

COURT OF APPEALS
DIVISION II

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY KAC
DEPUTY

DIVISION II

COURT OF APPEALS No. 40514-8-II

DEA/TAHOMA NARCOTICS ENFORCEMENT TEAM

PLAINTIFF/RESPONDENT

vs.

ONE (1) 2001 BMW X5,
DEFENDANT IN REM,
and
ANGELA FINLEY,
CLAIMANT/APPELLANT

APPELLANT'S BRIEF IN STRICT REPLY

APPELLANT'S COUNSEL:



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C. *While an individual may sometimes waive certain rights, there are rules and DEA/TNET did not follow them, thus, Angela did not waive her Due Process or Statutory rights under RCW 69.50.505.*

D. *DEA/TNET cannot argue that Angela’s signature on the document constituted a “knowing, intelligent, and voluntary” waiver because neither Hearing Examiner Minturn nor Judge Lee found or concluded*

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III. REPLY ISSUES

A. *DEA/TNET has inappropriately raised its issues “A,” “B,” “C,” and “D” because the arguments raised are not supported by the record of this present appeal.*

- i. *Argument “A” is inappropriate.*
- ii. *Arguments “B,” “C,” and “D” are also inappropriate*

B. *The so-called “Waiver” document is not a contract, is not a settlement agreement, is not a confession of judgment, is not a stipulation, and is not a consent decree*

C. *While an individual may sometimes waive certain rights, there are rules and DEA/TNET did not follow them, thus, Angela did not waive her Due Process or Statutory rights under RCW 69.50.505.*

D. *DEA/TNET cannot argue that Angela’s signature on the document constituted a “knowing, intelligent, and voluntary” waiver because neither Hearing Examiner Minturn nor Judge Lee found or concluded*

E. *Angela’s 8th Amendment excessive fine argument is reviewable for the first time on this appeal because the issue pertains to a manifest error affecting a constitutional right and involves review of a sentence under the 8th Amendment to the United States Constitution.*

- i. *Angela excessive fines issue is reviewable because it pertains to a manifest error of constitutional magnitude*
- ii. *The forfeiture of Angela’s vehicle is an erroneous sentence, reviewable for the first time on appeal.*

IV. CLAIMANT’S REPLY

“Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.” *United States v. One 1936 Model Ford V-8 De Luxe Coach, 307 U.S. 219, 226 (1939).*

An Aside: Angela's Assignments of Error, the Difference between Findings and Conclusions, and Why it Matters

In its response brief, DEA/TNET devotes much space to describing the law and standard of review on creditability and factual issues. Angela has not assigned error to a single finding of fact, thus DEA/TNET's devotion seems misplaced.

For example, Angela's Assignment of Error #3 states that "Hearing Examiner Minturn erred in concluding that Angela "executed a signed waiver and consent to forfeiture." (AR 4-5). Angela only takes issue with the word "executed." She does not deny, nor has she ever denied, that she signed the document. There is no assignment of error to a finding of fact, only an assignment of error to a conclusion of law, and only because the Hearing Examiner failed to define "executed," leaving us all scratching our heads. Hearing Examiner must have meant something other than signed when using the term executed since both words are in the same sentence and one is a verb and the other is an adjective. (Hearing Examiner Minturn never explained what he meant by "executed," but the Order of forfeiture specifically sites RCW 69.50.505, not the signed document, when Ordering Angela's vehicle forfeited).

Counsel will not waste your Honor's time explaining all nine (9) assignments of error in minute detail here, but suffice it to say that Angela

has not assigned error to so much as a single findings of fact. Period.

If DEA/TNET has an issue with a finding of fact made by Hearing Examiner Minturn or Judge Lee, then DEA/TNET should have cross-appealed. It did not. Thus, its lengthy chatter regarding the testimony of the witnesses and whether one should be believed over another can be ignored – none of it matters here as only questions of law have been presented to you for decision.

A. DEA/TNET has inappropriately raised its issues “A,” “B,” “C,” and “D” because the arguments raised are not supported by the record of this present appeal.

“Failure to cross-appeal an issue generally precludes its review on appeal.” Tellevik v. 31641 W. Rutherford St., 120 Wn.2d 68, 89, 838 P.2d 111, 845 P.2d 1325 (1992). However, a prevailing party that seeks no further affirmative relief on appeal “is entitled to argue any grounds in support of the [ruling] that are supported by the record (emphasis added).” McGowan v. State, 148 Wn.2d 278, 288, 60 P.3d 67 (2002), citing RAP 2.4(a); RAP 5.1(d); State v. Bobic, 140 Wn.2d 250, 257-58, 996 P.2d 610 (2000).

Accordingly, DEA/TNET is entitled to argue any grounds for the

Administrative Order of Forfeiture that are supported by the record.

None of DEA/TNET's first four (4) arguments are supported by the record: Thus, the arguments are inappropriate. The four (4) unsupported, inappropriate arguments are:

- *“A” - Washington law favors settlement and there was no error in enforcing the agreed upon Waiver of Hearing and Consent to Forfeiture.*
- *“B” - Under Washington law, there is statutory authority to allow settlement by way of Waiver of Hearing and Consent to Forfeiture.*
- *“C” - There is authority from drug seizure and forfeiture cases that allow for confession of judgment and stipulation without formal invocation of statutory drug seizure process.*
- *“D” - Under the authority of federal law there is authority to allow the voluntary Waiver of Hearing and Consent to Forfeiture without the need to specifically invoke the drug seizure process of RCW 69.50.505.*

(Response Brief, pg. 1).

i. **Argument “A” is inappropriate.**

DEA/TNET's issue “A” asserts that Hearing Examiner Minturn Ordered the forfeiture of Angela's vehicle by enforcing the so-called

“Waiver of Hearing and Consent to Forfeiture” document. This is an incorrect assumption.

Nowhere in the 2-page Order does it say the Hearing Examiner “enforced” the so-called waiver or forfeited the vehicle based on the document. (AR 4-5). Instead, the Order merely concluded that Ms. Finley “executed” the signed document,. (Id.). Note that executed and signed mean different things to Hearing Examiner Minturn, as executed is a verb, while signed is an adjective.

Hearing Examiner Minturn in fact Ordered the forfeiture “in accordance with... RCW 69.50.505.” (AR 5). This makes sense because Hearing Examiner Minturn also “found” he had jurisdiction to hear the matter under RCW 69.50.505 and also concluded the vehicle was subject to forfeiture under the same statute. (AR 4).

Had Hearing Examiner Minturn “enforced” the so-called waiver document, he could not have had jurisdiction , could not have ordered the vehicle forfeited, and could not have even held the hearing. If the so-called waiver controlled the outcome, no RCW 69.50.505 procedures would have been necessary for forfeiture or available to Angela.

Argument “A” as raised by DEA/TNET incorrectly assumes the hearing examiner was “enforcing” the waiver and is simply unsupported by the record. Thus, argument “A” was inappropriately raised and should

be ignored.

ii. Arguments “B,” “C,” AND “D” are also inappropriate

DEA/TNET’s arguments ‘B’, ‘C’, and ‘D’ are also unsupported by the record.

Argument “B” asserts the forfeiture should be upheld as a “settlement.” Argument “C” is basically the same but uses the phrase “confession of judgment and stipulation”. Nowhere in Hearing Examiner Minturn’s Order does he even imply that he forfeited the vehicle based on any “settlement” or “confession of judgment and stipulation” between the parties.

As with argument “A,” Argument “B” raised by DEA/TNET is not supported by the record, was inappropriately raised, and should be ignored.

Argument “D” asserts RCW 69.50.505 is irrelevant due to the so-called waiver or settlement or stipulation or whatever DEA/TNET chooses to call it for sake of whatever argument it happens to be raising.

If RCW 69.50.505 is irrelevant, then again, hearing Examiner Minturn had no jurisdiction, could not have Order the vehicle forfeited, or even held a hearing on the matter. This entire case is based on the rights, responsibilities, and authorities granted under RCW 69.50.505.

Nothing in the record supports anything else. DEA/TNET’s

argument that RCW 69.50.505 is irrelevant is unsupported by the records and should be ignored.

DEA/TNET is entitled to argue any ground in support of the upholding Hearing Examiner Minturn's Order that is supported by the record (emphasis added)." McGowan v. State, 148 Wn.2d 278, 288, 60 P.3d 67 (2002), citing RAP 2.4(a); RAP 5.1(d); State v. Bobic, 140 Wn.2d 250, 257-58, 996 P.2d 610 (2000).

The first four (4) arguments of DEA/TNET, arguments labeled "A," "B," "C," and "D," are unsupported by the record and should be ignored.

B. The so-called "Waiver" document is not a contract, is not a settlement agreement, is not a confession of judgment, is not a stipulation, and is not a consent decree

Every first year law student learns that it is basic black letter law that contract formation requires three parts: an offer, acceptance, and consideration, and if any one part is absent, no contract has been formed. DePhillips v. Zolt Constr. Co., 136 Wn.2d 26, 26 (1998).

Calling the so-called "waiver of hearing" a settlement agreement or consent decree changes nothing - A rose by any other name is still a rose. Settlement agreements and consent decrees are contracts, and thus the law of contracts applies no matter what the so-called "waiver" is called. Riley Pleas, Inc. v. State, 88 Wn.2d 933, 937-38, 568 P.2d 780

(1977); United States v. Bank of New York, 14 F.3d 756, 760 (1994).

In this case, no less than two of the three required parts of a contract are missing from the so-called “waiver ” document: DEA/TNET failed to offer Angela anything in return for her so-called “waiver of hearing,” thus, what Plaintiff considers a “contract” contains neither an offer nor consideration. Without these crucial necessities, no contract (no matter what you call it) can formed.

DEA/TNET cites an abundance of cases in support of its theory that the so-called “waiver” is a settlement document. A close look at each and every one of those cases shows a glaring pattern: Every “settlement agreement” that was enforced had three (3) crucial components: an offer, acceptance and consideration.

Did Angela receive anything? No. DEA/TNET attempts to convince us that she received the benefit of not litigating. But DEA/TNET is talking out of both sides of its mouth. DEA/TNET has repeatedly argued that the document is a “waiver” of Angela’s rights. So the so-called “contract” consists of DEA/TNET “offering” to take her vehicle and her rights in return for Angela not using the rights she just gave up???? This doesn’t make any sense! Such contract is illusory. Angela received no benefit whatsoever.

This document is not a contract. This document purports to take

away Angela's vehicle and rights under the Due Process Clause and RCW 69.50.505. The document violates those rights. That is issue in this case.

If DEA/TNET really thought this document was a contract, it would have sued Angela for breach, but did not. DEA/TNET never motioned to enforce a "settlement" and has not cross-appealed in this matter and cannot now claim breach of contract when DEA/TNET itself acknowledged Angela had not waived her rights by providing her an RCW 69.50.505 hearing.

What DEA/TNET is doing is akin to claiming an individual waived their right to remain silent, yet stipulated at trial that the statements would not be used; or that an individual consented to a search, yet stipulated at trial that no evidence found would be used. Here, DEA/TNET is claiming Angela waived her rights after granting her the very rights it claims she waived! If DEA/TNET truly believed its own argument, then Angela would have never been afforded a hearing in the first place.

This issue, just like the so-called "contract," is illusory.

C. While an individual may sometimes waive certain rights, there are rules and DEA/TNET did not follow them, thus, Angela did not waive her Due Process or Statutory rights under RCW 69.50.505.

DEA/TNET has failed to cite to a single case that casts doubt on

Angela's assertion that the so-called "waiver" document violates Due Process and RCW 69.50.505 *on its face*.

DEA/TNET instead reminded this Court that for an individual to waive one's "Miranda" rights under the 5th and 6th Amendments, one need only waive them "rationally" and "freely." (Respondent's Brief pg 19). Angela does not deny this. But, its not at issue in this case, either.

DEA/TNET also provided this Court with case law providing that an individual can "voluntarily consent" to give up his or her 4th Amendment rights. (Respondent's Brief pg 19). Angela does not deny this. But again, this is not the issue of the present case.

DEA/TNET also sites caselaw that a writing can be evidence (not proof) of one's waiver of certain rights. Again, no argument from Angela.

Angela is arguing that the document itself is unenforceable and violative of Due Process and the rights under RCW 69.50.505. On its face. That means nobody has to sign it – its just a bad form that cannot be used. That is Angela's argument and the examples provided by DEA/TNET and discussed above ignore the issue that the document itself is bad.

DEA/TNET touches on the real issue on page 20 of its brief, stating that all "substantive" rights are contained within the document.

Angela's argument is one of *Procedural* Due Process. And the

document fails to mention a *crucial Procedural* Due Process right granted to her under RCW 69.50.505 – all potential claimants are provided 45 days to contemplate whether or not to file a claim. RCW 69.50.505(4). Intrinsic in this requirement is the that the notice required to be provided to each potential claimant under subsection (3) of the statute contain language alerting the potential claimant of his or her right mandated in subsection (4).

The document failed to provide Angela with proper notice of her rights. This is fatal to the document under the Due Process protections of the Constitution and RCW 69.50.505.

D. DEA/TNET cannot argue that Angela’s signature on the document constituted a “knowing, intelligent, and voluntary” waiver because neither Hearing Examiner Minturn nor Judge Lee found or concluded

Finally, when forfeitures of the type contemplated under RCW 69.50.505 are “quasi-criminal” in nature. One 1958 Plymouth Sedan v. Pa., 380 U.S. 693, 697-98 (1965). In a criminal case, due process requires that a waiver of one’s fundamental rights be knowing, intelligent, and voluntary. State v. Walsh, 143 Wn.2d 1, 7 (2001). Thus, when a waiver of one’s rights in such a case is not knowing, intelligent, and voluntary, the waiver is voidable. Id.

Neither Hearing Examiner Minturn nor Judge Lee found or

concluded that Angela's signature on the document constituted a "knowing, intelligent, and voluntary" waiver. Thus, it was not. The document is unenforceable.

E. Angela's 8th Amendment excessive fine argument is reviewable for the first time on this appeal because the issue pertains to a manifest error affecting a constitutional right and involves review of a sentence under the 8th Amendment to the United States Constitution.

Washington Appellate Courts generally will not review an argument raised for the first time on appeal. RAP 2.5(a); State v. Williams, 137 Wn.2d 746, 749, 975 P.2d 963 (1999). But the argument will be reviewed when it pertains to a manifest error affecting a constitutional right. RAP 2.5(a)(3); Williams, 137 Wn.2d at 749.

Further, erroneous sentences may be challenged for the first time on appeal. State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000).

i. Angela excessive fines issue is reviewable because it pertains to a manifest error of constitutional magnitude

Angela's issue meets the definition of "manifest."

An alleged error is manifest when it results in a detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record. State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999). The record below contains all facts necessary for review and Angela will surely be prejudiced if the issue

is not heard, as ownership of her vehicle is at stake. And of course, the issue itself, claiming an 8th Amendment violation, is one of constitutional magnitude.

To perform an excessive fines analysis, Washington courts must examine two factors to determine whether a specific forfeiture is so excessive as to violate the Constitution: (1) instrumentality, or the relationship of the property to the offense; and (2) proportionality, or the extent of the criminal activity compared to the severity of the effects of the forfeiture on the claimant. Tellevik, 83 Wn. App. at 371-76.

Because the record contains all that is required for the excessive fines analysis, the issue is “manifest.”

Instrumentality factors include the role the property played in the crime, the role and culpability of the property owner, whether the use of the property was planned or fortuitous, and whether the offending property can be readily separated from innocent property. Id. at 374.

In this case, DEA/TNET has not alleged that Angela’s vehicle was involved in Mr. Cage’s criminal endeavors. Nor has DEA/TNET,

or any other law enforcement agency, alleged that Angela is in any way culpable for any crime.

Thus, ordering the forfeiture of Angela's vehicle is an excessive fine under the instrumentality factor.

Proportionality factors include the nature and value of the property; the effect of the forfeiture on the owner and gravity of the type of crime; the duration and extent of the criminal activity; and the effect of the criminal activity on the community, including the costs of prosecution. *Id.* at 374-75.

In this case, the seized property was purchased for \$22,000.00, with ½ the funds traceable directly from Angela's bank account. This is quite a lot of money to lose when one hasn't been accused of any crimes. The effect on Angela of the intended forfeiture was immediate and detrimental – she was left alone without a ride home with her tiny daughter on a rainy night. *AR 11-13*. Again, no law enforcement agency has accused Angela of any crimes, thus Angela has not negatively affected her community and no agency prosecuted her.

Of course, to forfeit 100% of the vehicle would also be

detrimental, as she has done nothing criminal yet is being punished with the taking of her personal vehicle.

Thus, ordering the forfeiture of Angela's vehicle is an excessive fine under the proportionality factor. This is a manifest constitutional issue that can be addressed in this present appeal.

ii. The forfeiture of Angela's vehicle is an erroneous sentence, reviewable for the first time on appeal.

Erroneous sentences may be challenged for the first time on appeal. State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000). Indeed, an erroneous sentence can only be raised for the first time on appeal!

When proceedings are introduced for the purpose of declaring the forfeiture of property by reason of criminal activity, those proceedings are "quasi-criminal" in nature. One 1958 Plymouth Sedan v. Pa., 380 U.S. 693, 697-98 (1965).

The 8th Amendment to the United States Constitution provides that excessive fines shall not be imposed, or alternatively speaking, that an excessive sentence shall not be imposed. Thus, under Hunter, in forfeiture cases under RCW 69.50.505, any claimant may always raise an 8th Amendment excessive fine/sentence argument for the first time on appeal.

Thus, Angela may raise this argument for the first time on appeal.

V. CONCLUSION

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REPLY

Angela seeks the reversal of Judge Lee's affirmation of Hearing Examiner Minturn's forfeiture of the defendant property to DEA/TNET, the reversal of Hearing Examiner Minturn's Order forfeiting the defendant property, and an Order directing the immediate return of the vehicle to Angela.

Angela further seeks attorney fees as authorized by RCW 69.50.505 and RAP 18.

RESPECTFULLY SUBMITTED this December 6, 2010.

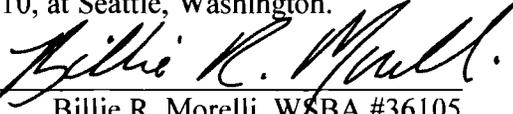


Billie R. Morelli, WSBA #36105
Attorney for Claimant/Appellant Angela Finley

CERTIFICATE OF SERVICE

I, BILLIE R MORELLI, certify under penalty of perjury under the laws of the State of Washington, that on December 6, 2010, I caused a copy of this APPELLANT'S' BRIEF IN STRICT REPLY to be delivered to the Pierce County Sheriff's Office, attention Craig Adams, by way of legal messenger.

DATED This December 6, 2010, at Seattle, Washington.



Billie R. Morelli, WSBA #36105