UNITED STATES OF AMERICA

STATE OF ILLINOIS COUNTY OF DUPAGE

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

People of the State of Illinois **Plaintiff,** **v.** **One 1998 GMC** **Defendant**	)))))))	**Case # 07 MR 1126**
People of the State of Illinois **Plaintiff,** **v.** **One 1996 Chevrolet** **Defendant**	)))))))	**Case # 08 MR 1320**
People of the State of Illinois **Plaintiff,** **v.** **One 2002 Chevrolet** **Defendant**	)))))))	**Case # 08 MR 1614**

MEMORANDUM OPINION AND ORDER

The respondents, each of whom has an interest in one of the three motor vehicles seized by the State, have filed separate motions to dismiss the State's complaints that seek the forfeiture of their interests in those vehicles. Each motion is brought pursuant to Section 2-619 of the Illinois Code of Civil Procedure. Each motion is identical in that the respondents claim that 720 ILCS 5/36-1 *et. seq.* of the Illinois Revised Statute, commonly known as the Illinois Vehicle Forfeiture Statute, is facially unconstitutional and violates the due process clauses of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

All respondents allege that the statutory scheme that allows the State to seek a forfeiture of their property fails to provide a post-seizure, pre-trial mechanism to enable them to test

the State's right to retain their vehicles while they await trial on the merits of the forfeiture action.

For the reasons stated in this memorandum opinion, this court finds that 720 ILCS 5/36-1, *et seq.* violates the Due Process Clause of the Illinois Constitution and the Fifth and Fourteenth Amendment of the United States Constitution. Therefore, the Section 2-619 motions of each respondent are granted.

Findings of Fact

The three cases that comprise this ruling were consolidated for the limited purpose of entertaining the identical Section 2-619 motions filed by the respondents. In each case, the State seized the vehicles after they were allegedly used in the commission of various criminal offenses that subjected the vehicles to forfeiture under Section 5/36-1 of the Illinois Vehicle Forfeiture Statute.

Three of the respondents in these cases (George Reardon in case 07 MR 1126, Michael Adams in case 08 MR 1320 and Robert Messina in case 08 MR 1614) were charged with crimes. Reardon was initially charged by information with felony driving while under the influence of alcohol and felony driving while his license was revoked (625 ILCS 5/6-303 (d)) along with a number of non-felony driving charges, including a count of misdemeanor driving while his license was revoked under 625 ILCS 5/6-303(a). The day before the forfeiture complaint was filed, indictments were returned on both felony charges by the DuPage County Grand Jury. (07 CF 2004). The forfeiture complaint, by contrast, alleges only the misdemeanor 625 ILCS 5/6-303 (a) as its basis.

Adams was also indicted by the DuPage County Grand Jury on two felony charges of Aggravated Driving Under the Influence of Alcohol (DUI) after being initially charged with these offenses only by information along with a number of non-felony driving offenses. Adams' indictments charged him with violations of 625 ILCS 5/11-501(d)(1)(A) and 625 ILCS 11-501(d)(2)(B)—two or more prior violations of driving while under the influence, and similar charges based on a blood alcohol level in excess of 0.08. (08 CF 2238). Adams' forfeiture complaint is based on one of these charges.

Messina was initially charged with two counts of misdemeanor DUI and a separate business offense of failing to carry valid liability insurance for his vehicle on October 4, 2008 (08 DT 4806). The DUI charges were subsequently enhanced to felonies by the DuPage County Grand Jury on January 20, 2009 and the misdemeanor and business charges were *nolle prossed* by the State. The charges that were *nolle prossed* were not re-filed as part of the felony case. Both aggravated DUIs charged in the felony case allege that Messina committed at least two prior DUI offenses in violation of 625 ILCS 5-11-501(d)(1)(A). (09 CF 178)

Messina's vehicle was seized before his misdemeanor charges were enhanced to felonies. The forfeiture complaint filed on October 14, 2008 notes the misdemeanor case number "08 DT 4806" in its caption, but alleges offenses that Messina was not charged with at

the time as the basis for the seizure. Instead, it alleges that Messina operated his vehicle while under the influence of alcohol in violation of 625 ILCS 5/11-501(d)(1)(A), an aggravated DUI charge. Thus, the forfeiture complaint does not reflect the actual criminal charges that were pending against Messina at the time his vehicle was seized and only partially reflects the felony indictments ultimately issued by the grand jury.

The respondent, Reardon Painting, Inc. is the alleged co-owner of the vehicle seized in case 07 MR 1126. It has not been charged with a crime. In common with the other defendants, however, is the loss of use of its property that remains in the hands of the DuPage County Sheriff while these cases await trial.

On October 15, 2008, the defendants gave notice of their claim of unconstitutionality to the Illinois Attorney General as required by Illinois Supreme Court Rule 19. The Illinois Attorney General has not sought to intervene or to participate in these proceedings.

The Statutory Scheme

In general, 720 ILCS 5/36-1 *et. seq.* subjects any vehicle used in the commission of certain crimes to be seized by law enforcement officials and held for possible forfeiture proceedings. Section 5/36-1 lists a variety of felonies and driving offenses that may subject a vehicle to seizure. These offenses include first degree murder, involuntary manslaughter and reckless homicide, aggravated kidnapping, indecent solicitation of a child, soliciting for a juvenile prostitute, juvenile pimping, exploitation of a child, child pornography, heinous battery, aggravated battery causing great bodily harm, aggravated battery with certain firearms, aggravated battery of a child, aggravated battery of a senior citizen, stalking, aggravated stalking, aggravated criminal sexual assault, criminal sexual assault, armed robbery, burglary, possession of burglary tools, residential burglary, arson, unlawful possession of explosives, unlawful possession of a deadly substance, aggravated discharge of a firearm, reckless discharge of a firearm, unlawful gambling, criminal sexual abuse by use of force, criminal sexual abuse of a minor, aggravated criminal sexual abuse, certain unlawful uses of weapons, select felony charges for driving while under the influence of alcohol or drugs, aggravated fleeing and eluding, and operating a motor vehicle without a valid driver's license while one's license is suspended or revoked for a previous charge of driving while under the influence of alcohol.

Any vehicle used in the commission of these crimes may be seized by the arresting agency. If seized, the vehicle is to be delivered "forthwith" to the sheriff of the county where the seizure occurred. The sheriff must give notice of the seizure by certified mail within 15 days after receipt of the vehicle to all person on the vehicle's title on file with the office of the Illinois Secretary of State. It must also notify the State's Attorney of the seizure within the same time period. 720 ILCS 5/36-1.

The State's Attorney must "promptly" exercise his discretion to determine whether the seizure of the vehicle was incurred "without willful negligence or without any intention on the part of the owner of the . . . vehicle . . . to violate the law, or [find] the existence of such mitigating circumstances as to justify remission of the forfeiture" after receiving

notice of the seizure from the sheriff. If the State's Attorney concludes such factors are present, he is to direct the sheriff to remit the vehicle "upon such terms and conditions as the State's Attorney deems just." However, if he concludes those factors are not present, a complaint must be filed "forthwith" against the registered titleholders, seeking the forfeiture of the seized vehicle. 720 ILCS 5/36-2.

If a complaint seeking the forfeiture of the seized vehicle is filed, the State must establish at trial that the vehicle seized was used in the commission of one of the offenses enumerated in Section 5/36-1 of the statute. If it does so, the court may order the vehicle destroyed, sold at public auction, or released to the Illinois State Police or to any local law enforcement agency.

The owner, by contrast, has the burden of showing that his property should be returned to him. He may recover the seized vehicle if he shows, "by the preponderance of the evidence, that he did not know, and did not have reason to know, that the . . . vehicle was to be used in the commission of [the] offense." 720 ILCS 5/36-2.

In addition, a spouse of any owner whose vehicle was seized for certain of the criminal offenses that may subject the vehicle to forfeiture, may recover the vehicle if that spouse shows that the seized vehicle is the family's only source of transportation and that the financial hardship to the family, as a result of the seizure, outweighs the benefit to the State. This argument may be raised at a separate pre-trial proceeding or at the trial of the forfeiture complaint. 720 ILCS 5/36-1. In either scenario, the burden to recover the vehicle rests with the spouse.

The right of a spouse to seek recovery of the seized vehicle from the State is limited. It does not apply in all cases where a vehicle has been seized. The hardship defense may only be raised in cases where the vehicle was seized for driving while the operator's privilege to drive was suspended or revoked for a prior DUI, the commission of a felony DUI or involuntary manslaughter or reckless homicide. 720 ILCS 5/36-1.

Analysis

As noted, each respondent seeks dismissal of the State's complaints under Section 2-619 of the Illinois Code of Civil Procedure. A motion filed pursuant to Section 2-619 admits all well pleaded facts as true, but alleges that an affirmative matter exists that defeats the plaintiff's cause of action as a matter of law.

In each instance, the affirmative matter alleged is the facial unconstitutionality of 720 ILCS 5/36-1 *et. seq.* of the Illinois Revised Statutes. The respondents argue that this statute violates the Due Process Clauses of the Illinois Constitution and the Fifth and Fourteenth Amendments of the United States Constitution because it fails to provide a mechanism to challenge the State's right to seize and hold their vehicles while awaiting trial on the merits of the State's claim.

Statutes enacted by the legislature are presumed to be constitutional. The burden of proving them unconstitutional rests with the party mounting the constitutional challenge. That burden is a heavy one. To challenge a statute as facially unconstitutional, one must "establish that no set of circumstances exist under which the [a]ct would be valid." *U.S. Salerno*, 481 U.S. 739, 745 (1987).

Salerno, however, does not mean that a court must take action to cure a constitutional defect once the challenger has properly demonstrated that such a defect exists. As was explained by our appellate court:

> "This language does not mean a statute survives a facial procedural due process challenge unless it is impossible for it to be applied constitutionally. This would mean a statute could only fail such a challenge if it mandated that insufficient process be provided (e.g., barred a criminal defendant from cross-examining any witness against him), because a court could otherwise always provide more procedural protections than the statute on its face required." *In re Branning,* 285 Ill.App.3d 405, 416 (4th Dist. 1996).

When analyzing a statute facing a facial due process challenge under the Fourteenth Amendment, as here, the court is to examine the statute as written and not how it could have been written or improved. The statute, as written, either passes muster under the Due Process Clause or it does not.

The standards for analyzing facial due process challenges under the Fourteenth Amendment to the United States Constitution in civil forfeitures cases were established in *Matthews v. Eldridge,* 424 U.S. 319, 334 (1976). The court must consider the following factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

The most notable case applying the *Matthews* standards to vehicle forfeiture proceedings is *Krimstock v. Kelly,* 306 F.3d 40 (2nd Cir. 2002). *Krimstock* involved a New York City ordinance that permitted the city to seize vehicles involved in a variety of criminal activities and to conduct forfeiture hearings resulting in the owner's permanent loss of the vehicle. In its general scheme, the New York City ordinance was similar to 720 ILCS 5/36-1. Although there are numerous procedural differences between the New York City ordinance and our state's law, the defect alleged by the litigants and examined by the United States Court of Appeals is the same: neither law provides a prompt post-seizure mechanism on its face for an owner to challenge the legitimacy of the government's retention of their vehicles while the forfeiture proceedings themselves are pending.

The challenges raised by the respondents in these cases involve rights as old as our legal system itself. The right to own and to possess property free from governmental

interference is as old as Magna Carta and is bedrock to the Anglo-American legal system. It is echoed in Thomas Jefferson's paraphrase of John Locke's statement of the inalienable rights of mankind—"life liberty and property"—contained in the Declaration of Independence. It is preserved, *verbatim,* in the Bill of Rights of the Illinois Constitution, the Fifth Amendment to the United States Constitution and made applicable to all 50 states by the Fourteenth Amendment: "[N]o person shall . . . be deprived of life liberty or property, without due process of law."

The *Krimstock* court recognized these long-standing principals before commencing its *Matthews* analysis. It began by noting that the Fourth Amendment of the United States Constitution protects individuals from unreasonable seizures of their property in civil forfeiture proceedings. *United States v. James Daniel Good Real Prop.,* 510 U.S. 43, 49 (1993). It further recognized that in order to initially seize a citizen's property, the government must demonstrate that it has probable cause to believe the property is subject to forfeiture. *United States v. Daccarett,* 6 F.3d 37, 49 (2nd Cir. 1993).

It noted that the government generally is not required to make this demonstration, unless a claimant challenges the validity of the seizure before trial. *Marine Midland Bank N.A. v. United States,* 11 F.3d 1119 (2d Cir. 1993). *Once challenged,* however, the government must establish probable cause for the initial seizure or offer post-seizure evidence to justify the seized property's continued impoundment. Otherwise the retention runs afoul of the Fourth Amendment of the United States Constitution. 306 F.3d 40 at 50.

Krimstock reasoned, therefore, that a procedural mechanism must exist to enable a person deprived of his or her property to test the government's right to hold the seized property during the pendency of the forfeiture proceeding. See *United States v. James Daniel Good Real Property,* 510 U.S. 43, 62: "the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture."

Krimstock's holding is not new. Almost forty years ago the United States Supreme Court concluded that: "At least where irreparable injury may result from a deprivation of property **pending final adjudication of the rights of the parties,** the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or **prompt** post-deprivation hearing **at which some showing of the probable validity of the deprivation must be made."** *Fuentes v. Shevin,* 407 U.S. 67, 97 (1972) (emphasis added).

Such a hearing must be afforded a party whose property is seized by the government "at a meaningful time and in a meaningful manner." *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972). To be "meaningful," such a hearing must occur promptly after a seizure occurs, otherwise an owner's rights under the Fourteenth Amendment are jeopardized: "[I]t is now well-settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Fuentes v. Shevin,* 407 U.S. 67, 84-85 (1972).

Finally, *Krimstock* recognized that to be meaningful, the probable cause hearing had to be adversarial and take place before an independent third party. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Good Real Property,* 510 U.S. 43 at 55 (1993).

Krimstock, therefore, recognized that the purpose of such a due process, or "probable cause," hearing was not an abstraction. It was directly connected to those ancient rights of property ownership enshrined by the founding legal documents mentioned above: "to protect [the] use and possession of property from arbitrary encroachment—to minimize substantially unfair or mistaken deprivations of property." *United States v. James Daniel Good Real Property,* 510 U.S. 43, 53 (1993).

To summarize, the government may not seize and hold a person's property unless it establishes probable cause for doing so once the owner makes such a demand. An adversarial hearing on that demand must occur promptly before an independent fact finder within a meaningful time after the demand is made and must take place in a meaningful forum. The burden at such a hearing is upon the government to establish its right to retain the owner's property and not upon the owner to establish his right to its return.

As a general proposition, the United States Supreme Court has defined "probable cause" in this fashion:

"[t]he substance of all the definitions of probable cause is a reasonable ground for belief of **guilt**, . . . and that **the belief of guilt must be particularized with respect to the person to be searched or seized,** *Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). In *Illinois v. Gates,* we noted: "As early as *Locke v. United States,* 7 Cranch 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, '[T]he term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation .... It imports a seizure made under circumstances which warrant suspicion.'" *Maryland v. Pringle,* 540 U.S. 366 (2003). (emphasis added).

A probable cause hearing is intended to test whether evidence exists to support each of the elements of the State's case. That evidence need not be sufficient to prevail on the final merits of the case, but should be enough to warrant reasonable suspicion that each element can be satisfied. Strict rules of evidence need not be applied and hearsay can be admitted.

Because the "substance of all probable cause hearings is a reasonable ground for belief of guilt," the government must, therefore, demonstrate that the property owner is somehow "culpable" for the crime committed through the use of his or her property. He need not be criminally charged to satisfy this standard. It may be enough, for example, to show that he was willfully negligent in allowing the use of his vehicle or knew or should have known that it was likely to be used to facilitate the commission of a crime.

Without such a showing, however, the government has no basis to deprive an innocent owner of the possession of his or her property. Such a retention would constitute an arbitrary, unfair or mistaken deprivation of property contrary to the holding of *United States v. James Daniel Good Real Property,* 510 U.S. 43, 53 (1993).

Our state's Supreme Court implicitly recognized this principle in *People v. Canaday,* 49 Ill.2d 416 (1971). *Canaday* involved the return of property seized as evidence pending trial to the innocent crime victims who were its rightful owners. In upholding the trial court's authority to do so under Section 108-11 of the Illinois Criminal Code, the Court recognized the serious potential for harm that can occur when an innocent owner is deprived of his or her property for an extended period of time. It reasoned: "Were the court forbidden to enter such an order, the owners of perishable property would suffer total loss. In the case of other property, owners would be deprived of the use and the right to dispose of it during the pendency of what are often protracted court proceedings." 49 Ill.2d 416, 423 (1971).

In the context of civil property seizures, therefore, a probable cause hearing should require the government to produce evidence of at least three factors in order to establish its right to continue to hold such a citizen's property pre-trial. The State must first establish that there is a reasonable, factual basis to believe that a crime has been committed that subjects that property to forfeiture. Second, it must establish that a reasonable, factual basis exists to believe the vehicle seized was used to facilitate the commission of that crime. Thirdly, it must establish that a reasonable, factual basis exists to believe that the owner is somehow responsible, or "culpable" for the use of his vehicle in the commission of the crime. Any statute that fails to provide a mechanism to test these three elements is facially unconstitutional and violates the due processes clauses of the Illinois and the United States Constitution.

These principles must serve as the backdrop for the *Matthews* inquiry required of this court when considering the respondents' Section 2-619 challenge. The *Matthews* inquiry is designed to determine whether the constitution will **"tolerate"** an exception to the rule requiring a post-seizure, prejudgment probable cause hearing. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 53 (1993) (emphasis added). On its face, the Illinois Vehicle Forfeiture Statute does not provide for such a hearing. Thus, the question before this court is whether the procedural safeguards the statute does contain are adequate substitutes for the absence of such a hearing under the *Matthews* standards.

The Private Interest Affected:

The *Matthews* inquiry involves a three-part analysis. First, the court must identify the private interest that will be affected by the State's seizure decision. In each of the cases before this court, the interest of the private individuals is the same: the loss of use and possession of their automobiles while the forfeiture action awaits trial.

In cases almost too numerous to mention, courts have acknowledged the central importance automobiles play in the daily lives of Americans. *Lee v. Thornton,* 538 F.2d

27 (2nd Cir. 1976); *Perry v. McDonald,* 280 F.3d 159 (2nd Dist. 20010; *Coleman v. Watt,* 40 F.3d 255 (8th Cir. 1994); *Stypmann v. City of San Francisco,* 557 F.2d 1338 (9th Cir. 1977). Automobiles have been recognized as the means by which citizens get to work, take their children to school, purchase groceries and other necessities of life and attend medical appointments. As *Krimstock* noted: "The particular importance of motor vehicles derives from their use as a mode of transportation and, for some, the means to earn a livelihood." *Krimstock v. Kelly,* 306 F.2d 40, 61 (2nd Cir. 2002). Public transportation is often unavailable or inadequate to serve these needs.

The loss of the use and possession of a vehicle is often compounded by the fact that payments are owed on those vehicles. The loss of use of that vehicle may result in that person's inability to hold a job and generate the income necessary to maintain those payments. In such a situation, the owner may lose the vehicle to a bank or finance company whether or not the State prevails on its claim and continue owing their creditor on any deficiency that may result on the loan.

Moreover, one of the respondents, Reardon Painting, Inc., is not charged with the criminal use of the vehicle that subjected it to seizure and possible forfeiture. It is a co-owner, allegedly unaware that the vehicle was to be used in the commission of a crime. Nonetheless, it must bear the loss of the use of its property as a result of the State's seizure of the vehicle while it awaits trial.

The fact that the respondent is a corporation and not an individual is of no consequence. Corporations, too, are entitled to due process under our constitution. In addition, corporations may experience the same losses experienced by individuals when their vehicles are seized. Corporations may find their ability to service customers, run necessary errands and transport goods or supplies needed in their business compromised by the loss of a vehicle. To offset this loss, corporations may be forced to rent other vehicles in the short term or to purchase a replacement vehicle if the deprivation is severe enough. In either scenario, the corporation is impacted adversely.

These factors, therefore, clearly establish that the private interest asserted by the respondents in these cases is great with far-reaching ramifications for those affected.

To What Degree Does the Illinois Vehicle Forfeiture Statute Risk the Erroneous Deprivation of Property Pending Trial?

The second factor in the *Matthews* inquiry requires the court to assess the risk that the owner will be erroneously deprived of his or her property through the procedures provided by the statute and the probable value that additional or substitute procedural safeguards would provide. This analysis is more complex than the analysis just completed.

The State argues that the statute protects against the erroneous deprivation of property in a number of ways. First, it notes that the statute sets limits to ensure a timely review of the government's decision to seize a vehicle. It notes that Sections 5/36-1 and 5/36-2

require the sheriff's department to notify the owner of the seizure of his vehicle within 15 days of its delivery to the department and mandates that the State's Attorney "promptly" review the propriety of the seizure before filing suit. Second, it argues that Section 5/36-4 allows the Attorney General to review the forfeiture of a vehicle if an owner or interested party files a petition for the remission of the vehicle before its sale or destruction.

As timely as the requirements of Sections 5/36-1 and 5/36-2 may be, they only set "deadlines" for the filing of the forfeiture action. They set no deadlines for the forfeiture hearing itself to take place once the action is filed. In fact, the time within which the forfeiture hearing may take place is left open-ended. Thus, the speed with which a forfeiture hearing may occur may vary widely from venue to venue and is subject to the degree of crowding present on any individual court's docket. As a consequence, notice under the statute may be swift, but the ultimate hearing may not be.

Cases, such as these, are often tied to the outcome of the underlying criminal actions that gave rise to the forfeiture case in the first place. Criminally charged owners must choose between a possible waiver of their Fifth Amendment right against self-incrimination should they demand trial before the criminal proceedings conclude or await the outcome of their criminal charge before proceeding to trial on the forfeiture complaint.

Non-criminally charged owners often suffer the same fate. In certain cases, the accused's testimony may be necessary to provide proof that a co-owner had no knowledge of the intended criminal act or that ownership of the seized vehicle rested solely with the non-criminally charged party. The same Fifth Amendment considerations just discussed often delay the right to a hearing for non-criminally charged owners and those considerations are outside of their control. *Krimstock* noted with disapproval the lengthy delays that often resulted before a trial on the merits occurred and noted that without a pre-trial mechanism to test the government's right to hold an owner's property pre-trial, significant deprivations often resulted. *Krimstock v. Kelly,* 306 F.3d 40, 53-55 (2nd Circuit 2002).

Section 5/36-4 sets no time limits for the Attorney General's review process. Unlike the State's Attorney's review under Section 5/36-2, there is no requirement that the Attorney General even act "promptly" or consider the petition "forthwith" when conducting its review. It is completely open-ended.

Fuentes v. Shevin mandates that the statute provide a post-seizure review at a "meaningful time." The Illinois Vehicle Forfeiture Statute sets no deadline within which a trial on the merits of the claim must occur or when the Attorney General's review process must conclude. Thus, the timing of an owner's ability to challenge the State's right to hold his property is left to chance, the serendipity of a court's docket and the schedule and priorities set by the Attorney General. If a hearing to test the State's right to hold property is to occur at a "meaningful time, when it occurs cannot be left to chance. It must be part of the statutory design. As such, these sections of the Illinois Vehicle Forfeiture Statute fail to meet this standard.

Moreover, the statute fails to allow a property owner to contest the seizure of his property in a "meaningful manner" because he is unable to test the State's decision to retain his property before an independent third party. Section 5/36-2 of the Illinois Vehicle Forfeiture Statute directs the States Attorney to conduct a review of the seizure of all vehicles to determine if it was properly seized or if mitigating factors justify its remission to the owner. Although this court's experience has been that the DuPage County State's Attorney has acted honorably to discharge this obligation, he cannot be said to be disinterested in the outcome of these proceedings. After all, it is his office that is charged not only with the prosecution of the underlying criminal case that gave rise to the vehicle's seizure, but the prosecution of the forfeiture action as well.

Krimstock and its progeny recognized this problem and specifically rejected the prosecutor's office for this role in favor of a neutral fact-finder. (See *Krimstock v. Kelly,* 306 F.2d 40, 51, 67 (2nd Cir. 2002); *Krimstock v. Kelly,* 464 F.2d 246 (2nd Cir. 2006). In the first of the Krimstock cases, the court noted that the seizing authority—the prosecutor's client—had a direct pecuniary interest in the outcome of the case. If the seized vehicle was forfeited, the value of the vehicle or the vehicle itself was tendered to the municipality that seized it. That interest rendered the prosecutor's review non-neutral and, therefore, an inappropriate safeguard of the aggrieved owners' due process rights.

A similar statutory scheme exists here under 720 ILCS 5/36-2. Seized vehicles that are forfeited following a trial on the merits of the State's complaint are subject to a variety of potential dispositions. The court may order the vehicle destroyed, delivered to any law enforcement agency, including the agency conducting the arrest, or order it sold at public auction. 720 ILCS 5/36-2(a). The State seeks each of these remedies in the alternative in the three complaints before this court. Because the vehicle can be, and frequently is, released to the arresting agency, the State's Attorney's review is as equally non-neutral as the review process in *Krimstock.* Therefore, it is equally ineffective to protect the due process rights of the respondents in a meaningful manner.

The Criminally Charged Defendants

The State argues that numerous procedural safeguards exist under the Illinois Code of Criminal Procedure that satisfy the due process standards of the Illinois Constitution and the Fifth and Fourteenth Amendments of the United States Constitution particularly for criminally charged owners. It notes that three owners in the cases at bar were indicted by a grand jury. To achieve these indictments, it argues, its office was required to present evidence that Reardon, Adams and Messina had committed the felonies with which they were ultimately charged. Thus, some level of probable cause determination that they had committed a crime subjecting their vehicle to forfeiture was made by the grand jury before their indictments were returned.

However, the Unites States Supreme Court in *United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993) observed that important distinctions exist between seizures

that satisfy the Fourth Amendment of the U.S. Constitution and those that satisfy the Fifth Amendment of the Constitution.

The Supreme Court noted that seizures under the Fourth Amendment generally involve the seizure of evidence that support the commission of a crime. It held that although due process for the seizure of such property under the Fourth Amendment may be satisfied by the issuance of a pre-seizure warrant or the presence of exigent circumstances without a warrant, different considerations are at stake under the Fifth Amendment. The reason, it observed, was that in civil forfeiture actions, the government seizes property not to preserve evidence of criminal wrongdoing to be presented at trial, but to **permanently** assert ownership and control over the property itself.

The Supreme Court held that seizures of this latter category, "must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments." 510 U.S. 43 at 52. It reasoned that even if due process existed to arrest and charge a defendant criminally under the Fourth Amendment, that determination may be insufficient to seize and hold a defendant's property in a civil forfeiture proceeding under the Fifth and the Fourteenth Amendments. The Court concluded, therefore, that due process under the Fifth and the Fourteenth Amendments required the government to afford even criminally charged defendants, "notice and a meaningful opportunity to be heard before seizing real property subject to **civil** forfeiture." 510 U.S. 43 at 62 (emphasis added).

Real property is not, of course, at issue in these cases. However, the issues of when and under what circumstances the government may seize and hold a criminally charged citizen's property pending civil proceedings are equally at stake. *Fuentes v. Shevin,* out of which the analysis in *James Daniel Good* and *Krimstock* grow, involved personalty, not real property. Therefore, the fact that personalty is at issue in these cases is irrelevant for the purposes of due process and does not affect the applicability of *James Daniel Good's* reasoning to the cases at bar.

However, the fundamental defect of grand jury proceedings and all procedures the State cites as substitutes for a post-seizure, pre-trial hearing for criminally charged owners lies in their failure to test whether probable cause exists to believe that the vehicles seized by the State were used to facilitate the crimes that subject them to forfeiture.

Grand jury proceedings concern themselves only with whether an indictment should issue against a defendant. *In re v. Oliver,* 333 U.S. 257, 68 S.Ct. 449 (1948). They are **not** intended to examine whether the defendant's property should be seized and held for subsequent forfeiture proceedings as required by the Fifth Amendment. Thus, the business of the grand jury does not concern the central issue at stake in a post-seizure, pretrial probable cause hearing that was identified in *United States v. James Daniel Good Real Property.*

In Adams' and Messina's cases the elements of aggravated driving while under the influence of alcohol require only that the State present evidence that they were operating

a motor vehicle at the time of the offense. It need not establish its make, model, color or vehicle identification number to return an indictment.

This is likewise true in Reardon's case. The state need only show that Reardon was operating a vehicle along the public roadway while his license was suspended or revoked due to a prior DUI to establish the elements necessary to charge him with a violation of 625 ILCS 5/6-303. It need not identify the vehicle he was driving. Furthermore, the State presented no evidence in its arguments before this court that the grand jury considered such evidence or made a finding that the vehicles seized were used to commit the crimes for which Reardon, Adams and Messina were indicted. Therefore, the grand jury proceedings in these cases and grand jury proceedings generally are inadequate substitutes for the post seizure, pre-trial hearing which due process under the Fifth Amendment demands.

Furthermore, grand jury proceedings are conducted in secrecy and are not adversarial proceedings. The defendant is not present and has no right to participate in them. "The fundamental requirements of due process are notice of the proceeding and an opportunity to present any objections." *People ex rel. Birkett v. Konetski,* 233 Ill.2d 185, 201 (2009). "Fairness can rarely be obtained by secret, one sided determination of facts decisive of rights . . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. V. McGrath,* 341 U.S. 123, 170-172 (1951). A defendant indicted by a grand jury, therefore, is not afforded a hearing in which he is able to test the state's decision to retain his property "at a meaningful time and in a meaningful manner" as required by *Fuentes v. Shevin* or *United States v. James Daniel Good Real Property.*

Even if a grand jury indictment could somehow satisfy the requirements of procedural due process, the Illinois Vehicle Forfeiture Statute does not require that a felony be charged before a vehicle may be seized. The statute permits the seizure of vehicles for certain misdemeanors as well, such as driving while one's license is suspended or revoked for a prior violation of 625 ILCS 5/11-501. Therefore, not all defendants whose vehicles are seized are charged with felonies. Grand juries are not usually impaneled to charge persons with misdemeanors. As such, not even the minimal probable cause findings of a grand jury need occur before misdemeanants are charged with a crime and their property is seized.

Not all felony defendants are charged by indictment, however. Felony defendants need only be charged by information before their property is subject to seizure. 725 ILCS 5/111-2(a). Unlike defendants charged by indictment, defendants charged by information are entitled to a preliminary hearing within 30 days after they were taken into custody or within 60 days from the date of their arrest if they have been released on bond. 725 ILCS 5/109-3.1(b). For these defendants, a post-seizure, pre-trial probable cause hearing may arguably be afforded "at a meaningful time" (within 30 to 60 days of their arrest).

However, the focus of the preliminary hearing is not whether there is sufficient evidence to seize a defendant's vehicle, but whether there is sufficient evidence to require a defendant to stand trial for a felony. Thus, a court may find probable cause for charging the defendant with a particular crime without ever identifying or discussing the vehicle allegedly used in the commission of that crime. This is particularly true for certain crimes, such as burglary, that subject vehicles to seizure and forfeiture but do not require the use of vehicles to establish their elements. For such charges, the vehicle's involvement in the crime may never be discussed at all. A preliminary hearing, therefore, fails to test the critical issue in a forfeiture proceeding, namely, that the vehicle seized was used to facilitate the commission of that crime. As such, it does not allow a defendant to test the State's right to **seize his vehicle** in a "meaningful manner."

The State points out, however, that Reardon, Adams and Messina were charged with felony aggravated DUI. It notes that, because of the nature of these charges, each criminally charged defendant had the right to challenge the probable cause for his arrest by requesting a summary suspension hearing pursuant to 625 ILCS 5/2-118.1(b). This court takes judicial notice that Reardon, Adams and Messina each sought summary suspension hearings in their underlying criminal cases (07 CF 2004, 08 CF 2238 and 08 DT 4806 respectively). All three challenges were unsuccessful.

This argument, however, applies only to criminally charged owners whose vehicles were seized for felony DUI offenses. Owners charged with any of the more than thirty non-DUI violations that may subject their vehicles to seizure under Section 5/36-1 have no right to a summary suspension hearing whatsoever. Moreover this argument fails as a substitute for a civil forfeiture probable cause hearing for DUI felons as well for the same reasons discussed above: a summary suspension hearing fails to test whether the vehicle seized was used to facilitate the crime that subjects it to forfeiture.

Summary suspension hearings allow a defendant to challenge "whether the person was placed under arrest for an offense as defined in Section 11-501, or a similar provision of a local ordinance . . . and [w]hether the officer had reasonable grounds to believe that the person was driving or in physical control of a motor vehicle upon a highway while under the influence of alcohol, other drug or combination of both." 624 ILCS 5/2-118.1. They do not explore or make a probable cause finding that the vehicle seized was the vehicle used in the offense. In Reardon's case this is particularly significant because the basis for the forfeiture of his vehicle—driving while his license was revoked—is not tested in a summary suspension hearing at all. Therefore, his summary suspension hearing could not examine whether the State had probable cause to seize his vehicle pre-trial for the grounds alleged in the civil forfeiture complaint.

Moreover, Section 5/36-1 of the Illinois Vehicle Forfeiture Statute only subjects vehicles used in the commission of **aggravated** DUI's, not simple DUIs, to seizure. The purpose of a summary suspension hearing is not to determine whether an **aggravated** DUI was likely committed. The purpose is to determine whether the arresting officer had reason to believe that the defendant was driving or in physical control of a motor while under the

influence of alcohol or drugs. The elements of aggravation, such as whether this is the defendant's third or subsequent DUI charged or second DUI after being convicted of reckless homicide, are not at issue in such a hearing. Therefore, it is highly unlikely that the probable cause to charge a defendant with the type of DUI necessary to trigger a seizure of his vehicle would ever be tested in a related summary suspension hearing.

In addition, the defendant bears the burden of establishing a *prima facie* case for rescission of the suspension of his privilege to drive in a summary suspension hearing. *People v Granados,* 332 Ill.App.3d 860 (2002). The burden shifts to the State only *after* the defendant satisfies this initial burden. The burden under our constitution to justify the seizure of property when challenged, however, is upon the government, **not** upon the property owner. "In order to seize property . . . , the **government** must demonstrate that there was probable cause to believe that the property is subject to forfeiture." *United States v. Daccarett,* 6 F.3d 37, 49 (2nd Cir. 1993)(emphasis added). Therefore, a statutory summary suspension hearing is not an adequate substitute for the type of probable cause hearing required by *Fuentes v. Shevin.*

Non-DUI misdemeanants whose property is seized, by contrast, fare even worse than defendant-owners charged with felonies. They have no right to a preliminary hearing or to a summary suspension hearing whatsoever. Nonetheless, the State argues that such persons have the right, as do all criminally charged defendants, to challenge the probable cause for their arrest by filing a motion to suppress as part of their criminal proceedings. A finding of no probable cause resulting from such proceedings, the State argues, would be binding in the forfeiture action and result in the release of the defendant's vehicle.

Whatever may be the merits of this argument, the State acknowledges that the defendant who files a motion to suppress has the burden of proof under 725 ILCS 5/114-12. As such, a motion to suppress suffers from the same problem as a summary suspension hearing: the burden, under *Fuentes v. Shevin,* is not upon the defendant to show the absence of probable cause, but upon the government to show its presence. Moreover, a motion to suppress under 725 ILCS 5/114-12 challenges only the issue of whether probable cause exists to arrest and charge a defendant with a crime. It does not test the central issue in a forfeiture proceeding, namely, whether the vehicle seized was used to facilitate the commission of that crime.

The Non-Criminally Charged Defendants

Not all owners of seized property are criminally charged, however. Vehicles frequently are co-owned. Sometimes the vehicle is stolen or used without the knowledge of the non-criminally charged owner. Merely because the State may be able to establish probable cause against a criminally charged owner, therefore, does not mean that it has established probable cause against a non-criminally charged co-owner. *United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993). *Maryland v. Pringle* requires that the State's showing of probable cause be **particularized** with respect to the person whose property is seized.

To deprive any owner of his or her property while awaiting trial, the concepts of due process require the State to establish that the owner has some "culpability" for the criminal activity that resulted in the seizure of his property. This may be relatively easy in the case of the criminally charged owner by showing that he used his own vehicle to facilitate a crime.

However, to deprive a non-criminally charged owner of his or her property while awaiting trial, the concepts of due process require the State to establish that the non-criminally charged owner also has some "culpability" for the criminal activity that resulted in the seizure of his property. For example, the State may show that he or she was willfully negligent in allowing the use of his or her vehicle or knew or should have known that it was likely to be used to facilitate the commission of a crime. Otherwise, the State has no right to withhold possession of that property from an innocent owner. *People v. Canaday,* 49 Ill.2d 416 (1971). The statute itself tacitly concedes this point by requiring the State's Attorney to determine whether the seizure occurred "without willful negligence or without any intention of the owner ... to violate the law" before filing the forfeiture complaint. 720 ILCS 5/36-2.

Non-criminally charged owners have no right to participate in the criminal proceedings that trigger a vehicle's seizure under Section 5/36-1. Therefore, it is highly unlikely that any hearing in the criminal case would address their knowledge or willful negligence in permitting the criminally charged party to use their vehicle in the commission of the crime. *United States v. James Daniel Good Property,* 510 U.S. 43 (1993). *Maryland v. Pringel, 540 U.S. 366, 371 (2003); People v. Canaday,* 49 Ill.2d 416, 423 (1971).

Nonetheless, the State argues that non-criminally charged owners do have rights under the statute to test the issue of probable cause. It notes that the "innocent owner" may contest the forfeiture by proving that he or she did not know or have reason to know that the vehicle was to be used in the commission of an offense or establishes that the vehicle was unlawfully in the criminally charged defendant's possession. (720 ILCS 5/36-2 and 36-3). In addition, the State notes that a spouse may have the vehicle forfeited to him or to her if the spouse establishes that the financial hardship to the family outweighs the benefit to the State. (720 ILCS 5/36-1).

These procedures, however, are inadequate substitutes to meet the probable cause standards required by due process. A probable cause hearing is intended to test the State's right to hold the vehicle at "a meaningful time" **before** trial. The "innocent owner defense" is an affirmative defense, and by its very nature, cannot be heard until the time of the forfeiture trial itself. It, therefore, fails as a substitute for a **pre-trial** probable cause hearing.

Moreover, the statutory scheme assumes that the vehicle seizure is lawful based upon the State's Attorney's Section 5/36-2 determination until the owner proves otherwise. As such, it impermissibly places the burden of proof on the non-criminally charged owner to prove innocence before the vehicle may be returned, rather than on the State to demonstrate the non-criminally charged owner's "guilt" to justify holding it in the first

place. To allow the "innocent owner defense", even if it were available pre-trial, to substitute for a probable cause hearing would turn the Due Process Clause on its head.

The "spousal hardship defense" is essentially an equitable argument made on behalf of the family to avoid any hardship that will befall it if the vehicle is forfeited. Spouses who raise this defense need not be owners or co-owners of the seized vehicle. However, spouses often are co-owners of the seized vehicles.

Although the "spousal hardship defense" may be raised before trial, the hardship hearing does not concern the critical issue of whether the State's seizure of the vehicle was justified in the first place. It looks only at whether the retention and loss of the vehicle would create a financial hardship for the spouse and family, not whether probable cause exists to seize the vehicle. Therefore, it fails by design to test the issue of probable cause at all.

Furthermore, the hardship defense is only available to spouses. It is not available to allegedly innocent non-spouse co-owners who may suffer equal hardships over the loss of their property or to all spouses who are co-owners of seized vehicles. The hardship defense is only available to those spouses whose family vehicles were seized for certain aggravated DUIs or for operating a vehicle during a period of suspension or revocation of a person's privilege to drive. 625 ILCS 5/36-1. For spouse co-owners whose vehicles were seized for other crimes, the defense provides no pre-trial mechanism to challenge the State's right to seize their property whatsoever.

Finally, the State contends that equitable remedies generally available to all civil litigants are adequate to compensate for the absence of a specific post-seizure, pre-trial probable cause hearing provision in the statute. It argues that the respondents here, just as all civil litigants, have the right to seek a temporary restraining order from the court to require the State to return their vehicles to them while awaiting trial on the merits of the forfeiture complaint.

The burden to seek and to obtain a temporary restraining order, however, is on the owner and not on the State. The owner must establish that he will suffer irreparable harm if the vehicle is not immediately returned, that he has a protectable right or interest in the seized vehicle, that no adequate remedy at law exists and that he is likely to prevail on the merits of the forfeiture action itself before relief may be granted. The owner must establish each of these elements on the face of his pleadings and supporting documents before the State is even obligated to reply. To regard the right to seek a temporary restraining order as an adequate substitute for a probable cause hearing would impermissibly shift the burden of proof from the State to demonstrate its right to seize the property to the owner and compel him to demonstrate his right to retain it.

Moreover, hearings on petitions for temporary restraining orders are summary proceedings, limited to the four corners of the pleadings and any affidavits satisfying Supreme Court Rule 191. No witnesses are called and there is no right of cross-examination. When confronted with conflicting affidavits, a court cannot weigh the

evidence before it. *Passon v. TCR, Inc.*, 242 Ill.App.3d 259, 608 NE2d 1346 (2nd Dist. 1993). As such, it is not an evidentiary proceeding that tests the state's right to retain the defendant's property in the classic sense of the word. As such, it is not a meaningful hearing in the contemplation of *Fuentes v. Shevin.*

Based on the foregoing analysis, therefore, the Illinois Vehicle Forfeiture Statute runs substantial risks of erroneously depriving owners of their property pending trial. It fails to provide either a meaningful, timely or procedurally correct mechanism to test the State's right to hold their vehicles as required by the Due Process Clauses of the Illinois and United States Constitutions.

The Administrative Burden of a Pre-trial Probable Cause Hearing:

The final factors under the *Matthews* standards that this Court must analyze are the government's interest, the function involved and the administrative burdens additional or substitute procedures to those contained in the statute would entail.

The interest of the State in such cases is obvious. The Illinois Vehicle Forfeiture Statute is intended to ensure that vehicles that have enabled defendants to commit crimes cannot be used in that capacity once again. The loss of one's means of transportation also serves as a significant deterrent to crime. Not only will potential criminals and think twice about committing crimes, but co-owners may also become more vigilant about whom they allow and how they allow their property to be used to prevent its seizure and forfeiture by the State.

However, neither of these interests is jeopardized by requiring the State to establish probable cause for holding an owner's vehicle pre-trial. After all, if the State lacks probable cause to support the underlying factors that gave rise to the seizure, it has no right to seize the vehicle in the first place.

The administrative burden of such a hearing is not inconsequential. This court alone considers over 800 vehicle forfeitures per year and the cost to the court system statewide in terms of additional crowding of already over-crowded dockets is real. Probable cause hearings will create another task for the court when resolving forfeiture cases. The judiciary's ability to handle that added task well is compounded by the Constitution's requirement that an owner's probable cause challenge be heard promptly. Consequently, such challenges may require that such hearings take priority over other court business thereby impacting the speed with which other litigant's non-forfeiture claims are resolved.

Nonetheless, we are dealing with a right regarded by the Constitution as worthy of due process protection and historically fundamental to our legal system. Providing a forum to ensure the protection of such rights is what courts do. Therefore, the additional burden such hearings would create is overshadowed by the importance of the right at stake. As *Krimstock* observed, the hearing necessary to satisfy the due process clause of the Fourteenth Amendment need not be an exhaustive evidentiary battle. Such hearings

would be confined to testing the merits of the State's case. As such, they should be short and summary in nature.

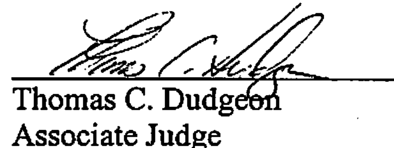
However, it is not up to the judicial system to supply the remedy to this constitutional defect present in Illinois' Vehicle Forfeiture Statute. As noted at the outset of this opinion, courts, in theory, could always supply the missing procedural protections and save statutes from the risk of being declared unconstitutional. Writing legislation, however, is not the function of the judiciary. Under our State's constitution, that role rests with the legislature.

This court is aware that *Krimstock* remanded its cases to the district court and to the parties to fashion an appropriate hearing procedure. However, unlike the cases before this court, the *Krimstock* litigants did not request that the New York City ordinance be declared unconstitutional. Instead, they requested that the court grant them a post-seizure, pre-trial hearing to test the city's right to hold their vehicles. The remedy the federal appeals court directed the federal district court to fashion, therefore, was the remedy requested by the parties in that case.

Ruling

In summary, after balancing the factors required by *Matthews v. Eldridge,* 424 U.S. 319, 334 (1976), the court finds that 720 ILCS 36-1 *et. seq.* violates the Due Process Clauses of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution on its face. It fails to provide an adequate means to test the State's right to hold respondents' property in either a meaningful time frame or a meaningful manner while the underlying forfeiture action is awaiting trial. The alleged safeguards argued as substitutes for a post-seizure, pre-trial probable cause hearing are inadequate to satisfy the standards of due process and cannot reasonably be construed in a manner that will preserve the validity of the statutory scheme. Because of the nature of the defendants' Section 2-619 challenge, this court's finding of unconstitutionality is necessary and the judgment of this court cannot rest on an alternative ground. Therefore, for the reasons stated in this memorandum opinion, the motions filed by all defendants pursuant to 735 ILCS 2-619 to dismiss each of the complaints against them are granted with prejudice.

Entered: November 17, 2009



Thomas C. Dudgeon
Associate Judge