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CASES NOTED

HEARING REQUIRED BEFORE THE REPOSSESSION OF GOODS

Appellants, residents of Florida and Pennsylvania, had purchased household goods in their respective states under conditional sales contracts. The goods were replevied under the Florida and Pennsylvania prejudgment replevin statutes,[1] and the appellants brought suit challenging these statutes as being in contravention of the due process clause of the fourteenth amendment. Both statutes provided for the seizure of goods by a sheriff upon the filing of an application to a court clerk or prothonotary and the posting of a bond for double the value of the property. Neither statute required that notice be given to the possessor nor that there be an opportunity for a hearing prior to the seizure of the property. Two three-judge federal district courts upheld the constitutionality of the Florida and Pennsylvania statutes which authorized prejudgment replevin.[2] On appeal, the United States Supreme Court reversed in a four-three decision, and *held*: The Florida and Pennsylvania prejudgment replevin statutes are in violation of the fourteenth amendment since they deprive the possessor of due process of law by taking his property without notice and without any prior opportunity to be heard; and a provision in a sales contract for repossession of goods upon default is not a waiver of the purchaser's procedural due process right to a preseizure hearing nor an indication of the method by which the property will be taken. *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972).

The prejudgment replevin statutes are descendants of the common law action for replevin, but the early action was used to recover goods that were either wrongfully taken or distrained. Under the early form, the one whose goods were being seized had the opportunity to claim that he was the rightful owner of the goods and the sheriff would then decide whom to believe and would act accordingly.[3] The procedure under the laws of Florida and Pennsylvania provided for the issuing of a writ for goods allegedly wrongfully detained and for subsequent seizure without hearing and before final judgment.

The Florida statute permitted the repossessor to begin his action merely by filing a bond with the clerk of the court for double the value of the property. The clerk then executed a writ commanding the sheriff to replevy the goods in the possession of the defendant and to summon the defendant to answer the complaint. The sheriff would hold the

1. FLA. STAT. ch. 78 (1969); PA. STAT. ANN. tit. 12 § 1821 (1967).
2. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).
3. 92 S. Ct. at 1993.

property for three days and then deliver it to the plaintiff unless the defendant gave a forthcoming bond with a surety for double the value of the property replevied. The bond would be held until the action was completed. In the event that the defendant posted such a bond, he could retake the property pending the outcome of the action.[4]

Under the Pennsylvania law, the applicant was not required to institute a repossession action nor make an allegation that he was legally entitled to the property, as was the procedure in Florida. He only needed to file an affidavit for the property value and post a bond for double that value. The party from whom the property was replevied had to either begin an action of his own to recover the property or post a counterbond within three days of the seizure in order to retake the property.[5]

In several recent decisions, the Supreme Court has held that the due process clause protects certain property interests or rights, and affords the parties whose interests are affected a right to notice and an opportunity to be heard.[6] Whether the right to be heard was provided at a "meaningful time" was a basic question considered by the Court in determining the validity of the statutes in the instant case. According to the Court, if a hearing was necessary, it must have been offered before the deprivation of the interest and at a time when any contravention of due process requirements could have been prevented.[7] Despite the provision for a hearing after the seizure, neither the Florida nor the Pennsylvania laws provided for any hearing prior to the seizure of the property.[8] In light of this summary procedure, Justice Stewart, in the majority opinion, held that "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."[9] The Court concluded that only a hearing held before the deprivation of property had occurred could meet due process requirements.[10]

Prior to *Fuentes*, there had been considerable dispute as to what property interests were to be subject to the due process right to a prior

4. FLA. STAT. §§ 78.01, .07, .08, .10-.13 (1969).

5. PA. STAT. ANN. tit. 12 § 1821 (1967) (authorizing writs of replevin); PA. R. CIV. P. 1073, 1076, 1077, 1037(a) (procedural prerequisites to issuance of prejudgment writ).

6. Bell v. Burson, 402 U.S. 535 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

7. 92 S. Ct. at 1994.

8. The Florida law guaranteed an eventual hearing in each case since the applicant was required to file a complaint initiating court action in order to obtain a writ of replevin. The hearing came in the form of a court action for repossession in which the person who had his property repossessed was the defendant. FLA. STAT. § 78.07 (1969). The Pennsylvania law did not guarantee that there would ever be a hearing since the writ applicant was not required to initiate a court action as under the Florida law. In order to insure a hearing, even though it was after the seizure, the party who had lost his property must have initiated a lawsuit himself. PA. STAT. ANN. tit. 12, § 1824 (1967).

9. 92 S. Ct. at 1995.

10. *Id.*

hearing. The appellants relied heavily on *Sniadach v. Family Finance Corp.*,[11] in which a Wisconsin garnishment statute was invalidated by the Court as being violative of fundamental principles of due process, because it failed to provide notice or a prior hearing. In *Sniadach*, wages were frozen at the initiation of an action, and throughout the interim until trial, without any opportunity for the wage earner to be heard or to tender any defenses he might have. Justice Douglas, in the majority opinion, stated that "[a] procedural rule that may satisfy due process for attachments in general . . . does not necessarily satisfy procedural due process in every case."[12]

The *Sniadach* holding could have summarily dealt with all future situations in which property of any type was taken without notice or prior hearing. However, Justice Douglas emphasized the gravity of the problem involved in a garnishment procedure and stated that wages are a "specialized type of property presenting a distinct problem in our economic system."[13] Federal and state courts had been divided in their interpretation of *Sniadach*. Some courts restricted its impact to wages, while other courts made no such distinction and extended the holding to property deprivation in general.[14] The district courts in the instant case held that the household goods seized from the appellants were not protected by the due process clause of the fourteenth amendment because the items were not "absolute necessities of life."[15]

Fuentes appears to have settled the dispute as to what property interests are protected by the due process requirement of a prior hearing. The Court rejected what it called a "very narrow" reading of *Sniadach* and *Goldberg* by the district courts.[16] It was held that those cases were in the "mainstream" of decisions which required notice and a hearing prior to the deprivation of one's property in order to meet due process requirements, and they had "little or nothing to do with the absolute 'necessities' of life . . . ."[17] In substantiating its interpretation of *Sniadach* and *Goldberg*, the Court pointed to its recent decision in *Bell v. Burson*,[18] which called for a proper hearing before the suspension of a driver's license. The holding in that case was that a driver's license was an "important interest" entitled to the protection of due process of law. The Court in *Fuentes* applied the "important interest" test instead of the far more restrictive test of absolute neces-

11. 395 U.S. 337 (1969) [hereinafter cited as *Sniadach*].

12. *Id.* at 340.

13. *Id.*

14. 92 S. Ct. at 1990 n.5 (history of cases interpreting *Sniadach*). In Goldberg v. Kelly, 397 U.S. 254 (1970) [hereinafter cited as *Goldberg*], the Court upheld the right to a prior opportunity to be heard; however, the case involved welfare benefits, an interest so closely related to wages the scope of the *Sniadach* decision was not expanded.

15. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

16. 92 S. Ct. at 1998.

17. *Id.*

18. 402 U.S. 535 (1971).

sity.[19] Although the Court referred to the "important interest" requisite as used in *Bell v. Burson*, it appears that a prior hearing must now be given before deprivation of any property interest that is more than de minimis.[20]

Historically, exceptions to due process requirements have allowed summary seizure or deprivation of property where a valid state or federal interest is present.[21] Justice Harlan recently made it clear that a hearing must be provided an individual prior to any deprivation of property except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.[22] Unable to find any valid state interest involved in the instant case, the Court held that the procedures authorized by the Florida and Pennsylvania laws were invalid. Private parties were able to serve their own private interests under the statutes by unilaterally invoking state power to replevy goods from another without supervision by state officials. The lack of state participation in the determination of the validity of the claim was sufficient grounds to strike down the prejudgment replevin statutes, because it constituted an abdication of "effective state control over state power."[23]

Having already determined that the appellants had a right to a hearing prior to the seizure of their property, the Court examined the conditional sales contract provisions, which provided for the repossession of the property by the seller in the event of a default in payments. The Court held that these provisions did not constitute a waiver of appellants' constitutional right to a prior hearing because the contracts did not specify the process for repossession but only stated the right of the seller to retake the goods upon the happening of certain events.[24] The Court distinguished the case of *D. H. Overmeyer Co. v. Frick Co.*,[25] which involved the question of contractual waiver of due process rights. In *Overmeyer*, the Court found that there was no unequal bargaining power and that the parties were aware of the significance of the waiver provision. The Court in *Fuentes* held that the present situation in-

19. 92 S. Ct. at 1998.
20. *Id.* at 1999 n.21.
21. *E.g.*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (dismissal of government defense employee); Ewing v. Mytinger & Casselbery, Inc., 339 U.S. 594 (1950) (protecting public from misbranded goods); Fahey v. Malonee, 332 U.S. 245 (1947) (protecting public from bank failure by taking possession); Bowles v. Willingham, 321 U.S. 503 (1944), and Yakus v. United States, 321 U.S. 414 (1944) (upholding administrative price and rent controls prior to hearing in time of war); Phillips v. Commissioner, 283 U.S. 589 (1931) (summary seizure of property to collect tax revenue); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) (attachment of property without hearing following bank failure); Ownbey v. Morgan, 256 U.S. 94 (1921) (attachment of property without hearing to secure jurisdiction in a state court); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (protecting public health from contaminated food).
22. Boddie v. Connecticut, 401 U.S. 371 (1971).
23. 92 S. Ct. at 2001.
24. *Id.* at 2002.
25. 92 S. Ct. 775 (1972).

volved parties with unequal bargaining power, contracts with terms in small print without explanation, and a situation where the appellants were unfamiliar with the ramifications of the provisions involved. Citing *Overmeyer*, the Court held that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue."[26] The provisions in the instant case were not clear waivers of the appellants' constitutional rights, and the appellants were entitled to a preseizure hearing.

At first impression, the ultimate effect of this decision is that it will force the State to provide notice and proper hearing prior to seizure of any property interest that is more than de minimis. The limitation that various courts have imposed on the *Sniadach* and *Goldberg* decisions has apparently been swept away, and the due process requirement of prior hearing is no longer restricted to property of absolute necessity.

The power to seize before final judgment has been entered is still a valid procedure as long as there has been a real test to determine the probable validity of a claim for repossession. The Court has also left room for seizure without prior hearing in cases of important governmental or public interest, in which immediate action is necessary to preserve the interest involved; however, this exception to the due process requirements does not appear to be a method by which these rights will be circumvented on a large scale.

Nevertheless, it is still questionable as to what real impact *Fuentes* will have in view of Justice White's dissenting opinion. He claims that creditors can simply make clear in their credit agreements that the installment buyer waives all right to prior hearing in the event there is a default. If this is the case, despite the majority holding in this case, there will be no improvement in the buyer's bargaining position, since creditors will be allowed an avenue of escape from prior hearing requirements. Moreover, it is unclear whether *Fuentes* bars a secured party's right to take possession of his collateral upon default by self-help, as provided by the Uniform Commercial Code.[27] The issue to be decided, where a state statute allows such self-help, is whether there is "state action" even though the only act done by the state is the enactment of the statute itself.

The instant case was a four-three decision with Justices Powell and Rehnquist not participating. It is yet to be seen whether one of them will unite with the majority in upholding a right to prior hearing despite waivers to the contrary and possible statutory provisions for self-help. If the decision withstands these challenges, it can be a meaningful tool in testing all claims for writs of replevin, giving the buyer

26. 92 S. Ct. at 2002, *citing* D.H. Overmeyer Co. v. Frick Co., 92 S. Ct. 775, 783 (1972).

27. UNIFORM COMMERCIAL CODE § 9-503. *See* 92 S. Ct. at 2006 (dissenting opinion).

an equal chance to defend his property interest. The deterrent effect on those creditors who in the past initiated unjust claims may also be of substantial value to the buyer's interest.

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GIDEON'S ENCORE

Petitioner, an indigent, was tried without benefit of representation by counsel on the charge of carrying a concealed weapon. The offense was punishable by imprisonment for up to six months and/or a one thousand dollar fine. The petitioner was sentenced to serve ninety days. He thereafter filed an original writ of habeas corpus in the Supreme Court of Florida alleging that, as an indigent, he was deprived of his right to counsel and that he was therefore unable to properly raise and present to the trial court good and sufficient defenses to the charges for which he was convicted. The Florida court discharged the writ, holding that indigent defendants were entitled to counsel only when the offense involved a possible imprisonment of *more than* six months.[1] On certiorari, the United States Supreme Court *held*, reversed: Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless represented by counsel at trial. *Argersinger v. Hamlin*, 92 S. Ct. 2006 (1972).

The right to counsel has slowly but steadily evolved for forty years[2] and was extended to state felony defendants in the landmark case of *Gideon v. Wainwright*.[3] The sweeping language of *Gideon*[4] met mixed reactions in the state courts and legislatures. In a large minority of them the case was limited on its facts to felonies.[5] However, thirty-one states extended the *Gideon* rule to crimes less serious than

1. State *ex rel.* Argersinger v. Hamlin, 236 So.2d 442 (Fla. 1970).

2. *See, e.g.*, Comment, *Will the Trumpet of Gideon Be Heard in All the Halls of Justice?*, 25 U. MIAMI L. REV. 450, 451-52 (1971); Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1250 (1970).

3. 372 U.S. 335 (1963) [hereinafter cited as *Gideon*]. An interesting account of the preparation of a series of right to counsel cases including *Gideon* is found in A. LEWIS, GIDEON'S TRUMPET (1964); and J. MEADOR, PRELUDES TO GIDEON (1967).

4. The Court stated:

> [A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental . . . in some countries, but it is in ours.

Gideon v. Wainwright, 372 U.S. 335, 344 (1963). The applicable language of the sixth amendment is equally broad, providing that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

5. *E.g.*, State *ex rel.* Taylor v. Warden, 193 So.2d 606 (Fla. 1967); Watkins v. Morris, 179 So.2d 348 (Fla. 1965); Fish v. State, 159 So.2d 866 (Fla. 1964).