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Supreme Court, Nassau County, County of Nassau v. Moloney

Joaquin Orellana

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EXCESSIVE FINES

United States Constitution Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

New York Constitution Article I Section 5:

Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted . . . .

SUPREME COURT OF NASSAU COUNTY

County of Nassau v. Moloney[1]
(published October 2, 2002)

Terry Moloney was arrested for driving while intoxicated, and as a result, police officers seized Moloney's 1995 Ford Explorer.[2] Moloney subsequently pleaded guilty to the lesser charge of driving while ability impaired due to alcohol consumption.[3] The County of Nassau instituted this action for forfeiture of defendant's vehicle pursuant to Nassau County Administrative Code[4] Section 8-7(g).[5] Moloney moved for summary judgment to dismiss the complaint and have his vehicle returned, and the County of Nassau cross-motioned for summary judgment on the issue of forfeiture of defendant's vehicle.[6]

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[1] N.Y.L.J., Oct. 2, 2002, at 228, col. 2 (Nass. Co. Sup. Ct.).
[2] *Maloney, supra* note 1.
[3] *Maloney, supra* note 1.
[4] NASS. CO. ADMIN. CODE §8- 7(g) (3) (1990) provides in pertinent part: "The County of Nassau may commence a civil action for forfeiture to the County of Nassau of the . . . instrumentality of a crime seized incident to an arrest for a misdemeanor crime . . . upon a conviction for such misdemeanor crime . . . against any person having an interest in such property."
[5] *Moloney, supra* note 1.
[6] *Maloney, supra* note 1.

Moloney raised several arguments to support his motion for summary judgment.[7] First, he argued seizure of his vehicle violated the Equal Protection Clause of the United States Constitution[8] and Article I, Section 11 of the New York State Constitution.[9] However, the court found that argument was without merit. Moloney further argued that seizure of his vehicle violated the Excessive Fines Clause of the Eighth Amendment to the United States Constitution[10] and Article I, Section 5 of the New York State Constitution.[11] The Court granted the County's cross-motion for summary judgment and Moloney's motion for summary judgment limited only to the issue of hardship on the defendant.[12]

The court looked to *United States v Milbrand,*[13] which articulates a three part test in determining whether seizure of Moloney's vehicle was an excessive fine.[14] In *Milbrand,* law enforcement officers conducted a consensual search and found a large quantity of marijuana plants growing on and around the defendant's property.[15] The officers also found three loaded guns and other drug paraphernalia, which all belonged to Milbrand's son, Mark.[16] Mark pleaded guilty and was convicted in state court of criminal possession of marijuana.[17] The United States instituted an action pursuant to 21 U.S.C. § 881(a)(7)[18] for forfeiture of

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[7] *Maloney, supra* note 1.

[8] U.S. CONST. amend. XIV provides in pertinent part: "[N]or deny to any person within its jurisdiction the equal protection of the laws."

[9] *Moloney*, supra note 1; N.Y. CONST. art I, § 11 provides in pertinent part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof . . . ."

[10] U.S. CONST. amend. VIII provides : "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[11] N.Y. CONST. art I, § 5 provides in pertinent part: "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted . . . ."

[12] *Moloney, supra* note 1.

[13] 58 F.3d 841 (2d Cir. 1995).

[14] *Id.*

[15] *Id.* at 843.

[16] *Id.*

[17] *Id.*

[18] 21 U.S.C. § 881(a)(7) provides in pertinent part: "The following shall be subject to forfeiture to the United States . . . . All real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the

defendant's property, and defendant filed a claim to the property.[19] The trial court denied defendant's claim and found defendant's property forfeitable because the property was used to "facilitate a narcotics felony and that Milbrand was not an innocent owner."[20] The Second Circuit affirmed and issued a three part test for determining excessive fines.[21]

> The factors to be considered:
> . . . include (1) the harshness of the forfeiture (*e.g.*, the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.[22]

Considering the seriousness of the offense and the value of the marijuana compared to the value of the home, the court in *Milibrand* held the forfeiture not to be harsh, thus satisfying the first factor.[23] The court concluded that the second factor was also satisfied because the property was used to grow the marijuana and advance the crime.[24] Lastly, the court reasoned that Milbrand must have known about her son's activities, thus having a significant degree of culpability to satisfy the third factor.[25] Therefore, the court of appeals agreed with the district court's conclusion that the

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commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . ."

[19] *Milbrand*, 58 F.3d at 843.

[20] *Id.*

[21] *Id.* at 847-49.

[22] *Id.* at 847-48.

[23] *Id.* at 848.

[24] *Milbrand*, 58 F.3d at 848.

[25] *Id.*

forfeiture did not violate the Excessive Fines Clause of the Eighth Amendment and affirmed the judgment.[26]

The *Moloney* court also cited to *Attorney-General of the State of New York v. One Green 1993 Four Door Chrysler (Green Chrysler),*[27] where at least one New York appellate department had adopted the three part *Milbrand* test in determining whether fines are excessive.[28] In *Green Chrysler,* state police had previously discovered cocaine was being sold from the defendant's residence and obtained a search warrant.[29] However, before the search warrant was executed, state police received information that the defendants, Kelly and German, would be traveling to Albany in Kelly's 1993 Chrysler to purchase cocaine.[30] The state police followed Kelly's vehicle to an apartment building in Albany, where Kelly waited while German entered the building.[31] Upon German's return, the troopers continued to follow the 1993 Chrysler, finally stopping the vehicle for vehicle and traffic law violations.[32] The troopers found cocaine in the vehicle and on the defendants, and the vehicle was subsequently seized.[33] The New York State Attorney-General instituted a forfeiture proceeding against the vehicle and Kelly moved for either a dismissal or a jury trial to determine the excessiveness of the forfeiture under both the New York and Federal constitutions.[34] Kelly was convicted of criminal possession of a controlled substance in the fifth degree[35] and sentenced to five years probation with six months house arrest and a $2,500 fine.[36] The Third Department adopted the three part test articulated in *Milbrand* and held the forfeiture of the 1993

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[26] *Id.* at 848-49.

[27] 217 A.D.2d 342, 636 N.Y.S.2d 868 (3d Dep't 1996) [hereinafter *Green Chrysler*].

[28] *Moloney, supra* note 1.

[29] *Green Chrysler,* 17 A.D.2d at 344, 636 N.Y.S.2d at 870.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Green Chrysler,* 17 A.D.2d at 344-45, 636 N.Y.S.2d at 870.

[35] N.Y. PENAL LAW § 220.06 (5) (McKinney 2003) states: "A person is guilty of criminal possession of a controlled substance in the fifth degree when he knowingly and unlawfully possesses cocaine and said cocaine weighs five hundred milligrams or more."

[36] *Green Chrysler,* 17 A.D.2d at 345, 636 N.Y.S.2d at 870.

Chrysler did not violate the Excessive Fines Clause of the United States Constitution or New York State Constitution.[37]

The Third Department in *Green Chrysler* reasoned that the second and third factors, which relate to "the relationship between the property and the offense" and "the role and degree of culpability of the owner of the property," were satisfied because the defendant's vehicle was used to transport the cocaine and Kelly was an active participant in the crime.[38] The court also found the first factor, which relates to "the harshness of the forfeiture in comparison to the gravity of the offense and the sentence that could be imposed," was also satisfied. Kelly could have received a harsher sentence as a result of her plea, and the vehicle in question had already been replaced by a 1985 Chrysler.[39] Therefore, the Third Department held the forfeiture of the vehicle was not in violation of either the Excessive Fines Clause of the United States Constitution or the New York State Constitution.[40]

Unsuccessfully, Moloney based his argument on *United States v. Bajakajian*[41] and its "grossly disproportional to the gravity of the offense" test.[42] In *Bajakajian,* the defendant, his wife, and his two children were leaving on a flight to Italy when a customs inspector approached them regarding the $230,000 found in their suitcases.[43] The Bajakajians lied about the money they were carrying and were subsequently searched.[44] The search produced more money, and all the currency was ultimately seized.[45] Consequently, Bajakajian was arrested for attempting to transport $357,144 without reporting it, in violation of 31 U.S.C. § 5316(a)(1)(A)[46] and for making a false statement to a customs agent.[47]

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[37] *Id.* at 348, 636 N.Y.S.2d at 872.
[38] *Id.* at 347, 636 N.Y.S.2d at 872.
[39] *Id.* at 348, 636 N.Y.S.2d at 872.
[40] *Id.*
[41] 524 U.S. 321 (1998).
[42] *Moloney, supra* note 1 (citing *Bajakajian,* 524 U.S. at 334).
[43] *Bajakajian,* 524 U.S. at 324.
[44] *Id.* at 324-25.
[45] *Id.* at 325.
[46] 31 U.S.C. § 5316(a)(1)(A) provides in pertinent part:

> [A] person or an agent or bailee of the person shall file a report . . . when the person, agent, or bailee knowingly--

The United States Supreme Court held that forfeiture of Bajakajian's $357,144 violated the Excessive Fines Clause of the Eighth Amendment because it "would be grossly disproportional to the gravity of his offense."[48] Because the government proceeded against the defendant in a criminal *in personam* proceeding rather than a civil *in rem* proceeding, the Court determined the forfeiture to be punitive and analyzed the forfeiture under a proportionality test.[49] The Court announced that a punitive forfeiture would violate "the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[50] The Court found defendant's crime to be "solely a reporting offense" with a maximum fine of $5,000.[51] The Court also found the Government's deprivation of information to be minimal harm, which "caused no loss to the public fisc."[52] The Court concluded that the gravity of Bajakajian's offense could not compare to the forfeiture of $357,144, and thus, violated the Excessive Fines Clause.[53] However, the *Moloney* court rejected this test and distinguished the *Bajakajian* case for "fines imposed in criminal cases where the property sought to be forfeited was not the object of a civil forfeiture action."[54]

Adhering to the three part test announced in *Milbrand* and subsequently adopted by the Third Department in *Green Chrysler,* the *Moloney* court found the second and third factors were easily satisfied because Moloney pleaded guilty to an offense that involved his vehicle.[55] The three *Milbrand* factors were analyzed: "(1) the harshness of the forfeiture . . . (2) the relationship between the property and the offense . . . and (3) the role and degree of

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> transports, is about to transport, or has transported, monetary instruments of more than $ 10,000 at one time-- from a place in the United States to or through a place outside the United States . . . .

[47] *Bajakajian,* 524 U.S. at 325.

[48] *Id.* at 324.

[49] *Id.* at 333-34.

[50] *Id.* at 334.

[51] *Id.* at 337-38.

[52] *Bajakajian,* 524 U.S. at 339.

[53] *Id.* at 339-40.

[54] *Moloney, supra* note 1.

[55] *Maloney, supra* note 1. When a lower court in New York is faced with an issue of first impression, it must look to other appellate departments if its own appellate department has not yet decided such an issue.

culpability of the owner of the property."[56] However, in applying the first factor of the three part *Milbrand* test, which balances "the harshness of the forfeiture (*e.g.*, the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense," the court determined there was a genuine issue of material fact that a bench trial needed to resolve.[57] The court noted that the vehicle was worth more than the maximum fine imposed, and that the defendant, a carpenter, made his living with the vehicle in question, which was his only vehicle.[58] The court reasoned it may be overly harsh to impose a forfeiture on a person with a deteriorating financial condition and might violate the Excessive Fines Clause of the United States Constitution and New York State Constitution. Therefore, the court ordered discovery and a bench trial to determine the issue of hardship.[59]

In conclusion, the three part test annunciated in *Milbrand* and adopted in *Green Chrysler,* is currently the standard among lower New York courts for reviewing whether a fine imposed, such as forfeiture of real or personal property, is overly excessive and in violation of the Excessive Fines Clause of the United States Constitution and New York State Constitution. Because neither the New York State Court of Appeals nor the Appellate Division, Second Department has decided on the issue of excessive fines, the court was bound by the Third Department's decision in *Green Chrysler* and issued its determination accordingly.[60]

Although the *Moloney* court held Nassau County Administrative Code was not violataive of the Excessive Fines Clause of the Federal or New York State Constitution, just prior to publishing this Purview, the Appellate Division, Second Department held in *County of Nassau v. Canavan* that the Nassau County Administrative Code is unconstitutionally vague and therefore violates due process.[61] The Second Department held that

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[56] *Milbrand,* 58 F.3d at 847-48.
[57] *Moloney, supra* note 1.
[58] *Maloney, supra* note 1.
[59] *Maloney, supra* note 1.
[60] *Maloney, supra* note 1.
[61] 2003 N.Y.App. Div. LEXIS 2174 at *3 (2d Dep't 2003).

because the statute did not "define any offense or petty offense or provide any legislative history for its forfeiture sections" that the statute did not provide "fair notice."[62] Although the county conceded that forfeiture is utilized only for alcohol related offenses and not merely for reckless driving or driving with a suspended license, the court found it problematic that the statute is too general.[63] Furthermore, the court reasoned that because the statute did not provide the public with adequate notice what of conduct will result in forfeiture, there is an enhanced "opportunity for arbitrary and discriminatory enforcement."[64]

Joaquin Orellana

[62] *Id.*
[63] *Id.*
[64] *Id.*