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No. 54492-0-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

U4IK GARDENS, LLP, a Washington limited liability partnership,

Appellant,

v.

STATE OF WASHINGTON, THE WASHINGTON STATE LIQUOR CONTROL BOARD, KENDRA OGRAN and JOHN DOE NOS. 1-6,

Respondents.

REPLY BRIEF OF U4IK GARDENS, LLP

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October 1, 2020

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Summary of Argument

Perhaps recognizing that Officer Ogren's extraordinary (and probably personally motivated) attack on Appellant's business is beyond any ordinary practice of the Washington State Liquor Control Board (the “Board”) in its exercises of regulatory authority, and indeed inconsistent with its own regulations in innumerable respects, the Board now attempts to suggest as its very first point heading that it had a "mandatory duty to seize and summarily forfeit" Appellant's plants. (Resp. Br. 14). The Board further clarifies its position that unless a licensee is operating in perfect "compliance with all applicable provisions of RCW 69.50 and [the] regulations adopted by the Board" (Resp. Br. 21), no matter how trivial the violation, its entire inventory of plants and product is subject to seizure and summary destruction by any agent of the Board.

This absurd interpretation sets aside the Board's entire regulatory structure governing the procedure and substance of enforcement decisions for arbitrary decisions that, as a practical matter, put a licensee's business at such fantastic risk as to be entirely incompatible with licensing production in the first place. The Board argues serious health and safety risks, but can offer no explanation how, in a facility under constant video surveillance, and regulations that call for administrative segregation of untagged plants to prevent the very risks it cites, any real public harm could result.

The Board's interpretation of Chapter 69.50 RCW renders its entire carefully-constructed regulations controlling the procedures for seizing and destroying or forfeiting marijuana a nullity. The Board ignores the overarching problem that regulatory violations are not "violations of this Chapter" within the meaning of the statutes it cites in its attempt to characterize Appellant's plants as "contraband". A careful reading of Chapter 69.50 RCW makes it clear that where plants were concerned, the Legislature expected the Board to exercise enforcement authority in compliance with its own procedural regulations.

Once the "contraband" theory is rejected, the Board has no excuse for avoiding trespass and tort liability. Any state official knows, or has reason to know, you can't just walk into a business, even a highly-regulated business, and destroy its entire inventory without any notice, order, opportunity to be heard or any of the fundamental prerequisites of an American government that treats citizens as citizens, not slaves or subjects.

And even if this Court were to conclude that the Legislature and Board had somehow purported to create "law" authorizing such conduct, it is fatally inconsistent with the Washington Constitution. If Appellant has no statutory or common law remedy for trespass or conversion, then the Constitution is the

only source of a remedy for the due process violation here, and one must be inferred.

Argument

I. THE BOARD HAS NO AUTHORITY TO SUMMARILY DESTROY MARIJUANA PLANTS UNDER CULTIVATION BY A LICENSED PRODUCER.

A. The Board's Regulations Control Its Exercise of Prosecutorial Discretion.

The Board does not dispute much of Appellant's Opening Brief which addresses how the Board's agents are supposed to exercise enforcement authority. (*See* Resp. Br. 19.) Appellant has established that:

- The rules provide a specific process for "summary destruction," including a requirement that agents obtain a "summary destruction order" after "preliminary staff investigation" (WAC 314-55-220; Opening Br. 7-8).
- No such order was obtained in this case.
- The rules provide a less summary procedure which requires agents to follow seizure laws (WAC 314-55-210(4); Opening Br. 8-9), including proceedings before forfeiture after seizure (RCW 69.50.505(3)).
- The Board's agents did not follow this procedure either.
- The rules provide for an "administrative hold" that allows "continued cultivation or harvesting" of plants pending "a final agency order for destruction" (WAC 314-55-210(6); Opening Br. 10-11).
- The Board's agents did not follow this procedure either.
- The rules provide for routine "[d]estruction after case adjudication" (WAC 314-55-230(2); Opening Br. 9).
- The Board's agents did not wait for case adjudication here.

All these careful procedural mechanisms for executing authority to seize and destroy marijuana were developed through notice and comment rulemaking as expressly directed by the Legislature. RCW 60.50.345(12). The Board asks this Court to disregard them all.

The Board now argues that by comparing subsections (5) and (6) of WAC 314-55-210, one can somehow divine an intent that its agents must summarily destroy marijuana "not identifiable through the Washington traceability system". (Resp. Br. 22.) This make no sense. Subsection (5) says that the agents "*may* destroy" the marijuana, requiring those agents to invoke the procedures listed above that are to be used to determine *whether* the marijuana should be destroyed—but were not used in this case.

Moreover, there is no dispute that each and every plant here was entered into the traceability system (CP55; *see also* CP180-92); the only issue was the absence of tags with the numbers that had been created, because they had not been printed yet on account of difficulties with the printer. (CP55.) While the plants may not have been individually identifiable because of the lack of tags, the "marijuana" as inventory was "identifiable through the Washington marijuana traceability system" within the meaning of WAC 314-55-210(5).

The Board appears to suggest that the absence of a specific reference to untraceable marijuana in subsection (6) (agents "may order an

administrative hold") somehow signifies that untraceable marijuana was to be summarily destroyed rather than placed in an administrative hold. That makes no sense, because subsection (6) allows agents to act on the basis of any "violation of the state laws or rules," including violations of traceability rules. WAC 314-55-210(6)(a). There was no reason in subsection (6) to highlight violations of the traceability rules as opposed to any others; the Board's attempt to elevate these violations above all others lacks any basis in the structure of the statute or rules.

In fact, subsection (6) provides ample authority to do precisely what Officer Ogren should have done had she bothered to attempt to relate the plants to the entries in the traceability system (she did not) and had she been unable to do so: order a hold permitting "continued cultivation" (WAC 314-55-210(6)(c)). Such an order will readily "prevent destruction of evidence, diversion or other threats to public safety" as stated in the regulation. WAC 314-55-210(6).

Thus the entire regulatory design eviscerates the Board's claim that the identified and logged but untagged plants posted "extreme risk . . . to public health and safety" (Resp. Br. 23), because it gives the Board's agents flexibility to address "any violation". It eviscerates the Board's claim that any untagged plants "must be removed from the production sequence" (*id.*), because the regulations take the exact opposite position: the licensee can keep

growing the plants while a "Group 2" regulatory violation such as this (with a presumptive $2,500 penalty) is adjudicated. *See* WAC 314-55-525. The Board even argues that "an administrative hearing was inappropriate in this case" (Resp. Br. 23) even though *it held one* and imposed the presumptive penalty for the conduct—after arbitrarily destroying the entire business.

B. The Board's "Contraband" Theory Is Meritless.

According to the Board, all "those regulations do not apply here, where the Board seized contraband". (Resp. Br. 19.) "Contraband" is a term that is not defined in Chapter 69.50 RCW, and the Board concedes that it means "an object, the possession of which, *without more*, constitutes crime". *State v. Alaway*, 64 Wash. App. 796, 799, 828 P.2d 591, 593 (1992) (quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 14 L. Ed. 2d 170, 85 S. Ct. 1246, 1250 (1965)). The whole idea of contraband is that we do not need to exercise ordinary due process of law before taking the object away from the citizen because the contraband object cannot lawfully be possessed *under any set of circumstances*.

Marijuana plants in the possession of a licensed marijuana producer are not contraband, because there are circumstances under which they can be lawfully possessed, and due process of law is required before the plants may be destroyed. The plants are what *Alaway* calls "derivative contraband," being unlawful because other facts may be established, and in such cases,

fundamental constitutional protections require that "the owner of derivate contraband does not automatically lose his property interest" and "the government must follow proper procedures to divest him of that interest". *Alaway*, 64 Wash. App. at 799. *See also* Point III *infra*.

The Legislature presumably knew the narrow definition of contraband when utilizing the term "contraband". *Police Guild v. City of Seattle*, 151 Wash. 2d 823, 845, 92 P.3d 243, 255 (2004) ("We further presume 'the legislature . . . know[s] the existing state of the case law in those areas in which it is legislating;'" citation omitted). The term "contraband" appears only twice in Chapter 60.50 RCW, specifically in RCW 69.50.505(11):

> Controlled substances listed in Schedule I, II, III, IV, and V that are possessed, transferred, sold, or offered for sale in violation of this chapter are contraband and shall be seized and summarily forfeited to the state. Controlled substances listed in Schedule I, II, III, IV, and V, which are seized or come into the possession of the board, the owners of which are unknown, are contraband and shall be summarily forfeited to the board.

The Board insinuates that if a licensee violates its regulations, that makes its possession of the plants is "in violation of this Chapter," making the plants contraband and subject to immediate seizure and destruction. This interpretation is manifestly unreasonable for at least three reasons.

1. The Board's statutory interpretation makes its entire regulatory structure surplusage.

This interpretation makes a nullity of the entire regulatory structure discussed above, and many other provisions, including the presumptive

penalties for regulatory violations. The Board does not dispute that the failure to tag the plants charge was "Licensee's first Group 2 regulatory violation and the standard penalty for this is a $2,500 monetary fine under WAC 314-55-525" (since reduced to $1,250). (CP81-82.)

The Board defends its rejection of the entire regulatory structure by asserting it had a "*mandatory duty* to seize and summarily forfeit controlled substances produced and possessed in violation of RCW 69.50". (Resp. Br. 14.) In other words, the Board contends that it had *no discretion whatsoever* to follow its own regulations, and, indeed, would be subject to a writ of mandamus to destroy all inventory whenever a producer is operating in violation of any of the Board's regulations. Under the Board's interpretation, every time a producer's video recorder failed to record the correct time (a complaint levied against Appellant (Resp. Br. 7)),[1] citizens opposed the cultivation of marijuana might bring mandamus actions requiring the Board to destroy the producer by destroying his entire inventory.

This is preposterous. The statutory authority that the Board can properly invoke is not couched in mandatory terms. The core dispute focuses upon the various subsections of RCW 69.50.505, which begins by declaring that "the following are *subject to* seizure and forfeiture" (RCW 69.50.505(1) (emphasis added))—not that that they "shall be forfeit". The reason the Board

[1] Were this an issue at trial, Appellant would show that one monitor was showing a.m. instead of p.m., which as far as Appellant can tell was an artifact of the system being set to NIST time over the Internet.

has the presumptive schedules of penalties in its regulations is because it does not believe its is required to destroy all marijuana each time a violation is discovered, with no process whatsoever.

2. Appellant did not violate Chapter 69.50 RCW, it violated the Board's Rules to implement Chapter 69.50 RCW.

We demonstrated in the Opening Brief that "in violation of this Chapter" is simply not the same thing as in violation of the "rules adopted to implement and enforce [this Chapter]," and that the Legislature carefully distinguished between the two.[2] (Opening Br. 16-17 (quoting RCW 60.50.325).) The Board offers no response.

We demonstrated that the Legislature demanded that the Board adopt the regulatory structure discussed above to specify the procedures for seizure and forfeiture (Opening Br. 17-18 (quoting RCW 60.50.345(12)), which the Board now claims it may disregard entirely. The Board offers no response.

And we demonstrated that the Legislature did have a special concern for what might violate "this Chapter"—producing without a license or

[2] This is a distinction commonly understood and used by the Legislature. *See, e.g.,* RCW 58.17.210 (remedy for "selling or transferring land in violation of this chapter or local regulations adopted pursuant thereto"); RCW 70.94.435 ("in violation of this chapter or of any ordinance, resolution, rule or regulation adopted pursuant hereto"); RCW 48.44.315 ("the commissioner may disapprove such a contract form if it is in any respect in violation of this chapter or if it fails to conform to minimum provisions or standards required by the commissioner by rule").

quantities in excess of a licensed amount. (Opening Br. 18-19 (quoting RCW 69.50.366).) The Board offers no response.

3. The statute newly emphasized by the Board, RCW 60.50.505(12), merely underscores the Legislature's deliberate decision not to allow summary destruction of plants grown by a licensee.

The Board now advances subsection (12) of RCW 69.50.505, never put before the trial court, asserting that this subsection authorizes the Board to seize and summarily forfeit plants from which controlled substances may be derived cultivated in violation of [Chapter] RCW 69.50". (Resp. Br. 2.) Putting aside the problem that Appellant did not "violate the Chapter," this subsection, in context, merely underscores the Legislature's distinction between mandatory seizure and forfeiture authority in some cases, and discretionary authority in others.

Specifically, under subsection (11), "controlled substances" possessed "in violation of this Chapter" may be "contraband" and "*shall be* seized and summarily forfeited to the state" (RCW 69.50.505(11) (emphasis added)), but under subsection (12), the *plants*, which is what this appeal is all about, "*may be* seized and summarily forfeited to the state" (RCW 69.50.505(12) (emphasis added). This again refers the Court back to the Board's regulations (and the Washington Constitution) to address the exercise of the Board's discretion.

The structure is strikingly clear when RCW 69.50.505(11) & (12) are viewed in in context with subsection (13).

> (11) Controlled substances listed in Schedule I, II, III, IV, and V that are possessed, transferred, sold, or offered for sale in violation of this chapter are contraband and shall be seized and summarily forfeited to the state. Controlled substances listed in Schedule I, II, III, IV, and V, which are seized or come into the possession of the board, the owners of which are unknown, are contraband and shall be summarily forfeited to the board.
>
> (12) Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the board
>
> (13) The failure, upon demand by a board inspector or law enforcement officer, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored to produce an appropriate registration or proof that he or she is the holder thereof constitutes authority for the seizure and forfeiture of the plants.

It is obvious from this design that the Legislature intended that "shall be seized and summarily forfeited" authority in subsection (11) be exercised differently than the "may be seized and summarily forfeited" authority in subsection (12)—quite apart from the absence of any "violation of this Chapter". Plants of a licensed producer are simply not "contraband" that may be destroyed at will by the Board's agent, consistent with the fundamental statutory decision to authorize their cultivation. Rather, they "may"—or "may not"—be seized and forfeited under the regulations developed by the Board for that purpose—the regulations the Board asks this Court to ignore.

And subsection (13) underscores the statutory interpretation of a "violation of this Chapter" sufficient to result in seizure and forfeiture: operating without a license. The Legislature never intended to authorize the Board to summarily cut down its licensees' plants, where licensees can present "an appropriate registration or proof that he or she is the holder thereof".

* * *

It is a longstanding rule of interpretation in the Washington courts that the courts are "obliged to construe" a statute "in a way that is consistent with its underlying purpose and avoids constitutional deficiencies". *State v. Crediford*, 130 Wash. 2d 747, 755, 927 P.2d 1129, 1133 (1996) (construing statute to added "implied element" to avoid due process problem). It fully vindicates all purposes of Chapter 69.50 RCW to require the Board to follow its own procedural rules before destroying the inventory of the businesses it regulates; there is no need to empower the Board's agents to make arbitrary destruction decisions on the spot in derogation of all those rules. By contrast, construing any regulatory violation to be a "violation of this chapter" for purposes of creating "contraband" pursuant to RCW 69.50.505(11) is entirely unnecessary and creates serious problems of due process of law, both substantive and procedural, as explained further in Point III.

II. ABSENT AUTHORITY TO SEIZE AND DESTROY OR FORFEIT THE PLANTS, THE BOARD IS LIABLE FOR TRESPASS AND CONVERSION.

The Board argues that the authority discussed above somehow insulates it from claims for statutory trespass and conversion (Resp. Br. 19) on the theory that there is no property right whatsoever in any plants (or indeed any marijuana) unless its licensees are operating in perfect congruence with its regulations. This argument fails for reasons similar to those just discussed, and again should be rejected as causing serious and unnecessary constitutional problems.

The Board relies upon RCW 69.50.505(1)(a):

> "The following are subject to seizure and forfeiture and no property right exists in them:
>
> > "(a) All controlled substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of this chapter"

As explained above, Appellants' plants were not manufactured or possessed "in violation of this Chapter". RCW 69.50.505(1)(a). Nor were they a "[s]pecies of plants from which controlled substances in Schedules I and II may be derived" which were "cultivated in violation of this Chapter". RCW 69.50.505(12). The violation was a minor, first offense, Group 2 *regulatory* violation arising because Appellant could not print the labels to put on the plants, which had all been entered into the traceability system.

The Board next invokes two cases from Colorado and Oregon which are entirely inapposite. *People v. Crouse*, 2017 Colo. 5, 388 P.3d 39, 40 (Colo. 2017), held that a Colorado statute that would have required law enforcement officers to deliver marijuana to plaintiff conflicted with the federal controlled substances law by involving the officers in delivery of a controlled substance. But Appellant does not seek an order asking the Board's agents to give the plants back; it seeks damages for their unlawful destruction.

State v. Ehrensing, 255 Or. App. 402, 296 P.3d 1279 (Or. 2013) is to the same effect: the courts will not enter injunctions requiring state officials to violate federal law. This case involves no contest between state and federal law. It arises exclusively because of the failure of the Board and its agents to follow Washington law and the Washington Constitution.

The Board stresses a statement by the Oregon court that the plaintiff could not lawfully possess marijuana under federal law. In context, the federal law was only relevant because

> ". . . there is no reason to believe that the legislature, in enacting the omnibus evidence return provisions in 1971, intended to compel the return of items to persons whose possession would violate federal law. Finally, construing ORS 133.643 in such a fashion as to authorize—indeed, compel—the return of items whose possession would violate federal law could, as the parties' preemption-related contentions manifest, give rise to 'serious constitutional problems.'"

Id. at 415 (citation omitted). Here, no problem of conflict with federal law arises by reason of affording a damage remedy against the Board for destruction of the business it licensed to Appellant.

Ultimately, it defies credulity to suggest that the People of Washington, directly or through their legislature, intending to establish a system "similar to that for controlling hard alcohol" (2013 Laws, Chapter 3, § 1), established a system where any officials have the arbitrary discretion to destroy the entire business at will based on any regulatory violation without notice or hearing.

III. IF THERE IS TECHNICALLY NO PROPERTY INTEREST TO SUPPORT THE TRESPASS OR TORT REMEDY, THE WASHINGTON CONSTITUTION MUST PROVIDE A REMEDY.

This case is not about the lawfulness of "unannounced inspections". (*Cf*. Resp. Br. 28.) And the marijuana plants do not constitute "contraband," because they are not illegal under any and all circumstances, such that fundamental due process considerations may be discarded. (*Cf*. Resp. Br. 29.) Appellant was running a lawful business licensed by the State, producing a product that might be possessed and sold lawfully. The Constitution, and indeed the American form of government, refutes the proposition that roving officials may destroy a citizen's business without notice or any opportunity to be heard, and outside the "contraband" theory, this is not disputed by the Board.

As demonstrated in the Opening Brief, the extraordinary position of the Board deprived Appellant of property "without due process of law" and denies Appellant equal protection of laws. Wash. Const. Art. I, § 29; *see also id.* §§ 7, 12. A constitutional regime in which the Legislature is free to declare that any minor regulatory violation by a business can render can turn its entire inventory into "contraband"—not that the Legislature intended any such result here—is a regime with no protection against arbitrary seizure and destruction by public officials.

This is an affront to the Washington Constitution, as we explained in our Opening Brief (at 21-23). It is not just matter of the total failure to provide constitutionally-adequate procedural protections. As the Supreme Court of Washington long ago explained,

> "it is sufficient to render a law or ordinance void in the light of these constitutional guaranties, if the prescribed manner of administering such law or ordinance results in leaving the question of the propriety of issuing, withholding or revoking a license to conduct an ordinarily lawful business, and thus the question of who may and who may not engage in such business, to the decision of any officer or set of officers, uncontrolled by any prescribed rule of action."

State ex rel. Makris v. Superior Court of Pierce Cty., 113 Wash. 296, 302-03, 193 P. 845, 847 (1920). Day and day out, the Board processes violations in accord with its regulations, exacting fines for regulatory violations without destroying its licensees, but the Board tells this Court that its regulations do

not prescribe any rule of action whatsoever in light of the newly-asserted duty to destroy all plants cultivated in violation of its regulations.

And as we demonstrated in our Opening Brief, Washington's guarantees of due process of law extend to any "protected interest," and extend even in cases where RCW 69.50.505(1) might be construed to say no property right exists. (Opening Brief at 23 (citing *Tellevik v. 31641 W. Rutherford St.,* 120 Wn.2d 68, 92, 838 P.2d 111, 123 (1992).) The Supreme Court recently summarized the two fundamental due process constitutional protections which apply to any "protected interest":

> The procedural component provides that "[w]hen a state seeks to deprive a person of a protected interest," the person must "receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006). Meanwhile, the substantive component of due process "protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Id*. at 218-19.

Chong Yim v. City of Seattle, 194 Wash. 2d 682, 688-89, 451 P.3d 694, 697 (2019). Here, Appellant had a protected interest in operating his licensed facility under the Board's regulatory regime and got neither procedural nor substantive due process.

As to the question of remedy, the Board does not respond to Appellant's careful demonstration why it is not heretofore been necessary to infer a remedy for flagrantly unconstitutional conduct by Washington

officials. In every other case, there was an alternative remedy, and no need to reach the question. If this Court interprets the Chapter 69.50 and the Board's regulations to authorize the extraordinary conduct of the Board's officials—and it should not—the Washington Constitution cries out for a remedy against astounding and unfettered powers exercised in violation of all constitutional and even regulatory norms. This Court should follow in the footsteps of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and many, many other states, and uphold the "mandatory" nature of the Washington Constitution (Art. I, § 29) through a remedy that prevents its blatant violation.

Conclusion

For the foregoing reasons, and the reasons stated in the Opening Brief, the trial court should be reversed, and summary judgment entered in favor of Appellant U4IK Gardens holding Respondents liable for damages to be established through further proceedings below.

RESPECTFULLY SUBMITTED this 1st day of October 2020.

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