

FILED
IN SUPREME COURT
OF TEXAS

AUG 29 2008

No. 08-0265

COPY

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IN THE SUPREME COURT OF TEXAS

CITY OF DALLAS,

Petitioner,

v.

VSC, LLC,

Respondent.

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS
FIFTH JUDICIAL DISTRICT OF TEXAS
No.05-05-01227-CV

REPLY TO RESPONDENT'S RESPONSE
TO THE CITY'S PETITION FOR REVIEW '

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TABLE OF CONTENTS

INDEX OF AUTHORITIES	ii
CONFLICT JURISDICTION EXISTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. This court should exercise jurisdiction to resolve whether and to what extent a valid exercise of police power can be a compensable taking	2
A. The seizure of stolen vehicles was not a compensable taking	2
B. Claims about Chapter 47 are wrong and defeat jurisdiction	4
II. The court of appeals erred in holding that a "finder" of stolen property has a vested property interest in stolen property	4
III. The court of appeals erred by finding jurisdiction existed to declare the future rights of a regulated business after its license was revoked and it was speculative whether a license would ever be granted in the future	6
IV. The court of appeals erred in finding jurisdiction existed to declare the future obligations of non-parties	8
CONCLUSION AND PRAYER	8
CERTIFICATE OF SERVICE	9

INDEX OF AUTHORITIES

Cases

<i>Bennis v. Mich.</i> , 516 U.S. 442 (1996)	3
<i>Bland Indep. Sch. Dist. v. Blue</i> , 34 S.W.3d 547 (Tex. 2000)	4
<i>Bledsoe v. Colbert</i> , 120 S.W.2d 909 (Tex. Civ. App.-Eastland 1938, no writ)	5
<i>City of College Station v. Turtle Rock Corp.</i> , 680 S.W.2d 802 (Tex. 1984)	2, 3
<i>City of Dallas v. VSC, LLC</i> , 242 S.W.3d 584 (Tex. App.-Dallas 2008)	2, 6
<i>Coulson v. City Council</i> , 610 S.W.2d 744 (Tex. 1980)	7
<i>Drake Ins. Co. v. King</i> , 606 S.W.2d 812 (Tex. 1980)	5
<i>Fireman's Ins. Co. v. Bd. of Regents of Univ. of Tex. Sys.</i> , 909 S.W.2d 540 (Tex. App.-Austin 1995, writ denied)	4
<i>First Fed. Sav. & Loan Ass'n v. A & M Towing & Road Serv., Inc.</i> , 711 N.E.2d 755 (Ohio Ct. App. 11th Dist. 1998)	6
<i>Scott v. Scott</i> , 68 Tex. 302, 4 S.W. 494 (1887)	5
<i>State v. Richards</i> , 157 Tex. 166, 301 S.W.2d 597 (1957)	3
<i>State v. Southwind Auto Sales</i> , 951 S.W.2d 849 (Tex. App.-San Antonio 1997, no pet.)	3
<i>T.R. Ltd. v. Lee</i> , 465 A.2d 1186 (Md. Ct. Spec. App. 1983), <i>cert. denied</i> , 470 A.2d 353 (1984)	6
<i>Thomas v. Long</i> , 207 S.W.3d 334 (Tex. 2006)	7

Wash. v. Ring,
126 Wash. App. 1037,2005 WL 712444,3-4
(Wash. Ct. App. Mar. 22, 2005) 5

Statutes

TEX. CODE OF CRIM. PROC., ch. 47 4

TEX. TRANSP. CODE § 501.158 2, 5

Rules

TEX. R. APP. P. 47.1 7

TEX. R. EVID. 803 5

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, the City of Dallas, submits this reply.

CONFLICT JURISDICTION EXISTS

Without argument in its response, VSC denies that this Court has conflict jurisdiction. (VSC Response at v-vi). VSC does not explain how the court of appeals' published opinion is not a radical departure from existing jurisprudence that

- all property is held subject to the proper exercise of police power,
- all circumstances are to considered in determining whether a compensable taking has occurred,
- police reports have probative value,
- mere possessors of stolen property have no protected rights in that property,
- statutory possessory liens require the owner's agreement,
- an implied contract requires the knowledge and agreement of all parties,
- declaratory relief is unavailable for unalleged and hypothetical facts,
- declaratory relief is unavailable against non-parties,
- claims without jurisdiction are to be dismissed even if jurisdiction existed over a different claim, and
- a court of appeals is to address all issues raised.

A contrary finding to each of these principles was critical the court of appeals' holdings.

Conflict jurisdiction exists.

SUMMARY OF ARGUMENT

VSC does little more than quote or paraphrase portions of the opinion in *City of Dallas v. VSC, LLC*, 242 S.W.3d 584 (Tex. App.-Dallas 2008). VSC does not address how, pursuant to express statutory authorization, law enforcement officials' seizure of stolen property was a compensable taking. Nor does VSC explain how a trial court has jurisdiction to declare the future rights of non-parties or to declare a plaintiff's future rights as a licensed business when the plaintiff's license has been revoked.

ARGUMENT

- I. This court should exercise jurisdiction to resolve whether and to what extent a valid exercise of police power can be a compensable taking.
 - A. The seizure of stolen vehicles was not a compensable taking.

VSC urges a *per se* taking rule by which governmental entities are to be strictly liable for any physical seizure or damage to property. However, all property is held subject to valid exercise of the police power for which compensation is not required. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984). Physical seizure or damage of property should not alter the analysis.

VSC does not dispute that the vehicle seizures were statutorily authorized and pursuant to a valid, necessary, and proper exercise of police power. *See* Tex. Transp. Code § 501.158(b). VSC does not address or respond to the City's arguments that the seizures were pursuant to a regulatory scheme concerning stolen vehicles, stolen property, and vehicle storage facilities. Likewise, VSC does not address or respond to the authorities that refused to find a compensable taking even though there was a physical

seizure or damaging of property. *See Bennis v. Mich.*, 516 U.S. 442, 452-453 (1996); *State v. Richards*, 157 Tex. 166, 301 S.W.2d 597, 600-601 (1957); *State v. Southwind Auto Sales*, 951 S.W.2d 849, 853-855 (Tex. App.-San Antonio 1997, no pet.). Instead VSC merely claims there was a per se taking. (VSC Response at 2-3).

This Court has already rejected one attempt to mandate a per se taking rule. In *Turtle Rock Corp.*, the issue was whether a city could require developers to dedicate land for parks to obtain plat approval. The court of appeals held such dedication requirements were per se invalid. This Court noted it had "refused to establish a bright line for distinguishing between an exercise of the police power which does constitute a taking and one which does not." *Id* at 804. The Court emphasized that all the circumstances must be considered and the Court looked to whether the action was adopted to accomplish a legitimate goal that was substantially related to the health, safety, and general welfare of the people through reasonable, not arbitrary, action. *Id* at 805.

Here, a per se rule must also be rejected and all the circumstances considered. There is no dispute that the City's actions had a legitimate goal involving the public's safety and welfare, nor is there any dispute that the City's actions were reasonable and statutorily authorized. VSC's interests were limited, if they existed at all, and must be balanced against society's desire to solve crime, return stolen property to its rightful owner, and take the profit out of dealing in stolen property. Trying to deter and solve crime and trying to locate and return stolen property are difficult enough without local governments having to be concerned that scavengers, interlopers, finders of stolen

property, and possessors of contraband can sue and obtain money damages for law enforcement's actions in seizing stolen property and contraband.

The court of appeals erred by sanctioning a per se rule.

B. Claims about Chapter 47 are wrong and defeat jurisdiction.

VSC makes a new assertion of takings based on violations of Chapter 47 of the Texas Code of Criminal Procedure. (VSC Response at 2-3). However, a valid takings claim must be based on the government's intentional action within its authority. *See Fireman's Ins. Co. v. Bd. of Regents of Univ. of Tex. Sys.*, 909 S.W.2d 540, 543 (Tex. App.-Austin 1995, writ denied), *overruled in part on other grounds, Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). VSC's new allegation of City actions outside the scope of its authority negates jurisdiction for VSC's takings claim.

Even if the argument was not self-defeating, it is wrong. Allegedly stolen property is subject to a hearing "*only if the ownership of the property is contested or disputed.*" Tex. Code Crim. Proc. art. 47.01(a) (emphasis added). VSC denied ownership and denied it sought possession. (CR 91; CR 188, ¶ 83). Article 47.01a was inapplicable.

The court should grant the petition, consider all the circumstances, and hold that the statutorily authorized seizures were not a compensable taking.

II. The court of appeals erred in holding that a "finder" of stolen property has a vested property interest in stolen property.

VSC had no protected property interest in the seized vehicles. Without objection, the City presented summaries of police reports that all seized vehicles were reported

stolen. VSC claims the evidence lacked probative value because it only established that the vehicles were "reported stolen" rather than "actually stolen." (VSC Response at 5-6). But the Legislature declared such vehicles are to be treated as stolen. Tex. Transp. Code § 501.158(b). VSC is silent about the statute.

Further, VSC does not explain why this is a valid evidentiary distinction.! It would likewise mean that other reports and records, including business records, are without probative value since they only "report" events rather than establish the events "actually" occurred. An autopsy report or death certificate would be no evidence since a person would only be "reported dead" rather than "actually dead.,,2

Additionally, VSC claims that, despite the thefts, the vehicle owners impliedly granted a statutory lien to Vsc. (VSC Response at 5-6). The claim ignores Texas precedent that "whether the lien be created by statute, or directly by constitution, ownership of the property and a contract binding upon the owner are indispensable." *Bledsoe v. Colbert*, 120 S.W.2d 909,910 (Tex. Civ. App.-Eastland 1938, no writ); *see, e.g., Drake Ins. Co. v. King*, 606 S.W.2d 812, 818 (Tex. 1980) (no repairman's lien in stolen vehicle); *Scott v. Scott*, 68 Tex. 302, 4 S.W. 494 (1887) (no stable keeper lien in "borrowed" horse). Other jurisdictions have concluded no garageman's lien exists in stolen vehicles even when the police ordered the removal and storage. *First Fed. Sav. &*

Neither VSC nor the court of appeals cited any authority. The only case located by the City held that property "reported stolen" was evidence that the property was "actually stolen." *Wash. v. Ring*, 126 Wash. App. 1037, 2005 WL 712444, *3-4 (Wash. Ct. App. Mar. 22, 2005) (unpublished opinion).

² The reports are evidence of the truth of the matters stated therein. Tex. R. Evid. 803(8). If VSC believed the evidence was unreliable or untrustworthy, it should have objected. *Id.* It did not.

Loan Ass'n v. A & M Towing & Road Serv., Inc., 711 N.E.2d 755 (Ohio Ct. App. 11th Dist. 1998); *T.R. Ltd. v. Lee*, 465 A.2d 1186 (Md. Ct. Spec. App. 1983), *cert. denied*, 470 A.2d 353 (1984).

VSC does not explain how a property owner impliedly consents to have property stolen, seized and removed by a finder, stored by the finder, and pay the finder fees that the finder unilaterally charges. The court of appeals' decision is a significant departure from what is necessary for an implied agreement between private parties. Instead, the court of appeals has created a novel scheme that increases the burden on theft victims, undermines conversion claims, and adds a new defense and claim to those that traffic in and profit from stolen goods.

The Court should grant the petition and hold that no protected property interest was involved.

III. The court of appeals erred by finding jurisdiction existed to declare the future rights of a regulated business after its license was revoked and it was speculative whether a license would ever be granted in the future.

VSC's factual allegations and requested declaratory relief were all premised on its actions as a licensed vehicle storage facility. (CR 163, ¶ 36, 37; CR 167, ¶ 35; CR 170-171, ¶ 52(a)).³ See VSC, 242 S.W.3d at 589, 597. VSC offers no argument supporting jurisdiction over its stated claims for declaratory relief as a vehicle storage facility whose license has been revoked. Likewise, VSC does not mention the court of appeals' failure

³ VSC alleged it was "in the business of owning and operating storage lots and vehicle storage facilities and operated a licensed vehicle storage facility from which the seizure of vehicles made the basis of this suit occurred." (CR 167, ¶ 35). VSC's prayer sought declaratory relief regarding vehicles "stored at its licensed vehicle storage facility." (CR 170, ¶ 52(a)).

to address the issues before it as required by Rule 47.1 of the Texas Rules of Appellate Procedure and *Thomas v. Long*, 207 S.W.3d 334, 339 (Tex. 2006).

VSC only asserts that it "could" store vehicles with the consent of the owners, without a license, and that VSC's requested declaratory relief that "could apply" to vehicles towed and stored with the owner's consent and seized by the City. (VSC Response at 6-7). VSC does not claim this has ever happened or suggest how it "could" ever happen.

A district court lacks jurisdiction to give advice or decide cases on speculative, contingent, or hypothetical fact situations. *Coulson v. City Council*, 610 S.W.2d 744, 747 (Tex. 1980). Here, jurisdiction was founded on an unalleged and hypothetical claim. The decision is an explosive expansion of jurisdiction for advisory declaratory judgments. If the court of appeals' opinion becomes the law, a party need only claim that the requested declarations "could apply" to some other factual situation regardless of whether that fact situation is alleged or has or will likely ever occur.⁴

The court should grant the petition and curb the expansion of advisory declaratory judgment actions.

⁴ VSC claims that its license is only "not active" not "revoked." (VSC Response at 6). The Texas Department of Transportation summaries of VSC's licenses stated, "Certificate Status: Revoked." (CR 118-121). VSC apparently relies on a message concerning printing, "The Vehicle Storage Facility License is not active and can not be printed."

IV. The court of appeals erred in finding jurisdiction existed to declare the future obligations of non-parties.

VSC does not address the trial court's complete lack of jurisdiction to declare the future rights of the vehicle owners. VSC's only contention is that the issue was not raised in the trial court. (VSC Response at 7-9). The statement is false.

The City's plea contained a section titled "Plea in Abatement, Plea to Jurisdiction, and Motion to Abate or Dismiss for Failure to Join Parties" in which the City argued that the owners were needed for a just adjudication, that the trial court lacked jurisdiction to declare the rights of non-parties; and that VSC sought to declare the rights of the owners. (CR 46-48). The issue was raised.

While egregious to the City, the significance of the court of appeals' opinion is not simply whether error was preserved. Rather, the court of appeals' opinion alters the law of declaratory judgment jurisdiction by providing a new method of obtaining advisory opinions. While declaratory relief against non-parties based on past events is apparently prohibited, prospective or future declaratory relief against non-parties is permitted.

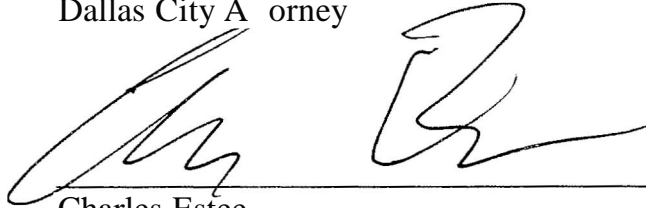
The Court should grant the petition and hold that no jurisdiction exists for a trial court to grant prospective declaratory relief against non-parties.

CONCLUSION AND PRAYER

The City asks the Court to grant the petition for review, reverse the judgment of the court of appeals, and render judgment dismissing VSC's claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August 2008 a copy of the foregoing instrument was served, via certified mail/return receipt requested, to counsel for

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