

NO. 40921-6-II

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

STATE OF WASHINGTON, RESPONDENT

v.

LEROY R. BRANDT, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 08-1-02151-5

Response Brief

MARK LINDQUIST
Prosecuting Attorney

By
Stephen Trinen
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Did the trial court properly deny defendant's motion for return of property because the defendant, as part of a plea agreement, agreed to forfeit his property absent proof of legal title and failed to offer proof of legal title?..... 1

 2. Is defendant's claim moot where the court cannot provide a remedy because defendant voluntarily forfeited under another cause number the property he moved the court to return under this cause number? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts..... 3

C. ARGUMENT..... 4

 1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CrR 2.3(e) MOTION BECAUSE DEFENDANT VOLUNTARILY FORFEITED ALL PROPERTY ABSENT PROOF OF LEGAL OWNERSHIP 4

 2. DEFENDANT'S ASSIGNMENT OF ERROR IS MOOT BECAUSE THE COURT CANNOT PROVIDE A REMEDY 8

D. CONCLUSION..... 9-10

Table of Authorities

State Cases

<i>State v. Alaway</i> , 64 Wn. App. 796, 798, 828 P.2d 591 (1992).....	5, 8
<i>State v. Asaeli</i> , 150 Wn. App. 543, 573, 208 P.3d 1136 (2009).....	6
<i>State v. Calhoun</i> , 163 Wn. App. 153, 168, 257 P.3d 693 (2011)	9
<i>State v. Card</i> , 48 Wn. App. 781, 784–86, 741 P.2d 65 (1987).....	4, 5, 8
<i>State v. Davison</i> , 116 Wn.2d 917, 919, 809 P.2d (2004)	6
<i>State v. Iniguez</i> , 167 Wn.2d 273, 280, 217 P.3d 768 (2009)	6
<i>State v. Marks</i> , 114 Wn.2d 724, 735, 790 P.2d 138 (1990)	5
<i>State v. Wade</i> , 138 Wn.2d 469, 464, 979 P.3d 850 (1999)	6
<i>State v. Zhao</i> , 157 Wn.2d 188, 197, 137 P.3d 835 (2006)	6

Rules and Regulations

CrR 2.3(e)	4, 5
------------------	------

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's motion for return of property because the defendant, as part of a plea agreement, agreed to forfeit his property absent proof of legal title and failed to offer proof of legal title?
2. Is defendant's claim moot where the court cannot provide a remedy because defendant voluntarily forfeited under another cause number the property he moved the court to return under this cause number?

B. STATEMENT OF THE CASE.

1. Procedure

On May 5, 2008, the Pierce County Prosecuting Attorney's Office (State) charged Leroy Raymond Brandt, Jr. (defendant) with trafficking in stolen property in the first degree, possession of stolen property in the first degree, obstructing a law enforcement officer, and unlawful possession of a stolen vehicle. CP 104-05. The State later amended the information to include two counts of bail jumping. CP 106-08.

On November 26, 2008, a jury found defendant guilty of all charges. CP 111–17. After the jury’s finding of guilt, defendant entered a plea of guilty on two separate pending cause numbers, 08-1-05887-7 (unlawful possession of stolen vehicle), and 08-1-01076-9 (unlawful possession of stolen vehicle and unlawful possession of a controlled substance). 1/2/2009 RP 9;¹ CP 120–28 (plea of guilty, CA# 08-1-05887-7); CP 144–52 (plea of guilty, CA# 08-1-01076-9). The plea form under cause number 08-1-05887-7 stipulates that the plea was a combined agreement. CP 123 (plea of guilty, CA# 08-1-05887-7, page 4, paragraph (g)).

As part of defendant’s plea to cause numbers 08-1-05887-7 and 08-1-01076-9, defendant agreed to forfeit all property seized by law enforcement that he could not provide legal documentation as to his ownership. CP 123 (plea of guilty, CA# 08-1-05887-7, paragraph (g)); CP 147 (plea of guilty, CA# 08-1-05887-7, paragraph (g)). This included forfeiting the property seized under the cause number currently on appeal. *See* CP 123 (plea of guilty, CA# 08-1-05887-7, paragraph (g)); CP 147 (plea of guilty, CA# 08-1-05887-7, paragraph (g)). The defendant’s judgment and sentence for 08-1-02151-5 also specifies this forfeiture. CP 7 (section 4.4).

¹ The hearing includes the plea hearing for both cause numbers 08-1-05887-7, 08-1-01076-9, and the sentencing for all three cause numbers.

On January 2, 2009, the Honorable Vicki L. Hogan simultaneously sentenced defendant for both his pleas of guilty and his convictions in the present case. 2/9/2009 RP 22. The court sentenced defendant to 84 months in custody. CP 8; 2/9/2009 RP 21.

On June 18, 2010, defendant moved the court under CrR 2.3(e) to return seized property that had not yet been claimed. RP 3. However, the court denied the motion because, pursuant to defendant's plea agreement, defendant did not provide legal documentation of ownership for any of the property. RP 5-6. The court stated that it would grant any motion to return property so long as defendant first provided documentation of legal title. RP 5.

This appeal timely followed on July 2, 2010. CP 118.

2. Facts²

On May 2, 2008, Pierce County Sheriff's Department Deputy Carolus responded to a report of stolen property that had been subsequently located by the victim. CP 109. The victim was an owner of EM Precision, a construction company, and had been informed by a subcontractor that defendant was selling nail guns, power tools, and a

² Because defendant assigns error only to a procedural error by the court during his 2.3(e) motion, the transcript of defendant's trial was not submitted to the court. Accordingly, the State has relied on the affidavit of determination for probable cause to provide a brief factual background. CP 109-10.

utility trailer that had belonged to the company. CP 109. The subcontractor showed Deputy Carolus where the property was located at defendant's property. CP 109.

The deputy questioned defendant about the stolen goods and placed him under arrest. CP 109. Defendant then fled from deputies on foot after escaping from a patrol car where he had been detained. CP 109. Officers later apprehended defendant while investigating another report of stolen property. CP 110.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CrR 2.3(e) MOTION BECAUSE DEFENDANT VOLUNTARILY FORFEITED ALL PROPERTY ABSENT PROOF OF LEGAL OWNERSHIP.

“A person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. If the motion is granted the property shall be returned. . . .” CrR 2.3(e). Although the language of CrR 2.3(e) refers only to unlawfully seized materials, the court applies the same test when the property is seized lawfully pursuant to a warrant. *State v. Card*, 48 Wn. App. 781, 784–86, 741 P.2d 65 (1987). A motion for return of property may be made

even after a determination of guilt. *Id.* at 786.

A CrR 2.3(e) motion requires a hearing where the State and the defendant can offer evidence of their claimed right to possession. *State v. Marks*, 114 Wn.2d 724, 735, 790 P.2d 138 (1990). The State has the initial burden of proof to show its right of possession. *Card*, 48 Wn. App. at 790 (holding that the State must prove by a preponderance of the evidence that the property is stolen). If the State satisfies its preliminary showing, then the defendant “must come forward with sufficient facts to convince the court of his right to possession. *If such a showing is not made, it is the court’s duty to deny the motion.*” *Id.* (emphasis added).

When property is no longer needed as evidence, a court may nonetheless refuse to return it if (1) *the defendant is not the rightful owner*, (2) the property is contraband, or (3) the property is subject to forfeiture pursuant to a statute. *State v. Alaway*, 64 Wn. App. 796, 798, 828 P.2d 591 (1992).

In *Card*, the State failed to make its initial showing where the State only offered evidence pertaining to the circumstances under which the stolen property was seized. *Card*, 48 Wn. App. at 791. The defendants in *Card* ran a legitimate second-hand business from where the stolen property was seized, and thus the court held that the State still had to make a substantial showing that the property seized was stolen. *Id.*

While no published authority could be found that articulated the standard of review of a motion for return of property, presumably the

court's factual determinations are reviewed for legal sufficiency of the evidence, and the decision on the return of property is reviewed for abuse of discretion. *See, e.g., State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (holding that a trial court's decision to deny a motion for a continuance for abuse of discretion); *State v. Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) (reviewing whether the trial court properly denied a defense motion to withdraw guilty plea for abuse of discretion); *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d (2004) (holding that a trial court's discretion as to whether sufficient facts justify the imposition of restitution is reviewed for abuse of discretion).

When abuse of discretion is the standard of review, the burden is on the appellant to prove the abuse of discretion. *See State v. Wade*, 138 Wn.2d 469, 464, 979 P.3d 850 (1999); *see also State v. Asaeli*, 150 Wn. App. 543, 573, 208 P.3d 1136 (2009). The trial court abuses its discretion when its rulings are manifestly unreasonable or based on untenable grounds. *Asaeli*, 150 Wn. App. at 573.

In this case, after the jury convicted defendant of his charges, defendant pleaded guilty to two other sets of charges that were still pending trial. RP 3–4. The court simultaneously accepted defendant's plea agreements and sentenced defendant for all three cause numbers. 2/9/2009 RP 22.

As part of a plea agreement, defendant waived his right to have the State make a preliminary showing of its ownership. Defendant's plea

agreement under cause number 08-1-05887-7 states: “As part of this agreement, the defendant agrees to following on 08-1-02151-5: . . . forfeit all property seized by law enforcement that defendant cannot provide legal documentation as to ownership.” CP 123 (paragraph (g)). The same agreement is found on the plea agreement for cause number 08-1-01076-9. CP 147 (paragraph (g)). Defendant’s waiver is also recorded on his judgment and sentence. CP 7 (section 4.4) (“forfeit any property seized by law enforcement that defendant cannot provide lawful title to”).

Each of the plea agreements and defendant’s judgment and sentence demonstrate that defendant knowingly and voluntarily waived his right to have the State make a preliminary showing of ownership. Thus, the trial court properly refused to return any property that defendant could not prove ownership for. RP 5.

Because defendant accepted the burden of showing his right to the property, when he failed to offer any evidence of legal title, the trial court properly concluded:

Without some acquisition of ownership, the Court is not in a position to do anything other than confirm what is listed in the property release. I think this is consistent with what I ordered when we talked about this initially at the Judgment and Sentence and that was he would be entitled to those items that were his in which he could prove ownership.

RP 5. In its order, the trial court also referenced the forfeiture as indicated on defendant’s judgment and sentence. RP 5–6; CP 7 (section 4.4).

Moreover, under *Alaway*, the court may properly refuse to return seized property if the defendant is not the rightful owner. 62 Wn. App. at 798. Because defendant waived his right to the State's preliminary showing of ownership as part of a plea agreement and failed to prove ownership, the trial court properly refused to return the property.

The defendant has not satisfied his burden on appeal to show that the trial court's denial of his motion was manifestly unreasonable. Although defendant might argue that the court's ruling in *Card* controls in this case, those facts are significantly different. Unlike the defendants in *Card*, the defendant in this case voluntarily waived his right to have the State make its preliminary showing pursuant to a plea agreement. Defendant thus relieved the State of providing a substantial showing at the hearing that the property was stolen. Accordingly, the trial court properly denied defendant's motion for return of property absent some showing of legal title.

2. DEFENDANT'S ASSIGNMENT OF ERROR IS MOOT BECAUSE THE COURT CANNOT PROVIDE A REMEDY.

Even if the court were to hold that the waiver does not apply to this cause number, defendant is not entitled to relief. That is because the same order occurred on all three judgment and sentences. *See* CP 134 (CA# 08-1-05887-7, Section 4.4); CP 159 (CA# 08-1-01076-9, Section 4.4). Even if the court were to hold the forfeiture invalid under this cause number,

defendant would still need to bring repeat actions under each of the other cause numbers before he is entitled to relief. An assignment of error is moot if the court cannot provide a remedy to the appellant. *State v. Calhoun*, 163 Wn. App. 153, 168, 257 P.3d 693 (2011).

Even if the trial court erred in this case when it denied defendant's motion for return of property, the court's order on the two other cases still remains in effect and prohibits the return of defendant's property. Accordingly, this Court cannot provide the relief sought by defendant.

D. CONCLUSION.

The trial court properly exercised its discretion when it denied defendant's motion to return property. Defendant voluntarily waived his right to have the State make its preliminary showing of ownership as part of a plea agreement. Without proof of ownership, the trial court correctly followed the agreement as recorded in defendant's judgment and sentence. Furthermore, defendant's assignment of error is moot because the property he moved the court to return is still forfeited under two separate cause

numbers. The State respectfully requests this Court to affirm the trial court's denial of defendant's motion to return property or dismiss the claim for mootness.

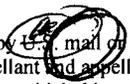
DATED: January 17, 2012.

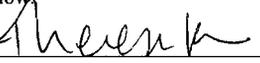
MARK LINDQUIST
Pierce County
Prosecuting Attorney



STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~  ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/17/12 
Date Signature

PIERCE COUNTY PROSECUTOR

January 17, 2012 - 12:50 PM

Transmittal Letter

Document Uploaded: 409216-Respondent's Brief.pdf

Case Name: St. v. Brandt., Jr.

Court of Appeals Case Number: 40921-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us