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Division II
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No. 51747-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

LAYNE E. HUBER
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Sue Wilson
Cause No. 11-1-01008-6

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1-2

C. ARGUMENT.....

 1. The trial court properly applied CrR 2.3(e) in its consideration of Huber’s motion for return of property...... 14

 2. The State presented sufficient evidence for the trial court to conclude that the items seized belonged to the individuals who identified them...... 21

 3. The trial court was not required to make a ruling on the legality of the search warrant and did not consider any argument regarding the legality of the warrant 24

 4. The trial court only considered the return of stolen property and no party requested that the trial court make a ruling with regard to the seized marijuana 27

 5. The State objects to Huber's request for reasonable attorney's fees pursuant to RAPO 18.1 31

D. CONCLUSION..... 32-33

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Dux v. Hostetter,
37 Wn.2d 550, 554, 225 P.2d 210 (1950) 31

State ex rel. Schillberg v. Everett Dist. Justice Court,
90 Wn.2d 794, 585 P.2d 1177 (1978) 15-18, 21, 23

State v. Catlett,
133 Wn.2d 355, 366, 945 P.2d 700 (1997) 19

State v. Lively,
130 Wn.2d 1, 16, 921, P.2d 1035 (1996) 21

State v. Marks,
114 Wn.2d 724, 790 P.2d 138 (1990) 18, 19

State v. McFarland,
127 Wn.2d 322, 335, 899 P.2d 1251 (1995) 20

State v. Ruem,
179 Wn.2d 195, 199, 313 P.3d 1156 (2013) 29

State v. Salinas,
119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 21

Colorado Supreme Court Decisions

People v. Crouse,
388 P.3d 39, 40, 2017 CO 5 (2017) 30

Decisions Of The Court Of Appeals

Maytown Sand & Gravel LLC v. Thurston County,
198 Wn. App 560, 395, P.3d 149 (2017) 31

State v. Alaway,
64 Wn. App 796, 798, 828 P .2d 591 (1992)..... 15, 26, 29

State v. Card,
48 Wn. App 781, 784, 741 P.2d 65 (1987).....15, 21, 23

State v. Gerber,
28 Wn. App 214, 216, 622 P .2d 588 (1981)..... 28

State v. Moen,
110 Wn. App 125, 130, 38 P.3d 1049 (2002);
citing United States v. Ursery, 518 U.S. 267, 283, 116 S.Ct. 2135,
135 L.Ed.2d 549 (1996) 19, 20

State v. Smits,
152 Wn. App 514, 523, 216 P 3d 1097 (2009)..... 27

Oregon Court of Appeals Decisions

State v. Ehrensing,
296 P.3d 1279, 1280, 255 Ore.App. 402 (2013) 30

U.S. Court of Appeals Decisions

United States v. Farrell,
606 F.2d 1341, 1347 (D.C. Cir. 1979)..... 29

Statutes and Rules

CrR 2.3..... 1, 13, 15, 18-21, 23, 25-27, 31-33

CrR 3.6..... 26

CR 59(a)(7) 14

RAP 18.1..... 1, 31, 32

RAP 2.2..... 26

RCW 9.68A.120	20
RCW 10.79.050.....	15, 18, 24, 32-33
RCW 10.105.010.....	20
RCW 19.290.230.....	20
RCW 64.40.....	32
RCW 69.50.505.....	1, 19, 20, 31, 33
RCW 69.51A.	30
RCW 69.51A. 040(1)(a)(2011) (<i>Former</i>)	29
RCW 69.51A. 085(1)(b)(2011) (<i>Former</i>)	29
RCW 70.74.400.....	20

OTHER REFERENCES

2013 Wash. Laws ch. 3.....	29
21 U.S.C.§812(c)	29
21 U.S.C.§841.....	30
42 U.S.C.§1983.....	1, 31-33
Federal Criminal Procedure Rule 41(e).....	17

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court correctly applied the standards of CrR 2.3(e) to Huber's motion for return of property.
2. Whether sufficient evidence supported the trial court's finding by a preponderance of the evidence that the property at issue was stolen property.
3. Whether this court should considered the legality of the search warrant where the trial court did not consider the issue and was not required to in order to rule on Huber's motion.
4. Whether this Court should consider any claims regarding the return of marijuana where the trial court never made any findings regarding whether the marijuana was contraband and neither party requested any ruling in regard to the seized marijuana.
5. Whether this Court should consider a request for costs pursuant to RAP 18.1 where the request is based on RCW 69.50.505(6) and 42 U.S.C. §1983 and the only hearing held before the trial court was based on CrR 2.3(e).

B. STATEMENT OF THE CASE.

On June 24, 2011, after an informant had disclosed that he had taken stolen property to Layne Huber approximately eight times following burglaries that he had admitted to committing, officers conducted a search warrant and discovered approximately 120 marijuana plants and several items that were suspected to have been stolen and have been stolen, many of which matched items that had been reported stolen. CP 483-484. Huber was

initially charged with unlawful manufacture of a controlled substance and unlawful possession of a controlled substance marijuana, with intent to deliver. CP 6.

On September 25, 2012, Huber filed a motion to suppress and a memorandum in support of his motion, arguing that there was an insufficient basis for the search warrant that was served. CP 17-90, 91-92. The State filed a response to the motion to suppress. CP 146-190. The trial Court did not rule on the motion to suppress and it does not appear that the motion was ever considered by the trial court.

On December 10, 2013, the State filed a Motion and Order of Dismissal, citing as a basis that the State's lead detective on the case, Det. Steve Brooks, had passed away and was unavailable for trial. CP 181. The parties also filed an addendum to the order of dismissal noting that the attorneys, "pursuant to the dismissal order, agree[d] that had the 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 [the] court [had] previously found probable cause." CP 182. The parties also specified,

“The parties also agree that once the Mandate in the defendant’s civil case (U.S. Court of Appeals, 9th Cir. No. 13-35408 on appeal from U.S. District Court No. 12-05701-RBL) is filed and entered, the defendant will have 30 days from the date of such mandate to file any motions or pleadings pursuant to either a civil or criminal case for the purpose of requesting seized property by law enforcement that was previously identified as stolen by Lacey Police Department and Thurston County Sheriff’s Office under cause number 11-1-01008-6. Upon the expiration of the 30 days, the defendant agrees that if no motions or pleadings have been filed, such property that was previously identified as stolen may be returned to the proper owners.”

CP 182.

On July 10, 2014, Huber, acting pro se, filed a motion pursuant to CrR for Return of Property. CP 191-194. The State filed a responsive memorandum on March 22, 2017. CP 195-229. Attached to the State’s response were declarations from Lacey Police Department evidence custodian Emily Liening and Thurston County Sheriff’s Detective Tim Arnold, which detailed that a property viewing had been held in which identified property crime victims were allowed to view and identify items that had been seized. CP 202-204. Also attached were Thurston County Sheriff’s Office property sheets detailing items that had been identified as belonging to other individuals during that process. CP 205-229.

Huber filed a response to the State's responsive pleading. RP 230-246. Huber's attorney filed an amended response to the State's memorandum on May 12, 2017. CP 247-254. On May 15, 2017, Huber filed a Declaration with attachments. CP 255-315. On May 16, 2017, the State responded and included portions of police reports that related to the stolen items. CP 316-436. In that response, Deputy Prosecuting Attorney Olivia Zhou stated, under penalty of perjury, "attached are portions of police reports that outline the victim's name; agency's case number; and a list of items that the victims indicated were stolen at the time of the filing of the police report." CP 317.

On May 17, 2017, the trial court held a hearing on Huber's motion for return of property. 1 RP 4.¹ At the start of the hearing, the deputy prosecuting attorney stated,

"Your honor, I can tell the court as the court indicated, that the State has filed multiple briefs. I do have two witnesses here today, and they are Emily Liening and Detective Tim Arnold. Ms. Liening is from the Lacey Police Department, and Detective Arnold is from the Sheriff's Office. I anticipate taking their testimony. I know that in one of the briefs I've submitted to the court, I've also attached their declarations with

¹ For purposes of this brief the Verbatim Report of Proceedings for the May 17, 2017, motion hearing will be referred to as 1 RP. The Verbatim Report of Proceedings for the December 21, 2017, motion to reconsider hearing will be referred to as 2 RP.

regards to the property viewing. That's the only witnesses the State has."

1 RP 5. Later, the prosecutor discussed responsive briefing after Huber's retained counsel had filed a brief stating,

"I got notice that he was retained by Mr. Huber this week, earlier this week. An in response to a brief that he had filed, the State did not file any additional briefings, but I did provide a short declaration from myself and then also attached—basically attached portions of the individual police reports of each of the burglaries that were taken by law enforcement officers from the victims in this matter. I provided a bench copy to the court late yesterday."

1 RP 6. With regard to the victims of the burglaries, the prosecutor stated,

"I know in previous briefs that Mr. Huber filed, it sounds like it's his intention that he wants to - - I guess whether it was through himself or his counsel, be allowed to cross examine the victims. I did not have the victims come in today. I guess the State's position is that there's no case law indicating they're required, but if the court is wanting to hear from them, I would - - I guess the only suggestion I would have is to just schedule the matter for a further hearing and the State will bring in all 28 victims."

1 RP 6-7.

Huber's counsel indicated:

"First, I'd like to start with the documents I would like the court to address today. I would like the court to address the last response filed pro se by Mr. Huber before he retained me. I would ask the court consider the amended response to the State's memorandum

that I filed on this case - - I believe it was May 11. And I would ask that the court take note of the declaration of Layne Huber of May 12, 2017, as that contains all the relevant documents that we would refer to.”

1 RP 7-8. Counsel continued:

“There’s going to be no need for exhibits. We do not object to any of Ms. Zhou’s witnesses, as long as we get to cross-examine them. We will not be calling any witnesses ourselves. We would ask that we would only settle this through argument and make a judgment on the paper that you have in front of you.”

1 RP 8. During opening statements, Huber’s counsel acknowledged “the purpose of the hearing is to determine the right to possession as between the state and the defendant.” 1 RP 16.

Lacey Police Department evidence technician Emily Liening testified at the hearing. Liening assisted in the collection of evidence in a case involving Kirk Morlan. 1 RP 23-24. Her role in the investigation included assisting with the execution of a search warrant that had been obtained by Detective Brooks at Mr. Huber’s residence. 1 RP 25. During the execution of the search warrant, “there were officers assigned different areas of the property to search. They were to collect evidence and bring it to a central processing area,” where Liening was assisting in marking the items.

1 RP 26. Following the search, the Thurston County Sheriff's Office took custody of all of the items. 1 RP 26.

An evidence viewing occurred over four days. 1RP 27. Officers had a list of what they referred to as known victims from the Morlan case which were burglaries that he admitted to. And those were their first initial contacts. 1 RP 27. Liening indicated,

“We were already familiar with the cases that they had reported. They had documented case numbers for their burglaries. And in most cases, I had interacted with them previously and was familiar with what types of items they were looking for.”

1RP 27-28. Liening documented the viewer's case numbers and verified their identities before they were escorted into the building by other personnel. 1 RP 28. Other individuals who had not been identified as victims of Morlan were allowed to come to the viewing, but they were required to “present a case number and identification and a brief explanation of the types of items that they were looking for before they would even be allowed into the facility.” 1 RP 28.

A document was created that listed all of the individuals what identified items as part of the Huber property viewing. 1 RP 30-32. The document listed people who identified property as belonging to them, and referenced the case numbers that were their original burglaries. 1 RP 32. The trial court admitted the document as

Exhibit 1. 1 RP 34; Exhibit 1. Twenty-eight individuals identified property that had been seized as belonging to them. 1 RP 34. Twelve of those individuals had been identified as victims of the Morlan burglaries. 1 RP 34-35. The specific case numbers for the original burglary reports for each individual were also listed in the document. 1 RP 35.

One of the individuals who identified items was named Mark Larocque. Liening had interacted with him previously and noted “When we were originally processing the evidence in preparation for the viewing, we came across several items that had his name on it. And being previously familiar with him, I suggested to the employees of the Sheriff’s Office that they might want to reach out to Mr. Larocque.” 1 RP 36-37.

Detective Tim Arnold of the Thurston County Sheriff’s Office also testified at the hearing. Arnold testified that he is employed as a “major crime scene investigator and an evidence technician for both the Sheriff’s Office and the Thurston County Narcotics Task Force.” 1 RP 40. Arnold was involved in the initial execution of the search warrant at the Huber residence. 1 RP 41. Arnold noted that “ultimately, we released the majority of the property back to Mr. Huber.” 1 RP 42.

The property viewing was held from August 17 through August 20, 2011. 1 RP 42. The items had been photographed and cataloged. If a person identified an item as theirs, then the item was assigned a separate number. 1 RP 43-44. The viewing was documented with forms that were filled out when an individual identified property as theirs. The list that was created was an “accurate representation of the individual and the items - - evidence item number that the individuals identified.” 1 RP 47. That list was admitted as Exhibit 2. 1 RP 46, Exhibit 2.

At the end of the prosecutor’s closing argument, the trial court asked, “Am I correct to understand that the only property at issue in today’s hearing are the items referenced for each of these 28 victims on Exhibit 1.” 1 RP 59-60. The trial court also inquired as to whether the search warrant affidavit was part of the court file. 1 RP 60. The prosecutor offered to supplement the record with the search warrant affidavit and a taped statement and to continue the matter for live testimony from each of the 28 victims if needed. 1 RP 70. The trial court went into recess without ruling on that offer to supplement the record. 1 RP 71. When the Court returned from its recess, the court indicated: “I have reviewed the case law and the statutes that have been cited, and I have considered the

evidence that has been received today and submitted by way of declaration.” 1 RP 72.

The trial court stated:

“I think that the lawyers agree that the test the court employs in looking at this question is a four-part test. The first two parts are, the court conducts an evidentiary hearing. And the purpose of the hearing is to determine who has established or offered evidence to show a right to possession and basically the superior right to possession.

The third and fourth pieces or steps are, the State goes first and has the burden of showing the right of possession. And if the State asserts that they believe that the property is stolen, then they have a burden to show that based upon the evidence. If the State meets the initial burden, then the claimant must present sufficient facts to show his or her right to possession in the property.”

1 RP 72-73. Before ruling, the trial court specified what it was not addressing, stating:

“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.”

1 RP 73. The trial court specifically noted, “the issue is the right of possession.” 1 RP 75. At that point, the trial court indicated that the court had decided not to take additional evidence. 1 RP 75.

The trial court noted that in Huber’s declaration, the statement that he made regarding a claim of ownership was “the

coins, the tools, the armoire, the baseball cards, the jewelry, all of the things they took from my house are either the inventory of my business or the personal property of my family.” 1 RP 80. The court noted, “the declaration, from this court’s perspective, is fairly conclusory. It doesn’t provide any connection that the court could discern between the specific items that he seeks return of to tell the court the basis for his claim of ownership.” 1 RP 86.

The trial court found that the State had met its burden, stating”

“Here the court is finding that there is no mandate that each victim have a sworn statement; that having considered all of the testimony that was submitted today and the exhibits that were offered, understanding the nature or how the evidence came to be in the building where there was an evidence viewing in August of 2011, and understanding that each person who asserted a claim on the documents that have been admitted into evidence had to initially show that they had filed a police report and that the police report involved reporting of the taking of property that was consistent with property that was at the building for viewing. The court finds that all of that is sufficient support that these people who came and viewed, identified, and claimed these property items in fact have a valid claim.”

1 RP 87. The court later stated:

“the court finds that what the State has offered is sufficient proof to show their lawful right of possession as basically the person under the statute, under

10.79, that has the obligation to hold that property and pass it back to the alleged victims.”

1 RP 88-89.

After finding that the State met its burden, the trial court considered whether Huber presented sufficient facts to show his right to possession. The court stated,

“the court finds that Mr. Huber, in his proof, has not presented sufficient facts to show a right of possession, again in these items that are corresponding with the 28 victims.”

1 RP 90.

Following the trial court’s ruling, the prosecutor noted,

“I don’t know if the court wants to address this. As I indicated before, in speaking with law enforcement, they - - they will happily give Mr. Huber back his marijuana grow equipment, if they haven’t already done so. I don’t remember whether or not they have. And I think Mr. Huber is aware of that.

But as far as the marijuana. I’ve talked to law enforcement multiple times about this, and they have said they cannot, under federal law, return any controlled substances that are still illegal under federal law to Mr. Huber, unless there’s a federal court order, in essence. Because if they did that, then law enforcement, the Sheriff’s Office, would in essence have been violating a federal statute, a criminal statute.”

1 RP 91-92. Huber’s counsel argued that the marijuana was medically authorized, but stated,

“With that said, we’re more than happy to work with Ms. Zhou and work with the State as far as, I’m dealing with the disposition of the items, and we would just like the opportunity to inspect those items so that we can know precisely what we’re talking about.”

1 RP 92-93.

On May 30, 2017, Huber filed a Motion for Reconsideration of the trial court’s ruling. CP 437-448. The State filed a response and an amended response. CP 461-473. The trial court considered the motion for reconsideration on December 21, 2017.

2 RP 1. During that hearing, the trial court entered written findings of fact and conclusions of law regarding the May 17, 2017, hearing.

2 RP 9; CP 475-477.

During the hearing on reconsideration, Huber’s attorney argued that the State failed to follow the procedures in the forfeiture statute, RCW 10.105.010. 2 RP 10. The trial court summarized the argument that Huber made, stating:

“The argument from Mr. Huber is that it was an error for the court to address the disposition of the property under Criminal Rule 2.3 and not under forfeiture of property statutes. The court has reviewed the case law as well as the statutes, and the court does not find that there was an error of law in applying Criminal Rule 2.3 to the disposition of this property. My understanding of the law and the criminal rule is that that is the criminal rule and the applicable rule where

there is a question about the property ownership that is seized after the execution of a warrant.”

2 RP 21. The Court further indicated that the “second layer of argument that [was] made is essentially that the court misapplied the Shillberg test,” and found that Huber had made “no showing under CR 59(a)(7) in terms of lack of evidence or reasonable inference from the evidence supporting the decision.” 2 RP 21-22.

The final argument that the trial court addressed was

“the argument that the order that the court entered “is to effect an unconstitutional taking, arguing under the State Constitution Article I, Section 16, that the effect of the court’s order is that the state is taking property of Mr. Huber’s...”

2 RP 22. The court stated,

“The court is - - has not found any case law that supports that application of this rule in determining the rightful owner of the specific property that was the subject of this hearing amounts to an unconstitutional taking, and so the court is rejecting that as a basis for a reconsideration request.”

2 RP 22. The trial court entered a brief written order denying reconsideration. CP 474. Huber then initiated this appeal with the filing of a notice of appeal on January 19, 2018. CP 478.

C. ARGUMENT.

1. The trial court properly applied CrR 2.3(e) in its consideration of Huber’s motion for return of property.

RCW 10.79.050 requires the police to return all stolen property to its rightful owner. Specifically, the statute states: “all property obtained by larceny, robbery or burglary, shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to such property; and it shall be the duty of the officer...to secure the property...” RCW 10.79.050.

CrR 2.3 states: “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...” CrR 2.3(e). Although the language in CrR 2.3(3) discusses the disposition of property that was unlawfully seized, Washington appellate courts have consistently held that CrR 2.3(3) also governs motions for the turn of “lawfully seized property no longer needed for evidence.” State v. Alaway, 64 Wn. App. 796, 798, 828 P.2d 591 (1992). Furthermore, CrR 2.3(e) also addresses the disposition of property that was seized in cases where charges were not filed and in cases that is post adjudication. See State ex rel. Schillberg v. Everett Dist. Justice Court, 90 Wn.2d 794, 585 P.2d 1177 (1978) and State v. Card, 48 Wn. App. 781, 784, 741 P.2d 65 (1987).

In Schillberg, the suspect was arrested for possession of stolen property. In the backseat of his automobile were a number of items of merchandise that matched the description of items taken that day from a store in Everett. The complaint was not filed on time and the suspect filed a motion for an order directing the release of the property. In response to the motion and in support of its argument as to why it was entitled to possession of the property, one of the arresting officers filed an affidavit describing why he believed the items found in the suspect's vehicle were believed to be stolen. Schillberg, 90 Wn.2d at 796. The motion filed by the suspect's attorney contained an affidavit simply stating that the items taken were legitimately in the suspect's possession and that he [the suspect] had legitimately paid for such items. Id. The district court granted the suspect's motion and ordered the return of the possibly stolen property back to the suspect. Through a writ of certiorari, the Superior Court granted review and reversed the district court's order. On appeal to the Supreme Court, the Superior Court's order was upheld. In reaching its opinion, the Supreme Court discussed the burden that is placed on the person moving the court for the return of property—"he must prove not only that the search and seizure was illegal, but also that he is lawfully

entitled to possession of the property seized. This means that he must offer proof sufficient to satisfy the court of his right to possession.” Id. at 798.

In upholding the Superior Court’s ruling, the Washington Supreme Court looked to Federal Criminal Procedure Rule 41(e), in which the state court patterned its rule. The Supreme Court, in its reasoning, looked to cases under the federal rule and at common law, which held that “even though the seizure was illegal, the party claiming the right to return of property cannot recover contraband or stolen goods.” Id. at 798. The Supreme Court in Schillberg continued by stating:

“The purpose of the hearing is to determine the right to possession, as between the claimant and the court or officers having custody of the property...the claimant must satisfy the court that he has a lawful right to possession of the property. If he convinces the court that he is lawfully entitled to possession, but there is in fact another with a superior court, that right is not preempted by the order returning the property to the claimant.”

Id. The Supreme Court concluded by finding that the Superior Court was correct in conclusion that the property should not have been returned to the appellant-moving party because based on just the affidavit of the arresting officer, there was good reason to believe the property may have been stolen. Additionally, any

doubts on the matter was not resolved by the conclusory statements in the affidavit by the moving party. Id. at 801.

Post Schillberg, the Washington Supreme Court developed the standard that courts should follow in addressing the disposition of property pursuant to CrR 2.3(e). In State v. Marks, 114 Wn.2d 724, 790 P.2d 138 (1990), the Supreme Court held that the return of property to the person from whom it was illegally seized requires an evidentiary hearing to determine right to possession. Id. at 725. In Marks, the Spokane trial court suppressed all seized evidence, which included hundreds to items of property, due to the police exceeding its authorization in search warrants. Id. at 726. As a result, the trial court ordered that all property seized shall be returned to the defendant, despite the fact the State had submitted an affidavit demonstrating that at least 37 claimants had identified the seized property as being stolen from burglaries. Id. at 729. On appeal, the Washington Supreme Court developed the following guideline that trial courts should consider to resolve the conflict between CrR 2.3(e) and RCW 10.79.050:

- (1) 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;
- (2) The purpose of the hearing is to determine the right to possession as between the State and the

defendant;

(3) The State has the initial burden to show right to possession;

(4) Thereafter, the defendant must come forward with sufficient facts to convince the court of his right to possession. If such a showing is not made, it is the court's duty to deny the motion.

Id. at 735.

In this case, the trial court properly applied CrR 2.3(e) to Huber's motion for return of property and held a proper hearing as described in Marks. Huber confuses this test with the procedures for forfeiture of property used in a criminal enterprise. This is not a forfeiture action. This case involved the specific determination of the ownership of stolen property.

The majority of Huber's argument focuses on civil forfeiture following a drug crime. Civil forfeiture pursuant to RCW 69.50.505, which appears to be the focus of Huber's arguments, is an in rem action against property that is, in a legal fiction, held guilty and condemned for its involvement in the manufacture, sale or possession of controlled substances. State v. Moen, 110 Wn.App. 125, 130, 38 P.3d 1049 (2002); *citing* United States v. Ursery, 518 U.S. 267, 283, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996). Civil forfeiture proceedings utilize distinctly civil procedural mechanisms. State v. Catlett, 133 Wn.2d 355, 366, 945 P.2d 700 (1997). Civil

forfeiture proceedings are independent of any criminal charges. Moen, 110 Wn.App. at 131.

RCW 69.50.505 has specific procedures involving a hearing examiner and later review. RCW 69.50.505(5). The hearing held in this case was a very specific hearing held under the authority of CrR 2.3. It was not a civil forfeiture proceeding. Other forfeiture statutes have similar proceedings. RCW 19.290.230; RCW 9.68A.120; RCW 70.74.400; RCW 10.105.010. The hearing before the trial court at issue in this case was not brought pursuant to any of those statutes, and would not have properly been brought in the criminal case. The record created in the trial court only involved a criminal hearing pursuant to CrR 2.3(e). No matter how many references Huber may have made to forfeiture proceedings, there was no forfeiture proceeding before the trial court and therefore, no record of a forfeiture proceeding for this Court to review. The reviewing court will not consider matters outside the trial record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

By filing a motion for the return of property in the criminal case, Huber defined the playing field. The only proper standard for the trial court to consider was that set forth in CrR 2.3. Huber's arguments regarding forfeiture and de facto forfeiture are not

applicable to the CrR 2.3 issue that was litigated at the trial court and, therefore, are not properly before this Court.

2. The State presented sufficient evidence for the trial court to conclude that the items seized belonged to the individuals who identified them.

As stated above, a trial court properly denies a motion for return of property under CrR 2.3 where there is “good reason to believe the property may have been stolen, and the doubts on th[e] matter were not resolved.” Schillberg, 90 Wn.2d at 801. The State has the initial burden of showing that the seized materials are stolen property by a preponderance of the evidence. State v. Card, 48 Wn.App. 781, 790, 741 P.2d 65 (1987).

“A claim of insufficiency of the evidence admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Questions of sufficiency of the evidence are “viewed in the light most favorable to the prosecution.” Id. Appellate courts evaluate a sufficiency of the evidence argument on the trial record. State v. Lively, 130 Wn.2d 1, 16, 921 P.2d 1035 (1996). Therefore, the question for this court to consider is whether the record made at the evidentiary hearing, when viewed in a light most favorable to the State, would allow a rational trier of fact to conclude by a

preponderance of the evidence that the property involved was stolen. Id. at 17.

Here, the State presented testimony from two officers who detailed that 28 members of the community had attended a property viewing and identified the items as stolen property belonging to the members of the community. All of the members of the community who attended the viewing were required to “present a case number and identification and a brief explanation of the types of items that they were looking for before they would even be allowed into the facility.” 1 RP 28.

The State submitted an affidavit from Deputy Prosecutor Olivia Zhou and attached relevant portions of several police reports demonstrating that the property had been the proceeds of burglaries. 1 RP 6, CP 316-346. The State also presented and admitted Exhibit 1, which was a victim list, and Exhibit 2, which documented the specific identification of items as belonging to burglary victims. In a light most favorable to the State, the evidence demonstrated that the disputed property was stolen and belonged to other members of the community.

Huber argued at the hearing that the matter could be settled “through argument and...a judgment on the paper” that was filed. 1

RP 8. The State instead presented the testimony of two officers who detailed the State's reasons for believing that the property was stolen. In Schillberg, the Court found that an affidavit of "one of the arresting officers" which "stated that a man had been observed taking merchandise from the Everett store without paying for it was seen to enter a vehicle..." and the vehicle was later found to contain "boxes stacked in the back seat [which] bore tags of the store," was sufficient to meet the State's initial burden. 90 Wn.2d at 796.

In Card, the court specifically noted that "no affidavits were offered by either the State or the defendant, nor was other evidence taken at the hearing in the form of testimony." 48 Wn.App. at 786. The cases make clear that either an affidavit or testimony may constitute sufficient evidence at an evidentiary hearing pursuant to CrR 2.3(e) and an officer's affidavit may be sufficient without further testimony or affidavits from specific victims. Here, the two testifying officers detailed the specific identification of the property as stolen by 28 community members. Like the report in Schillberg that a man had taken merchandise without paying for it, the officers detailed that each member of the community had reported that their property was stolen and police reports had been generated from

those reports. The evidence was sufficient to demonstrate that the property was stolen.

Once the State presented sufficient evidence to demonstrate that the property was stolen, Huber then had the burden to demonstrate sufficient facts to convince the court of his right of possession. He did not do so. The trial court considered the evidence he provided, stating, “the declaration, from this court’s perspective, is fairly conclusory. It doesn’t provide any connection that the court could discern between the specific items that he seeks return of to tell the court the basis for his claim of ownership.”

1 RP 86.

The State has a duty to preserve and return property that has been stolen to its rightful owner. RCW 10.79.050. The State adequately demonstrated that the disputed property was stolen, thereby triggering the State’s obligation to maintain the property and return it to its rightful owners.

3. The trial court was not required to make a ruling on the legality of the search warrant and did not consider any argument regarding the legality of the warrant.

The trial court specified that it was not addressing the legality of the search warrant during the hearing pursuant to CrR 2.3, stating:

“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.”

1 RP 73. Huber spends considerable time in his opening brief arguing that the initial search was unlawful, but that issue was not considered by the trial court and is not properly before this court.

Huber painstakingly cites to declarations and attachments which were included in his original trial counsel’s motion to suppress and memorandum in support thereof, CP 17-90, but completely ignores the fact that the motion was never considered by the trial court, nor were the attachments to the motion considered during the CrR 2.3(e) hearing. At the CrR 2.3 hearing, Huber’s counsel stated,

“I would like the court to address the last response filed pro se by Mr. Huber before he retained me. I would ask the court consider the amended response to the State’s memorandum that I filed on this case on - - I believe it was May 11th. And I would and I would ask that the court take note of the declaration of Layne Huber of May 12th, 2017.”

1 RP 7. The memorandum filed by Huber's prior counsel on September 25, 2012, was not before the trial court and was never decided. CP 17. Huber improperly cites to the memorandum as evidence and authority for his claims of error, despite the fact that the issues raised in the memorandum were never properly admitted or considered. While the State disputes Huber's contention that the search warrant was unlawful, the issue was ultimately not relevant to the question considered by the trial court. See State's Memorandum in Response to Defendant's Motion to Suppress Pursuant to CrR 3.6, CP 146-190.

Although the language in CrR 2.3(3) discusses the disposition of property that was unlawfully seized, Washington appellate courts have consistently held that CrR 2.3(3) also governs motions for the return of "lawfully seized property no longer needed for evidence." State v. Alaway, 64 Wn. App. at 798.

Because the criminal prosecution was ultimately dismissed, the issue of the legality of the search warrant was moot. All the trial court had before it was the question of who had the superior right of possession. The decisions of a Superior Court that may be appealed are listed in RAP 2.2. All of them are orders or actual decisions. A final judgment is one which settles all issues in a

case. State v. Smits, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009).

Here, the trial court never made a ruling in regard to the legality of the search warrant. In order for the trial court to have ruled on that issue, further factual development would have been necessary at a hearing. With the passing of the State's primary investigating officer, the State would have potentially been at a disadvantage and chose to dismiss the criminal prosecution. It is not proper for Huber to now argue that the search and seizure was unlawful where the issue was never decided and is ultimately irrelevant to the issue that was decided by the trial court. This Court should not consider such arguments in this appeal.

4. The trial court only considered the return of stolen property and no party requested that the trial court make a ruling with regard to the seized marijuana.

At the end of the CrR 2.3 hearing for the return of stolen property, the prosecutor noted,

"I don't know if the court wants to address this. As I indicated before, in speaking with law enforcement, they - - they will happily give Mr. Huber back his marijuana grow equipment, if they haven't already done so. I don't remember whether or not they have. And I think Mr. Huber is aware of that.

But as far as the marijuana. I've talked to law enforcement multiple times about this, and they have

said they cannot, under federal law, return any controlled substances that are still illegal under federal law to Mr. Huber, unless there's a federal court order, in essence. Because if they did that, then law enforcement, the Sheriff's Office, would in essence have been violating a federal statute, a criminal statute."

1 RP 91-92. Huber's counsel argued that the marijuana was medically authorized, but stated,

"With that said, we're more than happy to work with Ms. Zhou and work with the State as far as, I'm dealing with the disposition of the items, and we would just like the opportunity to inspect those items so that we can know precisely what we're talking about."

1 RP 92-93. No further hearing on the issue appears to have been requested and the trial court made no ruling with regard to the marijuana.

Appellate courts defer to the trial court to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. State v. Gerber, 28 Wn.App. 214, 216, 622 P.2d 888 (1981). Here, no factual record was made regarding the marijuana and whether or not it was medically authorized.

At the time that the search warrant was executed, a qualifying patient or designated provider of medical marijuana could not legally possess more than 15 cannabis plants. Former RCW

69.51A.040(1)(a) (2011). If the person was both a qualified patient and provider, the limit would be doubled. Former RCW 69.51.040(1)(b) (2011). Even a collective garden could not have more than a maximum of 45 plants. Former RCW 69.51A.085(1)(b) (2011). Though the information was not before the court nor considered by the Court, the probable cause in this case indicated that approximately 120 plants were seized. CP 484.

A court may refuse to return seized property no longer needed for evidence only if (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute. State v. Alaway, 64 Wn. App. at 798. “Contraband has been defined by the United States Supreme Court as an object, ‘the possession of which, without more, constitutes a crime’.” Id quoting United States v. Farrell, 606 F.2d 1341, 1347 (D.C. Cir. 1979). Marijuana plants are contraband. State v. Ruem, 179 Wn.2d 195, 199, 313 P.3d 1156 (2013). Despite the passage of Initiative 502 in this State decriminalizing possession of small quantities, marijuana remains classified as at the federal level as a schedule 1 controlled substance. 2013 Wash.Laws ch. 3; 21 U.S.C. § 812(c).

Dispensing a controlled substance is a federal offense. 21 U.S.C. § 841. Here, the parties indicated their respective positions regarding the marijuana to the trial court. CP 91-92. While the State is aware of no Washington State case directly on point, cases in Colorado and Oregon have looked at the issue. The Colorado Supreme Court recently found that a provision of the Colorado constitution requiring that seized medical marijuana be returned to an individual later acquitted conflicted with federal law and was therefore void. People v. Crouse, 388 P.3d. 39, 40, 2017 CO 5 (2017). A similar ruling was entered by the Oregon Court of Appeals. State v. Ehrensing, 296 P.3d 1279, 1280, 255 Ore.App. 402 (2013) (defendant cannot “lawfully possess” marijuana under federal law, therefore he does not have a valid claim to rightful possession).²

Huber’s attorney made a very brief argument that the marijuana was kept in compliance with RCW 69.51A, but Huber offered no evidence on the issue, and the Court did not make any ruling with regard to the marijuana. CP 92-93. The trial court left open the opportunity for Huber to seek additional relief, but he did not do so. CP 93. Given the State of the federal controlled

² This decision somewhat conflicts with an older Oregon case, State v. Kama, 39 P.3d 866, 178 Ore.App. 561 (2002).

substance act, the Court likely would have denied a motion to return the marijuana, but the issue simply wasn't litigated at the trial court. The issue is not ripe for appeal. Dux v. Hostetter, 37 Wn.2d 550, 554, 225 P.2d 210 (1950) (Any appeal purported to be taken from a final judgment, but taken before the entry of such judgment, would seem of necessity to be premature).

5. The State objects to Huber's request for reasonable attorney's fees pursuant to RAP 18.1.

Huber argues that the award of reasonable attorney's fees if he substantially prevails on appeal is authorized by RCW 69.50.505(6). That section of the RCW applies to "any proceeding to forfeit property under" title 69.50. As discussed at length above, the only ruling the trial court made in this case was in regard to an evidentiary hearing pursuant to CrR 2.3(e). There was no civil forfeiture proceeding. Therefore the award of costs pursuant to RCW 69.50.505(6) would not be appropriate.

Huber further argues that "damages are presumed for Fourth Amendment violations under 42 U.S.C. §1983." This is not a §1983 tort action. 42 U.S.C. §1983 is actually titled "Civil action for deprivation of rights." In Maytown Sand & Gravel LLC v. Thurston County, 198 Wn.App. 560, 395 P.3d 149 (2017), the case involved

a complaint alleging violations of RCW 64.40 and 42 U.S.C. §1983. Id. 574. This case involved a criminal hearing pursuant to CrR 2.3(e). If Huber wishes to seek damages pursuant to 42 U.S.C. §1983, he must first file and prevail in a §1983 law suit. That has not occurred in this case. While completely beyond the record properly before this Court, Huber attached a decision of the Ninth Circuit Court of Appeals upholding the dismissal of a collaterally filed §1983 action.

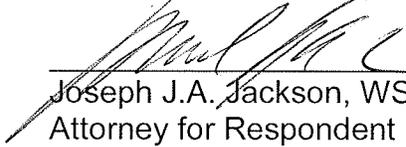
RAP 18.1 allows a party to request fees and expenses “if applicable law grants to a party the right to recover reasonable attorney fees or expenses.” Huber cites to no law that is applicable to the proceedings in this case. The request pursuant to RAP 18.1 is unsupported by law.

D. CONCLUSION.

The trial court properly concluded by a preponderance of the evidence that the specific property that Huber sought return of was stolen property by a preponderance of the evidence. Huber failed to provide sufficient facts to justify his claim of ownership, therefore, the Thurston County Sheriff’s Office has an obligation to hold the property and return the property to its rightful owners under RCW

10.79.050. The only issue pursuant to CrR 2.3(e) was the right of possession of the seized property that had been identified as stolen. There was no civil forfeiture proceeding and the trial court made no rulings regarding the legality of the search or with regard to the seized marijuana. This case involved a criminal hearing pursuant to CrR 2.3, and costs based upon RCW 69.50.505(6) and 42 U.S.C. §1983 are not authorized in this proceeding. The State requests that this Court affirm the decision of the trial court.

Respectfully submitted this 25 day of May, 2018.



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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 25th day of May, 2018, at Olympia, Washington.



JENA GREEN, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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