

ORAL ARGUMENT - 09/20/95
95-0289
ROMERO V. STATE OF TEXAS

JOERS: This is a drug forfeiture case in which the State seeks to forfeit petitioner's home, which she inherited from her mother. Petitioner earns \$6 per hour, and took this appeal as an indigent. The forfeiture was based on 2 alleged sales of cocaine by petitioner's former boyfriend in her presence. The State contends in its briefing that petitioner's role was to help the buyer arrange the money to the buyer's satisfaction. The appraised value of petitioner's home is \$46,000.

According to the undisputed affidavits neither petitioner nor her property has ever been connected with drugs apart from the 2 transactions in question.

SPECTOR: Were these transactions to an informer?

JOERS: Yes.

ENOCH: Mr. Joers she was charged with 2 events. She was found not guilty for one, and found guilty in the other. And for what she was found guilty what was the range of punishment?

JOERS: Five - 99 years I think.

ENOCH: And what was the range of fine?

JOERS: I am not sure. I think it is \$20,000, but the State could be more accurate.

ENOCH: Well the State's brief said \$50,000, but I didn't know if that was distinguishing between what she was charged with as opposed to her being found guilty. But there is a pretty substantial fine for this event?

JOERS: Yes. This case is distinguishable from cases involving so-called instrumentality forfeitures as stated in Austin v. United States. There is nothing even remotely criminal in possessing a home like petitioners. This case also does not involve any proceeds of illegal activity, or any true contraband such as controlled substances, or other property which is unlawful to produce or possess.

ENOCH: Mr. Joers under Austin, the SC said that there was still an issue as to whether or not the forfeiture in relationship to the crime that was committed raised the question or at least sent it back to the appellate court for a determination of excessiveness; is that correct?

JOERS: That's correct for purposes of the excessive fine's clause.

ENOCH: If the appellate court found that the forfeiture was not excessive in relation to the crime that was committed, would the State be permitted to forfeit property under Austin?

JOERS: In this case?

ENOCH: I am just talking about in the Austin case that the facts of that case if the appellate court had found that this fine...was forfeiture the fine was not excessive would the State have been permitted to forfeit - to take the property?

JOERS: Oh, sure, because there was no double jeopardy issue involved in Austin. For double jeopardy all there has to be is a punishment. The excessiveness of it is not even an issue.

ENOCH: Austin had been convicted of a crime had he not before this issue on forfeiture came up? Are you saying that issue just wasn't before the SC on double jeopardy?

JOERS: The issue wasn't even...I guess the issue wasn't before the court. It is not discussed at all in the case.

HECHT: To be clear you have not raised an excessiveness for fines clause problem?

JOERS: Not before this court. I did raise cruel and unusual punishment before the TC.

HECHT: So our only concern here is double jeopardy?

JOERS: Yes sir and the unconscionability of the contract and the total circumstances in which the thing was signed.

SPECTOR: Was the agreement when the agreement was made to split the proceeds was she represented by counsel?

JOERS: Yes.

SPECTOR: Was that you?

JOERS: Yes.

GONZALEZ: It was a plea bargain agreement?

JOERS: Yes, sir a settlement agreement. With respect to the criminal case, that was a contested trial before the court.

OWEN: In other words she had already been found guilty and sentenced before the settlement agreement was reached?

JOERS: Yes.

OWEN: And this was just a settlement of whether they were going to take all or part of the house?

JOERS: Right.

HECHT: Well what is the practical answer. If you are right about double jeopardy what does the State have to do bring this in a criminal case like the 9th Circuit says?

JOERS: Right. Bring it all in the same proceeding or elect not to bring the criminal case. And that only makes sense because you know the way the fact finder does these things on punishment in a criminal case you weigh all the options. And if the State wanted to have the fact finder consider this it ought to have been you know put in the equation with all the other options. For example: the court may have given less...you know in a hypothetical case I suppose might be inclined to give less probation time, and then forfeit. Or you know more of a civil fine, and then a forfeiture. You know weigh it all together.

HECHT: The 9th circuit says you've got to bring it in the indictment, and the same burden of proof would be apply. Why is that necessary? Why couldn't you have a split burden of proof in a case like this, assuming that you had a double jeopardy problem?

JOERS: I am not sure that you couldn't have a split burden of proof. The SC, I guess it was in Austin, said that you know the full panoply of criminal protections, and I guess that includes the burden of proof would apply in one of these cases if it was so punitive as to be criminal. So I guess that would not you know apply to all forfeiture cases.

ENOCH: Mr. Joers does the Halper opinion, which talks about these civil fines and forfeitures being double jeopardy, does it say that that's the end of the inquiry?

JOERS: For double jeopardy purposes?

ENOCH: Yes sir.

JOERS: No it doesn't.

ENOCH: Doesn't Halper in fact say that the State has an opportunity to demonstrate that the forfeiture or the civil fines can't bear a relationship to the cost of prosecuting and the cost of this crime?

JOERS: Yes.

ENOCH: So isn't that an issue that's left open for double jeopardy that means that there is an additional step before double jeopardy attaches?

JOERS: In the case of a forfeiture that is the subsequent case, because if the forfeiture is first a criminal prosecution can't be had at all, but in the case where the forfeiture is second as it was in Halper?

ENOCH: Or as it is in this case.

JOERS: Right.

ENOCH: There is an additional step remaining before the State is foreclosed from asserting forfeiture.

JOERS: I don't think there is because I think this case is distinguishable from Halper for the reasons set forth in Austin; namely it doesn't involve a small fixed penalty provision like the one in Halper. You know the SC in Austin says you don't have to do a case-by-case basis where on the face of the statute like the one here any relationship between the government's cost is purely incidental.

ENOCH: But isn't that in the context of an allegation that defines excessive as opposed to a double jeopardy?

JOERS: Yes, that is an excessive fine _____.

ENOCH: I don't remember which opinion, but doesn't Judge Scalilla in one of those opinions make the note that forfeiture is no different than a fixed fine. One is just a penalty in kind, another one is penalty in cash?

JOERS: Yes.

ENOCH: I can't remember was that the Halper case?

JOERS: I think it's the Austin case.

ENOCH: So he says that forfeiture is the same thing as a civil fine?

JOERS: Yes.

ENOCH: Ms. Romero signed a settlement agreement for this forfeiture matter. The question I have understanding Austin and Halper is it your position that under no circumstances whatsoever would the State have had a colorable claim to her house?

JOERS: No. I mean I think that's true, but I don't think that that's...you know I don't think that the petitioner is required to show that to prevail you know on the unconscionability a gross disparity in the party's bargaining positions.

HECHT: You can agree to waive your rights. You can even waive your double jeopardy rights.

JOERS: Oh, sure. But I don't think that's the issue here because you know if anybody contends that...you know if there had been any such express waiver in the settlement agreement, which there wasn't, but if there had been one it would suffer from the same infirmities as the rest of the contract. In other words unconscionable just like the rest of the contract. So I don't think that's an issue.

HECHT: Under your view of the case it couldn't be conscionable under any set of circumstances?

JOERS: I don't think so under the circumstances of this case. You know given the tangential relationships and merely incidental and fortuitous relationship between the property and the offense, given the fact that you are talking about a family homestead, and you find cases all over the place that talk about the historical protection that a homestead is given, especially in Texas.

OWEN: Was this agreement unconscionable on the day before the Austin decision was handed down?

JOERS: Yes, I think so.

OWEN: And what difference did the Austin decision make? Why do you rely so heavily on the Austin decision?

JOERS: Well part of the reason that I say that this thing was unconscionable you consider the whole setting on which it was signed. And previous decisions of courts in Texas on basically all federal decisions none of them had ever held or virtually 99% of them have never held that a forfeiture was improper, was excessive, or that it constituted punishment for double jeopardy purposes. This is exemplified by the opinion of the Dallas CA in this Ex Parte Rogers case. And of course Dallas is where any appeal from this case would have gone to. In Rogers the court said: that what you compared a forfeiture to for a proportionality analysis was the millions of dollars the government is being forced to spend generally on drug abuse programs. And you know that's no test at all. No forfeiture at all could ever be found to be...

SPECTOR: When the drug sale was transacted was Mrs. Romero living in the home at that

time?

JOERS: Yes.

SPECTOR: Because there was something in the State's brief that no one lived there.

JOERS: She moved out subsequent to the...

SPECTOR: When they were going to sale it?

JOERS: Yes.

GONZALEZ: What was her sentence in the criminal trial?

JOERS: She received the minimum. She received 5 years probation on 1 of the 2 offenses; no fine; and was found not guilty of the other. And that's another thing incidentally why I say that this is so unfair is that one fact finder had the opportunity to consider an additional monetary sanction against her and decided that her participation in the offense did not merit one.

ENOCH: If Ms. Romero had been sentenced to what you believe to be a maximum fine of \$20,000, and 99 years in prison, would that have been subject to an 8th Amendment challenge for excessiveness?

JOERS: No. I don't think so. I looked at that. I consider that question. The way I understand the case law, and I didn't spend a lot of time with this, but the way I understand it is a period of confinement is cruel and unusual punishment clause kind of stuff. And frankly you never see a case, I looked for this, you never see a case where they say the confinement amount of punishment is excessive. All the cases ever say is well it is within the range of punishment.

ENOCH: I understand that you say excessiveness is not raised here. But under the Austin rationale would the fact that 1/2 of the house was within the range of punishment of fine, that would be permitted under the criminal statute be one factor for determining whether or not this was an excessive punishment?

JOERS: It is under the test announced in some of these recent 8th amendment excessive fines cases. Other cases don't rely on that. So for some cases yes, and for others no.

ENOCH: So under that rationale there could be a question as to whether or not...if Austin literally applied in this case, that would be one of the considerations of whether or not what was forfeited here was within a range that the statute would have permitted to have been done under the criminal context?

JOERS: I think at least under some cases. But I do think that the thrust of most of these cases nowadays is a so called instrumentality approach. Looking at the nexus between the property and the offense. And that sort of thing wouldn't appear...

ENOCH: That would be another consideration?

JOERS: Yes. You know the amount of sentences for similar...you know the amount of possible sentence wouldn't seem to be relevant to that.

OWEN: If you had appealed this case, if you had not settled, and you had appealed the forfeiture, you would have the same argument you had in front of us today except the unconscionability claim; is that accurate or not?

JOERS: Yes.

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RESPONDENT

GONZALEZ: Mr. _____ before we get to the forfeiture itself, I am still not clear about the underlying criminal action. There were two? Ms. Romero was indicted on two different transactions?

LAWYER: Yes, sir.

GONZALEZ: And she was tried before a jury?

LAWYER: Yes, sir.

GONZALEZ: She was found not guilty as to what transaction?

LAWYER: She was found not guilty on the 2nd transaction wherein there was an attempted sale of cocaine.

GONZALEZ: And she was found guilty as to what transaction?

LAWYER: The first transaction.

GONZALEZ: And her participation was assisting her boyfriend in providing the place for this transaction?

LAWYER: Yes, sir.

GONZALEZ: And what was her sentence?

LAWYER: She had 5 years probation.

GONZALEZ: No fine?

LAWYER: No fine, sir.

GONZALEZ: Was there any discussions at all about forfeiture with the sentencing judge?

LAWYER: Judge, I was not present, but it is not the practice in Dallas County that that be the case.

GONZALEZ: There was a presentencing investigation if it's a usual case?

LAWYER: Yes, sir. Civil seizures are handled in Dallas County out of the civil section of the DA's office; criminal prosecutions are clearly handled out of the prosecution section of the DA's office. There is no interaction. They are separate proceedings.

GONZALEZ: Other than Ms. Romero providing the place for a drug transaction which she was sentenced to a 5 years probation, what was the connection of the house to that transaction she was found guilty?

LAWYER: The house is essential to the sale of cocaine, to the unlawful felonious sale of cocaine.

GONZALEZ: What was the amount, the amount that she was found guilty of participating in?

LAWYER: Two ounces, which is approximately 62 grams. The sentence statutory exposure for such an offense is: life; 5-99 years; or a fine of \$50,000.

GONZALEZ: The fact that she got 5 years probation that's an indication to me that this was her first offense.

LAWYER: Yes, sir.

GONZALEZ: And she had no prior record of any kind?

LAWYER: Yes, sir.

GONZALEZ: Can you stipulate to that?

LAWYER: No, sir. I can only answer what I know from the record. I did not participate in that proceeding. But I will say your honor, that the fact that she got a 5 years probation for this type of offense would indicate to me as a lawyer of 8 years in the DA's office that that's probably the case.

I would like to clarify a couple of points. This is not a plea bargain. It was a settlement agreement. It's a contract. Halper determines or conceptualizes the relationship between a civil seizure and a forfeiture to the damage sustained by the government, and the government is the people, and calls it rough justice. It can't be quantified. It's not a _____ assessment. And if the forfeiture is determined to be so excessive in the rare case and disproportionate to that damage, then Halper would suggest that double jeopardy applies, and the forfeiture would be unconstitutional.

HECHT: Austin suggests that any forfeiture is punishment, and double jeopardy always applies; doesn't it?

LAWYER: Not necessarily.

HECHT: Alright. It says: We therefore conclude that forfeiture under these provisions statutory, not the circumstances, constitutes payment to a sovereign as punishment for some offense.

LAWYER: Your honor it does.

HECHT: So if forfeiture is punishment, then you've got a double jeopardy problem?

LAWYER: Not necessarily your honor. The question remains under Halper, because Austin is not a double jeopardy case. Austin and Halper are distinguishable cases. As brilliant as they are they are distinguishable. Austin is an 8th amendment excessive fines case; Halper is a 5th amendment double jeopardy case. A point of fact here is very little mention of double jeopardy in the lengthy discussion of the history of forfeitures in Austin going back to the magna carta.

ENOCH: Since Austin does cite to Halper for the notion of punishment is punishment doesn't it?

LAWYER: I will admit your honor that it does suggest that this history of judicial evaluation of forfeitures as fines would lead then to believe that it can be defined as punishment, that a civil seizure and forfeiture can be defined as punishment given the prior decision of Halper. Austin doesn't overrule Halper. They are just distinguishable cases.

GONZALEZ: What was the leverage the DA's office had on Ms. Romero at the time this agreement was entered into? Was she told: We are going to take your house period? Did you have any leverage, any other charges pending, what clout? To me it seems strange.

LAWYER: Your honor, on Nov. 30, 1992, the State filed Plaintiff's First Amended Original Notice of Seizure and Intended Forfeiture under Ch. 59 of the Texas Code of Criminal Procedure. That is a verified petition with an affidavit signed by the affiant officers required by the statute. That's the only leverage. A very strong cause of action.

GONZALEZ: We are going to take your house!

LAWYER: We are taking your house...

GONZALEZ: That's worth \$64,000 on a case that she got 5 years probation on, because she allowed her boyfriend to do a transaction there?

LAWYER: Your honor at the time that case was filed, that's 30 days from the date of seizure. At that point in time the State has no idea what the resolution of the criminal case will be. I have had cases that have been filed within the 30 day statute of limitations where defendants have been acquitted. And we have still resolved or won the civil seizure. They are separate cases. They are not brought in one proceeding.

HECHT: Is that true today even since Austin?

LAWYER: That can very well be true today.

HECHT: No, I am asking you is it?

LAWYER: Yes sir it is.

HECHT: You still handle civil forfeitures and the criminal proceedings separately?

LAWYER: Entirely different. I frequently don't even know whose handling the prosecution end of a case. I go forward with the civil suit.

GONZALEZ: And you don't care what the sentence was, because as far as you know they did drug for any amount you are going to take their property?

LAWYER: Under the law your honor, the question of sentencing in the criminal case has no constitutional implication and does not provide a defense to the civil suit. It is not mentioned in Austin; it's not mentioned in Halper; it's not mentioned in Rogers. And it certainly is not mentioned in the new statute that says that civil seizures in the State of Texas are now considered remedial for evermore.

ENOCH: You are taking the position that since the legislature has changed the heading on it it is now fully remedial. But before they did that is it your position that Halper did not require a DA to at least make an argument that the civil forfeiture was related to the cost of their prosecution? You are saying Halper does not lead you to the conclusion that at least at that point the prosecutor had to come in or on the civil side going after forfeiture there had to be some demonstration that what you were taking was reasonably related to the cost of this crime, whatever it is?

LAWYER: No, your honor. What I am suggesting is that I must prove a rational relationship between the offense and the size of the forfeiture.

ENOCH: And if you prove that, then you can proceed on your forfeiture under Halper?

LAWYER: Yes, sir.

SPECTOR: What's the rational relationship here?

LAWYER: The rational relationship is clearly defined under nexus; the house was used, clearly intended to be used to commit the sale of cocaine. From a financial perspective, and the financial perspective is the damages or government damages sustained as anticipated by the Halper decision, the tax value of the house is alleged to be \$46,540, that's before the house became abandoned; and it's quite some time ago. So that's probably low.

SPECTOR: You do agree that she was living there at the time of the offense?

LAWYER: Yes, your honor she was definitely living there at the time of the offense. Not one criminal act was perpetrated to. The second time the supplier was arrested in the back yard of the home.

GONZALEZ: Do you concede the fact that the house was not purchased through drug money?

LAWYER: I have no knowledge of what assets were used to purchase the home your honor.

GONZALEZ: Well there was a statement made she inherited this from her mother; do you dispute that or do you have any basis to dispute that?

LAWYER: No, I do not. Important fact your honor there is no reason to suggest that that would be a legal defense. Not at all.

OWEN: You didn't finish your answer on the financial perspective. How does that relate to the size of the forfeiture?

LAWYER: The tax value of the house is alleged to be \$46,540. The total value of the cocaine sold or intended to be sold was \$8,750.

GONZALEZ: Is that for the transaction she was found guilty of or...?

LAWYER: Both transactions.

GONZALEZ: If you discount the transaction she was found innocent of what is the value of the cocaine?

LAWYER: About \$2,500. One half of \$46,540 is \$23,270, the ratio of the property loss to

the forfeiture to the direct economic value of the crime is between 2-1, and 3-1 when you look at the \$8,750. That's true your honor. The briefing analysis that we've provided was the fact that the house was used first for the one transaction that she was found guilty of. And second, for the intent to use the house. In other words if the case had gone to trial we would have clearly proven that the house was used as an instrumentality of crime - twice.

GONZALEZ: Despite the fact she was found innocent of any crime?

LAWYER: In a criminal court, not in a civil court. She never went to trial in a civil court. Entirely different standard in a criminal court.

GONZALEZ: So you don't see anything unconscionable about this transaction?

LAWYER: Not at all your honor. Not at all. It's a crack house. Drug sales are being conducted. Drugs are serious, serious menace to the community. The damages to the community by a drug crime is very, very serious.

GONZALEZ: You say it's a crack house. I associate the term "crack house" that's usually...that's multiple transactions of crack cocaine. Was there any evidence of that, that crack cocaine was being sold at this house?

LAWYER: I have reason to believe that if this arrest was not made on the 2nd transaction, multiple transactions could have very easily been accomplished there. The police could have conducted 10 transactions there.

GONZALEZ: What is the status of the house now?

LAWYER: It's abandoned.

HECHT: Well assume as hard as it will be that this is a double jeopardy problem. Does that still mean that the agreement in this case must be set aside or not?

LAWYER: Not at all.

HECHT: Even if this were punishment for which she could not be put twice in jeopardy, the agreement you think is valid and why?

LAWYER: Assuming that the forfeiture constitutes double jeopardy, that's a conclusory legal matter; therefore, it's possible that we might suggest that the agreement is unconstitutional and therefore the forfeiture is unconstitutional. However, under Green Int'l v. State, a very important case now before this distinguished panel for oral argument in November, it has been determined that to sue under such a contract for damages alleging it to be unconscionable, the State must clearly as a matter of statute waive its sovereign immunity from suit in a contract. And in Ch. 59 we do not find such a waiver. That defeats everyone of the contract arguments of my adversary.

OWEN: Any other reason?

LAWYER: To begin with another reason would be that in this particular case my adversary suggests he's before the court and the contract should be stricken or rescinded because Austin was determined the same day that the settlement agreement was executed. Halper was determined in 1989. Halper was the law. He suggest the law changed on the day that the settlement was executed, and we say

no.

It has been suggested in the question that this is a double jeopardy case. But the case presented to the court is an Austin case - an excessive fine case. That's why my adversary suggests that this contract should be rescinded because of Austin, Austin changed the law. We believe and we set forth a lengthy argument in our brief that Austin really didn't change the law. Austin is merely a statement of a trend of law clearly defined both federally and at the state level of Texas. And we rely on Halper and we rely on Rogers, and Johnson v. State.

GONZALEZ: You say that the house is vacant. I take it Ms. Romero is still the record owner of the house, and the house has not been sold as per your forfeiture?

LAWYER: Yes, your honor.

GONZALEZ: So it's in limbo at the moment?

LAWYER: Yes, your honor. There is no reason why she can't live there if she wanted to. She just probably doesn't want to.

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REBUTTAL

PHILLIPS: Why was Austin such a change in the law?

JOERS: I am not sure it was. What it was was it clarified what the law was. I have cited cases in the brief indicating that I don't think it was such a change that it doesn't apply retroactively for example. I do think that it makes...the decision is at odds with the law as announced by the courts in Texas, which I think was incorrect.

PHILLIPS: If it was not a fundamental thing in the law, if it's merely in line with Halper, then how can you set this agreement aside?

JOERS: Well the only contention that we've made that you know that's a problem with is mistake of facts/mistake of law. Otherwise the agreement is unconscionable under the law before and after.

GONZALEZ: Even though you agreed to it you're saying I should not have agreed to it because it is unconscionable ab initio?

JOERS: Yes, sir.

GONZALEZ: Are you the one that negotiated this on behalf of Ms. Romero?

JOERS: Yes, sir. I think I have alluded my explanation. I couldn't find any cases anywhere where a forfeiture had been found to constitute punishment for purposes of double jeopardy.

GONZALEZ: Are you a volunteer, or are you retained counsel?

JOERS: I have always been pro bono in this case.

PHILLIPS: The State cannot ordinarily be sued on a contract without giving its permission.

Can they be sued or rescind a contract under the _____?

JOERS: I don't know the answer to that. That's the first I've heard that. But of course the State would be in a position of having to sue her to enforce it I suppose. Wherein I would guess she could assert her defenses.

I did want to answer the court's question on how come the double jeopardy wasn't raised in Austin? I looked at the case and the reason I guess is because there were separate sovereigns involved. You know the criminal action took place in the State courts, and the forfeiture was in the federal courts. And the cases pretty uniformly hold that there is no double jeopardy problem when you have separate sovereigns.

Also I did look at one of these recent cases cited by the State, these excessive fine cases concerning relationship of the property and the offense; and it doesn't mention anywhere the possible assessable range of you know of fines can be assessed. Instead it talks about for example a nexus between the property and the offense. And none of these factors are present in this case: whether the use of the property was incidental, whether the property was important to the illegal activity, whether the use of the property was isolated, whether the purpose of acquiring the property was to carry out the crime.

ENOCH: Mr. Joers your position is that since they can't establish that they would not be able to take a forfeiture of the house. But if they had been able to establish that, then you agree that under Halper there was still an issue about whether or not the house could be forfeited?

JOERS: I don't think it's an issue I guess created by Halper only in the sense that Halper isn't specific enough to talk about this kind of situation. Halper doesn't say that...you know even under Halper there's a problem with doing a forfeiture in this case. I went back and read Halper pretty carefully. You see a lot of cases cite it and they distort it like this Rogers case. What Halper really says is the issue is the purpose of the sanction in question. Namely whether it bears any rational relation to the government's nonpunitive purposes. As explained in another case United States v. Hudson, 14 F.3d 536, merely because a sanction by a coincidence is reasonably related to the government's costs doesn't mean that the purpose of the sanction is _____.

HECHT: Did you say you prosecuted this appeal pro bono?

DOERS: Yes, sir.