adversarial preliminary hearing to be scheduled within ten days from the date of the Complaint, or as soon as practicable thereafter. Although the summons attached to this Complaint stated that Hannah had to file a response to the Complaint within twenty days, his failure to do so was entirely within reason. Hannah had already requested this same adversarial preliminary hearing, and requested that he be notified when the hearing was to be scheduled. This Complaint is the first correspondence Hannah received following his request, and it did not schedule a hearing, but rather only reiterated that a hearing needed to be held. Hannah could not have provided any response to the Complaint that was different than the response he provided initially on April 2, 2003. FCSO still had its obligation to set the

adversarial preliminary hearing within ten days of Hannah's request, and it failed to do so. As such, the Final Order of Forfeiture was void, and the trial court erred in not granting Hannah's Motion for Relief from Final Judgment.

B. The Final Order of Forfeiture is void because, after providing to Hannah the initial Notice of Forfeiture, the seizing agency failed to provide Hannah with proper notice of the forfeiture proceedings against him.

Although FCSO's initial Notice of Forfeiture to Hannah was proper, FCSO directed all further communications to an incorrect address, thereby depriving Hannah of proper notice of the forfeiture proceedings against him. FCSO could not have reasonably believed the address it used for purposes of notification to be correct because Hannah had specifically provided his correct address for purposes of notification, because FCSO had actual knowledge of Hannah's actual location during the pertinent time period, and because the address used was that of an attorney clearly lacking any authority to act on Hannah's behalf.

1. After providing to Hannah the initial Notice of Forfeiture, the seizing agency directed all further communications to an incorrect address, depriving Hannah of proper notice of the forfeiture proceedings against him.

On March 20, 2003, FCSO provided proper Notice of Forfeiture to Hannah. In response and in full compliance with the Notice of Forfeiture, Hannah made his

timely request for a post-seizure adversarial hearing, stating specifically that notice of the date and time for this and any proceedings should be sent to his Miami address (where FCSO sent Hannah the initial Notice of Forfeiture). Despite this specific statement of a proper address for future communications, FCSO directed all future communications to an incorrect address.

Upon receipt of Hannah's request for an adversarial preliminary hearing, FCSO filed its Notice of Hearing with the court, setting that hearing for April 14, 2003. Despite Hannah's statement that notice of the date and time for this hearing should be sent to his Miami address, FCSO did not send notice to Hannah at this address, and instead sent notice to attorney Jerome Rosenblum of Hollywood, Florida, an attorney who, as explained above, had not been retained to represent Hannah and who did not have authority to act on Hannah's behalf. When Rosenblum then received FCSO's Motion for Default, Rosenblum informed Nowell that he had not had any contact with Hannah or anyone in his family, and that he did not represent Hannah in this matter. FCSO then obtained an Order finding probable cause (dated May 15, 2003), a Notice of Filing Proof of Publication (dated May 16, 2003), and an order of Default (dated May 21, 2003), and, despite the clear statement from Rosenblum that he was not Hannah's attorney, FCSO sent all of these documents to Rosenblum only. Hannah received no notice of any of these events. Yet again, Rosenblum contacted Nowell

to remind him that he had not filed a notice of appearance in Hannah's case, and did not represent him in this matter.

Moreover, during the pertinent time period in which notification was being sent to Rosenblum, FCSO had actual knowledge that Hannah was then incarcerated at St. Johns County Detention Facility. Specifically, Rosenblum -by way of letter to FCSO in which he stated that he has not contacted Hannah or filed a notice of appearance- stated that Hannah was incarcerated in St. Johns County.

Here, following FCSO's initial Notice of Forfeiture, Hannah failed to receive proper notice of any forfeiture proceedings against him. FCSO instead sent all communications to an incorrect address that it could not have reasonably believed to have been correct: It was unreasonable for FCSO to fail to provide notice to Hannah at the address he requested specifically, or to provide notice to Hannah at St. Johns County Detention Facility, where FCSO had actual knowledge he was incarcerated during the pertinent time period. It was unreasonable also for FCSO to communicate with Rosenblum as though he were Hannah's attorney when Rosenblum clearly stated that he had not contacted Hannah or filed a notice of appearance. FCSO's continued communication with Rosenblum about Hannah following Rosenblum's unequivocal statement that he did not represent Hannah was also unreasonable.

Where a defendant fails to receive proper notice of proceedings because

notification was sent to an incorrect address, the final order based on those improperly-noticed proceedings is void. *See Greisel v. Gregg*, 733 So. 2d 1119, 1121-1122 (Fla. 5th DCA 1999)(finding that, where a plaintiff knew that the defendant's correct address was in Germany yet continued to provide notice to an incorrect address in Orlando, Florida, notice was improper and the resulting final order was void).

Because FCSO failed to provide proper notice to Hannah of the forfeiture proceedings against him, the Final Order of Forfeiture is void, and Hannah should have been entitled to relief on his Motion for Relief from Final Judgment. *See id.*

2. The seizing agency never cured its notice deficiencies.

In a letter to FCSO attorney Nowell from Judge Hammond, the judge presiding over Hannah's forfeiture proceeding, Judge Hammond informed Nowell that, "[h]aving reviewed the complaint for forfeiture in [Hannah's] case, the Court has been unable to verify that the notice required by the statute has taken place." Judge Hammond then specified that, under the Florida Contraband Forfeiture Act, "once the probable cause determination has been made, the complaint and the probable cause determination should be served as original process." [A.4-5]

FCSO has argued that it satisfied its notice requirements by providing notice

to Hannah in the form of a summons served personally on Hannah on April 14, 2003. This argument, however, is flawed. First, the record does not reflect that Hannah ever received this summons, as his affidavit stated that he did not and the summons contains no signature of receipt or any indication of what, if anything was attached to the summons, and second, even if this service did occur, it was insufficient under the Florida Contraband Forfeiture Act. Specifically, as outlined by the judge, to be sufficient, the summons would have had to have provided Hannah with the complaint, an affidavit supporting the complaint, and the probable cause findings. *See* Fla. Stat. § 932.704. The probable cause findings could not have been attached with the complaint on the alleged April 14, 2003, service, as the Order of probable cause findings did not exist until May 15, 2003. As such, this alleged service could not have satisfied the notice requirements under the Florida Contraband Forfeiture Act.

As FCSO never cured its notice deficiencies, notice remained improper under the Florida Contraband Forfeiture Act, and the resulting Order of Forfeiture is void. As such, the trial court erred in denying Hannah's Motion for Relief from Final Judgment.

CONCLUSION

_____In the forfeiture proceedings concerning Derrel Hannah's seized money, the seizing agency failed to comply with the requirements of the Florida Contraband Forfeiture Act, thereby rendering void the court's Final Order of Forfeiture. Because the Final Order of Forfeiture is void, the lower court erred in denying Hannah's Motion for Relief from Final Judgment. As such, Hannah respectfully requests this Honorable Court to reverse the lower court's denial of Hannah's Motion for Relief from Final Judgment.

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Respectfully Submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

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WILLIAM MALLORY KENT
Florida Bar No. 0260738

____

SUSAN STROMBERG MATTHEY
Florida Bar No. 0815470
1932 Perry Place
Jacksonville, Florida 32207-3443
(904) 398-8000 Telephone
(904) 348-3124 Facsimile
kent@williamkent.com

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14-point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on Warren W. Lindsey and William R. Ponall of Kirkconnell, Lindsey, Snure and Yates, P.A., Post Office Box 2728, Winter Park, Florida, 32790, this the 3rd day of November, 2008.

____
WILLIAM MALLORY KENT

____
SUSAN STROMBERG MATTHEY