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Supreme Court of Texas.
Larry York dba York Tank Trucks
v.
State of Texas and Wise County, Texas.
No. 09-0905.

December 6, 2011.

Appearances:

Samuel C. Bishop of Bishop & Bishop, for Petitioner.

Thomas Michel of Griffith, Jay & Michel, for Respondents.

Kristopher S. Monson of the Office of the Attorney General, for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

ORAL ARGUMENT OF SAMUEL C. BISHOP ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF THOMAS MICHEL ON BEHALF OF THE RESPONDENT
ORAL ARGUMENT OF KRISTOFER S. MONSON FOR RESPONDENTS
REBUTTAL ARGUMENT OF SAMUEL C. BISHOP ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first case, Larry York v. State of Texas and Wise County.

MARSHAL: May it please the Court, Mr. Bishop will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF SAMUEL C. BISHOP ON BEHALF OF THE PETITIONER

ATTORNEY SAMUEL C. BISHOP: May it please the Court and Counsel, good morning, all. I'm very pleased to be here this morning to speak on behalf of Larry York and his case and his desire to get his trailer back. This case is about a number of issues as I'm sure you know from the number of briefs and issues presented in those briefs, but I think there are a couple of primary issues that lay at the forefront. The first is whether the residents of the State of Texas may collaterally attack a judgment entered by a justice court or other court in violation of the automatic bankruptcy stay through the use of extrinsic evidence to show that they were in bankruptcy. The second issue is whether the residents of the State of Texas have a remedy under the takings clause of the Texas Constitution to maintain an action when the state has taken actual physical possession of their property under Chapter 47 and excluded them from the use and enjoyment of that property for many years.

JUSTICE PAUL W. GREEN: What would have happened if Mr. York had a Chapter 47 proceeding and went

into the JP proceeding and said, by the way, judge, there's a bankruptcy stay so nothing can happen here?

ATTORNEY SAMUEL C. BISHOP: I'm not certain whether or not the justice of the peace would have known what to do under those circumstances given the fact that our justices of the peace are generally not attorneys and have law degrees.

JUSTICE PAUL W. GREEN: So you don't think it makes any difference whether the state was urged at that time or not?

ATTORNEY SAMUEL C. BISHOP: Well, under the decision in Kalb that we cite in our brief, the United States Supreme Court says, specifically that whether it was raised or could have been raised at that time is not relevant to whether or not the court lacked jurisdiction or is subject to collateral attack. I believe it states that, near the conclusion of its decision.

JUSTICE DALE WAINWRIGHT: What do you think should have happened under Justice Green's scenario?

ATTORNEY SAMUEL C. BISHOP: What should have happened in the, well, I believe to begin with that a Chapter 47 proceeding should not have occurred. One, because of the bankruptcy state, but two, because there was never a dispute or the ownership of the property was never contested or disputed in this case. The state held the property for five months before requesting a hearing on the property. They conducted their investigation, could find no trailers of this make and model reported stolen anywhere. The sergeant apparently never contacted the one person he believed may be the registered owner who was the person that Mr. York's father purchased it from some two decades before. No one else has ever come forward to claim ownership of the property. Therefore, under 47.01(a), I don't believe that the proceedings should have taken place, but had it, I believe that Mr. York did present evidence of his superior right to possession through the insurance records, the registration records, the inspection records that are before the Court showing at one point, the trailer did, indeed, still have the VIN plate on it and it was inspected by DPS and in his possession. He presented substantial evidence of his possession to that court and he was the only one claiming possession before that court and I think there's at least a statement in this Court's recent decision in VSC that the one at the hearing who shows that they have the superior right of possession is entitled to return of the property. He was the one who showed his right to possession and it should have been returned to him. Does that answer your question?

JUSTICE DALE WAINWRIGHT: McNutt Company, was it notified of the hearing?

ATTORNEY SAMUEL C. BISHOP: No, the McNutt Company was not notified of the hearing. In fact, the owner of the McNutt Company, I believe, passed away over 10 years ago.

JUSTICE DEBRA H. LEHRMANN: Had this ever been brought to the attention of the bankruptcy court?

ATTORNEY SAMUEL C. BISHOP: We have not pursued the remedy through the bankruptcy court.

JUSTICE DEBRA H. LEHRMANN: And why is that?

ATTORNEY SAMUEL C. BISHOP: At the time, Mr. York's bankruptcy was either in Midland or out in west Texas, maybe Abilene, Midland, somewhere out there. Under the decision in Kalb, it appears that those whose rights have been violated through violation of the bankruptcy state do have a remedy in state court and should have a remedy in state court. Kalb holds that and it recognizes that the states have these rules like the extrinsic evidence rule that tend to give finality to judgments and make them somewhat unassailable on collateral review, but it also says that, under these circumstances where Congress has stepped in and enacted the Federal Bankruptcy Law in that case that that created a federal preemption to those laws and rules of practices in state court that make them unassailable on collateral review. So we felt we had a remedy in state court and rather than proceeding halfway across the state, we could do it locally.

JUSTICE NATHAN L. HECHT: Has he been discharged?

ATTORNEY SAMUEL C. BISHOP: He has. I believe I noted in our latest brief, I think that bankruptcy was completed maybe a year and a half ago.

CHIEF JUSTICE WALLACE B. JEFFERSON: What happens when there's a bankruptcy proceeding, but there's been a seizure? What happens to the property in the interim before the bankruptcy is discharged in general? So you own a truck and VPS comes and takes it and there's nothing that prevents, there's no state that prevents the law enforcement from seizing a vehicle they believe is stolen even during a bankruptcy proceeding, is that correct?

ATTORNEY SAMUEL C. BISHOP: We haven't challenged their seizure of it and my familiarity with bankruptcy code is not that great. I don't know that, I mean there are certain provisions that prevent any interference with the person or the property and the bankruptcy court may certainly have been in a position to step in and take some action at that point for interference. I'm not certain.

JUSTICE DAVID M. MEDINA: What do you have to say about the police power exception?

ATTORNEY SAMUEL C. BISHOP: Well, under the bankruptcy, there have been two. There's the police and regulatory powers exception under the bankruptcy code and then there was the police powers exception that the state noted in its response. To which would you be referring?

JUSTICE DAVID M. MEDINA: The latter.

ATTORNEY SAMUEL C. BISHOP: The latter? Well, I believe that the dissent in the VSC decision, Justice Wainwright, I believe, addressed that police powers exception and I think that the state made the same sort of argument in that case or the solicitor general's office did in that case under Chapter 47 that the language of the statute and the fact that it is an exercise of police power categorically prohibits the takings claim and I believe that this Court in deciding the case, maybe not expressly, but certainly impliedly rejected that position in saying that, no, you really need to pursue your Chapter 47 remedy as a prerequisite to pursuing your takings claim as opposed to it being completely categorically barred. As far as the police powers as recognized by Justice Wainwright, a lot of those cases, virtually all of those cases apply in the regulatory taking context and not in a physical taking context and as he noted, while there may be that big Serbonian bog that exists with regard to regulatory takings, we're on clear, dry land when it comes to an actual physical appropriation of property and in this case, they've seized his trailer. They've had it in their possession locked up behind a chain-link fence for going on five years now. This is actual physical taking of property.

JUSTICE EVA M. GUZMAN: Does the-

JUSTICE NATHAN L. HECHT: Go ahead.

JUSTICE EVA M. GUZMAN: Go ahead.

JUSTICE NATHAN L. HECHT: If the justice court's order was void, you still have a takings claim?

ATTORNEY SAMUEL C. BISHOP: I believe that I do because of their actual physical possession of the property.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Guzman.

JUSTICE EVA M. GUZMAN: Well, I was going to ask about that JP order as well. What impact, if any, does

the failure to call the bankruptcy stay to the JP court's attention have on the procedural posture that you're in now?

ATTORNEY SAMUEL C. BISHOP: I think that it's fairly well established and unfortunately, I don't have any cases for you. I may have cited some in the brief, but I think it's fairly well established in the law in the State of Texas that you need not bring that to the attention of whichever court you may be before, the bankruptcy stay is automatic. It operates regardless of whether you bring it to the court's attention.

JUSTICE EVA M. GUZMAN: The Fifth Circuit has seemed to now follow a line of reasoning that the judgments are merely voidable versus void.

ATTORNEY SAMUEL C. BISHOP: You're referring to the Sikes decision?

JUSTICE EVA M. GUZMAN: Mhmm.

ATTORNEY SAMUEL C. BISHOP: The Sikes decision was I think the Fifth Circuit actually recognized that it may have used poor language in drafting that decision subsequently. It has been cited in a number of cases and noted as a conflict between this Court's opinions and the Fifth Circuit, but and I have the name of the case here. In re there was a bankruptcy court out of the southern district that do have cited in the brief that addressed the Sikes decision and recognized that the Fifth Circuit probably used a poor choice of words in saying that it was voidable when it really meant to say that it was a nullity and which no one could rely upon and ultimately, the Fifth Circuit took that case up on appeal and affirmed that decision and basically agreeing, I guess, agreeing with what the bankruptcy court had written on the issue. So I don't think that there is any significant difference in what this Court is saying versus the Fifth Circuit as far as-

JUSTICE EVA M. GUZMAN: Very briefly, back on your takings claim, so they've had the trailer for five years. Are there loss of use damages? Was the trailer used for work or what was it used for?

ATTORNEY SAMUEL C. BISHOP: Yes, yes, that is a tank trailer used in oil field operations and he's had the loss of use of it during that time period, yes.

JUSTICE DEBRA H. LEHRMANN: Let me ask you and you may have answered this, but do you believe that there could have been a taking when your client had the opportunity to raise this issue in the JP court and failed to do so or to appeal that decision? Do you think that waived the takings claim?

ATTORNEY SAMUEL C. BISHOP: I do believe that, well, to begin with, and I know my time is pretty short, Mr. York proceeded pro se in the JP court and I understand that we don't give or grant a lot of favors to pro se litigants, but he did so at the request of Sergeant Martinez, who told him you don't need a lawyer. It's just an informal proceeding. And, that's the way things happen in JP courts around the state. People go there. They refer to it as small claims court. I don't need an attorney. He went in not knowing and his bankruptcy had been filed two years before and so he didn't have any idea that it would prohibit this other lawsuit and he had no idea to raise it and so I don't know that whether or not he raised it affects the validity of this takings claim.

JUSTICE PAUL W. GREEN: Was there a trustee appointed, I assume, in bankruptcy?

ATTORNEY SAMUEL C. BISHOP: Oh, I'm sure there was.

JUSTICE PAUL W. GREEN: Do you know how the trailer was treated in the bankruptcy schedules? Was it shown as owned by the State?

ATTORNEY SAMUEL C. BISHOP: It was listed in the schedules and those are in the records before the Court. That is part of our extrinsic evidence and I notice that I'm running out of time here.

CHIEF JUSTICE WALLACE B. JEFFERSON: You can complete your answer, Counsel.

ATTORNEY SAMUEL C. BISHOP: Those records regarding the schedules and its existence in the bankruptcy court are before the Court. That's the extrinsic evidence, that we're trying to utilize and I believe that the State concedes if we get to utilize that, our claim should move forward. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the Respondent, the State of Texas or Wise County, Wise County.

MARSHAL: May it please the Court, Mr. Michel and Mr. Monson will present argument for the Respondents. Mr. Michel will open with the first 10 minutes.

ORAL ARGUMENT OF THOMAS MICHEL ON BEHALF OF THE RESPONDENT

ATTORNEY THOMAS MICHEL: May it please the Court, excuse me, I believe the issues that we've been talking about as to whether or not extrinsic evidence can be presented, I think there are four reasons why they cannot. Number one is the long-held state law that extrinsic evidence cannot be brought in to try to collaterally show a judgment is void.

JUSTICE NATHAN L. HECHT: But if we can't, then you have to go bankruptcy relief for relief.

ATTORNEY THOMAS MICHEL: Correct.

JUSTICE NATHAN L. HECHT: Why would a state do that? Why would a state send its citizens to the bankruptcy court for relief of a violation of federal law instead of just rectifying it itself?

ATTORNEY THOMAS MICHEL: Actually, I think it's a perfect form to do it. It's a federal law. It's a federal protection.

JUSTICE NATHAN L. HECHT: Well, we lost that war so we're supposed to enforce it here and I wonder why we wouldn't enforce it in our courts rather than send the debtor over the bankruptcy court.

ATTORNEY THOMAS MICHEL: Well, I guess I don't really see that we're sending them over to bankruptcy court because the debtor has already filed bankruptcy and has chosen to go to bankruptcy court so he's already in the court of his choice seeking his protections.

JUSTICE NATHAN L. HECHT: What if the bankruptcy proceeding had ended it? Could you still go back and seek relief from the bankruptcy court?

ATTORNEY THOMAS MICHEL: It's my understanding it depends on the type of whether he was, in fact, discharged because if he had not completed his plan properly, he would not have received a discharge. Secondly, I think there are limited circumstances where you can go back and reopen a bankruptcy.

JUSTICE NATHAN L. HECHT: But is that if, I mean, this could easily happen that the debtor would be discharged before we found out about a judgment against property or maybe just what.

ATTORNEY THOMAS MICHEL: Yes, absolutely.

JUSTICE NATHAN L. HECHT: If this was after the proceeding had ended, but you think he could do that?

ATTORNEY THOMAS MICHEL: That is correct. There are procedures when I have talked to my bankruptcy

counsel that there are procedures under certain circumstances that you can go back in and actually reopen the bankruptcy and in fact, that may be a perfect example of where no notice was given at all and the debtor didn't know as opposed to here, it was the flip-flop. It was the debtor who did advise the court that there was a pending bankruptcy.

JUSTICE PAUL W. GREEN: Is there any doubt that Mr. York is the owner of that trailer?

ATTORNEY THOMAS MICHEL: I think there was. I think he's presented, he certainly has not presented a title. If anything, the State has taken the position that the McNutt, if anybody, based on the evidence before the Court, extrinsic evidence.

JUSTICE PAUL W. GREEN: Okay, procedurally, you may be right in terms of what happened at that proceeding. Is there any doubt now?

ATTORNEY THOMAS MICHEL: I'm not sure that it has been established.

JUSTICE PAUL W. GREEN: You're not sure.

CHIEF JUSTICE WALLACE B. JEFFERSON: What was the evidence before the JP court that York was not the owner or that the property was stolen, just the omission of the VIN or what?

ATTORNEY THOMAS MICHEL: I believe that was primarily it, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: That's it?

ATTORNEY THOMAS MICHEL: I believe so and the inability to locate the actual owner. I do take issue with the presentation that it's not a dispute, but that's, for example, if I go to one of these Chapter 47 hearings and I just come in and say I'm the owner and no one else shows up, I don't believe that constitutes sufficient evidence to say that it wasn't in dispute.

JUSTICE NATHAN L. HECHT: So then the State gets the property, that's?

ATTORNEY THOMAS MICHEL: No, there are procedures that the Chapter 47 provides for the disposition of that property.

JUSTICE NATHAN L. HECHT: I know, but if the State just drives down the street and grabs a car and takes it down and holds it and somebody comes in and says, well I think that's mine and the JP says, I don't think so the state gets the car?

ATTORNEY THOMAS MICHEL: Not necessarily. Chapter 47 provides a myriad of ways that property can be disposed. In Chapter 47, it's called, disposition of stolen property. Section 501 of the Transportation Code provides the property is to be treated as stolen. Section 31.11 in the Penal Code makes it a criminal offense to possess a vehicle without a vehicle identification number. So this is at its heart a very stated public policy by the Texas Legislature to try to address these in very real terms. We have in three different code provisions when trying to how to handle these.

JUSTICE NATHAN L. HECHT: But isn't the point of it all, the State seems to concede now that the point of all of this is to get the property back to its real owner?

ATTORNEY THOMAS MICHEL: I understand that's the State's position now.

JUSTICE NATHAN L. HECHT: That's not your position?

ATTORNEY THOMAS MICHEL: It's not our position. I think, clearly, the Chapter 47 is called, it's titled Disposition of Stolen Property and it is an avenue to try to deal with the situation of what is perceived to be stolen property and under 501 of the Transportation Code, a vehicle without a VIN number can be treated as stolen property.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me ask you this and I know you think we don't reach this, the merits here, but before the JP court, York came in and presented evidence of repair records, insurance records, and maintenance, registration and all of that. How, what explains the JP court's decision in light of that evidence and none to the contrary except for the missing VIN?

ATTORNEY THOMAS MICHEL: I think that's primarily it is there was no certificate of title of ownership. There was no insufficient evidence as best I can recollect and not having the vehicle identification.

JUSTICE DAVID M. MEDINA: Does this happen often in Wise County?

ATTORNEY THOMAS MICHEL: That's the allegation. Granted, it was presented by extraneous evidence, which was presented, but to say that that's often? Who's to say? An examination of the detailed analysis of each one of those claims would have to be undertaken rather than a disposition on a sheet.

JUSTICE DAVID M. MEDINA: It just seems to make no sense to me that someone would pursue this all the way to this Court if, indeed, they didn't have an interest in that being their own vehicle irrespective of the VIN and irrespective of what the statute says.

ATTORNEY THOMAS MICHEL: I can understand that stance, Your Honor, and I think from our practice though, we have had to deal with a lot of prosecutions of lawsuits that I never understood. In that respect, yes, they've taken it up here. There may be other issues involved while this case is proceeding, but that would be just speculation on my part.

JUSTICE DALE WAINWRIGHT: What does Wise County believe the purpose of Chapter 47 is if not to get the property to the owner?

ATTORNEY THOMAS MICHEL: I think the purpose of Chapter 47 is a mechanism to dispose of property that has been seized pursuant to the Transportation Code. Whatever mechanism that is, it may not necessarily just to get it back to the rightful owner, but that is a part of the process, but it's reality. I call it a reality statute. We've got this vehicle here and what are we supposed to do with it? And in-

JUSTICE NATHAN L. HECHT: Well, it's very difficult to understand the government arguing that when there's a victim, we should further the insult by taking the property and disposing of it ourselves and keeping the money.

ATTORNEY THOMAS MICHEL: Well, Wise County-

JUSTICE NATHAN L. HECHT: That seems to add insult to injury.

ATTORNEY THOMAS MICHEL: No, but that's not Wise County's, that is not what Wise County is doing.

JUSTICE NATHAN L. HECHT: Well, what effort has it made to get the tank to the owner?

ATTORNEY THOMAS MICHEL: It has, it is upholding or going, trying to uphold the valid rulings of the courts.

JUSTICE NATHAN L. HECHT: It's trying to, tell me that again.

ATTORNEY THOMAS MICHEL: It's following the valid orders of the court, of a court, which had not been appealed and for them to unilaterally then follow a judicial decision that said, it was not the owner and of which Wise County was not the Petitioner of this and this will get to the taking case as well. Wise County did not seize this. This was seized by the department. There were three other governmental entities that were involved before it ever gets to Wise County. You've got the DPS. You've got the State of Texas petition. You've got the justice court and then it gets awarded to the State of Texas to hand it off to Wise County. So to say that Wise County went in there and took this trailer is inaccurate.

JUSTICE EVA M. GUZMAN: How old was the trailer at the time they took it?

ATTORNEY THOMAS MICHEL: Apparently, the best we can tell, old.

JUSTICE EVA M. GUZMAN: Like how? 20 years old?

ATTORNEY THOMAS MICHEL: Perhaps.

JUSTICE EVA M. GUZMAN: So not have a VIN on there after 20 years, it's probably not that unusual is it?

ATTORNEY THOMAS MICHEL: It's a crime. It's a crime.

JUSTICE DALE WAINWRIGHT: So Wise County's position is that, you agree with the dissent in the Court of Appeals. The JP determined ownership against York. York didn't properly appeal. That issue's done.

ATTORNEY THOMAS MICHEL: Yes.

JUSTICE DALE WAINWRIGHT: So is it also your position then that we shouldn't consider the affidavit filed in the court of civil, county court at law rather, from the registered owner that York had indeed bought the trailer from him. So that's just, we can't even look at that because-

ATTORNEY THOMAS MICHEL: It's a collateral effect.

JUSTICE DALE WAINWRIGHT: JP's decision is final.

ATTORNEY THOMAS MICHEL: Yes, there was remedy by appeal and Justice Wainwright, I guess the burning question is, I know, Justice Hecht, you said, why not go to bankruptcy court. In all due respect, that's the place to go. It's going to afford, I think the question back to opposing counsel is why didn't he? Just because it's not convenient? I'll tell you, there's a reason why and I think it's because he didn't want to back to bankruptcy court and he didn't want this issue heard by a court and the trustee who has supervisory power because it's really actually property of the trustee at this point and not the debtor. He would have to have gone back to that court, so why did he pursue this roundabout collateral attack when the statute was amended in 1978 to allow a spot-on remedy to hear and why come in and inject this federal preemption controversy between state court, federal court, Chapter 47 and all of those efforts when it could have been squarely addressed in one court?

JUSTICE DALE WAINWRIGHT: Chapter 47 is not that great a statute frankly.

ATTORNEY THOMAS MICHEL: No it's not.

JUSTICE DALE WAINWRIGHT: For a criminal, the criminal forfeiture statute requires notice to all the interested parties, has a well-defined procedure. It works properly. Chapter 47 doesn't even require notice to all the interested parties. Now the JP, the Texas Justice Court's Training Center Desk Book advises the JPs to provide

notice, but the statute itself doesn't require notice. It requires that an officer identify or prepare a list of the interested parties, but nowhere does it require notice to those parties. If McNutt had been noticed and could have shown up, then this would have been resolved as to ownership if it's actually true that McNutt sold the property to York. It would have been done at the Chapter 47 hearing, but the hearing procedures just and then you have to also request an appeal immediately at the end of the hearing.

ATTORNEY THOMAS MICHEL: Correct.

JUSTICE DALE WAINWRIGHT: Not 5 days, not 10 days, not 20 days, immediately at the end orally. If you don't, you waive appeal, which is what happened here, which is why you say York doesn't have a remedy because ownership's been declared against him and he failed to appeal.

ATTORNEY THOMAS MICHEL: Well, as far as declared to be the owner, I think there's two aspects to that. One is the only issue York presented to the justice of the peace was that I was the owner of the trailer. So in that respect, the application of the automatic stay didn't apply. Secondly, with regard to notice, if McNutt, it wouldn't be property of the debtor and I think both sides agree that state court and federal court have concurrent jurisdiction to decide whether a particular piece of property is property of the debtor or not subject to being challenged and set aside by bankruptcy court, which dovetails into the procedures here at least that play in this case. Justice Wainwright is once again I think all of these issues, all of the concerns that the Court has could have been directly alleviated by a simple procedure of presenting this to the bankruptcy court. These all would have been wrapped up in one. In fact, as I said, the code was amended to allow that to occur.

JUSTICE DALE WAINWRIGHT: Or by noticing McNutt and having McNutt at the hearing, which didn't happen.

ATTORNEY THOMAS MICHEL: That is correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The Court is ready to hear argument from the State of Texas.

ORAL ARGUMENT OF KRISTOFER S. MONSON FORRESPONDENTS

ATTORNEY KRISTOFER S. MONSON: May it please the Court, Justice Wainwright, I'd like to talk about your concerns about Article 47 because I think I can explain it. 47.01a, not to be confused with 47.01 part sub-A, is a statutory replacement for the common law replevin mechanism and it is, it kind of is a like procedural requirement because the end result is merely a judgment of possession, which should that, at common law, you could have brought a writ of trover or detinue or another common law action against the recipient of the [inaudible] property in a separate court of law. .01a, which is separate and apart from the rest of Article 47, it's meant to replicate that narrow definition. That's why you have less procedures surrounding the determination and it's why it can't have preclusive effect about ownership. An .01a proceeding cannot result in any determination of ownership and this is where we part ways a little bit with the county and that's because-

JUSTICE DALE WAINWRIGHT: Let me ask a question here to make sure I understand. You said, 47.01a is different from the rest of Chapter 47.

ATTORNEY KRISTOFER S. MONSON: Yes.

JUSTICE DALE WAINWRIGHT: Interesting point because 47.05 says, if the court has any doubt as to the ownership of the property, it can require a bond suggesting ownership is the issue.

ATTORNEY KRISTOFER S. MONSON: .0-5 doesn't apply to .01a.

JUSTICE DALE WAINWRIGHT: I'm sorry?

ATTORNEY KRISTOFER S. MONSON: .05 doesn't apply to .01a. .05 only applies to .01, .03 and .04, in which case the test is on the plaintiff's attest to the statute ownership. Those-

JUSTICE DALE WAINWRIGHT: How do you determine that .05 does not apply to .01a?

ATTORNEY KRISTOFER S. MONSON: Because it says, if there's data to determination of ownership. If you're properly applying .01a, subsection b, you never determine ownership. It says, you determine possession based on whoever is noticed and shows up to the hearing and then it goes to the state, but the state doesn't establish ownership. Ownership only goes to the state if there's insufficient evidence that shows-

JUSTICE DALE WAINWRIGHT: But, Counsel, 47.01a(b) says, if it is shown in a hearing, the probable cause exists to believe the property was acquired by theft or by another manner and that the identity of the actual owner of the property cannot be determined, then the court shall order the peace officer to do a couple of things. So again, ownership in 47.01a, it suggests that ownership can be an issue, not just possession.

ATTORNEY KRISTOFER S. MONSON: Ownership can be an issue, but it can't be determined. Notice (b) specifically says that, the identity of the actual owner of the property cannot be determined. It doesn't say that the JP court has the power to determine who the actual owner of the property is. That's the power you have under .02. That's the power you have in an examining hearing under .03. I think this is important to remember. The rest of Article 47 was adopted in about this forum in 1857 by the Sixth Legislature. It sets out procedures at various stages in the criminal process in a prosecution of a crime to return property to its owner upon the determination of ownership based on the evidence in the criminal proceedings so either at the first examination hearing, during the trial or afterwards. That's why the test is ownership. .01a was added in 1977 because there's a problem, following rule 7.09 of the Rules of Civil Procedure was made things difficult for property owners who wanted to get their property out of the lockup when there wasn't a criminal proceeding underway. So it just sets up a completely different set of rights that's meant to replace the common law replevin scheme. The rest of Article 47 talks about what you do if there's a trial.

JUSTICE NATHAN L. HECHT: The troubling thing about it is it doesn't seem to be designed to get the property back to the owner. It seems to be designed for the State to hold on to property, which it's hard to see the rationale of that.

ATTORNEY KRISTOFER S. MONSON: I think if you take away the overlay of the Transportation Code issues, so putting that aside, it is meant to get to the person who has the best showing of possession so that they can go and fight it out not in JP court, in a court that has jurisdiction to resolve title to personal property. So if you don't have this overlay of the vehicle issue, I think it is pretty efficient that way.

JUSTICE NATHAN L. HECHT: Well, except that the county says, well this was a crime, possess it. Well, it's a misdemeanor. Well, it's a felony to take it off. Well, the sandblaster was never prosecuted so it never comes to a head and meanwhile, the State just keeps the property.

ATTORNEY KRISTOFER S. MONSON: I think all of that's irrelevant. I think the only thing that's relevant is .15a of Chapter 501 of the Transportation Code, which instructs law enforcement to treat VIN-less vehicles as stolen and that's why there's probable cause to believe that the trailer was obtained by theft because there's that statutory instruction to treat VIN-less vehicles that way.

JUSTICE NATHAN L. HECHT: But it seems to me the government's interest in treating property as stolen is to get it back to the people who own it.

ATTORNEY KRISTOFER S. MONSON: Well, but the reason that you want to treat it as stolen when you find

it on the highway is so that the government automatically seizes it in case it is stolen so that whoever's looking for their property has the time to get there if they want to institute their own 47 proceeding or if the government institutes a 47 proceeding.

JUSTICE DALE WAINWRIGHT: I don't think anyone on the bench side disagrees that there should be expedited procedures for dealing with property that's probable cause to believe has been stolen. The question is, with lack of notice to interested parties not being required in Chapter 47 and other issues that are raised, is this a deficient procedure and does it result in someone other than the owner actually getting the property?

ATTORNEY KRISTOFER S. MONSON: I think you could probably construe it to have only a limited effect of determining a right of possession the procedure isn't defective. I do think that if you construe Article 47 to determine title or ownership, then those procedures do cause some concern about due process.

JUSTICE DALE WAINWRIGHT: And what was the argument that York did not have the sufficient evidence of right of possession at the hearing?

ATTORNEY KRISTOFER S. MONSON: His right of possession isn't at issue because the trial court's order says, insufficient evidence and then the Bill of Review says, insufficient evidence of ownership.

JUSTICE DALE WAINWRIGHT: I understand that. What-

ATTORNEY KRISTOFER S. MONSON: In that case, his possession was never determined.

JUSTICE DALE WAINWRIGHT: You're the judge now. What is the evidence at the hearing that York did not have a superior right of possession?

ATTORNEY KRISTOFER S. MONSON: There is no evidence that he did not have the superior right of possession.

JUSTICE DALE WAINWRIGHT: So he should have gotten it?

ATTORNEY KRISTOFER S. MONSON: There is no evidence.

JUSTICE DALE WAINWRIGHT: So he should have gotten the trailer?

ATTORNEY KRISTOFER S. MONSON: No, no, he can't have gotten the trailer because there was no, insufficient evidence to show that you could in a subsequent proceeding show ownership. The title certificate wasn't, had no attachment to Mr. York and that's the only thing that isn't exactly the kind of evidence that if I stole a car, if I stole a car and then I wanted to go to an Article 47 proceeding after the police had taken it back, I take a picture of it in my driveway. I take it and get a new license registration. I get it inspected. I'd have it painted. I'd do all these things and it would look like I owned it. Those are all proof of possession, but they are not proof of ownership. You have to go back to title and it's worth pointing out for most of the 90s until 2001, under the Transportation Code and 74.01a, a certificate of title is rebuttable evidence of possession and ownership under this proceeding and the legislature took that away, but I think that the touchstone has always been can you bring it back to a title and but moreover I think that because the problem is not the paucity of evidence of possession, but the lack of evidence that you can establish ownership, that means that this case wouldn't be res judicata to a subsequent order for 47 proceeding by Mr. York.

JUSTICE NATHAN L. HECHT: Let me ask you before your time expires, in the Continental Casing case, we basically followed Kalb and the Supreme Court has been very insistent that lower courts follow its prior rulings and let them re-examine it when they choose to do so. In Sikes, the Fifth Circuit said, well, 362 has changed than it used to be. Why shouldn't we continue to follow Kalb?

ATTORNEY KRISTOFER S. MONSON: Well, Kalb discussed subsection of the Frazier-Lemke Act, which is pretty much 180-degree about face from 362. They are completely different statutory mechanisms. Subsection n was an ouster of jurisdiction that automatically attached to any trial court proceeding or any attachment or sale of the property. 362 in sharp contrast is a stay that has exceptions so that we know that at least in police power cases, for example, a state court could proceed on any proceeding that has to do with the rest of the bankruptcy estate. There are avoidances and there's a special avoidance for parties, good faith purchasers who have property transferred to them when they don't about this stay, all of which is kind of summed up in subsection D of 362, which says that, the bankruptcy court has the power to retroactively annul the stay in order to validate or ratify the state court's determination. By definition, either under federal law, the Espinosa case talks about what avoidances for the U.S. Supreme Court or under Texas law for 100 years if something is subject to post-judgment ratification, it is by definition, voidable, not void for Texas procedure purposes. And Kalb's, dicta discussing collateral attack is completely irrelevant because that addressed the ouster of jurisdiction provision of subsection N, not the complicated stay mechanism, which, by the way, this is really a preemption issue, right? What did Congress intend? [Inaudible]

CHIEF JUSTICE WALLACE B. JEFFERSON: You were about to say where you parted company from Wise County?

ATTORNEY KRISTOFER S. MONSON: Oh we parted company from Wise County that we think that the way you figure out what the Article 47 judgment does is to look at what the statute says, because we shouldn't be looking at the extrinsic evidence of what happened in the 47 proceeding. We don't have a record. We don't know exactly what happened in that case, but if you look at the text of 47, the State gets the property only if there's an insufficient evidence that showed you could establish ownership. It has nothing to do with the final determination in the law of York's claim of possession. I do think that that means a subsequent 47 proceeding in which he had the McNutt affidavit and the title would not be barred by res judicata and Mr. York could probably bring his claim again with all the evidence he needed to avoid because the award of the State is not an award of the State of right. It's really in the nature of a sheet. It means that a court has determined that there is no known contrary right of possession and that's why the state is not or the County is not acting contrary to any known property right and cannot perform a taking after the Article 47 judgment is entered.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. Are there any further questions? Thank you, Counsel. Court will hear rebuttal.

REBUTTAL ARGUMENT OF SAMUEL C. BISHOP ON BEHALF OF PETITIONER

ATTORNEY SAMUEL C. BISHOP: Justice Medina, I believe, I'd like to answer your question that you posed earlier whether this happens all the time in Wise County. Again, we're here before a plea to jurisdiction and we have the pleadings that show how this happens all the time, but I would also bring the Court's attention to what we've quoted in our brief and Wise County's own attorney before the trial court in this case saying anything that goes before any one of those hearings gets awarded to the county or to the state in Wise County and furthermore, you have the affidavit of Sergeant Martinez and his opinion that these things cannot be returned to the public.

JUSTICE DAVID M. MEDINA: Thank you.

ATTORNEY SAMUEL C. BISHOP: In these hearings, in these hearings, the JPs tend to go along with what the officers tell them the law is or what they should do and if they're mistaken in that belief, it results in this happening over and over again. I'd like to correct something that the Counsel for Wise County said, and he claimed that it's a crime to possess a vehicle with a missing VIN. Actually, the statutes that criminalize such action also create an exception for the owner of the vehicle or one who has the vehicle with the owner's permission. It is not a crime for them to possess, modify or operate that trailer on the highways of the State of Texas. Indeed, the

Transportation Code, I believe it is and I think it's likewise said, in my brief, provides a mechanism for those whose property has lost its VIN either getting knocked off, fallen off or having the little stickers that curl up and peel off and fall off in the heat of the State of Texas to apply to the Department of Public Safety for a replacement identification. Why would such a procedure be in place if the intent was that it were to go to the state?

JUSTICE NATHAN L. HECHT: Why doesn't any taking claim belong to the trustee in bankruptcy?

ATTORNEY SAMUEL C. BISHOP: I'm sorry?

JUSTICE NATHAN L. HECHT: Why doesn't any taking claim belong to the trustee in bankruptcy?

ATTORNEY SAMUEL C. BISHOP: I don't have enough working knowledge of the banking law to give you an answer to that. I do know that this bankruptcy has been closed for some time, although it was active when this suit was instituted.

JUSTICE NATHAN L. HECHT: Usually, the trustee owns or has control of the debtor's estate.

ATTORNEY SAMUEL C. BISHOP: I don't have the answer to your question. I would like to address an issue that the State raised and that is its assertion that York somehow had the burden in the hearing to show that ownership could be established at some later hearing. The Code nowhere provides that he's required to make such a showing in the Chapter 47 hearing under 47.01a. Indeed, that section places the burden on the State. It's the State's burden to prove that there's probable cause to believe that the property's stolen and that ownership can not be determined. Lastly, the State and Wise County have both taken the position during this case that if property lacks a VIN, it gives you reasonable suspicion to believe the property's stolen. The Bigford case cited in our brief addresses that issue. Fifth Circuit held that a missing VIN plate along with the registration that hadn't yet been transferred over to the new owner does not provide probable cause for an officer to believe that the property's been stolen and it further holds that the officer cannot disregard additional evidence which tends to dissipate any probable cause that he may have to tend to believe that the property is stolen, such as Mr. York's evidence of his insurance records, his inspections by DPS and all his other records that he presented. They've also taken the position that it creates an impossible situation to determine ownership when you have a missing VIN and I know I'm out of time. If I could briefly conclude.

CHIEF JUSTICE WALLACE B. JEFFERSON: Complete your thought, Mr. Bishop.

ATTORNEY SAMUEL C. BISHOP: I think if you take those two together, you're essentially giving the State both elements of Part b of Section 47.01a. In other words, if it's got a missing VIN, they meet the probable cause to believe it's stolen and they meet the second element of that test that ownership cannot be determined. Therefore, it automatically goes to the State. You're essentially rendering Chapter 47 a forfeiture statute. If the legislature had intended that, they would have written that in the Transportation Code Section 508, which allows its seizure. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

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