

09560-6

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NO. 69560-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY HUYNH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

APPELLANT'S REPLY BRIEF

2014 NOV 17 AM 9:06
COURT OF APPEALS
STATE OF WASHINGTON

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A. REPLY ARGUMENT

1. There is no “civil forfeiture” exception to the requirement for a hearing on a CrR 2.3(e) motion for return of property.

Appellant Jeffrey Huynh requested relief under CrR 2.3 for the return of his property seized by the police upon his arrest. CP 16-22. Prior to ruling on a motion under CrR 2.3(e), the trial court must hold an evidentiary hearing. State v. Marks, 114 Wn.2d 724, 734-35, 790 P.2d 138 (1990); State v. Card, 48 Wn. App. 781, 786, 741 P.2d 65 (1987). Quite simply, “CrR 2.3(e) requires an evidentiary hearing.” Card, 48 Wn. App. at 786.

Without the assistance of counsel and while in custody, Mr. Huynh gave proper notice to the opposing party, the State of Washington, of his motion for return of property. He requested that the court which sentenced him on the underlying criminal matter schedule a hearing. CP 18-21. Last, he kindly asked that he be allowed to appear. His requests were summarily rejected.

The State now argues that Marks and Card somehow do not apply because the merits of their position on the substantive return of property question are far superior to those of the appellant. Response at 21. The State wants to have its cake and eat it too: their legal representative was able to speak to the judge about the motion in a one-

sided presentation of what they thought about the civil forfeiture. RP 7-8. The procedure below was utterly flawed.¹

There is no “civil forfeiture” exception to the Marks and Card rule for a hearing as the State suggests. If a valid civil forfeiture had stripped Mr. Huynh of a possessory interest in the property in question, then he may not have a *winning* motion for its return. See State v. Alaway, 64 Wn. App. 796, 828 P.2d 591 (1992) (Discussing federal authority that would bar the return of seized property if the moving party is no the rightful owner, the property itself is contraband, or has been civilly forfeited); State v. Brandt, 172 Wn. App. 463, 290 P.3d 1029 (2012) (Affirming denial of post-conviction return of property motion where defendant had forfeited his possessory interest to the property pursuant to plea negotiations.)

However, the State’s claim that they will prevail on the merits cannot strip Mr. Huynh of the procedural protections granted by a hearing. The court’s procedure was “defective” under Marks and Card.

¹ Mr. Huynh was not in court, in person or by telephone, when the State argued its position to the judge on October 17, 2012. RP 6-8. It also appears that the State’s brief on the merits (and the appendices purportedly documenting the validity of the civil forfeiture) was not filed until that very morning, suggesting Mr. Huynh had no ability to reply even if just in writing. CP 23-28.

Marks, 114 Wn.2d at 734-36; Card, 48 Wn. App. at 786. As in those cases, the order should be reversed and the matter remanded for an evidentiary hearing.

In fact, courts do grant post-conviction hearings on CrR 2.3(e) return of property motions precisely to decide whether the movant still has a possessory interest in the items in question. For example, in State v. Brandt, a trial court properly entertained a CrR 2.3(e) motion for the return of property by holding a hearing as required under Mark and Card, even though the State's response to the motion was that Brandt had already forfeited his interest in the property pursuant to a plea agreement. Notably, though Brandt lost the return of property motion when he "failed to present the trial court with any evidence showing his right to possess the seized property," the Court of Appeals opinion writes of Brandt's request for appellate intervention as an *appeal*, rather than a motion for discretionary review. Brandt, 172 Wn. App. at 464-66.

2. CrR 3.6 cannot explain away the failure to hold the hearing required under Mark and Card.

The State's argument about the applicability of CrR 3.6(a) is not well-taken either. Response at 22-23. It is true that CrR 2.3(e) says that post-charging motions for the return of property are to be treated as

CrR 3.6 motions to suppress. However, the holdings in Mark and Card trump CrR 3.6 to the extent the rule says a motion to suppress can be adjudicated on the merits without an evidentiary hearing. Card, 48 Wn. App. at 786. (Reversing as defective disposition of a CrR 2.3(e) motion where the parties below offered memoranda, but no affidavits, and there was no hearing.) The trial court was not free to disregard Card and Mark; the hearing that Mr. Huynh requested should have been held.

3. Reversal under direct review is needed to remedy the error below.

“[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.” LK Operating, LLC v. Collection Grp., LLC, 181 Wn. 2d 48, 70, 331 P.3d 1147 (2014), quoting from Boddie v. Connecticut, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

The State believes Mr. Huynh lost the forfeiture by default, because he failed to respond within 45 days after being notified. RCW 69.50.505(4); Key Bank of Puget Sound v. City of Everett, 67 Wn. App. 914, 918, 841 P.2d 800, 802 (1992). Even if the State is correct in its position that a proper and final adjudication of the civil forfeiture

would bar a CrR 2.3 motion for return of property, Mr. Huynh should have been notified that this was the State's position and given the opportunity to respond. Neither occurred below.

Instead, taking advantage of their physical presence² in the courtroom, the prosecution responded to Mr. Huynh's CrR 2.3(e) motion, but not to him. Rather, the prosecutor addressed the trial judge directly, on the record, but *ex parte*. The State did not produce any witness with first-hand knowledge of Mr. Huynh being served with the civil forfeiture notice. He, on the other hand, had submitted a sworn affidavit that he had not been. CP 17.

The trial court erred in accepting the State's unsworn, one-sided representations as true without giving the appellant any opportunity to be heard. While what occurred was certainly convenient for the State, the shortcut taken was devoid of the most basic procedural due process and violated the Mark and Card requirement.

The State got to make its argument, but kept Mr. Huynh from doing the same. In this case, the question was not whether there had

² The case was called when Mr. Huynh's former counsel – not representing him on the return of property motion – was in court seeking guidance on his former client's request for a copy of discovery from the completed criminal case. RP 6.

been a civil forfeiture, the question was whether there had been a *valid* forfeiture that would deprive Mr. Huynh of his possessory interest in the property in question. But Mr. Huynh disputes that he was properly served and the court below never addressed his concerns.³

C. CONCLUSION

The denial of Mr. Huynh's motion for return of seized property is reviewable as an appeal of right. The trial court should have held an evidentiary hearing on the motion. The denial of Mr. Huynh's motion should be reversed and the matter remanded for an evidentiary hearing in accordance with Criminal Rule 2.3(e), Mark, and Card.

DATED this 14th day of November 2014

Respectfully submitted,



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³ Had the court held a hearing, the State would have to put on competent evidence as to the validity of the underlying civil forfeiture. Then, the court could weigh the competing claims and it is unknown if the State would prevail. For example, the alleged forfeiture notice document does not give the name of the officer who supposedly served Mr. Huynh. CP 26. There is an illegible signature there, but no name. Mr. Huynh swore in his affidavit that he was never properly served. CP 17.

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JEFFREY HUYNH,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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--	---

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF NOVEMBER, 2014.

X _____ 

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