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Court of Appeals
Division III
State of Washington

No. 33267-5-III

**Court of Appeals, Div. 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,

John E. Gangwish, property owner/claimant,

Appellant.

Brief of Appellant

Kevin Hochhalter
Attorney for Appellant
kevinhochhalter@cushmanlaw.com
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
T: 360-534-9183
F: 360-956-9795
WSBA # 43124

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1. Introduction

Yakima County Superior Court ordered John Gangwish's home of 20 years forfeited to the City of Yakima because the guest of a renter sold drugs out of the house. The court reached its conclusion on the basis of circumstantial evidence that demonstrated only that Gangwish should have known that his house was being used for the illegal activity, not that he actually did know. The house was not purchased with the proceeds of illegal drug transactions, nor was it used by Gangwish to traffic in illegal drugs. The house was Gangwish's residence. There was no substantial nexus between the drug sales and the real property. The house just happened to be the place where a transient guest was caught for her own, independent, illegal activities. To take Gangwish's home of 20 years from him due to the acts of an uninvited guest is an unconstitutionally excessive punishment. This Court should reverse the judgment of forfeiture.

2. Assignments of Error

1. The trial court erred in concluding that there was a substantial nexus between the commercial sale of methamphetamine and the defendant property (conclusion of law #3).

2. The trial court erred in concluding that Gangwish had actual knowledge and participated in methamphetamine deliveries (conclusion of law #4).

3. The trial court erred in failing to conduct a proportionality analysis to ensure that the forfeiture of Gangwish's home of 20 years was not an unconstitutionally excessive penalty.

Issues related to assignments of error

Whether the forfeiture of Gangwish's home of 20 years was an unconstitutionally excessive penalty under the Eighth Amendment (assignment of error 3).

Whether there was no substantial nexus between the drug sales and the real property (assignment of error 1).

Whether the City failed to prove that Gangwish had actual knowledge of the drug sales at his home (assignment of error 2).

3. Statement of the Case

John Gangwish owns a home located at 1606 West King Street in Yakima, Washington. RP 102-03. He has owned the home for about 20 years. RP 66, 103. He dug out an expansion to the basement by hand and finished the basement 15 years ago. RP 115. Gangwish's bedroom and bathroom were located in the basement. *See* RP 116, 118. Upstairs bedrooms were occupied by renters. RP 25, 104-05. Gangwish gave his renters their privacy and did not go into their bedrooms. *See* RP 111. He spent his days doing crafts in his bedroom to sell at shows. RP 107.

Early in the morning of April 5, 2012, Gangwish was awakened by the commotion of Yakima City police raiding the home. *See* RP 24-25; CP 12. The officers discovered Gangwish in his bedroom, where they found

a baggie of methamphetamine in Gangwish's dresser. RP 25, 27. The officers also showed Gangwish drug paraphernalia that was discovered throughout the home. *See* RP 56, 111. Gangwish admitted that he allowed people to use methamphetamine in the house, but denied any knowledge of drugs being sold in the house. RP 33. Gangwish was charged with maintaining a drug dwelling and possession of methamphetamine. RP 137. Gangwish pled guilty to the possession charge, but the drug dwelling charge was dismissed. RP 119, 137-38; CP 49.

Despite these charges, Gangwish was not the target of the police investigation and search of the home. *See* RP 27. The police were after a woman, Jeannie Luppino-Cronk. RP 27. The police had conducted three controlled buys from Luppino-Cronk at Gangwish's house by a confidential informant during the month of March. RP 15-23. After the third buy, the police obtained a search warrant from the house, which they executed on April 5. RP 24.

Luppino-Cronk was a friend of one of Gangwish's renters. RP 109. Gangwish often did not know when she was visiting the house. *See* RP 109. Luppino-Cronk was present at the time of the search and was found with ½ ounce of methamphetamine in her purse. RP 25-26. Luppino-Cronk was arrested and ultimately convicted of possession with intent to deliver. RP 28.

The City initiated forfeiture proceedings against Gangwish's house, alleging that the real property was forfeitable under RCW 69.05.505. CP 4. The City presented no evidence that the house had been acquired through proceeds of illegal drug transactions. The City presented no evidence that

the house was used for manufacturing, compounding, processing, import, or export of any controlled substance. The City presented no evidence that Gangwish himself sold drugs from the house. *See* RP 144. There was no dispute that Luppino-Cronk sold drugs from the house. *See* RP 144. The issues at trial were whether Gangwish had actual knowledge of her illegal transactions and whether there was a substantial nexus between the sale and the real property. *See* RP 143.

The City presented no direct evidence that Gangwish knew of or consented to Luppino-Cronk's activities. Instead, the City relied on circumstantial evidence and an argument that "he had to have known." RP 143. The trial court found, among other things, the following facts:

- Gangwish was not observed to be present at the home during any of the controlled buys;
- At the time of the search, there was drug paraphernalia throughout the house, including unused baggies, drug pipes, and digital scales;
- At the time of the search, Gangwish was in his downstairs bedroom;
- There was a surveillance camera at one entrance to the home with a monitor in Gangwish's bedroom;
- Gangwish had purchased methamphetamine from Luppino-Cronk at the house;
- There was significant traffic in and out of the house day and night;
- Luppino-Cronk's drug ledgers were kept in her vehicle, not in the home.

CP 48-49. From these and other findings, the trial court concluded that Gangwish had actual knowledge and participated in the illegal drug activity and that there was a substantial nexus between the drug sales and the real property. CP 50. The trial court entered final judgment forfeiting the property to the City of Yakima. CP 39-40. Gangwish appeals.

4. Argument

4.1 Standard of Review

When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law and judgment. Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. ... Unchallenged findings of facts are verities on appeal. ... We review questions of law de novo.

Buck Mountain Owners' Ass'n v. Prestwich, 174 Wn. App. 702, 713-14, 308 P.3d 644 (2013).

Gangwish does not challenge the trial court's findings of fact, except to the extent they are incomplete or insufficient to support the trial court's conclusions of law. Gangwish does challenge the trial court's conclusions of law, in particular conclusions 3 and 4, as being unsupported by the findings of fact or any other facts in the record. Whether the findings support the conclusions is a question of law this Court reviews de novo.

4.2 The forfeiture of Gangwish’s home of 20 years was an unconstitutionally excessive penalty under the Eighth Amendment.

Property forfeiture laws have been enacted at the federal and state level as a tool for fighting organized crime, major drug activity, and other crimes motivated by greed. Barbara A. Mack, *Double Jeopardy—Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime*, 19 Seattle U. L. Rev. 217, 244 (1996). In 1989, Washington’s drug forfeiture law was amended to include forfeiture of real property that was either purchased with proceeds of drug crimes or used to facilitate drug crimes. *Id.*; Laws of 1989, ch. 271, §§ 211-212. The legislature declared:

[D]rug-related offenses are difficult to eradicate because of the profits derived from the criminal activities, which can be invested in legitimate assets and later used for further criminal activities; and the forfeiture of real assets where a substantial nexus exists between the commercial production or sale of the substances and the real property will provide a significant deterrent to crime by removing the profit incentive of drug trafficking.

Laws of 1989, ch. 271, § 211. The legislature also acknowledged that forfeiture of real property “is a powerful tool,” which, if used improperly, could lead to “manifest injustice.” *Id.*

Federal and state courts have recognized the injustice that results when the penalty of forfeiture exceeds the weight of the property owner’s wrongdoing. *E.g.*, *Tellevik v. 6717 100th Street S.W.*, 83 Wn. App. 366, 921 P.2d 1088 (1996). The Eighth Amendment to the U.S. Constitution prohibits excessive fines and cruel and unusual punishments. “The purpose

of the Excessive Fines Clause is to limit the government's power to extract payments as punishment for an offense." *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 731 (C.D. Cal. 1994) (citing *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-67, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989)). Forfeiture of real property used in connection with drug crimes is punishment subject to the limitations of the Eighth Amendment's Excessive Fines Clause. *Id.*; *State v. Clark*, 124 Wn.2d 90, 103, 875 P.2d 613 (1994). "To the extent civil forfeiture constitutes an excessive fine, it will be invalid." *State v. Catlett*, 133 Wn.2d 355, 369 n.9, 945 P.2d 700 (1997) (citing *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)).

This Court held, in a similar case, that the Eighth Amendment analysis required to determine if forfeiture of real property is excessive includes both "instrumentality" and "proportionality" factors. *6717 100th Street S.W.*, 83 Wn. App. at 374. "Instrumentality" is concerned with the closeness of the relationship, or nexus, between the property and the criminal offense. *Id.* at 373; *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 982 (9th Cir. 1995). "Proportionality" involves a comparison of the value of the property being forfeited with the culpability of the owner's conduct. *Id.*; *6380 Little Canyon Rd.*, 59 F.3d at 982.

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.

Proportionality 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 374-75 (emphasis added).

An analysis of these factors leads to two conclusions: 1) Gangwish's home was not instrumental in Luppino-Cronk's crime of possession with intent to deliver; and 2) the punishment of forfeiture of Gangwish's home is excessive in proportion to his involvement in Luppino-Cronk's crime. Forfeiture of Gangwish's home of 20 years is unconstitutionally excessive and should be reversed.

4.2.1 Gangwish's home was not instrumental in Luppino-Cronk's crime.

The decision of the United States District Court in *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994), is particularly instructive in applying both the "instrumentality" and "proportionality" factors. In *6625 Zumirez Drive*, the government attempted to forfeit the home of Gene Craig Wall, at which Wall's son had been selling cocaine. *Id.* at 730. Wall had owned the home for over 20 years. *See Id.* Both Wall and his son were charged with possessing cocaine for sale. *Id.* Wall was acquitted; his son was convicted. *Id.* The government's theory to support forfeiture was that Wall did not prevent his son from using the home to sell drugs. *Id.*

The facts of *6625 Zumirez Drive* are very similar to this case. Gangwish has owned his home for 20 years. There is no evidence that the home was purchased with the proceeds of illegal activity. The only charge against Gangwish that arguably might have supported forfeiture was dismissed. Only Jeannie Luppino-Cronk, the guest of Gangwish's renter, was convicted of an offense that could support forfeiture. The City's theory was that Gangwish knew about Luppino-Cronk's criminal activity and did not prevent it.

The determination of whether the real property was "instrumental" to the crime is the same as that required to establish a "substantial nexus" under the forfeiture statute. See *6380 Little Canyon Rd.*, 59 F.3d at 982 (equating "instrumentality" with "nexus"). This involves an analysis of the role the property played in the crime—in this case, Luppino-Cronk's crime of possession of methamphetamine with intent to deliver.

The court in *6625 Zumirez Drive* determined that Wall's house was not instrumental to the son's sale of cocaine:

[F]or the property to be the site of illegal activity, without more, does not render the property an integral part of the activity. The mere fact that the criminal activity occurred at the property does not make the property "guilty" of an offense, as could reasonably be argued of, for example, the distillery in *Dobbins's Distillery v. United States*, 96 U.S. 395, 24 L. Ed. 637 (1878), or the pirate vessel in *Harmony v. United States*, 43 U.S. (2 How.) 210, 11 L. Ed. 239 (1844).

...

In this case, the Defendant Property is nothing more than a place at which drugs were sold. There is no other link between the property and the illegal activity. Unlike cases in

which the forfeited property is integral to the commission of the crime, forfeiture of the Defendant Property in this case does not rid society of the instrumentality of the crime or eliminate the resources of any criminal enterprise. Instead, it evicts Wall and his son from their home for the purported purpose of deterring them from future unlawful activities. However, forfeiture of the Walls' family home does little to serve that purpose. *See United States v. Real Property: 835 Seventh Street Rensselaer*, 820 F. Supp. 688, 696 (N.D.N.Y. 1993) (“the financial strain placed upon this claimant from forfeiture of his family’s home could very well have the effect of increasing claimant’s propensity to engage in illegal activities”).

6625 Zumirez Drive, 845 F. Supp. at 737-38.

The same is true here. Gangwish’s house was not instrumental to Luppino-Cronk’s sale of drugs. It just happens to be the place where she was caught. There is no evidence that Luppino-Cronk or anyone else manufactured, processed, or maintained inventory of methamphetamine at Gangwish’s house. Luppino-Cronk kept the ledgers of her drug enterprise in her vehicle. CP 49 (finding of fact #20). Her drug business was mobile. Gangwish’s house was not necessary to her criminal enterprise. Forfeiture of the house will do nothing to deter Luppino-Cronk from selling drugs. She will simply do it elsewhere.

Because Gangwish’s home was not instrumental to Luppino-Cronk’s crime, forfeiture of the home is excessive under the Eighth Amendment and improper under RCW 69.50.505. This Court should reverse.

4.2.2 The punishment of forfeiture of Gangwish's home is excessive in proportion to his culpability.

“Proportionality” analysis involves a comparison of the value of the property being forfeited with the culpability of the owner’s conduct. *6380 Little Canyon Rd.*, 59 F.3d at 982. Only the culpability of the owner himself is relevant to this analysis—not that of the actual criminal offender—because it is the owner who is being punished by forfeiture. *Id.* at 986; *6625 Zumirez Drive*, 845 F. Supp. at 733. In this case, that means Gangwish’s culpability for not preventing Luppino-Cronk from selling drugs out of his house. *See 6625 Zumirez Drive*, 845 F. Supp. at 737 (“Wall’s failure to prevent his son’s illegal drug activities, if he could have done so, is perhaps grave, but certainly not as grave as direct involvement in the crime itself.”).

Forfeiture of the property would work a severe hardship on Gangwish and his innocent renters. Gangwish has owned the house for 20 years. It is a two story (main floor and basement), three-bedroom, (presumably) two bathroom house in the City of Yakima. Gangwish has little to no income. His renters pay the utilities. It appears that the house is fully paid for. The house was not purchased with proceeds of criminal activity.

Both Gangwish and his renters rely on this home for shelter over their heads. Gangwish has little to no income. Some of his renters were not paying rent, likely because they have little to no income as well. Without the house, they have nowhere to live.

None of the findings of fact support a conclusion that Gangwish supported or participated in Luppino-Cronk’s crime. Luppino-Cronk was not

living at the house. Her drug operations were mobile. Gangwish purchased methamphetamine from Luppino-Cronk once. Gangwish was guilty of possession, but possession does not justify forfeiture of real property. *See* RCW 69.50.505(1)(h). The charge of maintaining a drug house was dismissed. At worst, Gangwish knew about Luppino-Cronk's activities but failed to put a stop to them.

The court's analysis in *6625 Zumirez Drive* is instructive on this prong of the analysis:

The government's forfeiture would not only permanently and completely deprive Wall of all the rights of ownership in the home he has maintained for twenty-two years, but would also operate to evict him from it. This is unquestionably a severe penalty when Wall himself has not been found guilty of any crime. ... Wall's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance.

On balance, a comparison of the gravity of the offense with the harshness of the penalty weighs in favor of Wall's position that forfeiture of his home would violate the Excessive Fines Clause.

6625 Zumirez Drive, 845 F. Supp. at 737 (citations omitted).

Because the value of Gangwish's home far exceeds his culpability for failing to prevent Luppino-Cronk's crime, forfeiture of the home is excessive under the Eighth Amendment. This Court should reverse.

4.3 There was no substantial nexus between the drug sales and the real property.

The City had the burden of proving that there was a “substantial nexus” between the drug sales and the real property. RCW 69.50.505(1)(h). The City failed to meet this burden. The trial court’s findings of fact do not support a conclusion that there was a substantial nexus.

The analysis of whether there was a substantial nexus is the same as the analysis of whether the property was “instrumental” to the crime. *See 6380 Little Canyon Rd.*, 59 F.3d at 982 (equating “instrumentality” with “nexus”). For the reasons set forth in Part 4.2.1, above, there was no substantial nexus between the property and Luppino-Cronk’s crime. There are no findings that Luppino-Cronk or anyone else manufactured, processed, or maintained inventory of methamphetamine at Gangwish’s house. There is, on the other hand, a finding that Luppino-Cronk kept the ledgers of her drug enterprise in her vehicle. CP 49 (finding of fact #20). Gangwish’s house was not necessary to Luppino-Cronk’s criminal enterprise because her business was mobile. Forfeiture of the house will do nothing to deter Luppino-Cronk from selling drugs. She will simply do it elsewhere.

The house was certainly one place where Luppino-Cronk sold drugs, but that is not enough to create a “substantial” nexus. Because the trial court’s findings of fact do not support the conclusion that there was a substantial nexus between the commercial sale of methamphetamine and the defendant property, the City failed to meet its burden under the statute and forfeiture was improper. This Court should reverse.

4.4 The City failed to prove that Gangwish had actual knowledge of the drug sales at his home.

The City also had the burden of proving that the house was “being used with the knowledge of the owner for the ... delivery” of drugs. RCW 69.50.505(1)(h). The “knowledge” required is *actual* knowledge, not constructive knowledge (“should have known”). *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009). The City failed to meet this burden. The trial court’s findings of fact do not support a conclusion that Gangwish had actual knowledge that Luppino-Cronk was selling methamphetamine from the house.

At best, the findings support a conclusion that Gangwish should have known. This is not enough. Gangwish was never linked to any of the sales, either during the controlled buys or the warrant search. CP 48 (findings of fact 7 and 15). The traffic in and out of the house, the drug paraphernalia, the various people found throughout the house, demonstrate only that Gangwish knew or should have known that people were using drugs in the house, not that anyone was selling. The fact that Gangwish bought from Luppino-Cronk on one occasion does not mean that he knew she was using the house as a base of operations to sell to others. Luppino-Cronk kept the signs of her business hidden in her vehicle. CP 49 (finding of fact 20). Perhaps Gangwish *should have known* that she was selling, but “should have known” is not enough to support forfeiture. Actual knowledge is required.

Because the trial court’s findings of fact do not support a conclusion that Gangwish had actual knowledge that Luppino-Cronk was using the

house to sell drugs, the City failed to meet its burden under the statute and forfeiture was improper. This Court should reverse.

4.5 Gangwish requests attorney fees on appeal.

Under RAP 18.1, a party may request attorney fees or expenses on appeal if applicable law grants the party such a right of recovery. The forfeiture statute allows for an award of attorney fees to a prevailing claimant: “In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys’ fees reasonably incurred by the claimant.” RCW 69.50.505(6). If this Court reverses the forfeiture of Gangwish’s house, he is entitled to an award of attorney fees as a substantially prevailing claimant. This Court should award Gangwish his reasonable attorney fees on appeal, subject to compliance with RAP 18.1(d).

5. Conclusion

The forfeiture of Gangwish’s house of 20 years as a consequence of a crime committed by a transient friend of a renter is excessive punishment under the Eighth Amendment to the U.S. Constitution. The trial court’s findings of fact do not support its conclusions that there was a substantial nexus between the house and the transient’s crime or that Gangwish had actual knowledge that the house was being used to sell drugs. This Court should vacate the judgment of forfeiture and award Gangwish his reasonable attorney fees on appeal.

Respectfully submitted this 7nd day of October, 2015.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
kevinhochhalter@cushmanlaw.com
Attorney for Appellant
Cushman Law Offices, P.S.
924 Capitol Way S.
Olympia, WA 98501
T: 360-534-9183
F: 360-956-9795

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on October 7, 2015, I caused the original of the foregoing document, and a copy thereof, to be served by the method indicated below, and addressed to each of the following:

Court of Appeals Division III 500 N. Cedar Street Spokane, WA 99201	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail
Bronson Faul Assistant City Attorney City of Yakima Legal Dept. Civil Forfeiture Unit 200 S. 3 rd Street Yakima, WA 98901-2830 Bronson.faul@yakimawa.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail

DATED this 7th day of October, 2015.

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant
Cushman Law Offices, P.S.
rdavidson@cushmanlaw.com
924 Capitol Way S.
Olympia, WA 98501
T: 360-534-9183
F: 360-956-9795