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Grays Harbor Co. Superior Court No. 18-2-363-14

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

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TAO YUAN, INC. AND ANDY ZHENG

Appellant,

v.

GRAYS HARBOR COUNTY DRUG TASKFORCE,

Respondent.

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APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards

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APPELLANT'S OPENING BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. The trial Court's finding that service of process was made on Tao Yuan, Inc. through the Secretary of State.
2. The trial court's conclusion that service of the notice of forfeiture through the Secretary of State satisfied due process.
3. The trial court's conclusion that service of the notice of forfeiture through the Secretary of State satisfied RCW 23.95.450.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether Interested Parties' right to due process under the Fourteenth Amendment to the United States Constitution was violated because Interested Parties did not receive adequate notice of proceedings to forfeit real property belonging to Tao Yuan, Inc.?
2. Whether service of notice of the forfeiture proceedings on the Secretary of State was invalid because the State failed to exercise reasonable diligence to serve Tao Yuan, Inc.'s registered agent as required under RCW 23.95.450?
3. Whether the Secretary of State could no longer be deemed an agent of Tao Yuan, Inc. under RCW 23.95.450 after notice of the forfeiture proceedings was actually served on Tao Yuan, Inc.'s registered agent?

### III. STATEMENT OF THE CASE

On May 7, 2018, Grays Harbor County (“GHC”) and the Grays Harbor County Drug Task Force (“DTF”) commenced forfeiture proceedings pursuant to RCW 69.50.505 against real property known as 3010 Sumner Avenue, Hoquiam, WA, 98550, in Grays Harbor County (“3010 Sumner”). See CP 1 - 5. A warrant for arrest of the property was issued by the Grays Harbor County Superior Court on the same date. See CP 17 – 19. During the relevant time period the property belonged to Tao Yuan, Inc. (“TYI”), whose sole owner and registered agent was Andy Zheng.<sup>1</sup> See CP 14 – 15. The address of TYI, and its registered agent on file with the Secretary of State was 107 South Harbor Street, Aberdeen, WA, 98550. See CP 14. Prior to the seizure of the property at issue in this matter, 3010 Sumner Avenue, an arrest was made at 107 South Harbor Street as part of the same investigation into alleged drug trafficking activity, and that property was in turn seized by GHC and DTF. See CP 14, 39. While it is unclear from the record when the property known as 107 South Harbor Street was seized, it is clear that legal proceedings involving 107 South Harbor Street were ongoing by the time forfeiture proceedings

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<sup>1</sup> TYI and Mr. Zheng are referred to collectively as Interested Parties.

against 3010 Sumner were initiated and that GHC and DTF were well aware of the proceedings related to 107 South Harbor Street and the arrest that was made there. See CP 14.

Nonetheless, GHC and DTF attempted to serve the notice of forfeiture related to 3010 Sumner on Mr. Zheng, TYI's registered agent, at 107 South Harbor Street, a property that was already the subject of legal proceedings initiated by DTF. See CP 14, 75. According to the affidavit of service submitted in the trial court by the GHC, attempts at personal service on Mr. Zheng were made on three occasions between May 24, 2018, and June 2, 2018, by the Grays Harbor County Sheriff's Office at 107 South Harbor Street. See CP 75. Of course, likely because of the drug raid at the property months earlier, neither Mr. Zheng nor any other representative of TYI was located at 107 South Harbor Street. See CP 75. Thereafter, GHC and DTF attempted service on TYI through certified mail on June 11, 2018. See CP 77. The certified letter containing the notice of forfeiture proceedings was mailed to the same 107 South Harbor Street address. See CP 77. When the certified letter was returned as undeliverable, GHC served the Secretary of State with the notice of forfeiture proceedings, pursuant to RCW 23.95.450(4). See CP 77, 79. At no point did GHC or DTF make any efforts to locate an alternative address or contact information for Mr. Zheng or TYI or give notice to Mr. Zheng or TYI through any other means.

This was despite the fact that GHC was aware of the legal proceedings involving 107 South Harbor Street as a result of the drug raid at that location and despite the fact that the State apparently had access to alternative addresses for Mr. Zheng through Department of Licensing (“DOL”) and Public Utility District (“PUD”) records because during its investigation of the activities at 3010 Sumner the State allegedly discovered the license plate number of Mr. Zheng’s automobile and obtained Mr. Zheng’s subscriber information from PUD. See CP 15.

In the meantime, while GHC was attempting to serve notice on TYI at 107 South Harbor Street, Mr. Zheng was out of state in New York. See CP 39. While Mr. Zheng had made arrangements to have mail sent to 107 South Harbor Street forwarded to him, he had no knowledge of the drug raid that took place at 107 South Harbor Street or that the property had been seized. See CP 39. Mr. Zheng returned to Washington State from New York in late 2018, and went to the 3010 Sumner property to make improvements. See CP 39. At that time he encountered a law enforcement agent who told him that the property had been forfeited and that he could not be on the property. See CP 39.

On October 18, 2018, Mr. Zheng went to the Grays Harbor County Superior Court to inquire about the case, but was not able to obtain any information about the case from the court. See CP 39 – 40. He subsequently

went to the Gray's Harbor County Sheriff's Office and was served with a copy of the notice of forfeiture proceedings and complaint. See CP 39 – 40.

On October 23, 2018, just five days after actual service of notice on Mr. Zheng, GHC moved for orders of forfeiture and default in the forfeiture action against 3010 Sumner. See CP 22 – 23, 27 – 29. An order of default and an order forfeiting the property in favor of GHC was entered on that date. See CP 24 – 26, 30 – 31.

On January 7, 2019, a motion to vacate the default and forfeiture orders was filed on behalf of Interested Parties, pursuant to CR 60. See 42 – 45. In support of the motion to vacate, counsel for Interested Parties argued that GHC and DTF failed to give TYI proper notice of the forfeiture action to Interested Parties. See CP 48 – 50; RP 2.

A hearing on the motion to vacate was held on January 22, 2019. See RP 1. After counsel for interested parties admitted on the record that service of notice was made through the Secretary of State, the trial court promptly denied the motion to vacate without permitting counsel to make any additional legal arguments. See RP 3 – 5. The trial court apparently believed that the only claim that counsel for Interested Parties was asserting was that Mr. Zheng was entitled to notice in his personal capacity, as the sole shareholder of the corporation. See RP 4 – 5. The following exchange took place:

Court: If that's the basis for your motion, your motion is denied.

Counsel: No, Your Honor –

Court: The – when –

Counsel: This is not the only basis –

Court: Excuse me. I am talking right now. . . . your motion is denied.

Counsel: Your Honor –

Court: I have ruled, sir. Your motion is denied. Do you have an order—

Counsel: If I could just make a proffer, with your permission to reflect on the record –

Court: Your motion is denied –

Counsel: I understand.

Court: We are done for today. You may present an order.

RP 4 – 5. After the denial of the motion to vacate, Interested Parties, through counsel, filed a motion for reconsideration pursuant to CR 59. See CP 89 – 95. That motion was denied without a hearing. See CP 19.

Interested Parties now appeal the order entered on January 22, 2019, denying Interested Parties' motion to vacate the orders of default and forfeiture entered in this matter on October 23, 2018, and the order denying Interested Parties' motion for reconsideration, entered in this matter on February 6, 2019.

#### IV. ARGUMENT

##### **A. Interested Parties' Right to Due Process was Violated Because the Notice Served on the Secretary of State was Insufficient to Apprise them of the Forfeiture Action at Issue.**

Interested Parties were deprived of due process of law in violation of the Fourteenth Amendment to the United States Constitution because they did not receive adequate notice of the proceedings to forfeit 3010 Sumner. A claim alleging a violation of the constitutional right to due process of law is reviewed de novo on appeal. Durland v. San Juan County, 182 Wn.2d 55, 69, 340 P.3d 191 (2014).

The Fourteenth Amendment to the United States Constitution guarantees due process of law. “An essential principle of due process is the right to notice and meaningful opportunity to be heard.” Downey v. Pierce County, 165 Wn. App. 152, 164, 267 P.3d 445 (2011) (citing Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)). At minimum, due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 2d 865 (1950).

Even when a statutory scheme for providing notice satisfies due process on its face, the procedures used in a particular case may still be insufficient to satisfy the requirements of due process. State v. Nelson, 158 Wn.2d 699,704, 158 Wn.2d 699 (2006) (“We agree with [Appellant] that the State’s statutory compliance does not preclude [Appellant] from bringing this as-applied procedural due process challenge.”).

In Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 1713, 164 L. Ed. 2d 415 (2006), the state of Arkansas sold the appellant’s home based on his failure to pay taxes. See id. at 224. Prior to the sale, in accordance with its statutory scheme, the State attempted to serve the homeowner by certified mail that was returned as undeliverable. See id. at 223 – 24. Subsequently, prior to the sale, notice of the sale was published in a local newspaper. See id. While the State’s attempt at service were consistent with its statutory scheme, the United States Supreme Court held that that the homeowner’s right to notice was violated because due process required the State to make attempts to notify the homeowner of the action against his property by other reasonable means before selling the property once the State became aware that its original attempt at service did not reach its intended recipient. See id. at 225.

The Supreme Court stated as follows:

We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed....

By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. . . . This is especially true, when as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made reasonable calculation of how to reach Jones, it had good reason suspect when the notice was returned that Jones was no better off than if the notice had never been sent. Deciding to take no further action is not what someone desirous of actually informing Jones would do: such a person would take further reasonable steps if any were available.

Id. at 229 – 30 (internal citations and quotation marks omitted).

In reaching its conclusion in Jones, the Court relied on its prior decisions holding that where the government had knowledge that its chosen method of service was not likely to give notice to the intended recipient, due process was violated. In Robinson v. Hanrahan, 409 U.S. 38, 93 S. Ct. 30, 34 L.Ed. 2d 47 (1972), for example, the Supreme Court held that service of a forfeiture notice to a property owner by mail at his home address failed to satisfy due process where the State knew that the homeowner was in jail.

The Court reasoned in that case:

In the instant case, the State knew that appellant was not at the address to which the notice was mailed and, moreover, knew also that appellant could not get to that address since he was at that very time confined in the Cook County jail. Under these circumstances, it cannot be said that the State

made any effort to provide notice that was reasonably calculated to apprise appellant of the pendency of the forfeiture proceedings.

Id. at 40.

The case before the Court is hardly distinguishable from Jones and Robinson. The record in this case establishes that the State was well aware that the individual tending to 107 South Harbor Street had been arrested in a drug raid at that address before mailing notice of the forfeiture proceedings related to 3010 Sumner to Interested Parties there. See CP 14. The State was also aware that the property was the subject of legal proceedings and that it was unlikely that there was anyone at the address or checking the mail there. See CP 14, 39. Nonetheless, the State proceed to attempt personal service on Mr. Zheng at the 107 South Harbor address on three separate occasions, and sent notice to that address by certified mail. See CP 75, 77. Even after the State's certified letter was returned as undeliverable, the State made no efforts to ascertain Mr. Zheng's address or attempt service on Interested Parties by other means.

Essentially, the State made attempts at service on Interested Parties at a location that it knew was unoccupied, and may have in fact been at the time seized by DTF, and then represented to the trial court that after a diligent search it was unable to locate TYI's registered agent at the address on file with the Secretary of State. See CP 14, 75, 77. Surely, due process

is not satisfied where the State knowingly attempts service on an unoccupied property and then fails to take any action to ascertain the intended recipient's new address or whereabouts.

The case law makes clear that where it is aware of circumstances that will prevent its chosen method of service from reaching the intended recipient due process is not satisfied, and the State must attempt service through alternative means. See Jones at 229 – 30. Further, the case law makes clear that constructive notice does not satisfy due process where the State's attempts at actual notice are not reasonably calculated to provide notice to the interested party. See id. at 237. Here, the State knew that the address where it was sending notice was unoccupied because there had been a drug raid there by DTF and the property was the subject of legal proceedings. Further, the State knew that the certified letter it sent to that address was returned as undeliverable. Despite these facts, the State failed to use any alternative methods to give actual notice of the forfeiture proceedings to TYI or its registered agent before opting for constructive service by serving the Secretary of State. Because the State knew that its attempts at actual service were not reasonably calculated to notify Interested Parties about the impending forfeiture of 3010 Sumner, Interested Parties' right to due process was violated.

**B. The State Failed to Comply with RCW 23.95.450 Because it Failed to Exercise Reasonable Diligence when Attempting to Serve TYI's Registered Agent.**

In the instant case, the State failed to comply with RCW 23.95.450, the corporate service statute, because it failed to exercise reasonable diligence to serve the Mr. Zheng, the corporation's registered agent. Whether service of process satisfied statutory requirements is a mixed question of fact and law that is reviewed de novo on appeal. See Crystal, China, and Gold Ltd. v. Factoria Center Investments, Inc., 93 Wn. App. 606, 610, 969 P.2d 1093 (1999).

RCW 23.95.450 provides:

- (1) A represented entity may be served with any process, notice, or demand required or permitted by law by serving its registered agent.
- (2) If a represented entity ceases to have a registered agent, or if its registered agent cannot with reasonable diligence be served, the entity may be served by registered or certified mail, return receipt requested, or by similar commercial delivery service, addressed to the entity at the entity's principal office. . . .
- (3) If process, notice, or demand cannot be served on an entity pursuant to subsection (1) or (2) of this section, service may be made by handing a copy to the individual in charge of any regular place of business or activity of the entity if the individual served is not a plaintiff in the action.
- (4) The secretary of state shall be an agent of the entity for service of process if process, notice, or demand cannot be served on an entity pursuant to subsection (1), (2), or (3) of this section.

RCW 23.95.450.

If a “statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” State Dept. of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9 – 10, 43 P.3d 4 (2002). The plain meaning of a statute is derived from “the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole.” Columbia Rivekeeper v. Port of Vancouver, 188 Wn.2d 421, 432, 395 P.3d 1031 (2017).

RCW 23.95.450 lays out a four-step procedure that must be followed when serving a corporation. In subsection (1), the statute provides that service may be made on a corporation by serving its registered agent. RCW 23.95.450(1). Subsection (2) provides that if a corporation’s registered agent cannot be served through the exercise of “reasonable diligence,” service may be accomplished by sending notice through registered or certified mail to the corporation’s principal office. RCW 23.95.450(2). Subsection (3) provides that if service cannot be effected through the methods prescribed in subsection (1) or subsection (2), notice can be served on an individual in charge of any regular place of business or activity of the entity. RCW 23.95.450(2). Finally, subsection (4) provides

that if and only if service cannot be accomplished by any of the methods prescribed in subsections (1) through (3), service of notice on the Secretary of State is effective to serve the corporation.

The plain language of the statute makes clear that service must be attempted through each method set forth in subsections (1) through (3) of the statute before the State can resort to service on the Secretary of State. See Davis v. Blumenstein, 7 Wn. App. 2d 103, 114, 432 P.3d 1251 (2019) (construing the non-resident motorist statute to conclude that the statute sets forth the mandatory steps a plaintiff must follow to comply with the requirements of substitute service on the secretary of state”). Most relevant to this case, the statute at issue, RCW 23.95.450, requires that a plaintiff exercise “reasonable diligence” when attempting to serve the corporation’s registered agent before moving on to any of the other methods of service provided for in the statute. See RCW 23.95.450(2).

The term “reasonable diligence,” as used in service statutes, has been construed by Washington courts to have the same meaning as the term “due diligence” as used in the non-resident motorist statute. See Crystal, 93 Wn. App. at 611. The term “due diligence” has been construed, in turn, to mean that a plaintiff must “make honest and reasonable efforts to locate the defendant” but “[n]ot all conceivable means must be employed.” Martin v. Meier, 111 Wn.2d 471, 482, 760 P.2d 925 (1988). The Court of Appeals’

decision in Crystal is instructive. In that case, when construing an older version of corporate service statute, the court found that the plaintiff exercised reasonable diligence in attempting to serve a corporation where after two unsuccessful efforts to serve the registered agent at his business address, the plaintiff made efforts to find the registered agent's home address in the phone book and through the operator, but was unsuccessful. See Crystal, 93 Wn. App. at 612.

More recently, Division I of the Court of Appeals held that an attorney's failure to send notice of a pending suit to a non-resident motorist at all addresses known to the attorney did not amount to due diligence. See Davis v. Blumenstein, 7 Wn. App. 2d 103, 432 P.3d 1251 (2019). While unlike the corporate service statute, the non-resident motorist statute explicitly requires a plaintiff to attempt service on a defendant at all known addresses, Blumenstein stands for the general proposition that a plaintiff does not exercise due diligence when he or she knows the chosen method of service will be ineffective to give notice to the intended recipient and fails to make use information in his or her possession that would make actual notice more likely.

When the reasoning in the above-referenced cases is applied to this case, it becomes clear that the State in this case failed to exercise reasonable diligence when attempting to serve Mr. Zheng, TYI's registered agent, and

that service on the Secretary of State was therefore invalid. As discussed above, the State knew that notice sent to 107 South Harbor Street did not reach Mr. Zheng because the individual tending to the property at that address had been arrested and the property was the subject of legal proceedings. See CP 14, 77. The State also had at its fingertips knowledge that is unavailable to a layperson. Specifically, the State had access to the DOL database and could have easily found a current mailing address for Mr. Zheng there. In fact, during the investigation the State allegedly learned the license plate of Mr. Zheng's vehicle. See CP 14. The State could have easily mailed Mr. Zheng notice at the address associated with Mr. Zheng's vehicle registration. The State also had access to Mr. Zheng's information from the PUD and could have easily attempted to serve Mr. Zheng at the address on file with the PUD. See CP 15.

Unlike the plaintiff in Crystal, the State in this case failed to make any inquiries into Mr. Zheng's home address. See Crystal, 93 Wn. App. at 612. Further, just like the plaintiff in Blumenstein, the State failed to send notice to Mr. Zheng's known address which it could have easily obtained from the numerous databases available to it. See Blumenstein, 7 Wn. App. 2d at 116. Because the State failed to exercise due diligence in its attempts to serve TYI's registered agent, as required under RCW 23.95.450, service

of notice of the forfeiture proceeding against 3010 Sumner on the Secretary of State was insufficient to satisfy the requirements of RCW 23.95.450.

**C. Service on the Secretary of State was Insufficient because Actual Service had Been Made on TYI's Registered Agent Prior to the Entry of Default.**

The State's service of notice of intent to seek default judgment on the Secretary of State was inadequate for an additional reason. Specifically, service on the Secretary of State was insufficient to satisfy the notice requirements of RCW 23.95.450 because prior to the entry of the order of default in this case, the State had actually served the complaint for forfeiture on Mr. Zheng, the corporation's registered agent. See CP 40. Upon service of notice on Mr. Zheng, the Secretary of State could no longer be considered TYI's agent under RCW 23.95.450, and Mr. Zheng was entitled to 90 days from the date he was served to file a claim with GHC and DTF pursuant to RCW 69.50.505.

As noted above, Court's must give effect to the plain meaning of a statute if the statute's meaning is clear on its face. Campbell, 146 Wn.2d at 9 – 10. RCW 23.95.450(4) provides that the secretary of state can only be considered a corporation's agent for purpose of service of process, if through the exercise of reasonable diligence the registered agent cannot be served. RCW 23.95.450 (2), (4). In the instant case, even if the Court finds that the State exercised reasonable diligence in attempting to serve TYI's

registered agent before serving the Secretary of State, the Court should nonetheless find that service of notice on the Secretary of State was invalidated when notice was actually served on TYI's registered agent.

RCW 23.95.450(4) unambiguously states that the Secretary of State can only be considered an entity's agent where the entity's registered agent has not been served. See id. In this case, after the Secretary of State was served with notice of the forfeiture proceeding, but before the entry of the order of default on October 23, 2019, GHC and DTF successfully served TYI's registered agent, Andy Zheng, through personal service on or about October 18, 2019. See CP 30 – 31, 40. Once Mr. Zheng was served, the Secretary of State could no longer be considered TYI's agent within the meaning of RCW 23.95.450. Furthermore, pursuant to RCW 69.50.505(4),<sup>2</sup> upon service of notice of the forfeiture proceeding against 3010 Sumner on its registered agent, TYI had 90 days to notify GHC and DTF of its interest in the property.

Because the order of default and forfeiture in this case was entered before the 90-day claim period expired, the order of default is contrary to law.

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<sup>2</sup> RCW 69.50.505(4) provides that a party has 90 days to file a claim after it is served with a notice of intended forfeiture of real property.

**D. Request for Attorneys' Fees.**

RCW 69.50.505(6) provides: "In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees incurred by the claimant." RCW 69.50.505(6). If the Court finds that the trial court erred when it denied Interested Parties' motion to vacate the orders of default and forfeiture entered in this matter, the Court should award reasonable attorneys fees to Interested Parties for the fees incurred in pursuing vacatur of the orders in the trial court and on appeal.

**V. CONCLUSION**

For the foregoing reasons the Court should reverse the orders of default and forfeiture entered in this matter and remand this case to the trial court for further proceedings.

DATED this 22<sup>nd</sup> day of July, 2019.

Respectfully submitted,

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**Transmittal Information**

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