

FILED
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No. 102211-5

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

CHIN FU CHEN AND MY TIEU LAO,
Petitioners,

v.

CHUCK E. ATKINS, SHERIFF OF CLARK COUNTY,
AND THE CLARK COUNTY SHERIFF'S OFFICE AND
CLARK COUNTY, WASHINGTON,
Respondents.

**RESPONDENTS' ANSWER TO
PETITION FOR REVIEW**

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**I. INTRODUCTION AND IDENTITY OF
RESPONDENT**

Chuck E. Atkins, Sheriff of Clark County, Clark County Sheriff's Office, and Clark County, Washington ("Respondent") hereby replies to and answers the Petition for Review filed by Petitioners subsequent to the Court of Appeals (Div. 2) decision in *Chin Fu Chen and My Tieu Lao v. Chuck E. Atkins, Sheriff of Clark County, and the Clark County Sheriff's Office, and Clark County, Washington*, 57002-5-II, 2023 2023 WL 331794 (Wash. Ct. App. May 9, 2023). This decision affirmed the Clark County Superior Court's order affirming the District Court's forfeiture order.

Petitioners fail to satisfy the standards of RAP 13.4(b)(1-4). Instead, Petitioners recycle the same unsupported inferences and misapplication of the law rejected by the district court, superior court, and Court of Appeals. Accordingly, this Court should deny the petition.

II. ANSWERS TO ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals correctly ruled the search warrant affidavit was not stale because there was “continuing and contemporaneous possession” of illegal proceeds remaining in Petitioners’ bank accounts in December 2020. As such, the Court of Appeals’ decision did not conflict with Supreme Court precedent. Therefore, Petitioners are not entitled to review under RAP 13.4 (b)(1).
2. The search warrant contained information about the location and accounts to be searched, the funds subject to seizure, and limited the amount of funds subject to seizure. Petitioners provide no legal basis, nor is there one, for a delineation between money received in relation to illegal drug proceeds and legitimate income. Therefore, Petitioners have not shown a lack of particularity or a significant question of law under the state or federal

constitutions entitling them to review under RAP 13.4(b)(3).

3. Petitioners fail to show that *Spinelli v. United States* and the basis of knowledge test applies to the present case where there is no informant and the information contained in the affidavit is from a member of law enforcement. Therefore, they also fail to demonstrate how a significant question of law under the state or federal constitutions is implicated under RAP 13.4(b)(3).¹
4. The financial analysis completed in this case was thorough and detailed, and the district court, superior court, and Court of Appeals all found it to support forfeiture. Therefore, Petitioners' fail to establish an issue of substantial public interest under RAP 13.4(b)(4).

¹ Respondent has combined its response to Petitioners' "issues for review" three and four regarding *Spinelli* and the basis of knowledge test rather than separating them as Petitioners have done.

III. STATEMENT OF THE CASE

1. Factual Summary

Petitioners' argumentative and unsupported factual background should be ignored. Respondent removes the argument and editorial in the version offered below.

On December 3, 2020, Respondent filed an affidavit with the Clark County Superior Court in support of a warrant to seize funds in bank accounts held by Petitioners. Clerk's Papers (CP) pp. 37-44. The subject of the proposed warrant was, "[p]roceeds derived from violations of the State of Washington's Uniform Controlled Substances act RCW 69.50". CP p. 37, ll. 13-15.

In support of the request for the warrant, the affiant made several germane observations. In a search of Petitioners' residence, conducted in response to a warrant issued in January 2020, Respondent found "a sophisticated illegal commercial indoor marijuana operation . . ." CP p. 39, ll. 3-7; p. 40, ll. 10-17. During that residential search, Petitioner Chen admitted to

growing and selling illegal marijuana for a period of two years. CP p. 40, ll. 18-21. An interview with both Petitioners also revealed that they had no sources of legitimate income beyond that reported in their W-2 documents. CP p. 42, ll. 10-12. Among other items discovered during the search, Respondent found numerous financial documents that included bank statements, tax returns, escrow records and a residential loan application. CP p. 39, ll. 8-11.

Based on the financial documents found during the above residential search, affiant applied for and obtained a second search warrant in December 2020 for detailed records of Petitioners' bank transactions. CP p. 39, ll. 12-27; p. 40, ll. 22-25; p. 41, ll. 18-23. The records obtained through that search showed deposits substantially more than the Petitioners' reported income. *Id.* Additionally, the bank records showed that Petitioners' personal living expenses far exceeded their reported income while Petitioners were amassing cash-on-hand and significant assets. CP p. 42, ll. 1-8. The records also appeared

to show that the illegal marijuana operation had “existed for at least four years,” contrary to Petitioner Chen’s admission during the residential search in January 2020. CP p. 40, ll. 10-25.

Based on the information obtained from the second search warrant, the affiant² opined that the only “source of the identified unreported income was the illegal commercial marijuana production operation.” CP p. 40, ll. 1-2; p. 42, ll. 18-21. The affiant also noted that any balance remaining in the bank accounts would represent illegal proceeds. CP. p. 42, ll. 22-25.

During the underlying case, Respondent asked the district court to allow Respondent to return \$30,242.40 to Petitioners, which represented the difference between the account balances between January 2020 and December 2020. CP pp. 85-87. The district court granted Respondent’s request. CP pp. 89-90.

² The affiant was qualified as an expert in financial forensics in the underlying case based on testimony very similar to the assertions made at the beginning of the affiant’s affidavit. CP pp. 37-38.

2. Procedural Summary

Petitioners removed the forfeiture action to Clark County District Court. Following a hearing, Judge Kristen Parcher entered Findings of Fact and Conclusions of Law (Motion to Dismiss, Motion for Summary Judgment, Hearing on Return of Forfeited Property).

Petitioners appealed the district court's findings and conclusions to the superior court, raising five assignments of error: 1) staleness of the December 2020 affidavit and warrant, 2) particularity as required by the Fourth Amendment, 3) whether the warrant was defective under *Spinelli*, 4) sufficiency of the evidence at trial to forfeit \$58,835.67, and 5) failure to calculate the amount of funds attributable to illegal marijuana sales in the accounts. Superior Court Judge Suzan Clark issued a written ruling affirming the trial court in all respects.

On June 24, 2022, Petitioners filed their Notice of Discretionary Review. On September 20, 2022, a commissioner granted discretionary review of Petitioners' first assignment of

error -- the staleness of the December 2020 affidavit and warrant. The other issues raised by Petitioners were denied because they failed to demonstrate that discretionary review was warranted under RAP 2.3.

Petitioners then filed a motion for modification of the commissioner's ruling. An order was entered on November 16, 2022, denying the motion to modify. The Court of Appeals issued their decision on May 9, 2023, affirming the superior court's order affirming the district court's forfeiture order. Petitioners then filed a motion for reconsideration. An order was entered on June 27, 2023, denying the request for reconsideration.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. *Petitioners' fail to establish any conflict between the Court of Appeals' decision and Supreme Court precedent. Similarly, Petitioners' fail to demonstrate that staleness of a search warrant affidavit is a question of constitutional magnitude. RAP 13.4(b)(1), (b)(3).*

A. *The Court of Appeals decision is not in conflict with Supreme Court precedent.*

Petitioners raise this issue of error in regard the staleness decision only. In doing so, Petitioners reference three cases: *State v. Maddox*, 152 Wn. App. 2d 499, 506, 98 P.3d 1199(2004); *State v. Young*, 62 Wn. App. 895, 802 P.2d 829 (1991); and *State v. Higby*, 26 Wn. App. 457, 460, 613 P.2d 1192(1980).

Petitioners assert that the underlying decision is in conflict with *Maddox* and *Young* because it does not represent, “a commonsense determination that there is continuing and

contemporaneous possession of the property intended to be seized”. Petition at 7. Petitioners do not, however, present the facts of *Maddox* and *Young* in a manner that establishes a standard for common sense in determining “continuing and contemporaneous possession”, much less do Petitioners assert that such standard is indelible. More importantly, Petitioners do not state specifically that the underlying decision failed to apply the holdings in *Maddox* and *Young*. Instead, Petitioners simply assert that the underlying decision “makes no sense”. *Id.* The fact that a court decision makes no sense to Petitioners does not create a conflict with state law. This Court need only look to the underlying decision to see that the commonsense standard presented in *Maddox* and *Young* was used by the Court of Appeals in their decision. See Appendix 1 of Petitioner’s Petition for Review.

Petitioners further appear to argue that the passage of time cleanses the funds, such that the funds in the account at the time of seizure were legitimate. Under RCW 69.50.505(1)(g), no

property right exists in illegal proceeds. If no property right exists in illegal proceeds, then Petitioners had no lawful right to withdraw those proceeds from their accounts. If the Petitioners' added legal proceeds (reported income) to their accounts after January 2020 (date that illegal marijuana operation ceased), then common sense would dictate that withdraws from those accounts would need to exhaust the legal proceeds, to which the Petitioners had a lawful property right, before touching the illegal proceeds, to which Petitioners had no lawful property right. It is common sense that in the absence of proof that Petitioners' accounts were completely purged between January 2020 and December 2020, some if not all, the funds in those accounts would be illegal proceeds. Thus, the Petitioners' by and through their bank accounts were in continuing and contemporaneous possession of illegal proceeds up through the time of seizure.

Petitioners state that the underlying decision is in conflict with *Higby* because "Proceeds of drug sales are illegal to possess, RCW 69.50.505(1)(g), and therefore as a matter of law are

contraband.” Petition at 8. Respondent cannot discern how that opinion gives rise to a conflict between the holding in *Higby* and the underlying Court of Appeals decision. Petitioners do not state how the holding in *Higby* applies to the facts of the underlying case or how the underlying decision creates a conflict with *Higby*.

In the absence of some explanation for how the above referenced cases conflict with the Court of Appeals decision, this Court should find that Petitioners have not satisfied RAP 13.4(b)(1).

B. Petitioners fail to establish how staleness is a significant question of law under either the federal or state constitutions as required by RAP 13.4(b)(3).

Petitioners also claim staleness of the search warrant is an issue of constitutional magnitude because this topic arises under constitutional. However, it seems clear that error under RAP 13.4(b)(3) requires something more than simply being related to constitutional law to make the issue constitutionally *significant*.

RAP 13.4(b)(1-4) appears to require a showing of probable or obvious error in the underlying decisions. Therefore, Petitioners need to show probable or obvious constitutional error in the Court of Appeals decision. Instead, Petitioners make a series of spurious and irrelevant arguments about how the Court of Appeals misinterpreted the search warrant affidavit.

Petitioners first claim the Court of Appeals doubled the amount of illegal drug proceeds. There is no support for this interpretation anywhere in the opinion. Even if the Court of Appeals somehow misunderstood the amount of money in the bank accounts attributable to drug proceeds, it does not change the conclusion there were proceeds from illegal drug activity in Petitioners' accounts at the time of seizure, which they have no legitimate claim to. The affidavit shows that \$169,000 in cash and money orders and \$75,000 in personal checks, totaling \$244,000 was deposited into the Petitioners' bank accounts in addition to their legitimate income.

Petitioners also conflate the terms “accumulate” and “spent.” Accumulating drug proceeds and cash-on-hand from drug proceeds is not the same as spending drug proceeds. The affidavit does not state Petitioners “spent” \$225,000 of drug proceeds. Petitioners’ “calculations” rely on an assumption of how the unreported income amount was calculated without having a basis to do so. This contention by Petitioners is an unsupported and strained reading of the affidavit. Petitioners also misrepresent that the drug proceeds were “spent” while legitimate income was somehow saved in the commingled bank accounts. Petitioners claim is in direct conflict with RCW 69.50.505, which states that no property rights exist in items subject to forfeiture.

Petitioners next argue the use of the term “cash-on-hand” in the Court of Appeals’ opinion demonstrates the court misinterpreted the affidavit. However, Petitioners’ understanding of cash-on-hand is flawed. Cash-on-hand includes money in a bank account. A search of the term “cash-on-hand”

shows it is a common term used in accounting that includes not only cash in the bank, but also any asset that can be converted to cash in the bank in 90 days.³ Petitioners incorrectly claim cash-on-hand equates only to physical currency. Petitioners attempt to redefine the term, or limited understanding of accounting principles, does not mean the court misinterpreted the affidavit nor does it make the affidavit stale.

Petitioners also claim the beginning bank account balance in 2016 and the ending balance in 2019 were required for a determination of whether legitimate or illegitimate proceeds remained in the bank account.⁴ This is a spurious argument. The affidavit states cash and money order deposits of \$169,000, along with check deposits of \$75,000, were commingled with legitimate income in the accounts. The affidavit shows the source

³ <https://www.uschamber.com/co/run/finance/cash-on-hand-considerations-for-businesses#:~:text=Cash%20on%20hand%20refers%20to,withn%20less%20than%2090%20days>.

⁴ Petitioners raised this argument for the first time in their Motion to Reconsider filed with the Court of Appeals.

of those deposits was illegal drug proceeds. Beginning and ending account balances do not change this fact. Petitioners further insinuate the beginning and ending account balances were not considered in Mr. Luciano's calculation of unreported income without any evidence to support this claim.

The affidavit also shows that Petitioners benefitted from at least \$225,000 in illegitimate gains. The funds seized from Petitioners' account was less than \$90,000. Every dollar remaining in the accounts as of December 2020 not in excess of \$225,000 was illegitimate. If the accounts contained more than \$225,000, there might be a question about staleness regarding the additional funds, but that is not our situation. In this case, Petitioners obviously did withdraw some of the drug funds because the money remaining in the accounts was not equal to the amount of unreported income.

2. *Petitioners' fail to establish the search warrant lacked particularity. As such, they also cannot demonstrate there is a significant question of law under the state or federal constitution as required by RAP 13.4(b)(3).*

Petitioners state that particularity requires enough information in an affidavit to avoid an unconstitutional general warrant. Petitioners then argue that something more than the information in this case is required to avoid a general warrant. Petitioners attempt to support that argument by stating that the absence of a monetary figure in the affidavit or warrant constitutes a blank check, which in turn makes the warrant unconstitutionally general.

To overcome the particularity standard, the affidavit and warrant must describe the place to be searched and the things to be seized. *U.S. Const., amend. IV*. In this case, the affidavit and warrant described the “place to be searched” by designating three bank accounts, by number, in a specific bank. The affidavit also described the “thing to be seized” as proceeds derived from

violation of the State of Washington’s Uniform Controlled Substances Act. The warrant was not a “blank check” because the proceeds subject to seizure were limited by the monetary figure presented in the affidavit in support of the search warrant. As such, the affidavit met the particularity requirements of Washington law.

3. *Petitioners fail to show that Spinelli v. United States and the basis of knowledge test applies to the present case. Therefore, they also fail to demonstrate how a significant question of law under the state or federal constitutions is implicated under RAP 13.4(b)(3).*⁵

Petitioners assert that the affidavit in this case fails to meet the requirements of *Spinelli v. United States*, 393 US 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969), because it fails to establish a *source-of-knowledge*. On that basis alone Petitioners assert that this issue is constitutionally *significant*. For this argument to

⁵ Respondent addresses both of Petitioners *Spinelli* issues in this section.

have any merit this Court must first find that *Spinelli* applies to the facts of this case, which it does not. *Spinelli* is limited to a discussion of the appropriate standard to apply to statements of an informant. *Spinelli* at 393 U.S. 415. The statements in the December 2020 warrant came from a law enforcement financial investigator who swore to the facts presented in an affidavit, subject to penalty of perjury.

Case law makes clear that a party is generally prohibited from “setting up an error at trial and then complaining of it on appeal.” *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (quoting *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). Likewise, an issue raised for the first time on appeal is not subject to review unless it involves a manifest error affecting a constitutional right. *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

State v. Scott is instructive on the construction courts should apply to the “manifest error standard.” 110 Wn.2d 682,

685, 757 P.2d 492 (1988). In *Scott*, the court held the proper approach to claims of constitutional error asserted for the first time on appeal is that “[f]irst, the court should satisfy itself that the error is truly of constitutional magnitude - that is what is meant by “manifest””; and second, “[i]f the claim is constitutional then the court should examine the effect the error had on the defendant’s trial according to the harmless error standard. [...]” *Scott*, 110 Wn.2d at 688.

Ironically, after admitting failure to litigate the *Spinelli* issue at the trial court level, Petitioners boldly claim that doing so did not prejudice the Respondent. That assertion is inaccurate at best. Had this issue been addressed at the trial court level, Respondent would have been provided an opportunity to develop evidence and testimony to counter Petitioners’ arguments; it is now foreclosed. Even setting this argument aside, Petitioners fail to demonstrate there was a manifest error affecting a

constitutional right under RAP 2.3(d)(2).

4. *Petitioners' fail to establish an issue of substantial public interest that should be considered by this Court.*
RAP 13.4(b)(4).

Petitioners place the issue of public interest before this Court on the premise that the underlying decision of the district court, superior court, and Court of Appeals established a disregard for property rights and the law. In support of that premise, Petitioners argue that *Tri-City Metro Drug Task Force v. Contreras*, 129 Wn.App. 648, 119 P.3d 862 (2005), requires tracing of drug proceeds to drug transactions, and that the district court's decision represented a departure from that requirement. The prior court decisions do not represent a departure from the *Tri-City* decision, much less a departure that gives rise to an issue of public interest.

The *Tri-City* decision requires *some* evidence of tracing. *Tri-City* at 653. In that case there was a point-in-time⁶ arrest of the claimant, and claimant's property was then seized because "it did not appear to be consistent with the legitimate income" documented by the Plaintiff. *Id* at 652. There was *no* evidence of any attempt by law enforcement to trace the seized property back to a specific drug transaction or a series of drug transactions, making the forfeiture of the property inappropriate. Contrary to the facts of *Tri-City*, our case involved ample evidence of tracing.

The district court acknowledged law enforcement's efforts in analyzing Petitioners' financial records as they might relate to

⁶ An informant notified law enforcement of claimants' participation in a possible drug transaction. Upon arrest, claimant was found to be in possession of 13 bags of marijuana. Subsequent search revealed some drug paraphernalia and methamphetamine. There was, however, no evidence of an ongoing drug enterprise or multiple drug transactions. *Tri-City* at 650.

income based off prior drug transactions. The district court then concluded that, “When viewed in conjunction with the illegal marijuana grow operated by Claimants, there is no rational basis for the additional income, except that is came from criminal drug-related conduct . . .”. The court’s finding and conclusion unquestionably recognize tracing of the property to a series of illegal drug transactions. No similar finding or conclusion is in the *Tri-City* decision. Petitioners do not demonstrate an error on the part of the district court or any appellate court that gives rise to an issue of public interest, nor do they explain how this very fact specific scenario is likely to occur again. As such, this Court should find that Petitioners have failed to satisfy RAP 13.4(b)(4).

II. CONCLUSION

Petitioners’ motion boils down to dissatisfaction with the underlying courts’ decisions. This is not a standard upon which this Court may grant discretionary review. Petitioners have failed to satisfy any of the standards set forth in RAP 13.4(b)(1-4). For

that reason, Petitioners' motion should be denied in whole.

Certificate of Compliance-RAP 18.17

This response contains 3715 words

DATED this 8th day of September, 2023.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Sheryl L. Thrasher, hereby certify that on this 8th day of September, 2023, I electronically filed the foregoing, *RESPONDENTS' ANSWER TO PETITIONER'S PETITION FOR REVIEW* using the Washington State JIS Appellate Courts' Portal, which will send notification of such filing to the following and sent via USPS regular mail to the following:

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