No. 33267-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CITY OF YAKIMA, ON BEHALF OF THE YAKIMA CITY NARCOTICS UNIT, DETECTIVE DIVISION OF THE YAKIMA POLICE DEPARTMENT, Respondent,

v.

REAL PROPERTY KNOWN AS 1606 W. KING STREET LOCATED IN THE CITY OF YAKIMA, WASHINGTON, Defendant,

and

JOHN E. GANGWISH, Appellant.

BRIEF OF RESPONDENT

JEFF CUTTER
City Attorney

BRONSON FAUL
Assistant City Attorney
Attorneys for Respondent City of Yakima
WSBA No. 34272
200 South Third Street
Yakima, WA 98901
(509) 575-6030

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Yakima Police department narcotics detectives assigned to the Drug Enforcement Agency as task force officers began a controlled substances investigation in March of 2012 involving the real property located at 1606 W. King Street in Yakima, Washington. During two separate investigations, they made five controlled purchases of methamphetamine and discovered multiple people with additional controlled substances located on the property. The property also contained a hidden dug out room under a shed in the backyard with old moldy marijuana plants. The property owner and claimant, John Gangwish, had allowed others to use the residence as a place to use controlled substances and himself had purchased a controlled substance from another at the residence. Following a bench trial, the court ordered the property forfeited pursuant to the Revised Code of Washington 69.50.505.

II. ASSIGNMENTS OF ERROR

Respondent assigns no additional assignments of error.

III. STATEMENT OF THE CASE

John Gangwish, the claimant and appellant, had started using methamphetamine for at least 10 years prior to 1606 W. King St. being ordered forfeited to the City of Yakima. RP 112-113. For the last five years

there were people coming in and out of the residence quite regularly at all hours of the day and night. RP 68. Going back several years, John Gangwish had been using, and arranging sales of, methamphetamine with his nephew in the residence. RP 40-41. John Gangwish has also allowed others to use the residence as a place to ingest methamphetamine. RP 33.

Yakima Police department Narcotics Officers began a drug investigation on 1606 W. King St. in early 2012. RP 9. From March 6, 2012 to March 29, 2012 they made three controlled purchases of methamphetamine from the defendant property. RP 15-24. On April 5, 2012, the detectives served a search warrant on defendant property and located five people. RP 24. Those found in the residence were there to use methamphetamine and several had possession of methamphetamine. RP 25-26. In addition to the methamphetamine, detectives also found drug paraphernalia that consisted of over a hundred unused baggies, pipes and digital scales in the residence. RP 30-31. The baggies had a special "#1" marking on them. RP 31. The third controlled purchase of methamphetamine involved the same style baggie with the special "#1" marking. RP 32. John Gangwish also had methamphetamine in his bedroom in the same style "#1" baggie that he admitted to purchasing from the target of the investigation. RP 32, 110. The target, Jeannie Lupino-Cronk, had a shared bedroom in the residence. RP 32. Detectives also

located marijuana plants in a secret room hand dug underneath a shed in the backyard of defendant property. RP 33-35.

In October 2013 during the pendency of John Gangwish's criminal case and this forfeiture case, detectives began a second narcotics investigation into defendant property. RP 125. They made two additional controlled purchases of methamphetamine from defendant property. RP 124-125. When they served the search warrant on the second investigation, detectives located a phone in John Gangwish's bedroom with drug related messages. RP 127-129. John Gangwish admitted to continuing use of methamphetamine. RP 130.

IV. ARGUMENT

1. Standard of Review

> The [appellate] court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. In determining the sufficiency of the evidence, the court need only consider evidence favorable to the prevailing party. There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence.

Buck Mountain Owner's Association v. Prestwich, 174 Wash. App. 702, 713-714, 308 P.3d 644 (2013).

In addition to only considering evidence favorable to the prevailing party, the court will also review all reasonable inferences in the light most

favorable to the prevailing party. *Jensen v. Lake Jane Estates*, 165 Wash. App. 100, 104, 267 P.3d 435 (2011). The trial court found that claimant's testimony was not credible (Finding of Fact #33). This court should not consider any facts favorable to the claimant's position or argument when determining if there is substantial evidence to support the trial courts findings.

2. Newly raised issues do not merit appellate review.

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). We decline to address new constitutional issues raised for the first time on appeal unless the claim reflects a manifest error affecting a constitutional right. RAP 2.5(a)(3). *Disability Proceeding Against Diamondstone*, 153 Wash. 2d 430, 443, 105 P.3d 1 (2005).

> Because RAP 2.5(a)(3) is an exception to the general rule that parties cannot raise new arguments on appeal, we construe the exception narrowly by requiring the asserted error to be (1) manifest and (2) "truly of constitutional magnitude." RAP 2.5(a)(3) was not designed to allow parties "a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted.

State v. WWJ Corp., 138 Wash. 2d 595, 602, 980 P.2d 1257 (1999).

In *WWJ Corp.*, the court analyzed if Eight Amendment Excessive Fines Clause can be raised for the first time on appeal. The court found the record was insufficiently developed to evaluate the merits and could not be shown to be manifest to meet the narrow exception to RAP 2.5(a)(3). *WWJ Corp.*, 138 Wash. 2d at 603.

Similar to *WWJ Corp*, our record is insufficient to determine the merits of the newly claimed constitutional error. The record is devoid of facts to property evaluate the proportionality factor in determining an excessive punishment. Because the issue was not raised at the trial court, the value of the property, the value of the illegal substances, the effect of these crimes on the community and the costs of prosecution are necessary facts missing from the record this court needs to properly evaluate the merits of the claim. The appellant is unable to show manifest error and the court should not consider any Eight Amendment arguments.

3. The forfeiture of claimant's property does not constitute an excessive penalty under the Eighth Amendment.

In the alternative to the court not considering the newly raised Eighth Amendment excessive penalty claims, appellant has failed to prove any constitutional violation.

When deciding how the Eighth Amendment affects a particular civil in rem forfeiture, it is necessary to address two questions: (1) Does the

forfeiture constitute punishment, and (2) if so, is that punishment excessive? *Tellevik v. Real Property Known as 6717 100th Street S.W., Located in Pierce County*, 83 Wash. App. 366, 372, 921 P.2d 1088 (1996). The City concedes for this case, the forfeiture constitutes a punishment for Eighth Amendment purposes.

> Constitutional excessiveness is analyzed by examining instrumentality and proportionality factors. Instrumentality factors include, but are not limited to, the role the property played in the crime; the role and culpability of the property's owner; whether the offending property can readily be separated from innocent property; and whether the use of the property was planned or fortuitous. Proportional factors include, but are not limited to, the nature and value of the property; the effect of forfeiture on the owner and innocent third parties; the extent of the owner's involvement in the crime; whether the owner's involvement was intentional, reckless or negligent; the gravity of the type of crime, as indicated by the maximum sentence; the duration and extent of the criminal enterprise, including in a drug case the street value of the illegal substances, and the effect of the crime on the community, including costs of prosecution.

6717 100th Street S.W., 83 Wn. App. at 374.

After applying the facts of this case to the factors of excessive punishment, it is clear the defendant property has been instrumental for controlled substances crimes for many years and that the claimant has either been involved or had actual knowledge of those crimes.

a) Instrumentality

Respondent moved to forfeit defendant property based upon a series of crimes, not a single crime. Substantial evidence exist in the record to show defendant property has been a hub for controlled substances for many years. Defendant property contained a secret hand dug room containing an old marijuana grow operation; had been used by claimant and his nephew to exchange and use controlled substances; was used by other residents and guests as a place to purchase, distribute and use controlled substances; and was actually used by the claimant to purchase a controlled substance. The constant flow of traffic to the residence for short periods of time over five years shows that defendant property was known as a place that others could frequent to purchase and use controlled substances.

The claimant, participated in many of the crimes related to controlled substances and admitted to making purchase from a dealer that was a resident of the defendant property. He was also found guilty of possession of a controlled substance and substantial evidence exists he maintained a drug dwelling at defendant property.

Defendant property was used in its entirety to support controlled substance violations. It is a residential lot consisting of a residence and a couple outbuildings. Substantial evidence shows the residence and outbuildings were used for manufacturing, delivering or using controlled

substances. There is no innocent property to separate as the entire property was used in some manner to support controlled substance related crimes.

Defendant property acts as the common factor in all of these controlled substance related crimes and was instrumental in the design to aid the crimes. The property was equipped with surveillance to aid those inside to avoid detection and commit crimes and the outbuildings were used to conceal a marijuana growing operation. Claimant maintained defendant property as a central location for methamphetamine purchase and use.

b) Proportionality

Many of the facts supporting instrumentality also support proportionality as one generally looks at the property and one looks at the owner's culpability of the crimes occurring on the property. Among the many controlled substances crimes identified occurring at defendant property, the claimant was convicted of a Class C felony with a serious level of I and punishable by up to 24 months incarceration and a fine of $10,000. A resident of defendant property was convicted of a Class B felony with a serious level of II punishable by up to 120 months incarceration and a fine of $25,000. The trial court found five additional delivery of methamphetamine crimes were committed (Findings of Fact 3, 4, 5, 29, 30) which are also Class B felonies with a serious level of II punishable by confinement up to 120 months incarceration and a fine of $25,000 each.

See RCW 9.94A.517, RCW 9.94A.518, RCW 9.94A.550. Just a portion of the criminal controlled substances activity at defendant property add up to maximum penalties of 744 months of incarceration and fines of $160,000.

No innocent third parties will be negatively effected by the forfeiture of defendant property. The only remaining residents at defendant property, at the time of the second search warrant, were involved in controlled substances. Other residents that had lived in the house previously were identified as dealers and users of controlled substances and are certainly not innocent parties that would be effected by this forfeiture. On the other hand, there will be positive effects on the innocent residents of the neighborhood who will not have put up with claimant's drug dwelling behaviors. They will be relieved of the constant traffic at all hours of the day and of the littering that comes from having drug users frequenting the property.

The duration and extent of the criminal enterprise has been fully discussed. Claimant and defendant property had been maintained and made available for use, as a place for the purpose of unlawfully distributing and using controlled substances for many years and through many dealers.

Appellant's reliance on the *Zummirez Drive* case should not persuade this court that forfeiture violates the Eighth Amendment. The facts in *United States v. Real Property Located at 6625 Zumirez Drive, Malibu, California*, 845 F.Supp. 725 (1994) are contrary to the facts in the

present case. The court when finding an Eighth Amendment excessive fines violations relied upon some key facts that are opposite of our evidence. The first fact the court relied upon is that the property owner was acquitted of all crimes after trial. Mr. Gangwish was convicted after a plea of guilty and was found to have committed uncharged crimes by the trial court. A second key fact the court considered in *Zummirez Drive* was that the relationship between the property owner and the person committing the controlled substances crimes finding that the father son relationship makes it unrealistic that forfeiture laws would induce parents to evict their own children from the home. *6625 Zumirez Drive*, 845 F. Supp. at 736. Mr. Gangwish has no such relationship with any of the five people found inside the residence at the time of the first search warrant or the identified resident at the time of the second search warrant. In addition to the factual distinction, the federal district court was analyzing federal forfeiture law that was subsequently superseded by statute and not Washington forfeiture laws.

4. Defendant property provides a substantial nexus for the commercial sale of controlled substances.

Respondent agrees with Appellant that substantial nexus is similar the law and arguments presented in IV.3.a, above, regarding instrumentality. The substantial evidence shows defendant property was a

major hub for controlled substance related crime. The residence was used to store, weigh, package, sale and use methamphetamine for a long period of time. When the first search warrant was served, the target of the investigation was found with roughly eighty to one hundred ten doses of methamphetamine. This is in addition to the other methamphetamine found on individual persons in the residence. The detectives located paraphernalia throughout the residence including numerous unused baggies and scales. (Finding of Fact #19).

No evidence supports appellant's theory that the drug operation was mobile. The drugs, the people, the processing, the packaging, the selling, the purchasing, the using and the activity did not occur in any vehicle. All of these things did occur in and on defendant property.

5. Claimant had actual knowledge of illegal controlled substances activity occurring at defendant property.

> All real property, including any right, title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements which are being used with the knowledge of the owner for manufacturing, compounding, processing, deliver, importing, or exporting of any controlled substance is subject to seizure and forfeiture and no property right exists in them.

RCW 69.50.505(1)(h).

"It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment, or other

pleading or in any trial, hearing, or other proceeding under this chapter. The burden of proof of any exemption or exception is upon the person claiming it." RCW 69.50.506(a). "The State carries the initial burden of producing evidence to show knowledge and consent, but the claimant carries the burden of persuasion of showing a lack of knowledge and consent." *Tellevik v. Real Property Known as 31641 West Rutherford Street, Located in the City of Carnation, Washington, and All Appurtenances and Improvements*, 120 Wash. 2d 68, 89, 838 P.2d 111 (1992). The trial court erred in finding it was the City of Yakima's burden to prove knowledge but the error was harmless considering the overwhelming evidence showing actual knowledge.

There is direct testimony to prove actual knowledge that the claimant was involved methamphetamine use and sales from defendant property. The testimony regarding his nephew was that for years they had used methamphetamine together in the residence and that the claimant would supply the methamphetamine for him (the nephew) to sell. CP 49. The other evidence of actual knowledge is the fact that claimant actually participated in a controlled substance delivery at defendant property. (Finding of Fact #24)

Deriving reasonable inferences from objective facts about what a person's subjective knowledge was at the time is appropriate because it

prevents the "I had my head in the sand" defense. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wash. 2d 834, 843, 215 P.3d 166 (2009). Claimant was an unemployed owner and resident of defendant property. He had a security system installed that would send an audible alert to his bedroom when someone was at the residence and had a camera so that he could see who was coming and going from the residence. (CP 105-107, 118). Controlled substances, packaging and other paraphernalia were found throughout his residence and claimant admits to maintaining the residence as a place for people to use methamphetamine. The only fact presented in contradiction that the claimant had actual knowledge was his own denial of any knowledge of these activities. There are sufficient objective facts to determine that the claimant had actual knowledge of the controlled substances criminal activity involving defendant property.

V. CONCLUSION

Defendant property is real property which was being used with the knowledge of the owner for manufacturing, compounding, processing, delivery, importing, or exporting controlled substances involving activities not less than a class C felony and a substantial nexus exists between the commercial production or sale of the controlled substance and the defendant real property.

John Gangwish has owned and operated defendant property with controlled substances dealers and as a place for others to congregate to use controlled substances for a long period of time. Detectives were finally able to break into this drug trafficking organization by making five controlled purchases of controlled substances spanning nineteen months and resulted in arrests and convictions. John Ganwish participated in a controlled substance delivery at defendant property which was littered with drug paraphernalia, including items used for packaging for sale.

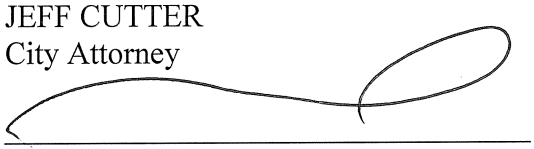
An Eighth Amendment Excessive Fines Clause argument was not raised to the trial court and does not meet the narrow exception to merit this courts analysis of the issue. Alternatively, the appellant fails to establish these facts prove forfeiture of defendant property consists of an excessive fine to John Gangwish, a willful participant in the criminal controlled substance violations occurring at the defendant property.

Appellant failed to overcome the presumption in favor of the trial court's findings of fact supporting the conclusion there was a substantial nexus between the defendant property and the drug sales occurring there.

This Court should dismiss the appeal and affirm the trial court's order of forfeiture of 1606 W. King Street.

RESPECTFULLY SUBMITTED this 2nd day of November, 2015.

JEFF CUTTER
City Attorney



BRONSON FAUL, WSBA No. 34272
Assistant City Attorney
Attorneys for Respondent City of Yakima
200 South Third Street
Yakima, WA 98901
(509) 575-6030

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that I am a Legal Assistant in the City of Yakima Legal Department, I am over the age of 18 years, not a party to this action and competent to be a witness herein. On November 2, 2015, I filed the "Brief of Respondent" with the Court, and served a copy on the attorney for the appellant in the manner indicated below:

Court of Appeals, Div. III	___ U.S. Mail
500 N. Cedar Street	___ Attorney Messenger Service
Spokane, WA 99201-1905	_X_ Electronic Filing
	___ Hand Delivery

and

Kevin Hochhalter	X U.S. Mail
Cushman Law Offices, P.S.	___ Attorney Messenger Service
924 Capitol Way S.	X Email
Olympia, WA 98501	(kevinhochhalter@cushmanlaw.com)

Dated at Yakima, Washington, this 2nd day of November, 2015.

Brandy R. Bradford

Brandy R. Bradford