

No. 44385-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL GARBER,

Appellant.

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COURT OF APPEALS  
DIVISION II  
2013 SEP 20 PM 1:12  
STATE OF WASHINGTON  
BY [Signature] DEPUTY

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

(No. 12-1-01516-5)

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The Honorable Frederick Fleming, Judge

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress the confession of h Amendment rights.
2. Garber assigns error to Finding 10 of the Findings of Fact and Conclusions of Law for the CrR 3.5 hearing, which provides, in relevant part:

No threats or promises were made to the defendant.

CP 35.

3. Garber assigns error to the trial court's conclusion that the confession was voluntary and conclusion 2, which provides, as follows:

Garber's confession was voluntary and not the result of coercion based upon the totality of the circumstances Garber's will was not overborne.

CP 37-38.

4. The sentencing court acted without statutory authority in ordering forfeiture of property based solely upon conviction of an offense, in violation of RCW 9.92.110.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in refusing to suppress Garber's confession when that confession was made only after an officer threatened Garber that he was either going to confess to being involved in stealing cars or police would believe he was involved in a shooting which had taken place just days before?
2. Was there insufficient evidence to support the court's findings that "[n]o threats. . . were made to the defendant" where the officer conducting the interrogation admitted that he had told Garber he was either going to confess to being involved in the car thefts or he was going to be considered "in" on a recent shooting?
3. The authority to forfeit property is wholly statutory and is granted to law enforcement agencies in certain cases, provided they follow the requirements of the relevant statute. Did the sentencing court act without statutory authority in ordering forfeiture of property as a condition of the sentences when there was no evidence the statutory

procedures had been followed?

4. RCW 9.92.110 abolished the doctrine that a criminal defendant was subject to forfeiture of his property simply because of being convicted of a crime. Did the order of forfeiture, based solely upon conviction, violate this statute?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Daniel Garber was charged by corrected amended information with two counts of theft of a motor vehicle and one count of unlawful possession of a stolen vehicle, all with an accusation of aggravating circumstances of recent release from incarceration and that he had a high offender score which would result in some of the current offenses going unpunished. CP 13-14; RCW 9.94A.535(2)(c); RCW 9.94A.535(3)(t); RCW 9A.56.020(1); RCW 9A.56.065; RCW 9A.56.068; RCW 9A.56.140. Pretrial and bench trial proceedings were held before the Honorable Judge Frederick Fleming on November 1, 6, 8 and 9, 2012, after which the judge found Mr. Garber guilty of the two theft counts but not guilty of the possession count.<sup>1</sup> CP 33-38.

On December 21, 2012, Judge Fleming imposed standard-range sentences. CP 42-54; SRP 12-14. Garber appealed and this pleading follows. See CP 59-60.

2. Testimony at trial

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<sup>1</sup>The verbatim report of proceedings in this case consists of separately paginated volumes, some of which have multiple proceedings. They will be referred to as follows: the volume containing the proceedings of November 1 and 5, 2012, as "1RP;" November 6, 2012, as "2RP;" November 8, 2012, as "3RP;" November 9, 2012, as "4RP;" December 21, 2012, as "SRP."

On April 23, 2012, Matthew Cowan was working an evening shift at a Target store in Lakewood when someone stole his 1984 Oldsmobile from the parking lot. 2RP 58-67. A loss prevention employee at the store later gave officers a copy of the surveillance video for the parking lot for the relevant time. 2RP 58-64.

On April 25, 2012, at about 10:30 in the evening, Jamal Robinson called police and told them his car had been stolen from his apartment building. 2RP 80-84, 98-99. The car was a 1975 Chevy Caprice. 2RP 86. The apartment manager copied the surveillance video and put it on a CD, which Robinson gave to the police. 2RP 80-81. The video showed two people driving up in a red car - one white and one black - but did not show anyone getting out of the car. 2RP 107, 115.

A man who lived nearby said he saw on his surveillance cameras a burgundy, four-door car park next to the black car, after which a person with long hair got out and got into the black car and drove away, with the red car behind. 2RP 119. The video from those cameras, however, no longer existed. 2RP 121.

Dana Lemos often drove her father-in-law's Nissan Quest and reported it stolen on April 26, 2012, when it was not in the assigned parking spot at her apartment. 3RP 4-5.

On April 26, 2012, at about 2:20 in the afternoon, Stephen Garber called police about a car sitting on the road in the cul-de-sac where he lived. 3RP 20-21. He knew the car was not his son's car, which was a "reddish color" Ford Fusion. 3RP 20-21. The car he called about was a Chevy Caprice, black on the bottom and white on the top. 3RP 21-22.

The day before, Stephen Garber had seen the car in his driveway, along with a black man and a white woman. 3RP 22-23. His son, Daniel Garber, was also there, by the garage. 3RP 22-23. Daniel Garber had told his father on the phone at some point that he had driven the man, “D Shot,” to where the vehicle was to be picked up and then returned to the home, after which “D Shot” and the Caprice had returned to the house. 3RP 23-24.

Officer Jeff Hall of the Lakewood police was aware of the April 23, 2012, theft of Cowan’s Oldsmobile and the April 25, 2012, theft of Robinson’s Caprice and was assigned to the Oldsmobile theft case. 3RP 30-31. He knew that both crimes were believed to have involved a dark red or maroon Ford Fusion with black rims and wheels. 3RP 32. On April 26, he and his partner, Detective Shaun Darby of the Pierce County Sheriff’s Department (PCSD), were out “on surveillance” trying to find the cars and “attempting to identify suspects” when Darby saw in some records that the Caprice had been recovered at the Garber home and a suspect named “D Shot” identified as being involved. 3RP 33, 64. Hall also became aware that a red Ford Fusion was associated with the same address, so he and Darby headed there. 3RP 32-33.

The officers were on their way to the Garber home when they happened to see a maroon or dark red Ford Fusion with black rims go by in the opposite direction. 3RP 33-34, 66. Hall turned his car around and they started following the Fusion, noting after a short time that the Ford seemed to have a green “Quest” minivan following it, too. 3RP 34, 66-67. Darby started “running” the license plates and the search showed that the

Ford was registered to Daniel Garber but the minivan was “an active stolen hit out of Tacoma.” 3RP 34-35.

Hall testified that the vehicles went into an alley and the officers did not follow, setting up surveillance and asking for assistance. 3RP 35-36, 66-67. As the vehicles had turned, the officer had seen Garber as the driver of the Ford but did not recognize the man driving the Quest. 3RP 35, 66-67.

Once they knew other officers were on their way, the officers went down the alley and saw the two vehicles parked. 3RP 36-37. According to Hall, Garber and another man, later identified as David Finn, were outside of the vehicle, there was a “jack” out as well as lug wrenches, and they appeared to be in the process of removing the right rear wheel and tire from the minivan. 3RP 37, 57. Hall also thought one of the lug nuts on that right rear wheel “had already been manipulated.” 3RP 57.

Hall admitted, however, that both men were standing up, not next to the tire, and the Fusion’s trunk and door were both open. 3RP 39-40. Hall also could not recall seeing anything in Garber’s hands and could only say that Garber was behind Finn. 3RP 68-69.

The officer admitted that he put the jack, the tire, the wheel and the lug wrench into the back of the red car in order to photograph them but the officer actually never saw Garber in possession of those items at all. 3RP 70-71. The property inside the van was stuff that Finn said was from his garage, and Garber never said anything about his property being inside. 3RP 72.

The officers ordered both men to the ground at gunpoint,

handcuffed them and transported Garber to the Lakewood Police Department. 3RP 40-41, 6 RP 69-70. Ultimately, Garber was read his rights and interrogated. 3RP 43, 86-87.

Darby conducted most of the interrogation. 3RP 46. Initially, Garber said he had given "D Shot" a ride to the Target and had no knowledge that the vehicle "D Shot" was picking up was being stolen. 3RP 47. Ultimately, however, Garber said that "D Shot" had come to Garber's apartment and told Garber he needed some help in getting the vehicle. 3RP 47. "D Shot" said he had broken his screwdriver. 3RP 47. Garber had then given "D Shot" a ride to a local tattoo shop, where "D Shot" knew someone who gave "D Shot" a new screwdriver to use. 3RP 47. After that, Garber gave "D Shot" a ride to the Target where Garber waited in the "traffic lane" for the other man to start the Oldsmobile. 3RP 47-48. They then drove to some apartments where Garber's girlfriend lived and "D Shot" parked the Oldsmobile there. 3RP 48. Officers later went over to that address and found the vehicle parked there with pieces of a broken screwdriver inside. 3RP 48, 57.

"D Shot" was the street name for "Damien L" or "Damien Hudson." 3RP 49.

Garber also ultimately admitted giving a ride to "D Shot" to some apartments in Tacoma and waiting while "D Shot" took the Caprice, after which they both drove to Garber's father's house. 3RP 49-50, 90. Once there, they worked on the Caprice, leaving it near the home. 3RP 50. Garber said "D Shot" gave him a small amount of cash and some drugs and that Garber also did some work on the carburetor of the Caprice. 3RP

50.

The trial court found Garber guilty as an accomplice for the Oldsmobile and Caprice thefts but found insufficient evidence that he knew the van was stolen. CP 33-38.

D. ARGUMENT

1. THE CONFESSION SHOULD HAVE BEEN SUPPRESSED AND THE REMAINING EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS

Coerced confessions are inherently untrustworthy. See Dickerson v. United States, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Further, due process requires that a defendant in a criminal case cannot be convicted, “in whole or in part,” based upon an involuntary confession.” Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 12 L. Ed.2d 908 (1964). As a result, where, as here, the state seeks to admit a defendant’s custodial confession, the state must first meet the heavy burden of proving that the confession was voluntary. See, State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 252 (1997).

In this case, this Court should reverse, because the prosecution failed to meet that burden of proof and the trial court abused its discretion in holding otherwise. Further, the convictions should be dismissed with prejudice, because there is insufficient evidence to support them without the confession.

a. Relevant facts

Before trial, Garber moved to suppress the statements he made to police during interrogation, arguing that the statements were made only

after the officers told him he had to confess or be considered a suspect for a recent, high-profile shooting at the University of Puget Sound. CP 15-19.

At the suppression hearing, Lakewood police officer Hall testified that Garber was held in a holding cell until the officers took him, in restraints, to an interview room within the station, where the restraints were finally removed. 1RP 31. It was about three hours after he had been taken into custody. 1RP 37. Hall told Garber that everything was being audiotaped and videorecorded and then advised him of his rights. 1RP 31. Hall read into the record from the preprinted form and said he thought Garber had indicated understanding of his rights as they were read. 1RP 33.

Hall testified that he did not “make any threats or promises to Mr. Garber to induce him to waive his rights,” that neither he nor Darby made any “threats or promises” to get Garber to answer questions and that it appeared to the officer that Garber was answering “of his own free will” and had “made a knowing, intelligent waiver of his right to remain silent.” 1RP 40.

After the prosecution played a recording of the interrogation, the prosecutor then asked Officer Hall about “the incident that occurred at University of Puget Sound that you talked to Mr. Garber about[.]” 1RP 43. Hall admitted that he and Darby were not investigating that incident “directly” but were aware “through investigative channels that that crime had occurred.” 1RP 43. He said that he was thinking the “circumstances, and, potentially, the individuals were matching up,” so the officers were

“doing . . . due diligence” and trying to determine if Garber and the others were involved. 1RP 43.

Damien Hudson or “D Shot” was known to be a light-skinned African-American. 1RP 43. Hall said that the suspect in the UPS shooting was a lighter-skinned African-American. 1RP 43-44. Hall said that they knew “some vague circumstances about it,” which were that someone had been doing a “car prowl” or attempted car theft near the university and a security guard had been “involved.” 1RP 49-50. The suspect, who had gotten away, had fired a gun. 1RP 50.

When asked on cross-examination what information he had at that point that indicated Garber was a suspect in the UPS shooting, the officer said that he was “probing” because during the interview, Garber had talked about driving Hudson to a location near UPS and it was “in that same timeframe.” 1RP 50. Hall said that Hudson was believed to be involved in at least two previous car thefts, something Garber apparently confirmed. 1RP 49-50.

Darby conducted most of the interview of Garber. 1RP 34. The officer testified that he used an interrogation technique on Garber which minimized the seriousness of the crimes he was suspected of in order to induce Garber to “accept the responsibility” for those crimes. 1RP 65. Darby admitted that, when he was interrogating Garber, he went on for “quite some time” and was not getting the answers that he wanted from Garber, so he then said something like, “[h]ere’s the deal, if D Shot is going to take you down, I can deal with that,” and “[y]ou’re going to be with D Shot on that whole thing or you’re going to come clean.” 1RP 66.

The officer then conceded that, when he made the latter comment, he was “referring to the UPS shooting, not the vehicle thefts.” 1RP 66.

At the time, Darby admitted, he had no information that Garber was involved in the UPS incident. 1RP 66-67. Instead, the officer explained, he was inquiring because “moments earlier” Garber had “confessed” to being in the area of UPS around the time the shooting occurred and had dropped off D Shot there “in the area where the shooting occurred.” 1RP 66. Darby said that this made him begin to suspect that “those two might actually be involved because the suspect was still outstanding from that shooting.” 1RP 67.

Darby then conceded that, when he said Garber was “going to be with D Shot on this whole thing,” that meant “[t]hat if D Shot is responsible for the shooting at UPS, that Mr. Garber could also be involved in it as well through his confession as he confessed to dropping D Shot off there.” 1RP 68.

Darby said that, when Garber was not giving him the answers the officer wanted, it was that Garber’s answers were inconsistent with what Darby had seen on the surveillance videos so he thought Garber “was lying.” 1RP 71. Hall said that, after the interview was over, Garber was providing information to “assist” with finding Hudson and getting him arrested but Garber was concerned about having any of that on tape, so the officers turned off the tape and talked to him further. 1RP 37-38.

Daniel Garber testified that he was in the alley getting some rims Finn had promised to give him when the arrest occurred. 2RP 6. Garber explained that he had some rims which had been stolen when they were at

Finn's home so he was being given the rims from the van to pay him back. 2RP 7.

Garber had smoked some methamphetamines supplied by Finn prior to driving the cars over to the alley. 2RP 8. Garber admitted he had been "smoking a lot of meth" and had been "up for about eight days at that point," without sleep. 2RP 8. They had not started getting the items off the van when the police arrived. 2RP 8-9. Indeed, Garber said, he was in the back of his trunk, moving some things around when an unmarked car pulled up and people got out with guns drawn, telling him to get down on the ground. 2RP 9. The people said "Lakewood Police" and then came over, handcuffed Garber and put him in a police car. 2RP 9.

After he was put in the car, Garber kept asking the police what he was being held for but they would not tell him. 2RP 9-10. They sat there for about an hour and he could not see what police were doing during that time. 2RP 10. At some point they asked him what his "involvement was with Finn." 2RP 10-11.

Garber was eventually transported to the precinct but was still not told why he was there. 2RP 11. He fell asleep in the holding cell and did not know how long he was there, except that it was "quite a while." 2RP 11-12. Eventually, some officers came and took him to the interrogation room and, Garber said, he agreed to speak because he was so tired he "just wanted to get it over with." 2RP 13.

Garber said that, when Darby said Garber needed to "figure out where" he wanted to be "on this thing" because Garber was "either going to be with D Shot on the whole fucking thing" or going to "come clean on

this and the Caprice,” Garber thought it meant the police were going to charge him with assault if he did not tell them “what they want to hear.” 2RP 14. Garber said he was not involved in any assault. 2RP 14. He was worried, however, about them slapping a possible assault charge on him “with his criminal history” and he would “get a lot of time.” 2RP 15.

When asked if the officers threatened him with anything after the video equipment was turned off, Garber said no. 2RP 15. He was clear, however, that the officers were making it known that, if he cooperated with them, they would not charge him with the UPS shooting. 2RP 15-16. He said it was made plain that, “[i]f I came clean and told them what they wanted to hear about the two cars, that they wouldn’t charge me with it. But if I didn’t, they would charge me no matter what.” 2RP 16. As a result, he said, he told the officers what they wanted to hear about the vehicles. 2RP 16-17.

On cross-examination, Garber said the threats did not occur until the officers asked him about the shooting, which he interpreted in a “hostile way.” 2RP 26-27. He also said they started swearing at him. 2RP 27. He felt they were using the language in an aggressive or hostile way, as opposed to the swearing that he did which was just part of his speech. 2RP 27-28. He agreed that he asked the officers “what’s this all about” and “what has this guy done” when they were questioning him, and the officer’s response was “I think he tried to boost a car. . . and he shot at a security guard.” 2RP 30.

In admitting the confession, the trial judge focused on whether there was a “promise broken” by the officers to induce the confession.

2RP 57. The court also declared, however, that the detective and officer had “arguably, bordered on taking advantage psychologically and beating [Garber] down[.]” 2RP 57-58. And the court concluded that there were no “threats or promises made” and that Garber’s confession was voluntary and not the result of coercion “based upon the totality of the circumstances Garber’s will was not overborne.” CP 57-58.

b. The confession should have been suppressed

The trial court’s decision to admit the confession should be reversed. To be voluntary, a confession must “be the product of a rational intellect and a free will.” State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984), quoting, Blackburn v. Alabama, 361 U.S. 199, 208, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1990). This is because of the “strongly felt attitude of our society that important human values are sacrificed” when an agent of the government elicits a confession out of the accused, “against his will.” Blackburn, 361 U.S. at 206-207.

It is not only due process but also the Fifth Amendment that is offended by an involuntary confession. See U.S. v. Tingle, 658 F.2d 1332, 1334-35 (1981). The Fifth Amendment guarantees the defendant’s right to remain silent “unless he chooses to speak in the unfettered exercise of his own will[.]” See Malloy v. Hogan, 378 U.S. 1, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), disagreed with in part on other grounds, Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

As a result, it is important that courts scrutinize the circumstances surrounding a confession in order to make sure that it is not obtained by coercion. A confession is coerced if, based upon the “totality of the

circumstances,” the defendant’s “will was overborne.” Broadaway, 133 Wn.2d at 132. The “totality” includes the defendant’s condition, his mental abilities at the time, and how the state actors behaved. Rupe, 101 Wn.2d at 678-79. Further, a confession need not be made under physical threat to be coerced; psychological pressure may have the same or even greater effect. See Watts v. Indiana, 338 U.S. 49, 53, 69 S. Ct. 1347, 93 L. Ed 1801 (1949); State v. Cushing, 68 Wn. App. 388, 392, 842 P.2d 1035, review denied, 121 Wn.2d 1021 (1993).

As one court has pointed out:

A confession is involuntary whether coerced by physical intimidation or psychological pressure. Law enforcement conduct which renders a confession involuntary does not consist only of express threats so direct as to bludgeon a defendant into failure of the will. Subtle psychological coercion suffices as well, and at times more effectively, to overbear “a rational intellect and a free will.” As the [U.S.] Supreme Court [has] noted. . ., “(w)e have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed.”

Tingle, 658 F.2d at 1335.

Thus, where the “critical impetus” for a defendant’s inculpatory statements was one officer’s statement that “other charges might be filed against him if he didn’t cooperate with the investigation of the burglary,” a defendant’s statement was deemed involuntary even though he had made a valid waiver of his rights. See State v. Rhiner, 352 N.W. 2d 258 (Iowa, 1984). Similarly, where the defendant was told a lesser charge than first-degree murder would be much more likely if he gave “his side of the story,” the resulting confession was deemed involuntary. See State v. Hodges 326 N.W.2d 345, 349 (Iowa, 1982). This is because an officer’s

statements telling an offender what “advantage is to be gained or is likely from making a confession” is the same as making “promises or assurances, rendering the suspect’s statements involuntary.” Id.

In this case, based on the totality of the circumstances, Garber’s confession was not voluntary. Looking at his condition, mental ability and how the state actors behaved proves this point. The evidence was that Garber had been up ingesting methamphetamines for quite some time - possibly even longer than a week. He had been held for about three hours, not knowing what was going on, but so tired he had fallen asleep. 1RP 37, 2RP 10-15. His condition and mental ability were thus clearly affected and he was likely more vulnerable to coercion. And it is well-recognized that a police-dominated atmosphere such as the interrogation which occurred here generates “inherently compelling pressures which work to undermine the individual’s will to resist and compel him to speak where he would not otherwise do so freely.” Illinois v. Perkins, 496 U.S. 292, 296, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990).

Most significant, the conduct of the officers clearly was such that Garber’s ability to freely decide whether to confess or not was clearly overborne. Officer Darby conceded that, when he was not getting the answers he wanted out of Garber (i.e. his confession), the officer had said something like, “[h]ere’s the deal, if D Shot is going to take you down, I can deal with that.” 1RP 66. After that, the officer said, “[y]ou’re going to be with D Shot on that whole thing or you’re going to come clean.” 1RP 66 (emphasis added).

And the officer agreed that, when he made the latter comment, he was “referring to the UPS shooting, not the vehicle thefts.” 1RP 66.

In fact, the officer specifically testified, when he told Garber that Garber was “going to be with D Shot on this whole thing,” that meant “[t]hat if D Shot is responsible for the shooting at UPS, that Mr. Garber could also be involved in it as well through his confession as he confessed to dropping D Shot off there.” 1RP 68.

By telling the officer that Garber would either “come clean” or “be with D Shot” on the UPS shooting, the officer clearly induced Garber’s subsequent confession. Who would not confess to a lesser crime in the face of being linked to and potentially prosecuted for a higher crime? Notably, it was only after the officer made these statements to Garber that Garber gave a full confession about his involvement - and that of D Shot - in the far lesser crimes involving car theft, rather than running the risk of being implicated in the UPS shooting. Just as telling a defendant what “advantage is to be gained or is likely from making a confession” amounts to a promise or inducement, telling a defendant he will be considered implicated in a shooting if he did not “come clean” by confessing to lesser crimes amounts to a threat or coercion.

Further, although the prosecution focused on it below, the officer’s potential motivation in investigating the UPS case is not important. The issue is not the officer’s motivation but whether, as a result of what the officer did or said, the defendant’s confession was coerced. See Rhode Island v. Innis, 446 U.S. 291, 300-301, 100 S. Ct. 1682, 63 L. Ed. 2d 297 (1980); State v. Sargeant, 111 Wn.2d 641, 643, 650-51, 762 P.2d 1127

(1988) (where a probation officer told the defendant if he “was to benefit from mental health counseling,” he would “have to come to the truth with himself” which meant he was going to have to admit guilt, that statement “in effect made confessing a precondition” to the treatment and likely made the defendant “feel compelled to confess”). Here, the confession was coerced by the officer’s message that Garber would be implicated in the UPS shooting, a far more serious crime, if he did not confess to the car thefts. The trial court’s decision to the contrary does not withstand review. This Court should so hold.

c. Without the confession, the convictions cannot stand

Because the confession should have been suppressed, this Court should also reverse and dismiss the two convictions, because those convictions are not supported by sufficient evidence, absent the confession. The only evidence supporting the conclusion that Garber *knew* that the cars were stolen - and thus had the requisite mental element to prove that he was an accomplice - was Garber’s statement. For the car stolen from the Target, the Oldsmobile, the prosecutor relied on Garber’s “own admission” to argue guilt. 4RP 7-8. Further, in finding Garber guilty of that count, the Court specifically relied on “what [he] said to the officers” in finding that Garber knowingly was involved. 4RP 7-8.

For Count II - the Caprice stolen from the apartments - the prosecution again relied on the confession. 4RP 10. And in finding guilt, the court specifically said that the evidence supported the defense that Garber did not know that the Caprice did not belong to “D Shot” but said

that the “problem then” was the “admission” by Garber. 4RP 40. The court found that Garber knew what was taking place and thus had the required knowledge for the crime because of his confession. 4RP 20-21.

Without the confession, there was simply insufficient evidence to prove that Garber knew the Caprice and the Oldsmobile were stolen and thus was acting as an accomplice and knowingly engaging in the conduct. Without the confession, therefore, there would not be sufficient evidence to support either conviction. This Court should so hold and, after suppressing the confession, should reverse and dismiss the convictions with prejudice.

2. THE SENTENCING COURT ACTED WITHOUT STATUTORY AUTHORITY AND IN VIOLATION OF RCW 9.92.110 IN ORDERING FORFEITURE

Under the Sentencing Reform Act (SRA), a sentencing court’s authority is limited. See, State v. Boyd, 174 Wn.2d 470, 471-72, 275 P.3d 321 (2012). Instead of unfettered discretion, sentencing courts are now required to act within their statutory authority when imposing terms of a sentence. See, State v. Hunter, 102 Wn. App. 630, 636, 9 P.3d 872 (2000), review denied, 142 Wn. 1026 (2001). As a result, a sentencing court may order only those conditions of a sentence which are statutorily authorized. See, In re West, 154 Wn.2d 204, 110 P.3d 1122 (2005). Further, where a court imposes a sentence which is not authorized by statute, the court has acted outside its authority and the resulting order must be stricken. See, State v. Bahl, 164 Wn.2d 739, 745, 193 P.3d 678 (2008).

In this case, even if this Court does not find that the confession

should have been suppressed and the theft convictions dismissed, Mr. Garber is entitled to relief in the alternative, because the sentencing court entered an order of forfeiture as a condition of the sentence but that order was unsupported by statute. Further, the order runs afoul of RCW 9.92.110.

As a threshold matter, this issue is properly before the Court. When a sentencing court acts outside its statutory authority, it has entered an illegal sentence which may be reviewed for the first time on appeal. See Bahl, 164 Wn.2d at 745. Further, a challenge to an illegal sentence is timely raised and may be addressed by this Court even “preenforcement” if the challenge on appeal is primarily a legal question and no further factual development is required. Id. This issue meets those standards because the sentencing court’s authority to impose the forfeiture condition, if at all, is wholly statutory, so that determining whether that authority exists is thus a legal issue. Further, there is no additional factual development required - the court’s order unmistakably orders that all items seized by police in their investigation are forfeited. And those items in this case include at least one car.

The clause in question requires that Mr. Garber must “forfeit any property seized by law enforcement in this matter.” CP 47-48. The court acted without authority in ordering the forfeiture and the clause runs afoul of RCW 9.92.110. As this Court has held, the sentencing court has no “inherent authority to order the forfeiture of property” - even that used “in the commission of a crime.” State v. Alaway, 64 Wn. App. 796, 828 P.2d 591, review denied, 119 Wn.2d 106 (1992). As a result, for there to be

authority for forfeiture of property, there must be a statute providing authorization. Id. Further, the procedures set forth in the relevant statute must be followed, in order for the forfeiture to be permitted under law. Id.

As Division Three recently noted, “[t]he power to order forfeiture is purely statutory and will be denied absent compliance with proper forfeiture procedure.” City of Walla Walla v. \$401,333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). Further, because “[f]orfeitures are not favored,” they are enforced only when they are consistent with the “letter” and “spirit” of the law. Id.

Thus, in Alaway, when the state failed to commence a statutory forfeiture proceeding under any statute but argued on appeal that the trial court had inherent authority to order forfeiture of seized property under CrR 2.3(e), this Court disagreed. 64 Wn. App. at 797. The property involved included “a substantial amount of equipment and personal property,” such as photos, saws, etc., which the state alleged was used in a marijuana “grow” operation for which Alaway was convicted. 64 Wn. App. at 797. After sentencing, the prosecution moved in court for an order forfeiting the property to the sheriff, but Alaway objected, asking for his property back. Id.

The prosecution argued to the trial court that the court had “inherent power to order how property used in criminal activity should be disposed of,” although conceding that it had not followed the statutory requirements of the forfeiture statute it claimed applied. Id. The trial court agreed with that theory, and entered an order of forfeiture for most of the property. Alaway, 64 Wn. App. at 798.

On appeal, this Court rejected that idea. *Id.* Noting that it was possible the evidence was used in a grow operation and thus it might be “derivative contraband,” the Court nevertheless found that a defendant is not automatically divested of his property interests in something which is not clearly contraband but rather used to create contraband, simply by means of conviction. *Alaway*, 64 Wn. App. at 799. Instead, this Court declared, “the State cannot confiscate” a citizen’s property “merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures.” *Id.*

Further, this Court was clear that the theory that trial courts have “inherent authority” to order forfeiture was simply wrong. “Every jurisdiction that has considered the question has held that the power to order forfeiture is purely statutory,” this Court said plainly, citing multiple cases from many jurisdictions. 64 Wn. App. at 800. This Court also noted that “[s]cholarly authorities also establish that the United States has never had a common law of forfeiture, and that since colonial times, forfeiture in this country has existed only by virtue of statute.” *Id.*

Put bluntly, this Court declared, “[i]n sum, there is **no authority anywhere** for the State’s contention that the court had the inherent power to order forfeiture of Alaway’s property because he used it in his marijuana growing operation.” *Alaway*, 64 Wn. App. at 801 (emphasis added). Because the authority was wholly statutory, this Court held, and because the prosecution failed to comply with the requirements of the relevant forfeiture statute, the forfeiture was improper and the defendant

entitled to have his property returned. Id.

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction. And indeed, to the extent that the court assumed it had authority to order the forfeiture based upon the criminal conviction, that assumption runs directly afoul of the law.

RCW 9.92.110 specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, “[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein.”

Thus, the mere fact that Mr. Garber was convicted of a crime did not mean the court could simply dispose of any rights he had to any property the police seized as part of the evidence. And to properly order forfeiture, the government had to assert an actual statutory authority for such an order, as well as following the relevant provisions of whatever statute it thought might apply. See, e.g., RCW 10.105.010 (seizing agency - here, the police - must serve proper notice on all persons with a known right or interest in the property, who then have a right to a hearing where they can attempt to establish an ownership right); RCW 69.50.505 (allowing forfeiture of controlled substances, raw materials for such substances, properties used as containers for them, and other conveyances and items used in drug crimes with proper notice, service and an opportunity for a hearing).

None of the relevant statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant in evidence, based solely upon his criminal conviction, without at least a modicum of proof that the specific property was somehow involved in or the fruits of criminal activity. Nor do they authorize such a forfeiture without any of the process which is constitutionally due before the government may seize the property of a man, or without following the requirements the Legislature set on such seizures.

Notably, here, one of the items impounded by police was a car.

See 3RP 43.

The sentencing court did not have the authority to order forfeiture. This Court should so hold and should strike the improper order even if it does not reverse and dismiss the convictions with prejudice.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the convictions for theft of a motor vehicle. In the alternative, the Court should strike the sentencing court's order of forfeiture, which is unsupported by any statutory authority.

DATED this 19th day of September, 2013.

Respectfully submitted,

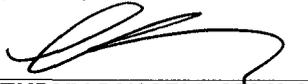


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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Kit Proctor, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402; to Daniel Garber, DOC 755896, P.O. Box 900, Shelton, WA. 98584.

DATED this 19th day of September, 2013.  
Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL/EFILING:

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the Appellant's Opening Brief and a copy of this Certificate to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Daniel Garber, DOC ~~755896~~, 775896, P.O. Box 900, Shelton, WA. 98584,

and a true and correct copy of this Certificate to opposing counsel Pierce County Prosecutor's Office via efilng in this Court's system this date.

DATED this 25th day of September, 2013.  
Respectfully submitted,

  
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