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No. 51747-7-II

(Thurston County Superior Court No. 11-1-01008-6)

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent

v.

LAYNE E. HUBER,

Appellant

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
Honorable Mary Sue Wilson

APPELLANT'S OPENING BRIEF

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Table of Contents

I.	Assignment of Error & Issues	1
A.	Assignment of Error: The trial court erred in denying Huber’s Motion for Return of Property [CrR 2.3]	
B.	Issues Pertaining to Assignments of Error:	
1.	Is this court satisfied that the seizing law enforcement agency presented sufficient evidence to persuade a fair-minded person that the trial court’s order is correct given:	
(a)	The illegal and outrageous searches and seizures;	
(b)	The absence of any testimony, affidavits or declarations from any alleged victim other than Layne Huber; and	
(c)	The trial court’s concern with the sufficiency of the State’s evidence?	
2.	Does CrR 2.3(e) provide any statutory authority for forfeiture?	
3.	Does retention of property for over seven years constitute <i>de facto</i> forfeiture?	
4.	Did the general warrants enable an unlawful searches and seizures in violation of Huber’s constitutional rights?	
II.	Statement of the Case	1
A.	Introduction	1
B.	Search and Seizure	2
C.	Status of Property	6
III.	Summary of Arguments	12

IV.	Arguments	13
	A. Law enforcement failed to present sufficient evidence to persuade a fair-minded person that the trial court’s order is correct. In this case, (a) the searches and seizures were illegal and outrageous; (b) there was no testimony, affidavits or declarations from any alleged victim other than Layne Huber; and (c) even the trial court questioned the sufficiency of the state’s evidence.	13
	B. CrR 2.3(e) does not provide any statutory authority for forfeiture.	17
	C. Retention of the property for years constitutes <i>de facto</i> forfeiture.	18
	D. The general warrants and their execution enabled unlawful searches and seizures in violation of Huber’s constitutional rights.	23
	1. The warrants, which authorized police to seize “any other property a reasonable prudent person would believe to be stolen,” ¹ violated the Fourth Amendment and Washington State Constitution art. I, § 17.	23
	2. Failure to provide Huber with any warrant violated his constitutional rights.	26
V.	Request for Attorney Fees and Expenses [RAP 18.1]	30
VI.	Conclusion	32

Appendix A

Off It, Inc., et al v Thurston County, et al, No. 13-35408 (9th Cir. 2014): Memorandum (7/28/14) and Mandate (8/20/14).

¹ CP 37

Table of Authorities

Cases:

Awaya v. State, 5 Haw. App. 547, 705 P.2d 54, *cert. denied*,
67 Haw. 685, 744 P.2d 781 (1985) 19, 20

City of Sunnyside v. Gonzalez, 188 Wn.2d 600 (2017)..... 14, 13, 30

Espinoza v. Everett, 87 Wn.App. 857, 866 (1997) 18

Marron v. United States, 275 U.S. 192, 196 (1927) 24

Maytown Sand & Gravel LLC v. Thurston County, 198 Wn.App. 560
(2017) 31

McDonald v. United States, 335 U.S. 451 (1948) 27

Messenger Service, Inc. v. United States, 587 F.2d 15 (7th Cir. 1978) ... 19

Shea v. Gabriel, 520 F.2d 879 (1st Cir. 1975)..... 19

Snohomish Regional Drug Task Force v. 414 Newberg Rd., 151 Wn.App.
743 (Div. 1 2009), *review denied*, 168 Wn.2d 1019 (2010)..... 21

State v. Alaway, 64 Wn.App. 796, 800 (1992), *review denied*, 1119 Wn.2d
1016 (1992)..... 17

State v. Card, 48 Wn.App. 781 (1978)..... 15

State v. Davis, 769 P.2d 840, 843 (Utah Ct. App. 1989)..... 19, 23

State v. Ettenhofer, 119 Wn.App. 300 (2003)..... 29

State v. Groom, 133 Wn.2d 679 (1997)..... 28

State v. Marks, 114 Wn.2d 724 (1990).....15, 16, 18, 21

State v. Perrone, 119 Wn.2d 538, 547 (1992) 24

State v. Roberts, 185 Wn.App. 94 (2014)..... 17, 18

<i>State v. Ross</i> , 141 Wn.2d 304 (2000).....	28
<i>State ex rel. Schillberg v. Everett Dist. Justice Court</i> , 90 Wn.2d 794 (1978).....	15, 16
<i>State v. Wible</i> , 113 Wn.App. 18 (2002).....	29
<i>Tellevik v. Real Property</i> (“Tellevik II”), 125 Wn.2d 364 (1994)	21
<i>Tri-City Metro Drug Task Force v. Contreras</i> , 129 Wn.App. 648 (2005).	13
<i>United States v. \$191,910.00 in U.S. Currency</i> , 16 F.3d 1051 (9 th Cir. 1994).....	21
<i>United States v. Gantt</i> , 194 F.3d 987 (9 th Cir. 1999).....	27, 28
<i>United States v. Grubbs</i> , 377 F.3d 1072 (9 th Cir. 2004).....	28
<i>United States v. Hayes</i> , 794 F.2d 1348 (9 th Cir. 1986).....	30
<i>United States v. Hector</i> , 474 F.3d 1150 (9 th Cir. 2007).....	28
<i>United States v. Martinson</i> , 809 F.2d 1364 (9 th Cir. 1987).....	22
<i>United States v. Palmer</i> , 565 F.2d 1063 (9 th Cir. 1977).....	22, 23
<i>United States v. Premises Known as 608 Taylor Ave.</i> , 584 F.2d 1297 (3 rd Cir. 1978)	19
<i>United States v. Wright</i> , 610 F.2d 930 (D.C. Cir. 1979).....	15
<u>Constitutional Provisions:</u>	
U.S. Const. amend. IV	1, 23, 24, 28, 31
Wash. Const. art. I, § 7	24, 28
<u>Statutes:</u>	
RCW 10.79.040 (1).....	28

RCW 10.79.050.....	18
RCW 10.105.010.....	21
RCW Ch. 69.50.505	21, 25, 30
42 U.S.C. § 1983.....	31
42 U.S.C. § 1988.....	31
<u>Court Rules:</u>	
CrR 2.3	passim
RAP 2.5(a)(3)	23
RAP 18.1	30, 31
<u>Other Authorities:</u>	
Black’s Law Dictionary.....	19
Comment, <i>Presumed Damages for Fourth Amendment Violation</i> , 129 U. Pa. L. Rev. 192 (1980).	31
Graham Miller, <i>Note and Comment: Right of Return: Lee v. City of Chicago and Continuing Seizure in the Property Context</i> , 55 DePaul L. Rev. 745, 783 (2006).....	21
Seth A. Fine and Douglas J. Ende, 13 B <i>Washington Practice</i> §§ 4301 and 4305 (2017-2018 Supp.).....	13, 25

I. Assignments of Error & Issues:

- A. Assignment of Error: The trial court erred in denying Huber's Motion for Return of Property [CrR 2.3(e)].
- B. Issues Pertaining to Assignments of Error:
 - 1. Is this court satisfied that the seizing law enforcement agency presented sufficient evidence to persuade a fair-minded person of the truth or correctness of the trial court's order given:
 - (a) The illegal and outrageous searches and seizures;
 - (b) The absence of any testimony, affidavits or declarations from any alleged victim other than Layne Huber; and
 - (c) The trial court's concern with the sufficiency of the State's evidence?
 - 2. Does CrR 2.3(e) provide any statutory authority for forfeiture?
 - 3. Does retention of property for years constitute *de facto* forfeiture?
 - 4. Did the general warrants enable an unlawful searches and seizures in violation of Huber's constitutional rights?

II. Statement of the Case:

A. Introduction:

Layne Huber was the victim of an illegal search and seizure. He seeks damages for violations of his constitutional rights and return of property held by the Thurston County Sheriff's Office since June 24, 2011.

B. Search and Seizure:

On June 24, 2011¹, the Lacey Police Department, with the assistance of the Thurston County Narcotics Task Force, raided Layne Huber's home,² his brother Leslie Huber's home,³ and his parents (Joseph and Vicky Huber's) home, as well as, his business, OFF It, Inc..⁴ Layne Huber was CEO of OFF It, Inc.,⁵ which buys and sells property on consignments⁶ and from estate sales and storage unit auctions.⁷ The raid was covered by *The Olympian* and featured on KIRO 7 news that evening.⁸

The *first* search warrant was for Layne Huber's home located at 8326 Rich Road, Olympia.⁹ It was issued by Thurston County Superior Court Judge Gary Tabor on June 16, 2011 and identified the following crimes: possession of a stolen property, trafficking in stolen property and conspiracy to commit residential burglary.¹⁰ It authorized the seizure of specific

¹ CP 197:13-15.

² CP 9, 28. Layne Huber resided at 8326 Rich Road, S.E., Olympia.

³ CP 3, 36. Leslie Huber resides at 8404 Rich Road, S.E., Olympia.

⁴ CP 13. Joseph and Vicky Huber reside at 4114 Fir Tree Road, S.E., Olympia. OFF-it, Inc., was located at that same address. CP 191.

⁵ CP 255.

⁶ CP 272-301.

⁷ CP 191-192.

⁸ CP 256; RP (5/17/17) at 38:24-25.

⁹ CP 36 [No. 11-276].

¹⁰ *Id.*

property, as well as, “any other property a reasonable prudent person would believe to be stolen.”¹¹

Detective Tim Arnold, the major crime scene investigator for the Thurston County Narcotics Task Force, testified at the Cr 2.3(e) hearing that:

At the time of the search warrant, the detectives were broken up into teams. They were advised that if they didn’t have a report or they didn’t know it was stolen, they weren’t supposed to take it. *Now, whether they abided by that, I can’t answer you on that.*¹²

According to Layne Huber, the police said they would take everything and “sort it out later.”¹³

That warrant was based on an affidavit from Lacey Detective Steve Brooks¹⁴ citing a jailhouse informant, Kirk Morlan. According to Det. Brooks, Kirk Morlan “wanted to ‘come clean’ in hopes the court would take into consideration his cooperation during his sentencing in numerous criminal charges.”¹⁵ Contrary to the trial court’s assumption,¹⁶ there was no sworn

¹¹ CP 37.

¹² RP (5/17/17) at 49:12-17 [Emphasis added].

¹³ CP 256.

¹⁴ CP 28-34.

¹⁵ CP 30-34; 21-22 [Morlan was convicted of 32 burglaries in 2010 and 2011. He was also convicted of 10 felonies between 1993 and 2001, for controlled substances, thefts and burglaries.].

¹⁶ RP (5/17/17) at 60:4-6 [THE COURT (to the Deputy Prosecutor): “All right. And you’ve referenced the search warrant that includes an affidavit or declaration from the defendant Morlan.”].

statement, declaration or affidavit from the jailhouse informant (Kirk Morlan) supporting the warrant.¹⁷

After that search¹⁸ and arrests of Layne Huber, Leslie Huber and Joseph Huber,¹⁹ Detective Brooks sought a *second* search warrant for property adjacent to Layne Huber's residence.²⁰ Specifically, the residences of Leslie Huber at 8484 Rich Road, S.E.,²¹ and Joseph Huber at 4114 Fir Tree Road, S.E..²² Joseph Huber's residence, 4114 Fir Tree Road, S.E., was also the corporate address for OFF-It, Inc..²³

This second search warrant was issued telephonically by Thurston County Superior Court Judge Paula Casey on June 24, 2011, at 1501.²⁴ It identified the following crimes: possession of a stolen firearm; possession of stolen property; and possession of marijuana with intent. Detective Brook's sworn statement in support of that warrant did not disclose that Kirk Moran

¹⁷ RP (5/17/17) at 16:22-25.

¹⁸ CP 12:20-21; 14:22-23.

¹⁹ CP 11.

²⁰ CP 39-44 [The warrant identified "8404 Rich Road, S.E., a white single-story residence and all out buildings; 414 Fir Tree Rd., S.E., a yellow mobile home; all vehicles and persons associated with said property." (LPD Case 2011-2552)].

²¹ CP 42:12-13 [4114 Fir Tree Road, S.E.].

²² CP 42:13-14 [8404 Rich Road, S.E.].

²³ CP 258.

²⁴ CP 39.

was a jailhouse informant or of Mr. Moran's desire to "come clean" in return for consideration in his own sentencing.²⁵

Both warrants included the following statement:

A copy of this warrant *shall be served* upon the person or persons found in or on said property or if no person is present, a copy shall be left at a conspicuous place on or in the property and a copy of this warrant and inventory shall be returned to the above-entitled court promptly after execution.²⁶

Although Layne Huber repeatedly asked to see the search warrant, it was not provided to him²⁷ or his wife, Jacqueline Durden.²⁸ When Layne Huber asked about the warrant, an officer kned his lower back where he recently had surgery.²⁹ This necessitated calling paramedics.³⁰ Although Layne Huber was seen by an EMT at the scene and advised he would be taken to the hospital, a police officer told the medics that the police would take him to the hospital when they were finished.³¹ Layne Huber was never taken to the hospital.³²

Additionally, Layne Huber testified that:

²⁵ CP 40-44.

²⁶ CP 37; 39 [Emphasis added]; See also CrR 2.3(d) ["The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken."].

²⁷ CP 10-11.

²⁸ CP 10; 16; 21:1-6; 25.

²⁹ CP 10:12-18.

³⁰ CP 10:19-25.

³¹ CP 10:26; 11:1-2.

³² CP 10:26; 11: 2-4.

My daughter Danika and her friend, who were both 15 at the time, were drug from our family home in their underwear. I watched my daughter and her friend cry out in pain as police officers in military-style armor groped the girls, threw them on the ground and put their knees to their backs.³³

A return copy of a warrant and evidence inventory forms³⁴ were eventually provided the next day, June 25, 2011, to Layne Huber's mother, Vicky Huber.³⁵ Those inventory forms do not indicate who had possession or where specific property was located when it was seized.³⁶

C. Status of Property:

Although over 500 items were seized,³⁷ none of the Huber family members were charged with any property crime. Instead, on July 15, 2011, Layne, Leslie and Joseph Huber were charged with marijuana related felonies: possession; manufacture and use of a building for drug purposes.³⁸

On August 19-20, 2011 the police held an "open house" for self-designated burglary victims to claim "stolen" property.³⁹ Again, KIRO 7 covered the event.⁴⁰ Alleged victims were told to provide a case or incident

³³ CP 256:13-16.

³⁴ CP 45-82.

³⁵ CP 13.

³⁶ CP 45-82. The inventory lists 578 items, including business equipment, cash, guns, electronics, photos, jewelry, medications, antiques and a Maytag washer/dryer. CP 63 [Items 266 & 267].

³⁷ CP 45-82.

³⁸ CP 7-8.

³⁹ CP 192; 203.

⁴⁰ CP 234.

number and questioned about the property they were missing.⁴¹ The police did not have any of the alleged victims submit a declaration or affidavit making claim to any of the property.⁴² This lack of specific evidence was characterized as “a bit of a gamble in terms of how much specific evidence was offered.”⁴³ The trial court went on to question the sufficiency of the state’s evidence, stating:

Now, what they didn’t do is sign anything under oath. They didn’t swear under oath that that was their item. So in terms of measuring whether the State’s proof is sufficient under the case law, there could have been a process that required the individual alleged victims to sign a declaration saying on this date my home was burglarized; these items were taken; I’ve now looked at these items here, and these items are the same items that were in my home on the day that they were taken.⁴⁴

Moreover, several of the claims broadly described property and had little, if any, connection to the items listed on the inventory.⁴⁵ For example, Mark Laroque claimed: “collectable dolls; sports figures; sports cards; mags & papers; figurines; Hot Wheel cars; sport memorabilia; comics.”⁴⁶ Huber’s former sister-in-law made claims to certain property, including the

⁴¹ CP 202 – 204; 475-476.

⁴² RP (5/17/17) at 38:5-8 [Cross-examination of Emily Liening, Lacey Police Department Evidence Technician].

⁴³ RP (5/17/17) at 86:8-17.

⁴⁴ RP (5/17/17) at 79:3-15.

⁴⁵ CP 192.

⁴⁶ CP 227-228.

washer/dryer.⁴⁷ Some of these claimed losses have apparently been paid-off by insurance.⁴⁸

On May 11, 2012, nearly one year after the raid, the Deputy Prosecutor advised the Sheriff's office that "the charges are all drug related" and to "please dispose of the seized property according to the individual law enforcement agencies' department protocol."⁴⁹

On July 27, 2012, the state responded to Joseph Huber's CrR 3.6 motion to suppress conceding that "probable cause *did not exist* in support of the addendum to the search warrant" for his residence.⁵⁰ Joseph and Vicky Huber resided at 4114 Fir Tree Road, S.E., Olympia. OFF-it, Inc., was located at that same address.⁵¹

On August 15, 2012, a CPA firm hired by Layne Huber's counsel audited the inventory of items held by the Thurston County Sheriff's Office.⁵²

⁴⁷ RP (5/17/17) at 66:1-5; CP 229 [Delicia Durden claimed: Santa Clause dinnerware (#458); champagne glass set (#445); videogames (#463-1); Baseball Reggie Jackson (#132-1); notes/records (#478) and "possibly the washer/dryer".].

⁴⁸ CP 423-432 [PEMCO insurance report on Jeffrey & Jennifer Bush].

⁴⁹ CP 170; 241.

⁵⁰ CP 165:10-13 [Emphasis added].

⁵¹ CP 191.

⁵² CP 94-145 ["Any items listed but not crossed off are still in possession of the Sheriff's office and were not present for us to inspect."].

Although some of the property was released to the Hubers,⁵³ other property was missing⁵⁴ or retained by the Thurston County Sheriff's Office.⁵⁵

On August 23, 2012, the state dismissed charges with prejudice against Leslie Huber stating the grounds as "in the interest in justice."⁵⁶

On September 25, 2012, Layne Huber filed a motion to suppress evidence in his criminal case arguing: lack of probable cause; the information provided by the jailhouse informant was unreliable; and Huber was not served with a search warrant.⁵⁷ The state did not respond until July 10, 2014.⁵⁸ The State's response did not mention that, in the interim, the criminal case against Layne Huber had already been dismissed with prejudice on December 10, 2013.⁵⁹ In the end, Layne Huber's suppression motion was never ruled upon.

The "Disposition Letter" from the Thurston County Prosecuting Attorney to the Thurston County Sheriff's Office [TCSO] dated December 10, 2013 stated:

TCSO still has in evidence property that was previously identified as being stolen by victims. Please HOLD ONTO such property as the defendant still has a *pending civil case*.

⁵³ CP 237 [guns and medical marijuana grow equipment]; CP 94 [riding lawn mower, a washer/dryer, and a television].

⁵⁴ CP 94 [baseball cards].

⁵⁵ CP 94; 184.

⁵⁶ CP 179.

⁵⁷ CP 91-92; 17-90.

⁵⁸ CP 146.

⁵⁹ CP 181.

Prosecutor's Office will advise of disposition of those property previously identified as stolen at a later date. TCSO still has in evidence firearms that were seized from the defendant. Please return those items to the defendant.⁶⁰

Regarding the *pending civil case*, Off-it, Inc. and Layne Huber filed a civil suit against Thurston County and the City of Lacey on April 18, 2012 for declaratory relief seeking return of "all property confiscated and still held by the Defendants."⁶¹ On August 7, 2012, that case was removed to federal district court based on 42 USC 1983.⁶² On April 25, 2013, the US District Court granted summary judgment in favor of Thurston County. Huber appealed to the Ninth Circuit on May 9, 2013. On July 28, 2014, the Ninth Circuit affirmed the US District Court's dismissal of Huber's federal case finding that there was a meaningful post-deprivation remedy under CrR 2.3(e). The Court noted that Huber filed a CrR 2.3(e) motion while his appeal was pending.⁶³ The mandate was entered on July 28, 2014. The parties agreed that Huber would have 30 days from the date of the mandate to file any motions or pleadings to request return of the seized property.⁶⁴

On October 30, 2013, the state dismissed charges against Joseph Huber stating "the state's lead investigator who is an important witness has

⁶⁰ CP 184 [Emphasis added].

⁶¹ CP 84-90.

⁶² *Off It Inc., et al v. Thurston County, et al*, No. 3:12-cv-05701-RBL.

⁶³ App. A: *Off It, Inc., et al v Thurston County, et al*, No. 13-35408.

⁶⁴ CP 182.

passed away.”⁶⁵ Likewise, on December 10, 2013, the state dismissed charges against Layne Huber stating “the State’s lead detective on this case, Det. Steve Brooks, has passed away; thus, is unavailable for trial.”⁶⁶ By addendum to that order, counsel for the parties agreed “that had this case proceeded to trial, the State could have amended the information adding the charge of Possession of Stolen Property in the First Degree for which this court has previously found probable cause.”⁶⁷

On July 10, 2014, Layne Huber filed, *pro se*, a CrR 2.3 Motion for return of all seized property.⁶⁸ On March 22, 2017, the state responded.⁶⁹ On May 12, 2017, Huber filed an amended response to the State’s Memorandum.⁷⁰ On May 17, 2017, the stated filed its response to Huber’s amended memorandum and the court denied Huber’s motion on that same day without entering any findings of fact or conclusions of law.⁷¹ The court’s decision was based on exhibits and testimony⁷² from evidence custodians.⁷³ There was no testimony, affidavits or declarations from the jailhouse

⁶⁵ CP 180.

⁶⁶ CP 181.

⁶⁷ CP 182.

⁶⁸ CP 191.

⁶⁹ CP 195.

⁷⁰ CP 247.

⁷¹ RP (12/21/17) at 3:12-19; CP 316.

⁷² RP (5/17/17) at 5:16-23.

⁷³ CP 202-204.

informant (Kirk Morlan) or any of the alleged⁷⁴ victims making claim to the property.⁷⁵ Detective Tim Arnold testified that the County still retains the items the individual alleged victims identified.⁷⁶

On May 30, 2017,⁷⁷ Layne Huber filed for reconsideration. He refiled on June 27, 2017⁷⁸. It was eventually heard and denied on December 21, 2017.⁷⁹ Layne Huber filed a Notice of Appeal on January 19, 2018.⁸⁰

III. Summary of Arguments:

- A. Law enforcement failed to present sufficient evidence to persuade a fair-minded person that the trial court's order is correct given: (a) the search and seizure was illegal and outrageous; (b) there was no testimony, affidavits or declarations from any alleged victim other than Layne Huber; and (c) even the trial court questioned the sufficiency of the state's evidence.
- B. CrR 2.3(e) does not provide any statutory authority for forfeiture.
- C. Retention of the property for years constitutes *de facto* forfeiture.
- D. The general warrants and their execution enabled unlawful search and seizure in violation of Layne Huber's constitutional rights.

⁷⁴ The Court did not make "a conclusion that anybody is a victim of Huber." RP (5/17/17) at 34:3-4.

⁷⁵ RP (5/17/17) at 6-7; 16:16-21 [Emily Liening, Lacey Police Dept. Evidence Technician]; RP (5/17/17) at 40: 18-22 [Detective Tim Arnold, major crime scene investigator and evidence technician for both Thurston County Sheriff's Office and the Thurston County Narcotics Task Force].

⁷⁶ RP (5/17/17) at 47:21-23.

⁷⁷ CP 437; RP (5/17/17) at 37-38 [cross-examination of Emily Liening, Lacey Police Department Evidence Technician].

⁷⁸ CP 449.

⁷⁹ RP (12/21/17); CP 474-477.

⁸⁰ CP 478.

IV. Arguments:

- A. Law enforcement failed to present sufficient evidence to persuade a fair-minded person that the trial court's order is correct. In this case, (a) the searches and seizures were illegal and outrageous; (b) there was no testimony, affidavits or declarations from any alleged victim other than Layne Huber; and (c) even the trial court questioned the sufficiency of the state's evidence.**

The standard of review in this type of case is settled law.⁸¹ The *appellate court* must be satisfied that the seizing law enforcement agency presented a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the trial court's order.⁸²

To obtain forfeiture, the government must trace the property to proceeds of criminal activity.⁸³ It is not enough to show that the owner was engaged in an illegal business and had assets beyond those attributable to legitimate income.⁸⁴ Nor is it sufficient to show that the property was the proceeds of illegal activity in general.⁸⁵ Rather, the government must show that it was the proceeds of the specific kind of activity defined by the forfeiture act.⁸⁶

⁸¹ *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 611 (2017); Huber disputed the court's application of the CrR 2.3(e) standard. RP (12/21/17) at 18:22-25; 20:23-25; 21:1-17.

⁸² *Id.*, at 612.

⁸³ Seth A. Fine and Douglas J. Ende, 13 B *Washington Practice* sec. 4305 (2017-2018 Supp.).

⁸⁴ *Metro Drug Task Force v. Contreras*, 129 Wn.App. 648 (2005).

⁸⁵ *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 609 (2017),

⁸⁶ *Id.*, at 615-16.

In *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600 (2017), the City of Sunnyside sought forfeiture of a motor vehicle and cash that was found inside the vehicle that were seized on suspicion that the items were connected to drug manufacturing and distribution. The municipal court, acting as a hearing examiner, ruled in favor of the city and ordered forfeiture of the property. The Superior court reversed but the Court of Appeals reversed the superior court and reinstated the order of forfeiture. The State Supreme Court reversed the Court of Appeals and held that substantial evidence did not support the municipal court's forfeiture order. The court vacated the order of forfeiture and granted the property owner's request for reasonable attorney's fees.

The Court noted that the standard of review in this type of case is settled law.

As Division Three correctly noted, “[W]e do not reweigh evidence or redetermine credibility” on review. *Id.* at 19. The parties are not required to prove or “disprove” any factual issues at the appellate level. *Id.* at 17. However, our function is not to automatically affirm the hearing examiner's decision either. *Appellate courts must be satisfied that the seizing law enforcement agency presented “‘a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the [hearing examiner's] order,’”*

City of Sunnyside v. Gonzalez, 188 Wn.2d 600, 612 (2017) [Emphasis added].

In *State v. Card*, 48 Wn.App. 781 (1978), the court relied on *United States v. Wright*, 610 F.2d 930 (D.C. Cir. 1979), to hold the initial burden of proof lies on the State in a CrR 2.3(e) hearing. In *Wright*, the court held:

The seizure of property from someone is *prima facie* evidence of that person's entitlement . . . The whole thrust of the cases that we have cited is that when property is seized from a person, the court must return it to that person when it is no longer needed by the government. The court is obligated to restore the *status quo ante*. Unless there are serious reasons (presented by the government or adverse claimants) to doubt a person's right to the property seized from him, he need not come forward with additional evidence of ownership.

Wright, at 939. The approach in *Wright* was adopted to protect the claimant's property interest by placing the burden initially on the State to show the seized property is the product of a crime. *Card*, at 790. See also *State v. Marks*, 114 Wn.2d 724, 734 (1990).

The trial court erred in finding that the state carried its initial burden of proof under CrR 2.3(e). In *State ex rel. Schillberg v. Everett Dist. Justice Court*, 90 Wn.2d 794, 801 (1978) the court stated:

The rule contemplates that the *claimant*, by his own testimony or affidavits, will show the court sufficient facts to convince it of his right to possession.⁸⁷

The claimants include Huber and any other victims. Although “the rights of third parties are not foreclosed in such a proceeding,”⁸⁸ there was no

⁸⁷ *State ex rel. Schillberg v. Everett Dist. Justice Court*, 90 Wn.2d 794, 801 (1978)

testimony, affidavit or declaration from the jailhouse informant (Kirk Morlan) or any alleged victim other than Layne Huber. Unlike similar situations, none of the seized property was brought before the court.⁸⁹ Even the trial court questioned the sufficiency of the State's evidence:

[T]here could have been a process that required the individual alleged victims to sign a declaration saying on this date my home was burglarized; these items were taken; I've now looked at these items here, and these items are the same items that were in my home on the day that they were taken.⁹⁰

The Court noted that the State "took a bit of a gamble in terms of how much specific evidence was offered" stating:

I imagine that each of the people on the exhibit lists would have been happy to write an affidavit and say that these items were, in fact, items that were taken from their house on a particular day or went missing on a particular day, and they've looked at them, and it is in fact their grandmother's jewelry or whatever the specific item is. But that did not happen here.⁹¹

Huber echoed that argument on reconsideration.⁹² Although the state offered to submit declarations and/or testimony from the victims, the court declined.⁹³

⁸⁸ *State ex rel. Schillberg v. Everett Dist. Justice Court*, 90 Wn.2d 794, 799 (1978).

⁸⁹ Cf. *State v. Marks*, 114 Wn.2d 724, 728 (1990), "Every piece of property that was seized was brought before the hearing."

⁹⁰ RP (5/17/17) at 79:5-15.

⁹¹ RP (5/17/17) at 86:8-17.

⁹² RP (12/21/17) at 11:15-25

⁹³ RP (5/17/17) at 71:11-15; 75:6-11.

B. CrR 2.3(e) does not provide any statutory authority for forfeiture.

CrR 2.3(e) states:

Motion for Return of Property. 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. If a motion for return of property is made or comes on for hearing after an indictment or information is filed in the court in which the motion is pending, it shall be treated as a motion to suppress.⁹⁴

Here, the state maintained the search and seizure was *lawful* and CrR 2.3(e) governs instead of any forfeiture statute.⁹⁵ The trial court agreed, stating that the criminal rule is “the applicable rule where there is a question about the property ownership that is seized after the execution of a warrant.”⁹⁶

However, CrR 2.3(e) only applies to “a person aggrieved by an *unlawful* search and seizure”.

The power to order forfeiture is purely statutory.⁹⁷ In *State v. Roberts*, 185 Wn.App. 94, 96-97 (2014), this court stated:

CrR 2.3(e) does not provide any statutory authority for forfeiture of seized property. And even if CrR 2.3(e) somehow authorized forfeiture, that rule applies only to property seized

⁹⁴ Emphasis added.

⁹⁵ RP (12/21/17) at 16-17.

⁹⁶ RP (12/21/17) at 21:5-9.

⁹⁷ *State v. Alaway*, 64 Wn.App. 796, 800 (1992), review denied, 1119 Wn.2d 1016 (1992); RP (12/21/17) at 10:1-5.

in an *unlawful* search. *There is no indication that any property here was seized in an unlawful search.*⁹⁸

In *Roberts*, this court reversed the trial court's forfeiture order because neither the court nor the State provided any statutory authority for that order.

Here, the State maintains it still has possession of property seized on June 24, 2011.⁹⁹ The state relies on RCW 10.79.050 to assert that property “obtained by larceny, robbery or burglary, shall be restored to the owner.”¹⁰⁰ However, Huber was never charged with larceny, robbery or burglary.¹⁰¹ The trial court noted “that there was not a crime established against Mr. Huber.”¹⁰²

C. Retention of the property for years amount to *de facto* forfeiture.

If the government fails to comply with the substantive or procedural provisions of a specific forfeiture statute, the claimant will be entitled to maintain ownership of the property in question.¹⁰³ The state may not retain

⁹⁸ Emphasis added.

⁹⁹ CP 480:18-19 [Findings of Fact #2 states “Since the execution of the search warrant, numerous items have already been returned to Mr. Huber. The items that are remaining were items that were identified in August of 2011 by individuals as being stolen from them in burglaries. Additionally, marijuana that were seized from Mr. Huber are still remaining.”]

¹⁰⁰ RP (5/17/17) at 52:1-4; 55:18-21.

¹⁰¹ cf. *State v. Marks*, 114 Wn.2d 724 (1990) [defendants were charged and prosecuted for trafficking in stolen property].

¹⁰² RP (5/17/17) at 76:18-19.

¹⁰³ See, e.g., *Espinoza v. Everett*, 87 Wn.App. 857, 866 (1997) (when statutory procedures are not followed, government is estopped from proceeding in forfeiture action.).

legally seized evidence indefinitely without filing criminal charges before a *de facto*¹⁰⁴ forfeiture occurs.¹⁰⁵

In *Awaya v. State*, 5 Haw. App. 547, 705 P.2d 54, *cert. denied*, 67 Haw. 685, 744 P.2d 781 (1985), the court considered the length of time the government may retain legally seized evidence without filing criminal charges before a *de facto* forfeiture occurs:

There are limitations on the length of time the government may retain legally seized evidence without filing criminal charges based thereon before a *de facto* forfeiture has occurred. *United States v. Premises Known as 608 Taylor Ave., Apartment 302, Pittsburgh, Pennsylvania*, 584 F.2d 1297, 1303 (3rd Cir. 1978) (hereafter *Taylor Ave.*). Moreover, "a defendant has a right to property lawfully seized where the government no longer has reason for its retention." *State v. Brighter*, 1 Haw. App. at 252, 617 P.2d at 1229 (emphasis in original). And in such case a motion or petition for return of the property may be addressed to the equity jurisdiction of the proper court. *Mr. Lucky Messenger Service, Inc. v. United States*, 587 F.2d 15, 16-17 (7th Cir. 1978) (hereafter *Mr. Lucky*). In the absence of arrest or indictment, or institution of forfeiture procedures, a motion for suppression and return of property may be treated as one solely for return of property. See *Shea v. Gabriel*, 520 F.2d 879 (1st Cir. 1975).

Mr. Lucky, *supra*, is illustrative of the process that should be used in determining whether the property is to be returned.

¹⁰⁴ "This phrase is used to characterize an officer, a government, a past action, or a state of affairs which must be accepted for all practical purposes, but is illegal or illegitimate." *Black's Law Dictionary*.

¹⁰⁵ *State v. Davis*, 769 P.2d 840, 843 (Utah Ct. App. 1989). "The state may not retain legally seized evidence indefinitely without filing criminal charges before a *de facto* forfeiture occurs. *Awaya v. State*, 5 Haw. App. 547, 705 P.2d 54, 61 (Haw. Ct. App. 1985); see also *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1302 (3rd Cir. 1978)."

There, appellant's property, including \$ 65,000 in currency, was seized. *After approximately a year and a half, when no charges were brought, appellant filed suit to recover the currency, without attacking the legality of its seizure.* In reversing the trial court's dismissal of the complaint, the seventh circuit court held that the complaint constituted an attack on the unreasonable length of time that the government had held the property without charging a criminal offense. *The appellate court held that, although the government is not required to secure an indictment immediately after property is seized, if no charges are filed within a year and a half after seizure, the critical inquiry is whether the government had adequate justification for retaining the property for so long without bringing charges. If the government is unable to present evidence justifying such a delay, constitutional violations emerge which would seem on equitable principles to mandate that the property be returned.*

Awaya v. State, 705 P.2d 54, 61-62 (Haw. App. 1985) [Emphasis added].

Here, the property deemed as stolen or contraband has presumably been held by the TCSO for over seven years. Neither Layne Huber, his brother or his father were charged with possession of stolen property. Any statute of limitations on such charges ran long ago.¹⁰⁶ The marijuana charges were dismissed with prejudice by December 10, 2013.¹⁰⁷

The trial court abused its discretion in authorizing the *de facto* forfeiture based on hearsay testimony¹⁰⁸ from evidence custodians.¹⁰⁹ There was no testimony, affidavits or declarations from any “victim” other than

¹⁰⁶ RCW 9A.04.080(i) [3 years].

¹⁰⁷ CP 181.

¹⁰⁸ RP (5/17/17) at 5:16-23.

¹⁰⁹ CP 202-204; RP (5/17/17) at 23 [Emily Liening, Lacey PD Evidence Technician].

Layne Huber who claimed the property.¹¹⁰ None of the seized property was brought before the court.¹¹¹

Forfeiture statutes are strictly construed against the government.¹¹² Washington courts require strict compliance with statutory requirements before ordering forfeiture.¹¹³ Failure to personally serve notice of the seizure precludes forfeiture.¹¹⁴

Here, no forfeiture notice was provided per RCW 10.105.010(3).¹¹⁵ No hearing was held as required by RCW 10.105.010(5)¹¹⁶ and RCW 69.50.505(c).¹¹⁷ Thurston County has carried out an unconstitutional *de facto* forfeiture by continuing to hold property for over seven years.¹¹⁸

It is not clear, after the passage of over seven years, what and if the Thurston County Sheriff's Office still holds the property at issue. Huber

¹¹⁰ RP (5/17/17) at 6-7; 16:16-21.

¹¹¹ Cf. *State v. Marks*, 114 Wn.2d 724, 728 (1990), "Every piece of property that was seized was brought before the hearing."

¹¹² E.g., *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051, 1068 (9th Cir. 1994).

¹¹³ *Tellevik v. Real Property* ("Tellevik II"), 125 Wn.2d 364, 372-73 (1994).

¹¹⁴ *Snohomish Regional Drug Task Force v. 414 Newberg Rd.*, 151 Wn.App. 743 (Div. 1 2009), *review denied*, 168 Wn.2d 1019 (2010).

¹¹⁵ RP (12/21/17) at 10:9-11.

¹¹⁶ RP (12/21/17) at 10:21-24.

¹¹⁷ Moreover, RCW 69.50.505 sets forth a detailed protocol for seizure and forfeiture of controlled substances, including recovery of reasonable attorneys' fees if the claimant substantially prevails. RCW 69.50.505(6).

¹¹⁸ "The danger of finding the Fourth Amendment inapplicable to government conduct after the initial seizure of an individual's property is that it may leave that person with no recourse against government conduct which amounts to a de facto forfeiture of personal property." Graham Miller, *Note and Comment: Right of Return: Lee v. City of Chicago and Continuing Seizure in the Property Context*, 55 DePaul L. Rev. 745, 783 (2006).

expressed concern that some of the property had already been given away or was missing.¹¹⁹ The remaining marijuana plants¹²⁰ were not released to Huber and, presumably, have been destroyed.

In *United States v. Martinson*, 809 F.2d 1364, 1368 (9th Cir. 1987), the

Court stated:

When a citizen has invoked the jurisdiction of a court by moving for return of his property, we do not think that the government should be able to destroy jurisdiction by its own conduct. The government should not at one stroke be able to deprive the citizen of a remedy and render powerless the court that could grant the remedy. Our decision in *United States v. Palmer*, 565 F.2d 1063 (9th Cir. 1977), is instructive. In *Palmer*, after the defendant was convicted of bank robbery, the government attempted to retain money seized prior to trial apparently to return it to the bank. We held that it could not.

While we wholeheartedly approve the proposition that victims of crime should have compensation from the criminal, we feel that even at the cost of judicial time it is preferable to accomplish this end through traditional judicial procedures rather than to leave it to the police, state or federal, to find non-judicial ways and means by which to secure compensation from the criminal. Accordingly, we reject any claim of the United States to possession of the money for such purpose.

Id. at 1064-65. If we were to allow the government to moot a motion for return of property by giving the property away or

¹¹⁹ CP 192.

¹²⁰ CP 475:19.

destroying it, we would be encouraging precisely the sort of unilateral nonjudicial conduct condemned in *Palmer*.

In *State v. Davis*, 769 P.2d 840 (Utah Ct. App. 1989), the defendant sought the return of money held by the state for more than two and one-half years since dropping criminal charges against him. In ruling for the defendant/appellant, the court held that:

Coercing a forfeiture would be an unconstitutional application of the statute. Forfeiture is simply not available for this purpose. We conclude that appellant had a right to the return of his money since section 77-24-2 is not a forfeiture statute and may not be used in a manner which constitutes a forfeiture.

State v. Davis, 769 P.2d at 844.

Here, the state has held the property for over seven years without following the protocol of any applicable forfeiture statute and without charging Huber with any property crime. The statute of limitations for doing so has passed and the property should be returned to Huber.

D. The general nature of the warrants and their execution enabled unlawful search and seizure in violation of Huber's constitutional rights.¹²¹

1. The warrants, which authorized police to seize "any other property a reasonable prudent person would believe to be stolen,"¹²² violated the Fourth Amendment and Washington Constitution art. I, § 7.

¹²¹ See RP (12/21/17) at 23:21-25; RAP 2.5(a)(3).

¹²² CP 37.

The Fourth Amendment to the United States Constitution and Article I, § 7 of the Washington State Constitution protect individuals against unreasonable searches and seizures. *State v. Day*, 161 Wn.2d 889, 893 (2007). The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*¹²³

The Fourth Amendment mandates that warrants describe with particularity the things to be seized. *State v. Perrone*, 119 Wn.2d 538, 547 (1992). Long ago, in *Marron v. United States*, 275 U.S. 192, 196 (1927), the U.S. Supreme Court stated:

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*¹²⁴

Here, the warrant authorized the police to seize specific property “and any other property a reasonable prudent person would believe to be stolen.”¹²⁵

Article I, § 7 of the Washington State Constitution states:

¹²³ Emphasis added.

¹²⁴ *Marron v. United States*, 275 U.S. 192, 196 (1927) [Emphasis added].

¹²⁵ CP 37 (#10).

No person shall be disturbed in his private affairs,
or his home invaded, without authority of law.

The general language of the warrants executed against the Huber family acted like a drag net,¹²⁶ authorizing seizure of specific property, as well as, “any other property a reasonable prudent person would believe to be stolen.”¹²⁷ The police proceeded with the understand to take everything and “sort it out later.”¹²⁸ This even included Huber’s washer/dryer based on a claim from his former sister-in-law.¹²⁹

The trial court was concerned by the scope of the search but did not acknowledge that CrR 2.3(e) only applies to “unlawful search and seizure”.

Before I proceed to what is before the Court, I wanted to indicate what the court is not addressing today. And this is not a hearing that requires the court to address the lawfulness of the search or the underlying search warrant and the manner in which the search was allegedly carried out.¹³⁰

I say that but I can’t help but comment on two statements in Mr. Huber’s May 12, 2017, declaration. In paragraph 6 it indicates that Mr. Huber saw with his own eyes and heard a police officer say that the county people said to take

¹²⁶ “Perhaps because drug offenders are perceived as having tremendous assets, the State often seizes and attempts to forfeit real or personal property that is in some way connected to the commission of a violation of the Uniform Controlled Substances Act [Ch. 69.50 RCW].” Seth A. Fine and Douglas J. Ende, 13 B *Washington Practice* sec. 4301 (1998 & 2017-2018 Supp.).

¹²⁷ CP 37 (#10).

¹²⁸ CP 256.

¹²⁹ CP 45-82. Emphasis added. The inventory lists 578 items, including business equipment, cash, guns, electronics, photos, jewelry, medications, antiques and a Maytag washer and dryer. CP 63 [Items 266 & 267]; CP 229 [Delicia Durden].

¹³⁰ RP (5/17/17) at 73:20-25.

everything, we'll sort it out later.¹³¹ That's obviously not consistent with the testimony received today for the individual law enforcement officials who had involvement in the execution of the search warrant. And to the extent that that statement was made by some person and that was part of the method, the court has concerns and is troubled by that statement.¹³²

The court was referring to Detective Tim Arnold, the major crime scene investigator for the Thurston County Narcotics Task Force, who testified:

At the time of the search warrant, the detectives were broken up into teams. *They were advised that if they didn't have a report or they didn't know it was stolen, they weren't supposed to take it.* Now, whether they abided by that, I can't answer you on that.¹³³

It is unclear what “reports” Detective Arnold was referring to since the “open house” where alleged “victims” provided police reports occurred *after* the raid.

Moreover, the inventory forms are a mess.¹³⁴ They do not “sort out” who had the property or where the property was located when it was seized. This commingling of property presents a problem given CrR 2.3(e) only applies to “*unlawful* search and seizure” and the state conceded that “probable cause *did not exist* in support of the addendum to the [second] search warrant”

¹³¹ CP 256:4-7.

¹³² RP (5/17/17) at 74:1-13

¹³³ RP (5/17/17) at 49:12-17 [Emphasis added].

¹³⁴ CP 45-82. The inventory lists 578 items, including business equipment, cash, guns, electronics, photos, jewelry, medications, antiques and a Maytag washer/dryer. CP 63 [Items 266 & 267].

for Joseph Huber's residence.¹³⁵ As noted above, OFF-it, Inc. was located at that same address.¹³⁶

2. Failure to provide Huber with any warrant violated his constitutional rights.

The trial court expressed concerns on how a search warrant was executed.

I also note that paragraph 9¹³⁷ that references alleged treatment of a teenager and her friend during the search again raises concern, and the court is troubled by that reference and is disturbed if that was how the search warrant was executed.¹³⁸

The Ninth Circuit caselaw requires police to present a copy of the warrant to the owner of the premises at the time of the search. In *United States v. Gantt*, the Ninth Circuit Court of Appeals stated:

The search warrant requirement arose from the Founder's understanding that "power is a heady thing; and history shows that the police acting on their own cannot be trusted." *McDonald v. United States*, 335 U.S. 451, 456, 93 L. Ed. 153, 69 S. Ct. 191 (1948). The citizen whose home is invaded without service of a warrant must suffer the invasion while still in doubt of its legality. Citizens deserve the opportunity to calmly argue that agents are overstepping their authority or even targeting the wrong residence. For this reason, service of the warrant at the outset of the search is recommended by the distinguished authors of the Model Code of Pre-Arrestment procedure. See American Law Institute, *A Model Code of Pre-Arrestment Procedure* 132 (1975). Our law requires officers

¹³⁵ CP 165:10-13 [Emphasis added].

¹³⁶ CP 191.

¹³⁷ CP 256 [Declaration of Layne Huber].

¹³⁸ RP (5/17/17) at 74:18-22.

wishing to search a premises to first conduct an initial investigation, prepare affidavits, appear before a magistrate, obtain a search warrant, and bring copies of the complete warrant to the search. After agents have complied with all of these burdens, we cannot understand why the government then objects to the agents spending a few seconds to serve the warrant as they begin their search, the final step in fulfilling two of the primary justifications for our warrant procedures.

United States v. Gantt, 194 F.3d 987, 1002 (9th Cir. 1999).

The key premise underlying the presentation requirement is that "[a]bsent such presentation, individuals would stand [no] real chance of policing the officers' conduct." *United States v. Grubbs*, 377 F.3d 1072, 1079 (9th Cir. 2004) (Grubbs I) (internal quotation marks and citation omitted).

United States v. Hector, 474 F.3d 1150, 1154 (9th Cir. 2007).

Warrantless searches done without a valid exception are *per se* unreasonable under Wash. Const. art. I, § 7. *State v. Ross*, 141 Wn.2d 304, 312 (2000). That section provides that: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. This section, which is more protective of individual liberties than the Fourth Amendment, requires a warrant or recognized exception to the warrant requirement. See *State v. Groom*, 133 Wn.2d 679, 685 (1997).

RCW 10.79.040 (1) states: "It shall be unlawful for any police officer or other peace officer to enter and search any private dwelling house or place

of residence without the authority of a search warrant issued upon a complaint *as by law provided.*¹³⁹

Under CrR 2.3(d), “The peace officer taking property under the warrant *shall give* to the person from whom or from whose premises the property is taken a *copy of the warrant* and a receipt for the property taken.”¹⁴⁰ In *State v. Ettenhofer*, 119 Wn.App. 300, 305 (2003), the court found that an oral warrant violated CrR 2.3(d). The court stated:

As these words are perfectly clear, the Supreme Court's intent with respect to subsection (d) is not open to debate; it expected that the person searched would receive a physical document.

A ministerial mistake is grounds for invalidating a search warrant if prejudice is shown. *State v. Wible*, 113 Wn.App. 18, 25 (2002).

Huber repeatedly asked for the warrant.¹⁴¹ The police callously¹⁴² and deliberately disregarded CrR 2.3(d), as well as, the express terms of the warrant itself.¹⁴³ Both warrants included the following statement:

¹³⁹ Emphasis added.

¹⁴⁰ Emphasis added.

¹⁴¹ CP 10, 16; 21:1-6; 25.

¹⁴² CP 10-11. When Huber asked about the warrant, the officer kned his lower back where he recently had surgery. This necessitated calling paramedics. Huber was seen by an EMT and advised he would be taken to the hospital. However, a police officer told the medics that the police would take him to the hospital when they were finished. Huber was never taken to the hospital.

¹⁴³ CP 37; 39; *See also* CrR 2.3(d) [“The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken.”].

A copy of this warrant *shall be served* upon the person or persons found in or on said property or if no person is present, a copy shall be left at a conspicuous place on or in the property and a copy of this warrant and inventory shall be returned to the above-entitled court promptly after execution.¹⁴⁴

Huber was prejudiced because he was not presented with the warrant and, therefore, did not have assurance that the search was authorized or “what items the officers can seize.”¹⁴⁵ In fact, the police had to secure a second telephonic warrant after he, his brother and father were arrested.¹⁴⁶

On July 27, 2012, the state responded to Joseph Huber’s CrR 3.6 motion to suppress conceding that “probable cause *did not exist* in support of the addendum to the search warrant” for his brother and father’s residence, which was also the address of Off-It, Inc.¹⁴⁷ Huber continues to be prejudiced by the fact that, over 7 years after the search, the police continue to hold his property even though the case was dismissed in 2013.¹⁴⁸

V. Request for attorneys’ fees and expenses. RAP 18.1

The Uniform Controlled Substances Act provides that a claimant who substantially prevails is entitled to reasonable attorney’s fees. RCW 69.50.505(6). In *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600 (2017), the

¹⁴⁴ CP 37; 39 [Emphasis added].

¹⁴⁵ See, *United States v. Hayes*, 794 F.2d 1348, 1355 (9th Cir. 1986).

¹⁴⁶ CP 39 [LPD Case 2011-2552]; CP 191.

¹⁴⁷ CP 165:10-13 [Emphasis added].

¹⁴⁸ CP 181.

State Supreme Court reversed the Court of Appeals and held that substantial evidence did not support the municipal court's forfeiture order. The court vacated the order of forfeiture and granted the property owner's request for reasonable attorney's fees.

Moreover, the Ninth Circuit found that Huber had a "meaningful post-deprivation remedy" in the form of a CrR 2.3(d) motion.¹⁴⁹ The Court stated:

The motion remains pending before the Washington State Superior Court. Because he has now filed a challenge under CrR 2.3(e) and failed previously to avail himself of this state post deprivation remedy, Huber cannot, *at this juncture*, demonstrate that Thurston County may be liable for ratifying a violation of federal law.¹⁵⁰

However, CrR 2.3(e) expressly applies to "unlawful search and seizure" which *ipso facto* would violate Huber's constitutional rights. Damages are presumed for Fourth Amendment violations under 42 U.S.C. § 1983.¹⁵¹ In *Maytown Sand & Gravel LLC v. Thurston County*, 198 Wn.App. 560, 592-593 (2017), this court awarded Maytown attorney fees on appeal pursuant to 42 U.S.C. §§ 1983 and 1988 and RAP 18.1.

¹⁴⁹ App. A: *Off It, Inc., et al v Thurston County, et al*, No. 13-35408: Memorandum (7/28/14) Memorandum Order.

¹⁵⁰ *Id.*, at 3.

¹⁵¹ Comment, *Presumed Damages for Fourth Amendment Violation*, 129 U. Pa. L. Rev. 192 (1980).

VI. Conclusion

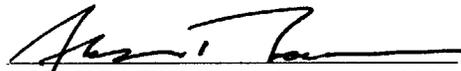
Layne Huber has been the victim of an outrageous unlawful search and seizure. Property seized by the police over seven years ago remains in the possession of the Thurston County Sheriff's Office based on unverified claims of alleged victims. A fair-minded person would not be satisfied with the evidence presented to the trial court. There was no testimony, affidavits or declarations from any alleged victim other than Layne Huber. Even the trial court questioned the sufficiency of the state's evidence. Keeping the property for over seven years amounts to *de facto* forfeiture. The court should hold that substantial evidence did not support the trial court's forfeiture order. The court should vacate that order and grant Huber's request for costs and reasonable attorney's fees.

Respectfully submitted by the Attorneys for Appellant Layne E. Huber:

Dated: March 28, 2018.



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No. 51747-7-II

(Thurston County Superior Court No. 11-1-01008-6)

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

STATE OF WASHINGTON,

Respondent

v.

LAYNE E. HUBER,

Appellant

APPENDIX A

Off It, Inc., et al v Thurston County, et al, No. 13-35408 (9th Cir. 2014): Memorandum (7/28/14) and Mandate (8/20/14).

FILED

JUL 28 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OFF IT INC, a Washington State corporation and LAYNE E HUBER, in his individual capacity,

Plaintiffs - Appellants,

v.

THURSTON COUNTY, a municipal corporation and CITY OF LACEY, a municipal corporation,

Defendants - Appellees.

No. 13-35408

D.C. No. 3:12-cv-05701-RBL

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted July 11, 2014
Seattle, Washington

Before: ALARCÓN, TASHIMA, and MURGUIA, Circuit Judges.

Appellants Off-It, Inc. and Layne Huber (collectively “Huber”) appeal from the district court’s grant of summary judgment in Appellee Thurston County’s

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

favor on Huber's claim against the County under 42 U.S.C. § 1983 for ratifying a constitutional violation. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

In his briefing, Huber identified the sole constitutional violation at issue in this case as the County prosecutor's "indefinite withholding" of the allegedly stolen property officers seized as evidence for criminal charges the County prosecutor had not yet brought but contended it would bring in the future.¹ Huber did not specify the federal constitutional violation he contended the County ratified. His complaint and his briefs on appeal suggest, however, that the County ratified an unconstitutional deprivation of property without due process in violation of the Fourteenth Amendment.

"[A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). Washington Superior Court Criminal Rule 2.3(e) ("CrR 2.3(e)") supplies such a remedy here.

¹The County represented at oral argument that it will not file stolen property charges against Huber, a representation that is consistent with its post-argument filing in this Court.

Although Huber contends that CrR 2.3(e) is an inadequate postdeprivation remedy, the rule's allowance for an evidentiary hearing that places the initial burden on the state undermines any such contention. *See State v. Marks*, 790 P.2d 138, 144 (Wash. 1990) (en banc) (“An evidentiary hearing is required under CrR 2.3(e) where the State and the defendant can offer evidence of their claimed right to possession,” at which “[t]he State has the initial burden of proof to show right to possession.”).

Huber argues that a CrR 2.3(e) motion here “would have no basis in law or fact” because Thurston County contends it holds the property as evidence for charges the prosecutor intends to file but has not. Huber conceded at oral argument, however, that he has filed a CrR2.3(e) motion since the district court entered judgment and after he took this appeal. That motion remains pending before the Washington State Superior Court. Because he has now filed a challenge under CrR. 2.3(e) and failed previously to avail himself of this state postdeprivation remedy, Huber cannot, at this juncture, demonstrate that Thurston County may be liable for ratifying a violation of federal law.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 20 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

OFF IT INC, a Washington State
corporation and LAYNE E HUBER, in
his individual capacity,

Plaintiffs - Appellants,

v.

THURSTON COUNTY, a municipal
corporation and CITY OF LACEY, a
municipal corporation,

Defendants - Appellees.

No. 13-35408

D.C. No. 3:12-cv-05701-RBL
U.S. District Court for Western
Washington, Tacoma

MANDATE

The judgment of this Court, entered July 28, 2014, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

Costs are taxed against the appellant in the amount of \$46.80.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court

Eliza Lau
Deputy Clerk

March 27, 2018 - 8:38 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v. Layne E. Huber, Appellant
Superior Court Case Number: 11-1-01008-6

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