

NO. 40514-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

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DIVISION II
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STATE OF WASHINGTON
BY 
DEPUTY

DEA/TAHOMA NARCOTICS ENFORCEMENT TEAM
PLAINTIFF/RESPONDENT

v.

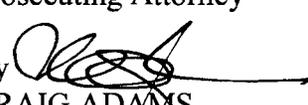
ONE (1) 2001 BMW X5,
DEFENDANT IN REM, and
ANGELA FINLEY,
CLAIMANT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda Lee

No. 09-2-10188-0

RESPONDENT'S BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

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.

E. There is authority to allow a waiver of important constitutional rights by individuals.

F. The claimant has waived the right to raise any claim relative to any issue of the Eighth Amendment excessive fines argument.

B. STATEMENT OF THE CASE

1. Procedure

This is an appeal of the decision of the Pierce County Superior Court holding an administrative review pursuant to RCW 34.05.570(3) (CP 37-40). The hearing resulted from the decision of the Hearing

Examiner under RCW 69.50.505 (AR 1). The Findings of Fact and Conclusions of Law show that a hearing before the Hearing Examiner was held on May 12, 2009 (AR 1, CP 37-40). At the hearing it was established that Angela Finley had executed a signed Waiver of Hearing and Consent to Forfeiture of the 2001 BMW X5 automobile which is the subject matter hereof (CP 37-40). The Hearing Examiner ordered the forfeiture of that vehicle pursuant to the Waiver and Consent which had been executed by Angela Finley (AR 5, Exhibit 1, CP 37-40). The Court held a hearing January 29, 2010, and entered Findings of Fact and Conclusions of Law on February 24, 2010 (CP 37-40). Appeal was filed March 30, 2010 (CP 41-46). This appeal is from the decision of the Superior Court, the Hon. Linda Lee (CP 37-40).

2. Facts

The seizure took place on November 8, 2006 (AR 5, Exhibit 1).

Mr. Kenneth Cage trafficked cocaine and ecstasy and was indicted. He had no source of legitimate income (AR 2, Notes of Hearing Examiner).

The claimant, Angela Finley, was the girlfriend of Kenneth Cage (AR 2, Notes of Hearing Examiner).

The claimant, Angela Finley, was contacted by Officers Verdow and Pavey [sic] (later corrected in Findings of Fact to Taibi) (AR 2, Notes of Hearing Examiner).

Officer Verdow indicated that the presentation of the Waiver of Hearing and Consent to Forfeiture is always done that way (AR 2, Notes of Hearing Examiner).

There was extensive testimony from both Angela Finley and Kathleen Schwartz (her mother) that Officer Verdow came to the home of Angela Finley in Olympia (AR 2, Notes of Hearing Examiner). However, Officer Verdow testified that he had never been at her house in Olympia (AR 2, Notes of Hearing Examiner).

It was the testimony of Angela Finley that she only put one-half of the funds into the purchase of the car (AR 2, Notes of Hearing Examiner). It was the testimony of the Officer that she stayed at home and had no income and had indicated that the vehicle was purchased by Mr. Cage (AR 2, Notes of Hearing Examiner).

The Waiver of Hearing and Consent to Forfeiture signed by Angela Finley (AR 5, Exhibit 1) contains the following rights:

1. I am aware that I have the right to have the law enforcement/police agency formally file a forfeiture action and proceed to hearing.
2. I have the right to be provided notice of this action.
3. I have the right to file a claim and contest the taking of this property.
4. I have the right to have a hearing before the chief law enforcement officer or their designee.
5. I understand that the law enforcement/police official would have to prove that the property which was seized

was either used to facilitate a drug transaction, was equipment used to assist drug distribution or manufacture or was the proceeds of a drug transaction.

6. In addition, the Waiver document specifically waived all rights under RCW 69.50.505.

The Waiver of Hearing and Consent to Forfeiture was signed by Angela Finley and countersigned by two witnesses, both of whom testified (AR 2, Notes of Hearing Examiner, AR 5, Exhibit 1).

C. **ARGUMENT**

STANDARD OF REVIEW:

In the Superior Court, Judge Lee found that the decision of the Hearing Examiner was supported by substantial evidence from the record and that the Waiver of Hearing and Consent to Forfeiture had been voluntarily executed (CP 37-40).

In such matters the court provides great deference to the decision of the Hearing Examiner, *see In re Eugster*, 166 Wn.2d 293, 209 P.3d 435 (2009). Courts will not overturn factual issues without substantial evidence and will defer to the Hearing Examiner on issues of determination of credibility. *In re Huddleston*, 137 Wn.2d 560, 974 P.2d 325 (1999); *Sylvester v. Pierce County*, 148 Wn.App. 813, 201 P.3d 381 (2009). The determination of credibility in this case is critical.

On review our courts will not substitute its judgment on witnesses credibility or the weight to be given conflicting evidence. *Western Ports Transportation, Inc. v. Employment Security Dept. of the State of*

Washington, 110 Wn.App. 440, 41 P.3d 510 (2002). The Notes of the Hearing Examiner (AR 2) indicate that both Angela Finley and her mother clearly indicate that Officer Verdow was personally at the home of Angela Finley in Thurston County (AR 2, Notes of Hearing Examiner). But, when asked about that, Officer Verdow indicated that he had never been to her home (AR 2, Notes of Hearing Examiner). In short, there was no credibility to the testimony of Angela Finley. This same credibility then carried over into other items of testimony from Ms. Finley. In short, her testimony was not credible. Given that the Hearing Examiner did not believe her, the reviewing Court must defer to the Hearing Examiner in making his factual findings.

In this same regard is an often quoted drug seizure case, *Escamilla v. Tri-City Metro Drug Task Force*, 100 Wn.App. 742, 999 P.2d 625 (2000), abrogated on other grounds; *In re the Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 215 P.3d 166 (2009), abrogated on issue of knowledge only, not as to standard of review). In that case, the Court sets both the standard of review and the deference to be paid to the findings of fact of the Hearing Examiner, see page 752:

The hearing officer simply chose to disbelieve her testimony. Credibility is for the fact finder and is not subject to review. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990). We conclude the evidence is sufficient to support the findings.

This is exactly what is present in the instant case. The Hearing Examiner simply chose to disbelieve the testimony of Angela Finley. As such, that finding of credibility is for the trier of fact and is not subject to review.

This is an appeal of a review held under RCW 34.05.570(3). The scope of this review is limited. On appeal from the decision of an administrative agency, an appellate court views the evidence and its reasonable inferences in the light most favorable to the prevailing party in the highest forum that exercised fact finding authority. *Orca Logistics v. State Department of Labor and Industries*, 152 Wn.App. 401, 216 P.3d 451 (2009).

There are two differing standards which may come into use: clearly erroneous and substantial evidence.

In this regard the Court, in *Escamilla, supra*, found that the proper standard of review is the clearly erroneous standard, see page 752:

The question is whether the findings here were clearly erroneous. *Clarke*, 106 Wash.2d at 109-10, 720 P.2d 793.

This then shows that the Court must give great deference to the findings entered by the Hearing Examiner in this case. Using this standard the appellate Court is not allowed to reverse the underlying determination unless the Court has been left with the definite and firm conviction, on the record as a whole, that a mistake has been committed. *Kettle Range Conservation Group v. Washington State Department of Natural*

Resources, 120 Wn.App. 434, 85 P.3d 894, amended on reconsideration, rev. den. 152 Wn.2d 1026, 101 P.3d 421 (2003). It is clear that Hearing Examiner chose not to believe the allegations of the claimant. That finding, although not specifically made, is clear from the Hearing Examiner not adopting any of the argument made by claimant.

A. *Washington law favors settlement and there was no error in enforcing the agreed upon Waiver of Hearing and Consent to Forfeiture.*

This is a routine matter of settlement and agreement (confession of judgment). There is ample law to govern the execution of documents as in the case at bar. First, our Courts have held that the compromise of litigation is to be encouraged. *Eddleman v. McGhan*, 45 Wn.2d 430, 275 P.2d 729 (1954). *See also Lavigne v. Green*, 106 Wn.App. 12, 23 P.3d 515 (2001) (oral agreement to settle); and *Rosen v. Ascentry Technologies, Inc.*, 143 Wn.App. 364, 177 P.3d 765 (2008) at page 372:

It is true that Washington courts favor amicable settlement of disputes and are inclined to view settlements with finality. *Snyder v. Tompkins*, 20 Wash.App. 167, 173, 579 P.2d 994 (1978). And the Washington Supreme Court has recognized that CR 2A and RCW 2.44.010 "give certainty and finality to settlements and compromises" *Eddleman v. McGhan*, 45 Wash.2d 430, 432, 275 P.2d 729 (1954).

To the same effect *see Stottlemyre v. Reed*, 35 Wn.App. 169, 665 P.2d 1383 (1983), rev. den. 100 Wn.2d 1015. (1983).

This rule has long been the case in Washington and is the law even when there is only oral assent. *See In re Marriage of Ferree*, 71 Wn.App. 35, 856 P.2d 706 (1993) (oral, unrecorded settlement agreement not even made on the record before a court is still enforceable). In the instant case the only "disagreement" with the agreement is one of "buyer's remorse" and not as to any condition of the agreement.

Our courts have also adopted CR 2A which sets forth a method by which settlements, in pending court actions, are accomplished. That process involves the parties reducing a matter to writing and signing it. That is exactly the same process by which the agreement in this case was handled.

B. Under Washington law, there is statutory authority to allow settlement by way of Waiver of Hearing and Consent to Forfeiture.

In addition to the established case law, the State of Washington also recognizes the doctrine of confession of judgment. *See RCW 4.60, et seq.* That statute authorizes a case to be settled before or after an answer is due and even to be done without a suit. RCW 4.60.050. Therefore, under Washington law, a case may be settled and judgment or final resolution entered without a lawsuit ever having been commenced. This is no different than the case at bar. In the case involving this asset Ms. Finley chose to settle her case at the outset. It is a tactical choice as part of any contested matter. It is an instance of confession of judgment.

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.*

In the early to mid 1990's there was a movement among criminal defense attorneys to have the courts find that civil seizure was "punishment". And, therefore a civil seizure action, if done to completion, would preclude a criminal prosecution by virtue of the concept of double jeopardy. Ultimately this movement died when the United States Supreme Court held that civil seizure was remedial in nature and not punitive and hence there would be no jeopardy which would attach. *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2136, 135 L.Ed.2d 549 (1996).

Before the United States Supreme Court entered its opinion on this it was not uncommon that criminal defense attorneys would seek to "stipulate" or enter into a confession of judgment to a civil seizure in an attempt to preclude criminal prosecution. In some instances this ploy worked. *See United States v. Messino*, 876 F. Supp. 980 (1995) at page 981-982:

Defendants were thus alerted to the reality that, without some further development in the civil proceeding, this court would not view any jeopardy as having attached. Christopher Richard Messino and Clement Messino tried to force such a further development in the civil proceeding by moving for "confession of judgment" before the civil forfeiture court. *See United States v. 167 Woodland Rd.*, Civ. A. No. 94-10851-RWZ, 1994 WL 707129 (D.Mass. Dec. 2, 1994) (where the strategy, or at least the civil forfeiture phase of the strategy, worked).

As a consequence of this ploy, the courts have addressed the issue of "confession of judgment" in the seizure context several times. *See*, for example, *State of Idaho v. McGough*, 129 Idaho 371, 924 P.2d 633 (1996), in which defense counsel acted using exactly this tactic. That is, counsel consented to judgment in the civil forfeiture context in an attempt to preclude criminal prosecution. However, the court found that the confession of judgment was valid and gave it full force and effect. To the same effect is *People v. Coolidge*, 953 P.2d 949 (Colo. App. 1997) (confession of judgment in civil forfeiture proceeding given full force and effect); and *United States v. Messino, supra*, (confession of judgment given effect). So, what has happened is that when defendants have made an agreement to forfeit their assets, the courts have upheld that agreement and not allowed the defendant to renege. There should be no qualitative difference in the instant case.

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.

Although there is little law in this state on this direct issue, there is ample law from the federal courts. Our courts have held that the state drug forfeiture law is modeled on its federal counterpart and reflects substantially the same wording. *Robertson v. Washington State Liquor Control Board*, 102 Wn.App. 848, 10 P.3d 1079 (2000), rev. den. 143 Wn.2d 1009 (2001). And, as a consequence, our courts in Washington

rely on federal cases in interpreting the state statute. *City of Bellevue v. Cashiers Check for \$51,000 and \$1,130 in US Currency*, 70 Wn.App. 697, 85 P.2d 330 (1993) rev. den. 123 Wn.2d 1008 (1994).

There are several cases bearing on this issue. *See United States v. Grover*, 119 F.3d 850 (1997-10th Cir.). In that case, Mr. Grover was indicted and entered into a forfeiture agreement with the government. No formal civil forfeiture action was ever commenced. Mr. Grover sought to set aside his agreement to forfeit the assets claiming that the statute of limitations had run. Mr. Grover then sought to avoid the agreement into which he had entered. The court found that Mr. Grover could not avoid the consequences of his agreement and was not coming forth with "clean hands". The court said that equitable principles controlled this matter and Mr. Grover could not seek to obviate his agreement.

This is likewise true of the agreement entered into by Ms. Finley. She agreed to waive all rights she had under RCW 69.50.505. But, after she had agreed to this, she then came forth and attempted to contest the matter (AR, Number 7). In matters of seizure, law enforcement is held to specifically defined time parameters in which seizure must be accomplished. Under RCW 69.50.505(1)(d), a conveyance must be seized within ten days of an arrest or in any event, not later than fifteen days. *See* RCW 69.50.505(3). So, what Ms. Finley can do is consent to forfeiture (as she did) and then come back more than fifteen days later and claim that there was no compliance with the statutory time parameters. She then gets

to argue that the government has not complied with the statute and therefore the seizure must be dismissed. This then becomes a classic case of "heads I win, tails you lose". This serves to reward the claimant for signing the Waiver and then subsequently renegeing on her agreement. In so doing, the claimant does not come before the court with "clean hands". And, what this also says is that no person could ever enter into any agreement consenting to forfeiture until there had been a hearing. This is clearly not the law.

In addition, the Court has had other instances where "consent decrees" and other agreements were reached. In virtually each case, the Court found that the agreement would stand and the person who had agreed would not be able to avoid the consequences of their agreement.

See United States v. Bank of New York, 14 F.3d 756 (1993) see page 759:

When a party makes a deliberate, strategic choice to settle, she cannot be relieved of such a choice merely because her assessment of the consequences was incorrect. *See In re Master Key*, 76 F.R.D. at 464 (citing *Ackermann*, 340 U.S. at 198, 71 S.Ct. at 211); *see also Janneh v. GAF Corp.*, 887 F.2d 432, 436 (2d Cir.1989) (holding that a settlement agreement is a binding contract), *cert. denied*, 498 U.S. 865, 111 S.Ct. 177, 112 L.Ed.2d 141 (1990). In the instant case, Wu made a conscious and informed choice of litigation strategy and cannot in hindsight seek extraordinary relief. *See Ackermann*, 340 U.S. at 198, 71 S.Ct. at 211 (ruling that strategic decisions made during course of litigation, that upon reconsideration appear to be erroneous, do not provide basis for relief under Rule 60(b)). To hold otherwise would undermine the finality of judgments in the litigation process.

The courts have held that such a choice applies equally to pro se defendant/claimants as well as those who are represented. *See Garibaldi v. Anixter*, 533 F.Supp.2d 308 (2008) (citing *Bank of New York* case).

In this same regard is a case which followed the *Bank of New York* case, *supra*. That case is *United States v. De La Mata*, 535 F.3d 1267 (2008). In that case there was an agreement made between the parties for forfeiture of assets. The government did not follow its procedures, either substantive or procedural, and the claimant's attempted to renege on their agreement. Ultimately, at page 1278 the court held:

The defendants do not dispute that they entered into these agreements freely and voluntarily, as they represented to the court when it questioned them on January 4, 1993, nor have they argued that the law somehow precluded the Government and a criminal defendant from providing for forfeiture by contract in advance of the trial on forfeiture. [Footnote omitted.] In the absence of any argument from the defendants on this point, we see no error in the Government reaching this, albeit somewhat unconventional, arrangement with the defendants. *See United States v. Bank of New York*, 14 F.3d 756, 758 (2d Cir.1994) (noting that defendant had settled civil forfeiture suit by executing consent decree); *United States v. White*, No. 01-173-JJB, 2008 WL 780667, at 1-2 (M.D.La. Mar. 19, 2008) (holding that defendant lacked standing to enjoin Government from seizing property he forfeited pursuant to a consent judgment, entered in lieu of normal criminal forfeiture proceedings); *cf. United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir.1999) ("A plea agreement is, in essence, a contract between the Government and a criminal defendant"). Absent a legal impediment to the settlement of forfeiture issues in the manner in which the settlements occurred in this case, we have no reason to vacate the district court's "final order of forfeiture." We therefore

affirm the court's final order of forfeiture as it applies to the defendants.

In its opinion, the court noted that had the defendant/claimant's promises been self-executing there would have been no reason for the government to have even brought the matter (see footnote 44, page 1278). In this case the claimant's promise was self-executing and there was therefore no reason for the Sheriff or law enforcement to have brought the matter forward.

Essentially the courts have found that when a person, whether pro se or represented, makes an agreement to forfeit assets that it is in the nature of a settlement agreement, the courts will be loathe to overturn such settlements. Such settlements are seen as strategic choices, and the courts will enforce those choices.

In the *Bank of New York* case *supra*, at page 760, the court said:

In the case at bar, the government and Wu made free, bilateral decisions to settle. Each bore the risks of litigation equally. A failure to properly estimate the loss or gain from entering a settlement agreement is not an extraordinary circumstance that justifies relief under Rule 60(b)(6). *See In re Master Key*, 76 F.R.D. at 463-65 (citing *Ackermann*, 340 U.S. at 199-202, 71 S.Ct. at 212-14).

This is no different than the choice made by Ms. Finley in the instant case. She elected to waive her rights and consent to the forfeiture. She signed away those rights after having been fully advised of them. Her

claim that she was not fully advised is a matter of credibility that was before the Hearing Examiner. She cannot now seek some action to "re-open" or void that agreement.

There is little state law on setting aside agreements on forfeiture; but, *see Romero v. Texas*, 927 SW 2d 632 (1996) (settlement agreement reached in civil forfeiture action, attempt to set aside denied, court denied claimant the ability to reassert a defense she had given up by entering into settlement).

In addition, there is *Blakely v. United States*, 276 F.3d 853 (6th Cir. 2002) which provides that the court finds that a consent judgment (agreement) freely executed by the parties and which had been approved by the court had the full effect of a final judgment. In our case we have a fully executed Agreement, signed by Ms. Finley. In that case the court denied a request to reopen or set aside the consent agreement.

Our courts have even held that the choice to agree to a civil seizure is not obviated by a subsequent reversal of a criminal conviction, *see Schwartz v. United States*, 976 F.2d 213 (1992) where the court found at page 217:

We will not entertain the suggestion that the order entered to enforce the consequences of this choice [settlement of civil action] violates due process [citation omitted].

The court found, in *Schwartz, supra*, that by his settlement with the government that he had made a conscious choice to forego procedures

afforded to protect his right to due process. These are exactly the same procedures that are listed on the Waiver of Consent, in detail, and which are specifically waived. Just as Mr. Schwartz had the right to try the case and question the ownership of his stock so did Ms. Finley have those same rights to have her case heard and tried. But, she gave up those rights and cannot now claim that there was any violation of due process.

So, even when a claimant/defendant argues that their choice to settle violates due process, the court does not set it aside.

Likewise in *United States v. Gonzalez*, 76 F.3d 1339 (1996) a settlement agreement was used against the government. And, in *United States v. \$660,220.00*, 423 F.Supp.2d 14 (2006), the court found that an oral settlement agreement made by the government; but, which had not yet been signed was fully enforceable and would be enforced. In that opinion, the court entered into a discussion of the "Winston test" and applied five factors of examination of the agreement. In making that assessment, the court found at page 26:

The *Winston* test is not an after-the-fact professed, subjective intent, but rather the parties' objective intent as "manifested by their expressed words and deeds at the time." *Hostcentric Tech., Inc. v. Republic Thunderbolt, LLC*, No. 04-Civ-1621, 2005 WL 1377853, at *6 (S.D.N.Y. June 9, 2005) (citing *Grupo Sistemas Integrales de Telecomunicacion S.A. de C.V. v. AT & T Commc'n, Inc.*, No. 92-Civ-7862, 1994 WL 463014, at *3 (S.D.N.Y. Aug.24, 1994) (internal quotations omitted)). The court must carefully weigh the four factors, first, to ascertain whether the parties intended to be bound and, second, to

ward off a party's attempt to rewrite the history of a case or manipulate the opposing party. "[T]he Court must be careful to guard against the possibility that parties will seek to manipulate settlements to gain strategic advantage, settling and 'unsettling litigation to suit their immediate purposes." *Media Group, Inc. v. HSN Direct Int'l, Ltd.*, 202 F.R.D. 110, 112 (S.D.N.Y.2001).

The court went on to set out the factors for consideration by the court, page 26:

The first *Winston* prong is whether "either party communicate[d] an intent not to be bound until he achieve[d] a fully executed document." *Winston*, 777 F.2d at 80. Such communication must be an "express reservation of the right not to be bound in the absence of a writing." *Id.* The second prong is "whether there has been partial performance of the contract." *Id.* The third prong is "whether all the terms of the alleged contract have been agreed upon." *Id.* Lastly, the fourth prong is "whether the agreement at issue is the type of contract that is usually committed to writing." *Id.* "No single factor is decisive, but each provides significant guidance." *Ciaramella v. Reader's Digest Ass'n, Inc.*, 131 F.3d 320, 323 (2d Cir.1997).

First, the court looked to see if there was an express reservation not to be bound by the agreement unless finalized in writing. In our case, the Agreement provides no such reservation.

Second, the court looked to partial performance. In our case there was not only partial performance, there was complete performance.

Third, were all the terms of the "alleged contract" agreed upon? Yes, all relevant terms were completed and there was nothing else to be determined.

Fourth, is this agreement of the type usually committed to writing? Such agreements are typically reduced to writing and there was testimony that these forms are used in virtually every case.

Fifth, what does fundamental fairness dictate? Here, the findings of the Hearing Examiner should be given great deference as should the case law which indicates that such "confessions of judgment" are tactical in nature and should be given effect. And, the Court must be aware of the "heads I win, tails you lose" effect of the action of Ms. Finley. That is, should she be allowed to consent to forfeiture and then come in after the period of time has run for the government to seize the vehicle and claim that the seizure cannot now be done? Fundamental fairness dictates that the vehicle should be forfeited.

E. There is authority to allow a waiver of important constitutional rights by individuals.

The claimant purports to say that the Waiver of Hearing and Consent to Forfeiture is unenforceable, on its face, because it violates a potential claimant's right to due process.

However, this argument fails to recognize that many important constitutional rights may be waived. For example, a suspect in a criminal investigation may waive his or her rights under the 5th and 6th Amendments to the United States Constitution, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

A waiver of the "Miranda" rights must be rational and made of free will, *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984). And, they must voluntarily waived, *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987). In making an analysis of such a waiver our courts have held that an express written statement is usually strong proof of the validity of that waiver, *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). In our case we have a written document signed by the claimant and witnessed by two officers (AR 5, Exhibit 1).

In addition, individuals are free from unreasonable search and seizure. However, an individual may consent to a search, *see State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). Warrantless searches are *per se* unreasonable; however, consent is a valid exception, *State v. Walker*, 136 Wn.2d 678, 965 P.2d 1079 (1998). The state must show that the person voluntarily gave consent, that the person granting consent had authority to do so and that the search did not exceed the scope of the consent, *State v. Walker, supra*. Voluntariness is dependent upon the totality of the circumstances, *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004).

Our courts have held that the use of a written and signed form carries with it the advantage of creating evidence that avoids the ambiguity of whether consent was actually given, *State v. Ferrier, supra*.

The argument of the appellant is that nowhere in the document does it detail that she has 45 days in which to file a claim. However, when

police give a warning under *Miranda v. Arizona, supra*, the police do not include that the suspect has a right to a speedy trial or to seek suppression under CrR 3.5. And, when police give a person the choice to consent to a search, they do not advise that person that they have a right to seek suppression under CrR 3.6. Rather, in each case, the police give the significant substantive rights which allow that person the right to make an informed choice. That is exactly what occurred in the underlying case. That is, the Waiver of Hearing and Consent to Forfeiture (AR 5, Exhibit 1) provided notice of all major substantive rights under RCW 69.50.505. Having those rights clearly delineated in a written document the appellant chose to voluntarily relinquish them just as if she had waived her rights to be free of a custodial interrogation under *Miranda v. Arizona, supra*, or had consented to a search under *State v. Ferrier, supra*.

The hearing in this matter centered, from the perspective of the Sheriff, around the issues inherent in any matter involving consent or waiver. The Superior Court ultimately found there to be sufficient evidence to make that finding (CP 37-40).

F. The claimant has waived the right to raise any claim relative to any issue of the Eighth Amendment excessive fines argument.

In Appellant's Brief, Appellant raises Issue E, which is framed as a Constitutional issue. However, Appellant failed to raise this issue before either the Hearing Examiner or the Superior Court below (see RP). Issues not raised below will not be considered for the first time on appeal, *see*

RAP 2.5(a)(3), *State v. Holzknecht*, 238 P.3d 1233 (September 13, 2010);
Brower v. Ackerley, 88 Wn.App. 87, 943 P.2d 1141 (1997).

For the Court to consider an argument made under the analysis set forth at *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), the Court would have to make specific findings of fact and engage in an evidentiary analysis. That analysis, since not made below at any stage, may not be made anew by this Court.

D. CONCLUSION

The Court must deny this appeal. There is ample evidence from the Hearing Examiner to sustain the finding that the claimant, Angela Finley, voluntarily executed a written Waiver of Hearing and Consent to Forfeiture of this asset. The Waiver of Hearing and Consent to Forfeiture is allowed by law and justified by the facts of this case.

DATED: November 5, 2010.

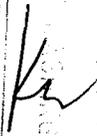
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing RESPONDENT'S BRIEF was delivered this 5th day of November, 2010, to the United States Postal Service, postage prepaid, with appropriate instruction to forward the same to the following:



COURT OF APPEALS
MICHIGAN II
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STATE OF MICHIGAN
BY  DEPUTY