UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

# United States v. Gene Allen Flores

90-1 USTC P 50,093 (5th Cir. 1989) · No. No. 88-2783 · Decided December 26, 1989

## SUMMARY

The Fifth Circuit affirmed Gene Allen Flores's conviction under 18 U.S.C. § 2233 for forcibly rescuing a 1984 Cadillac after the Internal Revenue Service had seized it. The court held that judicial intervention and a court-ordered money judgment were not prerequisites to the seizure, rejected challenges based on technical IRS procedures and agent authority, and denied a motion to supplement the appellate record.

## CASE DETAILS

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| COURT | United States Court of Appeals for the Fifth Circuit |
| WRITING FOR THE COURT | Per Curiam; Gee; Davis; Jones |
| JURISDICTION | Federal |
| DECIDED | December 26, 1989 |
| DOCKET | No. 88-2783 |
| DISPOSITION | affirmed |
| PROCEDURAL POSTURE | Flores appealed his federal conviction under 18 U.S.C. § 2233 for forcibly rescuing property seized under the revenue laws. |
| PRECEDENTIAL VALUE | Published opinion; precedential Fifth Circuit authority |
| PARTIES | Gene Allen Flores v. United States of America |

## TOPICS

tax collection · tax liens · criminal procedure · statutory interpretation · appellate procedure

## PRACTICE AREAS

Federal criminal law · Tax collection · Appellate procedure

## QUESTIONS PRESENTED

1. Whether the IRS seizure of Flores's Cadillac was legally sufficient to support a conviction under 18 U.S.C. § 2233 without a prior court-ordered money judgment, writ of attachment, or compliance with every technical seizure requirement.

2. Whether the jury was properly instructed regarding the lawfulness of the seizure and the authority of the seizing agent.
3. Whether the alleged variance between the indictment and the trial proof concerning the seizing agent's authority required reversal.
4. Whether the appellate court should supplement the record with evidence from a related civil action.

### HOLDINGS

1. A prior court-ordered money judgment, writ of attachment, or other judicial intervention was not required for the IRS to seize property located in a public place under the federal revenue laws.
2. For purposes of 18 U.S.C. § 2233, the seizure need only have been performed by a proper official with general authority under the tax code to make the seizure; disputes over other technical aspects of seizure legality do not negate the seizure element of the offense.
3. Flores could not invalidate his conviction based on an alleged violation of an internal IRS operating procedure where the seizure was authorized under the tax code and performed by IRS agents; in any event, the evidence supported a finding that the seizure was performed by an authorized GS-9-or-higher agent.
4. Any variance between the indictment's allegation that Agent Scott had authority and the proof concerning a GS-9-or-higher agent was not reversible error because it did not prejudice Flores's substantial rights.
5. The motion to supplement the appellate record with material from a related civil action was properly denied because appellate courts ordinarily do not enlarge the record to include material that was not before the district court.

### KEY QUOTATIONS

> “*Lawfulness of a seizure under section 7212(b) "means only that it was performed by a proper official with general authority under the tax code to make the seizure."*” (paragraph 11)

> “*"represents a legislative determination that in the context of the enforcement of the tax laws, once property had been seized, the risk of disorder by violent recovery of the property should be avoided entirely and the one who claims the right to the property should pursue legal remedies."*” (paragraph 13)

### FACTUAL BACKGROUND

While Flores was discussing his tax delinquencies with Internal Revenue Service agents at an IRS facility, agents levied on and seized his only known asset, a 1984 Cadillac. Despite explicit warnings and a seizure warning tag on the vehicle, Flores drove the Cadillac away. The evidence showed that Agent Gwendolyn Scott signed the notice of levy and that two GS-9 agents also signed it; one GS-9 agent was present when the notice and seizure warning were presented.

### PROCEDURAL HISTORY

The United States District Court for the Southern District of Texas convicted Flores after he drove away a Cadillac that Internal Revenue Service agents had levied on and seized. On appeal, Flores challenged the lawfulness and constitutional sufficiency of the seizure, the jury instructions, the authority of the seizing agent, the alleged variance between the indictment and proof, and the denial of his motion to supplement the appellate record. The Fifth Circuit rejected each contention and affirmed.

### DISPOSITION

affirmed

### CASES CITED

- United States v. Spicer, 547 F.2d 1228 (5th Cir. 1977), cert. denied, 430 U.S. 987 (1977)
- United States v. Sanders, 862 F.2d 79, 81-83 (4th Cir. 1988)
- G.M. Leasing Corp. v. United States, 429 U.S. 338, 351-52 (1977)
- Phillips v. Commissioner, 283 U.S. 589, 593-97 (1931)
- Fuentes v. Shevin, 407 U.S. 67, 91-92 (1972)
- Baddour, Inc. v. United States, 802 F.2d 801, 807 (5th Cir. 1986)
- United States v. Main, 598 F.2d 1086, 1090-91 (7th Cir. 1979), cert. denied, 444 U.S. 943 (1979)
- United States v. Scolnick, 392 F.2d 320, 326 (3d Cir. 1968), cert. denied, 392 U.S. 931 (1968)
- United States v. Hardaway, 731 F.2d 1138, 1140 (5th Cir. 1984)
- United States v. Massey, 827 F.2d 995, 1003 (5th Cir. 1987)
- United States v. Cook, 586 F.2d 572, 575 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979)
- Kemlon Prods. & Dev. Co. v. United States, 646 F.2d 223, 224 (5th Cir. 1981), cert. denied, 454 U.S. 863 (1981)

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