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SUPREME COURT

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No. 94135-1

SUPREME COURT

OF THE STATE OF WASHINGTON

URQUHART, KING COUNTY KCSO,

Plaintiff/Respondent

vs.

$6,510.00 U.S. CURRENCY,

In Rem Defendant

and

RICHARD MENDALL,

Claimant/Petitioner

AMENDED - CLAIMANT'S/PETITIONER'S RAP 13.4 PETITION FOR DISCRETIONARY REVIEW OF COURT OF APPEALS DIVISION I DECISION, 75026-7-I, TERMINATING REVIEW

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ORIGINAL

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TABLE OF AUTHORITIES

WASHINGTON COURT OF APPEALS CASES

A. IDENTITY OF PETITIONER

Petitioner, Mendall, intervened as Claimant in Respondent King County Office's (KCSO) proceedings against *in rem* defendant, $6,510.00.

B. CITATION TO COURT OF APPEALS DECISION

Mendall seeks review of Court of Appeals decision No. 75026-7-I, issued December 27, 2016, reconsideration denied January 18, 2017.

C. RAP 13.4(b) GROUNDS for DISCRETIONARY REVIEW

Mendall was denied due process, as have countless drug forfeiture claimants since Division One failed to apply the bright-line rule announced by the Washington State Supreme Court in the *Tellevik* cases[1], and instead fashioned its own in *One 1988 Black Chevrolet Corvette*[2]. Since then, the lower courts have followed Division One's decision, in essence ignoring this court's edict pronounced in *Tellevik I* and *Tellevik II.*

The Court of Appeals confused the statute of limitations announced in the *Tellevik* cases with a different deadline contained within an inapplicable section of the Administrative Procedure Act (APA), RCW 34.05.419. It confused the deadline to <u>*end*</u> forfeiture matters with the deadline to <u>*begin*</u>

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[1] TA \l "[1]*Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 86-7, 838 P.2d 11(1992), modified 845 P.2d 1325 (1993)(hereinafter \"*Tellevik I*\"), affirmed in T*ellevik v. 31641 W. Rutherford St*, 125 Wn.2d 364, 370-374, 884 P.2d 1319 (1994)" \s "Tellevik I" \c 1 [1]*Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 86-7, 838 P.2d 11(1992), modified 845 P.2d 1325 (1993)(hereinafter "*Tellevik I*"), affirmed in T*ellevik v. 31641 W. Rutherford St*, 125 Wn.2d 364, 370-374, 884 P.2d 1319 (1994) (hereinafter "*Tellevik II*").

[2] *One 1988 Black Chevrolet Corvette*, 91 Wn. App. 320 (1997)

them. Despite the forfeiture statute's clear pronouncement that "proceedings for forfeiture shall be deemed commenced by the seizure," RCW 69.50.505(3), the Court of Appeals held that the rule of the *Tellevik* cases is satisfied so long RCW 34.05.419 is satisfied. But section 419 does not apply to forfeiture proceedings. Section 419 of the APA describes the choices available to an agency upon receipt of an application for adjudication – one choice being commencing the applied for proceedings.

"A fundamental rule of statutory construction is that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into the statute." *Espinoza v. City of Everett*, 87 Wn.App. 857, 869 (1997). Thus, the phrase "a reasonable opportunity to be heard" contained within RCW 69.50.505(5) operates as if it were written "a hearing within 90 days." *Tellevik II*, 125 Wn.2d at 372, 374.

Neither the forfeiture statute nor the APA required Mendall to apply for an adjudicative proceeding; Mendall merely intervened in the *in rem* forfeiture proceeding that the seizure had previously commenced.

The decision below conflicts with Division One's own prior precedent, *Hutmacher v. Board of Nursing,* 81 Wn.App. 786 (1996). In *Hutmacher*, Division One explained when RCW 34.05.419 does and does not apply. It applies when proceedings are applied for. It does not apply when an agency commences proceedings on its own under RCW 34.05.413(1).

Hutmacher, 81 Wn.App. 786.

An agency may commence proceedings anytime, on its own, without first receiving an application. RCW 34.05.413(1). In *Hutmacher,* the Board of Nursing argued, and the Court of Appeals agreed, that RCW 34.05.419 was inapplicable to disciplinary actions before the Board. The *Hutmacher* Court ruled that the Board commenced disciplinary proceedings under RCW 34.05.413(1) by issuing the Statement of Charges that accused *Hutmacher* of wrongdoing, making RCW 34.05.419 inapplicable. *Hutmacher,* 81 Wn. App. at 772.

Likewise, in drug forfeiture proceedings in Washington State, proceedings commence under RCW 34.05.413(1) when an agency accuses property of wrongdoing by seizing an *in rem* defendant for forfeiture.

D. ISSUES PRESENTED

Did the Court of Appeals err when it applied RCW 34.05.419 instead of following the *Tellevik* cases and *Hutmacher*; and was Mendall denied Due Process when KCSO repeatedly delayed his hearing without sufficient evidence of good cause to do so?

E. STATEMENT OF THE CASE

On May 31, 2014, KCSO commenced drug forfeiture proceedings by seizing $6,510.00 from Mr. Mendall after firearms and a personal use quantity of suspected cocaine were observed in plain view. Ex. 1 (AR 50). KCSO timely mailed to Mendall notice of intended forfeiture. Id. On July

3, 2014, Mendall timely mailed his claim. Ex. 2 (AR 51-52).

On. Sept. 24, 2014, Mendall received notice from that a hearing had been scheduled. Ex. 3 (AR 53-55, 56 ln. 1). The hearing was to be held six days later, the 89th day after mailing his claim. Id.

Six days' notice violates WAC 10-08-040[1], placing Mendall in the unenviable position of choosing between rights. He could: i) demand the seven-day notice to which he was entitled; or ii) preserve his right to a hearing within 90 days; but he couldn't do both. Mendall chose number 2.

Although there is no such rule, KCSO's notice demanded Mendall provide KCSO with six-days' notice of any motions he intended to bring. Ex. 3 (AR 54, ln. 8). Mendall did intend to make motions, and so in good faith provided KCSO as much notice of his motions as possible, given the short timeframe KCSO provided to Mendall in the first place, by emailing Ms. Jacobsen-Watts, KCSO Counsel the very next morning, cc-ing the Administrative Hearing Examiner (hereinafter AHE). Ex. 4 (AR 57).

KCSO Counsel's response was to complain that Mendall's notice of intended motions "not enough time" for her to respond. Ex. 5 (AR 58-59, 1:38PM). Mendall's Counsel replied with objection to any delay, noting it was KCSO who chose the short timeframe, not Mendall. Ex. 6 (AR 63).

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[1]WAC 10-08-040 reads: "all parties shall be served with a notice of hearing not less than seven days before the date set for hearing."

Although signed in KCSO Counsel's name, KCSO's Counsel said the hearing was scheduled in "error" and without her knowledge. Ex. 5 (AR 58, 2:36PM). The AHE, who had been cc'd, provided alternative dates she could be available, should a continuance be requested. Ex. 7 (AR 60).

On Sept. 26, 2014, KCSO's Counsel motioned for a continuance. Ex. 8 (AR 62, 3:34PM). She explained that for a little over a month, through October, she would be attending to her father's medical emergency, and pledged to discuss potential settlement options with Claimant's Counsel in the meantime, should her request be granted. (Id.)

Mendall noted his objection. Ex. 9 (AR 064, 4:14PM). The AHE ordered the hearing be continued over two months, "to the first week of December," indicating her decision was based on: 1) Ms. Jacobsen-Watt's family emergency, and 2) her assurance that she would begin settlement discussions with Claimant's Counsel. Ex. 10 (AR 065).

KCSO's Counsel was back by Oct. 22, 2014. Ex. 11 (AR 67, 11:40AM). But, the hearing was not scheduled and KCSO's Counsel never engaged in settlement discussions as promised. Ex 15 (AR 56, para 6).

Seven weeks after the AHE granted the continuance, with just over two weeks until "the first week of Dec," KCSO contacted Mendall via email acknowledging the hearing was ordered continued to "the first week of

December," but asked if Mendall would agree to another delay of the hearing, indicating the AHE's schedule was no longer open. Ex 12(AR 69-70, 10:58PM.). Mendall did not agree; he objected. Ex. 13 (AR 69).

Rather than motion for another continuance as required by WAC 10-08-090, KCSO just defied the order, and scheduled the hearing for the *second* week of Dec. Ex. 14 (AR 34).

The day of the hearing, Mendall sought dismissal based on his right to due process. Ex. 16 (AR 39). Mendall argued in his briefing that perhaps the AHE's "unavailability" was caused by KCSO's negligent scheduling practice of waiting seven weeks before rescheduling. Ex. 16 (AR 46 ln. 26 – AR 47 ln. 3). Neither the AHE nor KCSO disputed this suggestion.

The motion was denied. Ex. 17 (AR 102 ln. 19). First, the AHE reaffirmed the full continuance, and for the first time disclosed was on vacation in Nov. (Id. at ln. 1). Then the AHE ruled that KCSO's violation of the order was permissible, and said that although she was back from vacation, she had been "unavailable" but did not disclose why. (Id. at ln. 2).

The property was then forfeited to KCSO. Ex. 17 (AR 107). Mendall timely appealed. King County Superior Court affirmed, as did the Court of Appeals. Mendall now Petitions this court for Discretionary Review.

F. STANDARD OF REVIEW

"Proceedings for forfeiture shall be deemed commenced by the seizure"

of property. RCW 69.50.505(3). Claimants to property have a due process right to "a hearing within 90 days if they contest the seizure." *Tellevik I,* 120 Wn.2d at 86-7, 838 P.2d 11(1992), modified 845 P.2d 1325 (1993), affirmed in T*ellevik II,* 125 Wn.2d at 370-374, 884 P.2d 1319 (1994).

Forfeiture proceedings may be continued upon a showing of evidence to support a finding of "good cause". WAC 10-08-090; *Tellevik I* at 91. "Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." RCW 34.05.461(4). The decision to grant a continuance of a commenced forfeiture action is reviewed for an abuse of discretion. *Tellevik I, 120 Wn.2d at 90-91.* The granting of a continuance is an abuse of discretion when "manifestly unreasonable, or resting on untenable grounds, or for untenable reasons." *City of Des Moines v. $81,231,* 87 Wn.App. 689, 698, 943 P.2d 670 (1997).

G. ARGUMENT – RCW 34.05.419 DOES NOT APPLY

RCW 34.05.419 begins, "[a]fter receipt of an application for an adjudicative proceeding, other than a declaratory order, an agency shall proceed as follows..." A claimant does not "apply" for anything. A claimant submits a claim to property. RCW 69.50.505(5).

CR 5(a), CR 17, CR 24, RCW 69.50.505(3, 5), Chapter 4.14 RCW,

RCW 34.05.413, Division One's prior precedent in *Hutmacher,* and the plain language of the *Tellevik* cases are in accord. Statutes that are *pari materia*, on the same subject matter, must be construed together. *State v. Chapman*, 140 Wn.2d 436, 998 P.2d 282 (2000). When read together, there is no room for doubt that Mendall's case commenced under RCW 34.05.413(1), as demanded by RCW 69.50.505(3).

a. Drug Forfeiture Matters are *in rem* Proceedings

Forfeiture proceedings in Washington State are *in rem* proceedings: a civil suit commenced by a plaintiff against property as the defendant. *In rem* proceedings are "based upon the unlawful use of the res, irrespective of its owner's culpability." *United States v. Seifuddin*, 820 F.2d 1074, 1076 (9th Cir. 1987). "It's the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." *Various Items of Personal Property v. United States*, 282 U.S. 581 (1931).

b. Forfeiture Claimants Do Not Apply for Proceedings

The lower court relied on RCW 34.05.419, but that statute does not apply. The first sentence of RCW 34.05.419 reads, "[a]fter receipt of an application for an adjudicative proceeding ... an agency shall proceed as follows...." Forfeiture claimants do not apply for proceedings. Claimants submit a written claim. RCW 69.50.505(4-5), *Snohomish Regional Drug*

Task Force (SRDTF) v. Real Property known as 20803 Poplar Way, 150 Wn. App. 387, 208 P.3d 1189 (2009) (filing of Notice of Appearance satisfies the claim requirement). This makes logical sense. It defies reason that a claimant would *ask* KCSO to sue his property for forfeiture.

c. Per CR 17 and CR 24, Claimants are Interveners

The caption of this present case is Urquhart, et. al. versus $6,510.00. Urquhart refers to current KCSO John Urquhart as the Plaintiff. (Ex. 1). The $6,510.00 refers to the *in rem* defendant property seized by KCSO. (Id). These roles are defined by CR 17: "The party commencing the action shall be known as the plaintiff, and the opposite party as the defendant."

Mendall is neither plaintiff nor defendant. Mendall is a CR 24 intervener. CR 24 allows non-parties to intervene in actions by making a "claim." *Id.* The forfeiture statute describes how to intervene: by providing a written claim to the agency. RCW 69.50.505(5).

d. Per CR 5(a), Proceedings Commence upon Seizure

> In an action begun by seizure of property, in which no person need be or is named as a defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of the seizure.

CR 5(a).

Proceedings commenced under the forfeiture statute are "an action begun by seizure of property, in which no person need be or is named as a

defendant." CR 5(a). The forfeiture statute likewise requires service of a notice "be made upon the person having custody or possession of the property at the time of the seizure." CR 5(a). Finally, any "answer, claim, or appearance" is filed within the previously commenced action. CR 5(a).

e. Proceedings Must Commence before Removing Them

The "removal" portion of the forfeiture statute makes clear that Mendall's case commenced upon seizure. A forfeiture claimant is entitled to remove administrative forfeiture proceedings to district or superior court:

> [A]ny person asserting a claim or right may remove the matter to a court of competent jurisdiction. Removal of any matter involving personal property may only be accomplished according to the rules of civil procedure. The person seeking removal of the matter must serve process against the state, county, political subdivision, or municipality that operates the seizing agency, and any other party of interest, in accordance with RCW or 4.92.020, within forty-five days after the person seeking removal has notified the seizing law enforcement agency of the person's claim of ownership or right to possession. The court to which the matter is to be removed shall be the district court when the aggregate value of personal property is within the jurisdictional limit set forth in RCW 3.66.020.

RCW 69.50.505(5).

Removal isn't dependent on whether the agency had set a hearing at all. Removal merely changes the venue of a previously commenced proceeding from the agency to court. RCW 4.14.030. Once removed, the litigants remain as they were: The seizing agency plaintiff still is suing the *in rem* defendant property. CR 17. This makes logical sense. One can't remove

proceedings that haven't commenced.

f. ***Hutmacher v. Board of Nursing* is in Accord**

The *Hutmacher* court explained when RCW 34.05.419 applies, and does not apply, to adjudicative proceedings. In *Hutmacher,* the Board of Nursing issued a Statement of Charges accusing a nurse of stealing drugs. The *Hutmacher* court ruled that when the Board issued that Statement of Charges, proceedings commenced, thus RCW 34.05.419 did not apply. *Hutmacher,* 81 Wn. App. At 772.

In *Hutmacher,* an accusation had been made. The legal issue within that accusation would be decided later, either by default or otherwise. Forfeiture proceedings work the same way. Property may be seized when there is probable cause to believe the property was involved in a drug crime. It's an accusation of wrongdoing against, an arrest, of the *in rem* defendant. The legal issue will be decided later, by default or otherwise.

Forfeiture cases work the same way. Seizure of property commences proceedings. A person with a property interest intervenes by way of claim. RCW 34.05.419 isn't triggered because the seizing agency commenced proceedings by way of the seizure. RCW 69.50.505(3).

Proceedings in *Hutmacher* began upon issuance of a Statement of Charges because the Board notified the nurse proceedings would *end* by

default if she did not file a timely response. Likewise, we know proceedings begin upon seizure in forfeiture cases because the agency notifies potential claimants that proceedings will *end* by default if a claimant doesn't timely respond. *Hutmacher* explains that RCW 34.05.419 is irrelevant because there is nothing more to commence. *Hutmacher, 81 Wn.App at 772.*

g. Commencement isn't Defined by Venue

For all forfeiture proceedings to commence at the same point, regardless of venue, RCW 34.05.419 can't apply. RCW 69.50.505 allows the seizure of both real and personal property. All real property cases are heard in Superior Court. To "seize" a piece of real property, a Superior Court "lis pendens" is posted on the property to commence proceedings and provide notice in accordance with RCW 69.50.505.

With real property, if no claimant comes forward the Superior Court orders the property forfeited by "default." If a claim is made, a hearing is held within the same Superior Court case where the "lis pendens" was issued. No new case commences.

Likewise, with personal property: if no claim is made the property is forfeited by default. If a claim is made, a hearing is held in front of the same magistrate that would have signed a default order.

h. Then to What Proceedings Does RCW 34.05.419 Apply?

An example of when RCW 34.05.419 applies involves proceedings within

the Employment Security Department (ESD). When ESD decides an person was overpaid benefits, that decision is *final* absent an *appeal*.. WAC 192-220-060. There is no pending legal issue that must be determined, as the ESD decision has already been made. There is no "we will unless..." as in *Hutmacher* or forfeiture cases. An individual must *appeal* the ESD decision; that is the "application" for new adjudicative proceedings of which RCW 34.05.419 refers. WAC 192-220-060.

i. *One 1988 Black Chevrolet Corvette* is incorrect

The point in going through the analysis (a-h) above is to show why *One 1988 Black Chevrolet Corvette* is wrong.

The 90-day deadline to provide a hearing begins the date the claim is made. All the various deadlines within forfeiture proceedings fall under the same "forfeiture proceedings" umbrella. There is one commencement date: the date of the seizure. Commencement does not come up as an issue in any forfeiture case ever again. It's a non-issue.

RCW 34.05.413(5) states proceedings "commence" when an agency notifies a litigant that a *stage* of a proceeding will occur. The next stage after seizure for forfeiture is a "default," unless a timely claim is made.

H. ARGUMENT –MENDALL WAS DENIED DUE PROCESS

Due Process requires notice and an opportunity to be heard prior to deprivation of life, liberty, or property. *Mullane v. Central Hanover Bank*

& Trust Co., 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950). The nature of the interest and the severity of the deprivation dictate the amount and type of process due. *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

The granting of a continuance is an abuse of discretion when "manifestly unreasonable, or resting on untenable grounds, or for untenable reasons." *City of Des Moines*, 87 Wn.App at 698.

No prejudice need be shown for a delay to violate due process. *State v. Chichester*, 141 Wn. App. 446 (2007) (dismissal of criminal charges affirmed where the prosecutor's unavailability was due to negligent scheduling practices, even when defense not prejudiced).

a. Mendall was Entitled to a hearing Within 90 Days of Filing His Claim, Absent Good Cause

Federal case law regarding alleged due process violations of the federal drug forfeiture statute are irrelevant when deciding whether a violation of the 90-day time limitation of RCW 69.50.505(5) occurred. *Tellevik II at 374. Tellevik II* explained:

> Unlike *Good*[2] [a federal case analyzing the federal drug forfeiture statute, the 90-day requirement isn't merely an "internal timing requirement." Here, as discussed above, the time limitation requirement was read into the statute in order to preserve its constitutionality.

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[2] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

Tellevik II at 374. In Washington State, the quantum of process due forfeiture claimants, as construed by our State Supreme Court, means a hearing within 90 days of the claim. *Tellevik I*, 120 Wn.2d at 77-87; *Tellevik II*, 125 Wn.2d at 370-374.

> (5) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right ... within forty-five days of the service of notice from the seizing agency here of personal property ... the person or persons shall be afforded a **reasonable opportunity to be heard** as to the claim or right....

RCW 69.50.505 (emphasis added).

Courts must construe statutes to preserve constitutionality when possible. *High Tide Seafoods v. State*, 106 Wn.2d 695, 698, 725 P.2d 411 (1986). Our Supreme Court preserved the constitutionality of the statute's generic phrase "reasonable opportunity to be heard" by construing the phrase to mean claimants have a due process right to "a hearing within 90 days if they contest the seizure." *Tellevik I*, 120 Wn.2d at 86, 87. Two years later the court affirmed this 90-day requirement, explaining that "the 90-day hearing requirement articulated in *Tellevik I* isn't dicta, but is, instead, central to its holding." *Tellevik II*, 125 Wn.2d at 372, 374.

"A fundamental rule of statutory construction is that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into the statute." *Espinoza v. City of Everett*, 87 Wn.App. 857, 869, 943 P.2d 387 (1997). Thus, the phrase "a reasonable

opportunity to be heard" contained within RCW 69.50.505(5) operates as if it were originally written "a hearing within 90 days." *Tellevik II*, 125 Wn.2d at 372, 374.

The *Tellevik* cases defined the deadline to *complete* proceedings, not *begin* them, and connected the 90-day statute of limitations to the claim. Claimants have a right to "a hearing within 90 days if they contest the seizure." *Tellevik I*, 120 Wn.2d at 86, 87.

Any delay beyond 90 days of a claim violates due process unless there is a "good cause" entered into evidence to support the delay. WAC 10-08-090; RCW 34.05.461(4); *Tellevik I*, 120 Wn.2d at 90-91. "The State does not have the power to ignore the statutory limitations on a [forfeiture proceeding] hearing date." *Tellevik II*, 125 Wn.2d at 373.

Merely scheduling some future stage of proceedings does not satisfy the statute of limitations announced in the *Tellevik* cases. The seizing agency must actually provide the hearing within 90 days of the claim, absent good cause for a delay.

b. <u>The Record Does Not Contain Evidence To Support a Finding of Good Cause for the Two-Month Delay</u>

Here, a hearing was scheduled to be held on the 89th day after filing of the claim. (Ex. 3). Had the hearing been held, due process would have been satisfied. But it was not. Instead, it was delayed over two months.

The over two-month delay of the hearing violated due process because sufficient "good cause" wasn't entered into evidence to support it. WAC 10-08-090; RCW 34.05.461(4); *Tellevik I,*120 Wn.2d at 90-91.

Mendall agreed in her appellate briefing that Ms. Jacobsen-Watt's family emergency was "good cause[3]," but only for as long as Ms. Jacobsen-Watt's was absent. Division One correctly found she was only unavailable through October 22, 2014. But Mendall's hearing was continued a month longer, without evidence of good cause in the record to do so. Ex. 10.

i. First Delay

Mendall also agrees that vacations can be "good cause." But here, no continuance was based on a vacation. No facts were in evidence to support such finding at the time the continuance was granted. (Ex. 8); (Ex. 10, AR). The AHE's order rested on Ms. Jacobsen-Watt's emergency. (Id). Only after Mendall filed and argued a motion to dismiss did the litigants learn that the AHE had been on vacation (past tense), and it was disclosed only as a part her denial. (Ex 17, pg. 2, finding 5).

Findings must be based exclusively on the evidence of record and on matters officially noticed. RCW 34.05.461(4). Here, the AHE's vacation was not part of the record when the order issued, so it can't be considered

[3]. Claimant's Appellate Brief, pg 18, para 1.

"good cause" for the two-month continuance. (Ex. 8); (Ex. 10). The continuance beyond Ms. Jacobsen-Watt's emergency rested on no grounds at all. The delay was a "manifestly unreasonable" abuse of discretion.

ii. Second Delay

Scheduling the hearing for the *second week* of December, rather than the *first week*, was in direct violation of the order. (Ex. 10, AR 65). The second delay was not based on another motion to continue. KCSO violated the AHE's direct order. This was not a mistake: KCSO sought Mendall's agreement, but when Mendall objected KCSO decided to just ignore the order. Intentionally. (Exs. 3, 12, 14).

The order was clear: schedule the hearing for the "first week of December." (Ex. 10). The record is also clear that when the order issued the AHE's calendar was open on Dec. 2nd and 3rd, such that the hearing could have been scheduled as ordered. (Ex. 7). KCSO had several weeks to request a continuance, but didn't. Instead, KCSO made a unilateral decision to violate the order over clear objection. (Ex. 14).

The law provides clear procedure in this situation: "If all parties do not agree to the continuance, the presiding officer shall promptly schedule a prehearing conference to receive argument and to rule on the request." WAC 10-08-090.

Again, the record is devoid of evidence to support the delay. (Ex. 17,

pg. 2, finding 6, conclusion 6). The AHE never provided an explanation for "unavailability," and she admitted she was not on "vacation." KCSO's flagrant disregard of an order, and the AHE's readiness to excuse such a violation, is an abuse of discretion that should give this court pause.

It's reasonable to consider the delay was caused by KCSO's negligent scheduling practices[4]. KCSO waited seven weeks before rescheduling. (Ex. 12). It's likely the AHE's calendar simply filled up with other matters in the normal course of business. Given the similar "error" that occurred earlier, KCSO's negligent scheduling practices are the most likely reason for the delay. Negligent scheduling practices do not rise to "good cause."

c. **No Prejudice to Claimant Need Be Shown**

Inadvertence of the party seeking excusal isn't "good cause." *State v. Luvene*, 127 Wn.2d 690 (1995). Our Surpreme Court made it clear "good cause" can't be based on an attorney's inadvertence, even when it causes a prisoner to miss a criminal appeal deadline, where prejudice from an error is at its height:

> We think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objec-

[4] KCSO's Counsel admitted the original hearing date was scheduled in "error." (Ex. 5, AR 58). The scheduling also violated WAC 10-08-040, forcing Mendall to choose between rights. It seems likely that the original hearing date was hurriedly scheduled without consulting Ms. Jacobsen-Watts after someone realized the 90-day deadline was about to pass. When finally scheduled, 89 of 90 days had passed since Mendall's claim, leaving just a day to spare to provide his hearing. (Ex. 3, AR 53-54).

tive factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

Id. at 753.

"[A]ttorney ignorance or inadvertence isn't "cause" because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." *Coleman v. Thompson*, 111 S. Ct. 2546, 2559 (1991).

KCSO does not have clean hands. Division One correctly concluded Mendall need not show any prejudice for his rights to have been violated.

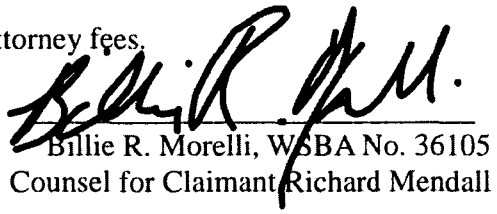
J. REQUEST FOR ATTORNEY FEES

Substantially prevailing claimants are entitled to attorney fees. RCW 69.50.505(6). Mendall requests an award of attorney fees.

K. CONCLUSION AND REQUEST FOR RELIEF

Mendall asks this court grant Claimant's petition, reverse the forfeiture order, to award him his costs and attorney fees.

PRESENTED March 17, 2017.



Billie R. Morelli, WSBA No. 36105
Counsel for Claimant Richard Mendall

L. CERTIFICATE OF SERVICE

I, Billie R. Morelli, declare that on or about March 17, 2017, I served this document on Plaintiff/Respondent by emailing a digital PDF copy of the same to Heidi Jacobsen-Watts and Candice Duclos. Petioner and Respondent have mutually agreed to accept email service in this matter.

DECLARED March 17, 2017, in Concrete, Washington.

Billie R. Morelli, WSBA #36105

M. APPENDIX

The following Administrative Records (AR) are referenced within this Petition for Discretionary Review, and are attached as exhibits hereto. The below reference list is in chronological order of the administrative proceeding, and is also how they are attached to this Motion.

Ex. 1 (AR 50) – Notice of Seizure from KCSO, dated May 31, 2014;

Ex. 2 (AR 51-52) – Mendall's Written Claim, dated July 3, 2014;

Ex. 3 (AR 53-55) – 1st Notice of Hearing from KCSO, dated Sept. 22, 2014;

Ex. 4 (AR 57) – Email from Claimant's Counsel Morelli, sent Sept. 25, 2014, at 9:37 AM;

Ex. 5 (AR 58-59) – Email from KCSO's Counsel Jacobsen-Watts, sent Sept. 25, 2014; at 1:38 PM;

Ex. 6 (AR 63) – Email from Claimant's Counsel Morelli, sent Sept. 25, 2014, at 2:17 PM;

Ex. 7 (AR 60) – Email from AHE, sent Sept. 25, 2014, at 8:50 PM;

Ex. 8 (AR 62) – KCSO's Motion to Continue, email sent Sept. 26, 2014, at 3:34 PM;

Ex. 9 (AR 64) – Claimant's Objection to Continuance, email sent Sept. 26 2014, at 4:14 PM;

Ex. 10 (AR 65) – Continuance Order, email sent Sept. 27, 2014,12:46 PM;

Ex. 11 (AR 67) – Email from KCSO's Counsel to Claimant's Counsel, sent Oct. 22, 2014, at 11:40 AM;

Ex. 12 (AR 69-70) – Email from KCSO's office to Morelli, sent Nov. 17, 2014, at 10:58 AM;

Ex. 13 (AR 69) – Email from Morelli to KCSO's office, sent Nov. 17, 2014, 11:03 AM;

Ex. 14 (AR 34-36) – 2nd Notice of Hearing from KCSO, dated Nov. 18, 2014;

Ex. 15 (AR 56) – Declaration of Morelli, dated Dec. 1, 2014;

Ex. 16 (AR 39-49) –Mendall's Motion to Dismiss filed with the AHE, filed Dec. 01, 2014;

Ex. 17 (AR 101-109) – Order of Forfeiture issued by AHE, filed Dec. 16, 2014;

Also referenced is Claimant's Brief filed with the Court of Appeals, and

Division One's decision in this matter, 75026-7-I, filed Dec. 27, 2016.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN URQUHART, in his capacity as King County sheriff; and KING COUNTY SHERRIFF'S OFFICE ,	)	No. 75026-7-I
Respondents,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
$6,510.00 CASH AND ALL NON-CONTRABAND SEIZED ITEMS,	)	
Defendant In Rem,	)	
and	)	
RICHARD MENDALL,	)	
Appellant.	)	FILED: December 27, 2016

APPELWICK, J. — Mendall seeks return of property on the basis that the forfeiture hearing was untimely. The hearing examiner did not abuse her discretion by granting continuances for a medical emergency and a preplanned vacation. The hearing was not untimely. We affirm.

FACTS

King County Sheriff's Deputies seized weapons, drugs, and cash from Richard Mendall during a traffic stop. On June 9, 2014, the King County Sheriff's Office (KCSO) mailed a notice of seizure and intended forfeiture to Mendall. In

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FACTS

King County Sheriff's Deputies seized weapons, drugs, and cash from Richard Mendall during a traffic stop. On June 9, 2014, the King County Sheriff's Office (KCSO) mailed a notice of seizure and intended forfeiture to Mendall. In

response, on July 3, 2014, Mendall mailed a notice of claim and request for a hearing regarding the forfeiture.

On September 22, 2014, KCSO sent Mendall a notice of hearing set for September 30, 2014. On September 27, 2016, the hearing examiner granted KCSO a continuance to "the first week of December" due to a serious health emergency involving counsel's family. KCSO's counsel was not available until October 22, 2014. The hearing examiner had previously advised that her first availabilities after October 22 would be December 2-3, December 8-11, or December 16-18. On November 17, 2014, KCSO e-mailed Mendall, stating that the hearing examiner would not be available until the second week of December. Citing due process, Mendall objected to the hearing being set beyond the first week of December.

The hearing occurred on December 9, 2014. The hearing examiner ruled in KCSO's favor, and Mendall therefore forfeited the property. The superior court affirmed the hearing examiner. Mendall sought direct review from the Supreme Court. The Supreme Court denied that request and transferred the appeal to this court.

DISCUSSION

Mendall makes two arguments. First, he acknowledges that the timing of the forfeiture hearing complied with existing precedent. But, he argues that we should overturn that precedent. Second, he argues that the hearing examiner abused her discretion by granting two continuances without good cause.

I. Timely Hearing

Mendall's first argument is straightforward. He asks this court to overturn its own precedent on civil forfeiture procedure.

Mendall believes that his due process rights were violated, because the forfeiture hearing was scheduled over 90 days from the date of seizure. KCSO responds that the hearing needs to be scheduled within 90 days of Mendall's claim challenging the seizure. This presents a question of law, that this court reviews de novo. Escamilla v. Tri-City Metro Drug Task Force, 100 Wn. App. 742, 747, 999 P.2d 625 (2000), abrogated on other grounds by In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 215 P.3d 166 (2009).

Under both Washington and federal law, a law enforcement agency must give an individual notice of its intent to permanently seize property, and that individual must have the opportunity to be heard. RCW 69.50.505(3); United States v. James Daniel Good Real Prop., 510 U.S. 43, 48, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993). Within 45 days of service of notice that personal property has been seized, the person must respond with notice that he or she intends to contest the seizure. RCW 69.50.505(5). This response triggers a right to a forfeiture hearing within 90 days. In re the Forfeiture of One 1988 Black Chevrolet Corvette, 91 Wn. App. 320, 323, 963 P.2d 187 (1997). The Administrative Procedure Act, chapter 34.05 RCW, and Washington case law govern forfeiture proceedings in Washington. See Black Chevrolet Corvette, 91 Wn. App. at 323.

Two Supreme Court cases clarify this statutory scheme, Tellevik v. 31641 West Rutheford Street, 120 Wn.2d 68, 838 P.2d 111, 845 P.2d 1325 (1992) (Tellevik I), and Tellevik v. 31641 West Rutheford Street, 125 Wn.2d 364, 884 P.2d 1319 (1994) (Tellevik II). In Tellevik I, the claimants alleged that RCW 69.50.505 contained insufficient procedural safeguards and thus was unconstitutional. 120 Wn.2d at 77. The Supreme Court read a 90 day time limitation into RCW 69.50.505 "in order to preserve the constitutionality of the statute." Id. at 85-86. Specifically, it held that due process entitles claimants "to a full adversarial [forfeiture] hearing within 90 days." Id. at 86. Tellevik II solidified this principle two years later. There, the Supreme Court found that an agency's failure to even provide a hearing date for nearly six months violated claimants' due process rights. Tellevik II, 125 Wn.2d at 372-73. The Court noted that "the 90-day hearing requirement articulated in Tellevik I is not dicta, but is, instead, central to its holding." Id. at 372 (emphasis in original).

Tellevik I and Tellevik II left open the question of what event triggers the 90 day hearing window. As Mendall notes, the plain language of RCW 69.50.505(3) states that "proceedings for forfeiture shall be deemed commenced by the seizure." (Emphasis added.) But, in Black Chevrolet Corvette, this court held that the right to a hearing within 90 days is triggered by the claimant giving notice of a claim contesting the seizure. 91 Wn. App. at 322-24. The court reasoned that that

> The applicable provisions of the Administrative Procedure Act (APA) require that hearing commence within 90 days, RCW 34.05.419, and further provide that the hearing commences when

> the agency or hearing officer notifies a party that some stage of the hearing will be conducted.

Id. at 322; see also RCW 34.05.413(5). Therefore, because a hearing will only "be conducted" if a claimant serves a notice of claim, that notice of claim triggers the 90 day window. Black Chevrolet Corvette, 91 Wn. App. at 324; Escamilla, 100 Wn. App. at 749 "[P]roceedings must be commenced within 90 days of the date a claimant notifies the seizing agency of a claim.").

Mendall concedes that the hearing was scheduled within 90 days of his notice of claim and that the hearing examiner properly applied Black Chevrolet Corvette. But, he explicitly asks us to overturn this court's decisions in Black Chevrolet Corvette and Escamilla. Mendall argues that this is warranted in light of the "plain language of 69.50.505(3)."

Although RCW 69.50.505(3) states that "proceedings for forfeiture shall be deemed commenced by the seizure," there is no indication that the right to a hearing within 90 days also commences on that date. Rather, the 90 day window is governed by the APA. Black Chevrolet Corvette, 91 Wn. App. at 323-24. RCW 69.50.505(5) states that a "hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW," which contains the APA. And, the APA explicitly states that "within 90 days after receipt of [an] application . . . the agency shall . . . [c]ommence an adjudicative proceeding." RCW 34.05.419(1)(b) (emphasis added). In the context of forfeiture, the claimant's notice of claim serves as the "application," because the notice of claim is the document that triggers the forfeiture hearing. This sound reasoning governed the result in Black Chevrolet Corvette. 91 Wn. App. at 324. It also governs here.

We hold that the KCSO properly scheduled Mendall's hearing within 90 days of Mendall serving his notice of claim against the seizure.

II. Good Cause for Continuance

Mendall also argues that the hearing examiner improperly granted two continuances. As an initial matter, these continuances moved the hearing date beyond the 90 day window. However, continuances that move a timely scheduled hearing date beyond 90 days after the seizure do not violate Tellevik or its progeny. See City of Des Moines v. Pers. Prop. Identified as $81,231 in U.S. Currency, 87 Wn. App. 689, 698, 943 P.2d 669 (1997). Thus, the remaining question is whether the hearing examiner properly granted these continuances.

A hearing examiner has the authority to grant continuances. WAC 10-08-090(1). The hearing examiner may order a continuance if a party shows good cause and may consider many factors, including whether there is prejudice to the defendant's presentation of his case. Id.; State v. Chichester, 141 Wn. App. 446, 459-60, 170 P.3d 583 (2007). This court reviews a grant of a continuance for abuse of discretion. State v. Hurd, 127 Wn.2d 592, 594, 902 P.2d 651 (1995). An abuse of discretion occurs when a decision is manifestly unreasonable or rests on untenable reasons. Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

Here, the hearing examiner originally continued the hearing until "the first week of December." She then set it for the Monday following that week, December 9, 2014, based on two conflicts. First, KCSO's counsel faced a family health emergency. She was not available for the hearing from September 26 to

October 22. Second, the hearing examiner had a prescheduled vacation that overlapped with KCSO's counsel's absence. At the time, the hearing examiner's next available dates after KCSO's counsel's return were December 2-3 or December 8-11. Mendall does not argue that he was prejudiced.[1] Thus, the only issue is whether the hearing examiner abused her discretion in finding good cause supported the continuances based on a family health emergency and then a preplanned vacation.

First, Washington courts routinely find good cause for illness. See, e.g., State v. Ruud, 6 Wn. App. 57, 59, 491 P.2d 1351 (1971) (finding good cause when "counsel became ill"). Mendall does not dispute the existence of a family health emergency. No published Washington decision explicitly endorses counsel's family health emergency as "good cause," but neither does one reject it. We decline to hold that the trial court abused its discretion in granting a continuance for a family health emergency. This is especially true in light of the case law on continuances for vacations, which may have planning and cost implications but lack the immediacy of a family health emergency. See, e.g., State v. Jones, 117 Wn. App. 721, 729, 72 P.3d 1110 (2003) ("[A]ttorney's prescheduled vacation is an adequate basis to justify a continuance.").

[1] Mendall's briefing contains no discussion of how the two month delay prejudiced his case. Instead, Mendall asserts that he "need not show prejudice here." Granted, prejudice is only a factor that the hearing examiner considers in determining whether to grant a continuance. Chichester, 141 Wn. App. at 459-60. But, the lack of prejudice further shows that the hearing examiner did not abuse her discretion in granting a continuance.

Second, Washington courts have also found that prescheduled vacations constitute good cause for the purposes of a continuance. See State v. Grilley, 67 Wn. App. 795, 800, 840 P.2d 903 (1992) ("[T]he District Court did not abuse its discretion in granting a continuance where the investigating officers were unavailable due to their scheduled vacations."); State v. Selam, 97 Wn. App. 140, 143, 982 P.2d 679 (1999) ("[W]e cannot say the trial court abused its discretion in granting a brief continuance while the defense counsel was on vacation."); State v. Heredia-Juarez, 119 Wn. App. 150, 155, 79 P.3d 987 (2003) (holding that prosecutor's vacation warranted continuance, and that reassignment to an available prosecutor was not necessary). Granting the continuances based on a preplanned vacation and a family medical emergency was not an abuse of discretion.

We affirm.

WE CONCUR:

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To: 'billie@LawyerfortheLittleGuy.com'; Dunnegan, Jocelyn; Jacobsen-Watts, Heidi; Candice Duclos
Cc: Div-1 Front Desk
Subject: RE: 94135-1 - John Urquhart v. $6,510.00, Claimant's REVISED Petition for Review ATTACHED

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