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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 REPLY BRIEF

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Introduction:

This case boils down to *de facto* forfeiture based on an illegal search.[1] As this Court held in *State v. Alaway*, "the State cannot confiscate property merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures."[2] This Court stated:

> RCW 69.50.505 provides the exclusive mechanism for forfeiting property of the type involved in this case. The State having failed to comply with that statute, Alaway is entitled to have his property returned.[3]

Arguments:

1. **The State ignores the standard of review applicable to the seizure and forfeiture of property.**

It is undisputed that CrR 2.3(e) provides no authority for forfeiture.[4] Yet, the State ignores the standard of review applicable to the seizure and forfeiture of property.[5]

The State argues this was resolved by the CrR 2.3(e) hearing. However, in *State v. Roberts*, this Court held that:

> 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 in an unlawful search.[6]

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[1] See Appellant's Opening Br. at 18-23.
[2] *State v. Alaway*, 64 Wn. App. 796, 799 (1992).
[3] *Id.*, at 802.
[4] Appellant's Opening Br. at 17-18.
[5] *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 611 (2017) [Appellant's Opening Br. 13, 14 and 30].
[6] 185 Wn. App. 94, 96-97 (2014).

2. The legality of the search is properly before this court.

The trial court did not rule on Huber's motion to suppress and concluded that it was not required to address the lawfulness of the search at the CrR 2.3(e) hearing. The State argues, therefore, that the issue is "not properly before the court."[7] The superior court erred in failing to address the issue.

The failure of the superior court to rule on Huber's motion to suppress does not preclude him from raising this manifest error on appeal per RAP 2.5(a)(3). Constitutional issues are questions of law that an appellate court reviews *de novo*.[8] Thus, contrary to the state's assertion, the legality of the search is not "moot" or "irrelevant."[9]

Huber preserved the constitutional issue for review by repeatedly raising it before the superior court. In *Blomstrom v. Tripp*, this court stated:

> The petitioners claim that urinalysis testing violates their right to privacy under article I, section 7 of the Washington Constitution. The State argues that this claim was not preserved because it "was never raised, argued, briefed, or addressed in the trial court." State Br. at 7. However, at a first appearance before the district court, one of the petitioners cited to a case discussing the constitutionality of urinalysis testing as a condition of pretrial release. We must

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[7] Respondent's Br. at 25, 27.
[8] *State v. Gresham*, 173 Wn.2d 405, 419 (2012).
[9] Respondent's Br. at 27.

> now decide whether this citation was sufficient to preserve the constitutional issue for review.[10]

This Court ultimately concluded that the defendants preserved the constitutional claims and permitted the petitioners to raise the issue on appeal.

The 9th Circuit dismissed Huber's constitutional claims premised on the assumption that there was a meaningful post-deprivation remedy under CrR 2.3(e).[11] Although CrR 2.3(e) applies to "unlawful" searches and seizures, the hearing did not provide "meaningful post-deprivation remedy" because the superior court did not address the constitutionality of the search.

Surprisingly, the State argues that "Because the criminal prosecution was ultimately dismissed, the issue of the legality of the search warrant was moot."[12] This is absurd and contrary to public policy. It would give law enforcement a "free pass" for violating fundamental constitutional rights.

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[10] *Blomstrom v. Tripp*, 189 Wn.2d 379, 393 (2017).
[11] Appellant's Opening Br. at 10 [App. A: *Off It, Inc., et al v. Thurston County et al.* No 13-35408]; See also, Respondent's Br. at 3.
[12] Respondent's Br. at 26.

Conclusion:

Ubi Jus, Ib remedium is an ancient legal maxim of law that stands for the proposition that "where there is a right, there is a remedy".[13] Here, Huber's due process and property rights were violated by applying CrR 2.3(e) rather than RCW 69.50.505 to forfeit property seized as a result of an unlawful search.

Contrary to the state's argument, violations of constitutional rights do not become "moot" and "irrelevant" if the State decides not to proceed with the criminal case. If that were true, it would give the state what amounts to immunity for violating fundamental constitutional rights.

Dated: June 4, 2018.

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[13] Black's Law Dictionary

CERTIFICATE OF SERVICE

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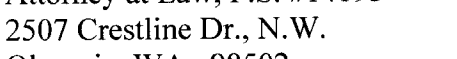

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