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No. 54704-0-II

COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

SIDNEY A. POTTS,

Appellant,

v.

THE CITY OF LONGVIEW POLICE DEPARTMENT

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent, The City of Longview Police Department (“Longview”), requests that the Court of Appeals affirm the decision of the trial court as set forth in the April 3, 2020, Order entered by Judge Michael Evans—following a hearing held on January 16, 2020. Appellant, Sidney A. Potts, (“Potts”) was convicted of felonies related to drug trafficking and it is appropriate that he forfeit property connected with his illegal activity.

Longview investigated Potts prior to his criminal conviction. Longview searched three locations in the course of the investigation: (1) Potts’ primary business location; (2) Potts’ secondary business location; and (3) Potts’ residence. Longview seized property from each of the three locations and seized money in Potts’ bank accounts. A single forfeiture hearing was held that encompassed all of the seized property. The Longview administrative forfeiture hearing was conducted on December 19, 2013, after being continued at Potts’ request to occur after the conclusion of Potts’ criminal case. The forfeiture hearing resulted in a determination that all of the seized property was forfeit.

Potts appealed the decision of the Hearing Officer in the forfeiture hearing and requested review by the Superior Court. Initially, the Superior Court denied Potts’ request for review based on issues surrounding the

timeliness of Potts' appeal. That issue was eventually resolved in Potts' favor by the Court of Appeals (46574-4-II). The Superior Court then denied Potts' request for review based on issues surrounding the content of Potts' Notice of Appeal. This issue was also eventually resolved in Potts' favor by the Court of Appeals (48410-2-II). Potts' persistence resulted in the Superior Court reviewing the decision of the hearing officer—culminating in a hearing held on January 16, 2020. However, the Superior Court ultimately decided the hearing officer at the forfeiture hearing made an appropriate decision, which should not be reversed except to the extent the Court of Appeals in Potts' criminal case ordered the return of certain property.

Potts appealed his criminal convictions in the intervening time between the forfeiture hearing (December 19, 2013) and review hearing (January 16, 2020). Potts' criminal case is separate from the civil forfeiture matter, but they are related cases. On July 6, 2016, the Court of Appeals (45724-5-II combined with 46300-8-II) upheld Potts' criminal convictions, but in so doing held Longview's searches of Potts' secondary business location and residence were improper—only the search of Potts' primary business location was authorized. The Court of Appeals' opinion in that appeal of Potts' criminal case indicated property should be returned to its

rightful owner(s) if seized at the two locations that were improperly searched. The Court of Appeals later in one of the appeals related to this forfeiture matter (48410-2-II), stated the forfeiture Order was void and portions vacated, but only as to “property seized from Potts’s home and his second dealership.”

Potts argues the entire forfeiture hearing was invalid because the hearing officer made decisions on property seized from all three properties as opposed to just the one property that was later determined to be the only valid search. Potts does not appear to desire a new hearing—he wants the December 19, 2013, hearing invalidated and *all* of the seized property returned, including property seized from the lawful search of his primary business property and money from his bank accounts.

In conjunction with the January 16, 2020, review hearing, the Superior Court Judge reviewed the transcript of the forfeiture hearing and correctly determined the hearing officer’s decision to forfeit property seized from the search of Potts’ primary business was appropriate because the decision to forfeit that property was not impacted in any way by considering property seized in the other searches. The Superior Court Judge concluded that Longview had properly returned property seized from locations of the two improper searches [consistent with the Court of Appeals’ decision in

Potts' criminal case], and that Longview was entitled to keep the forfeited property from the lawful search and cash from bank accounts.

Potts additionally argues the forfeiture decision from the hearing in 2013 should be invalidated in 2020 because Longview cannot produce copies of hearings notices—the originals of which would have been sent to Potts. It is regrettable Longview does not have copies of the notices. However, the following evidence proves Potts received timely notices related to the forfeiture hearing: (1) Potts' signed, handwritten statement affirming he received a notice of the hearing at a time when the hearing was scheduled for April 2013; (2) Potts' testimony during the forfeiture hearing confirming that he received notice; and (3) the finding by the hearing officer who had been involved in scheduling, which finding stated that Potts received hearing notices and requested several hearings postponements so that the forfeiture hearing could take place after Potts' criminal case concluded. It is apparent from the evidence that Potts was given notice of the forfeiture hearing, and that the parties cooperated in continuing the hearing until it could be set for a date that worked with Potts' prisoner transfer schedule. Potts made no argument during the forfeiture hearing that the hearing's timing was untimely and/or had been improperly delayed.

Potts' arguments fail, and it is time this case is finally concluded.

The following is an overview of the twists and turns this case has taken to reach this conclusion:

- Superior Court Case Number 12-1-00876-8 – Criminal case against Potts, which began with Potts’ initial appearance on **August 13, 2012**. A trial conducted in **November 2013** resulted in the jury finding Potts guilty of multiple crimes. Potts’ sentencing hearing was **December 19, 2013**.
- Longview’s Administrative Forfeiture Hearing – The relevant forfeiture hearing occurred on **December 19, 2013**.
- Court of Appeals Case No. 45724-5-II – Potts filed a Notice of Appeal on **December 19, 2013**, related to his criminal case.
- Superior Court Case No. 14-2-00217-4 – On **March 5, 2014**, after having received the hearing officer’s decision from the December 19, 2013, forfeiture hearing, Potts filed a Notice of Appeal with the Superior Court seeking review of the forfeiture hearing decision.
- Court of Appeals Case No. 46300-8-II (“Combined Criminal Appeal”) – Potts filed a second Notice of Appeal in his criminal case on **May 14, 2014**. Potts’ two appeals in his criminal case were consolidated.

- Court of Appeals Case No. 46574-4-II – On **August 6, 2014**, Potts filed an appeal of the Superior Court’s dismissal of his request for review of the forfeiture hearing decision. The Court had dismissed Potts’ case based on untimely notice arguments. However, on **July 14, 2015**, the Court of Appeals issued an opinion reversing the dismissal Order and remanding for further proceedings.
- Court of Appeals Case No. 48410-2-II (“Second Civil Appeal”) – On **November 9, 2015**, Potts filed an appeal of the Superior Court’s second dismissal of his request for review of the forfeiture hearing decision. The Court had dismissed Potts’ case based on argued defects with Potts’ Notice of Appeal.
- Combined Criminal Appeal – On **July 6, 2016**, the Court of Appeals issued an opinion affirming Potts’ criminal convictions, but holding that searches were improper as related to two out of the three locations searched by Longview.
- Superior Court Case Nos. 17-2-00276-34 and 17-2-00450-3 – Potts Family Motors, Inc., filed a lawsuit in Thurston County Superior Court on **January 26, 2017**. The matter was transferred to Cowlitz County in **April 2017**. This lawsuit

alleged that Potts Family Motors, Inc., owned seized and forfeited property, which contradicts Potts' claim that he was the owner of the forfeited property.

- Court of Appeals Case No. 50519-3-II – Potts filed a third appeal in his criminal case on **June 28, 2017**. This appeal was related to return of property from the two locations that the Court of Appeals determined were improperly searched. The property seized from these locations was eventually returned to Potts consistent with the Court of Appeals' decisions.
- Second Civil Appeal – On **December 27, 2017**, the Court of Appeals issued an opinion reversing the second dismissal Order and remanding for further proceedings.
- Court of Appeals Case No. 52751-1-II (“Potts Family Motors Appeal”) – On **September 26, 2018**, Potts appealed the dismissal of the lawsuit filed by Potts Family Motors, Inc.
- During 2018-19, multiple hearings were held under filings with cause numbers designating Potts' criminal case, the review of the civil forfeiture hearing decision, and the case initiated by Potts Family Motors, Inc. The Superior Court during this time period consistently held Longview was required to return

property seized from the two locations that were improperly searched—*i.e.*, Potts’ residence and secondary business. Then, after some continuances, the Superior Court held a hearing on **January 16, 2020**, to review the status of the matter and rule on Potts’ request(s) to essentially reverse the decision of the hearing officer at the forfeiture hearing. The Court denied Potts’ request(s) after reviewing the transcript from the forfeiture hearing and hearing argument. The Superior Court issued an Order on **April 3, 2020**.

- Court of Appeals Case No. 54704-0-II – Potts filed a Notice of Appeal on **April 17, 2020**, appealing the April 3, 2020, decision.
- Potts Family Motors Appeal – The trial court’s dismissal of the Potts Family Motors, Inc., case was affirmed in an opinion issued on **April 28, 2020**.

The pending appeal is the third appeal in the civil forfeiture action and seventh appeal overall. The water has gotten very muddy. Longview is partly to blame in light of two searches, which searches were ultimately held improper, and two attempts to dismiss this civil review matter on procedural grounds, which attempts were ultimately unsuccessful. But

getting to the heart of the matter, the issues are quite simple. First, whether the hearing officer's decision to forfeit Potts' property was appropriate related to the forfeiture of bank account funds and personal property seized from a location that was properly searched (*i.e.*, Potts' primary business), which funds and personal property are tied to drug-trafficking crimes as established through a criminal conviction? The answer is yes. Property seized from Potts' secondary business and residence was returned, but Potts is not entitled to the return of funds from his bank accounts or property seized from his primary business. Second, whether the hearing was conducted properly? Again, the answer is yes. The parties cooperated in scheduling the forfeiture hearing after the conclusion of Potts' criminal case and the forfeiture hearing was held immediately after Potts was sentenced. Evidence presented at the forfeiture hearing supports the forfeiture decision.

II. STATEMENT OF THE CASE

A. Potts was convicted of felonies related to drug trafficking.

The fact Potts was convicted of felony criminal charges related to drug trafficking is not in dispute: this fact was outlined by Longview at the beginning of the forfeiture hearing (CP 340-41); this fact was stipulated to by Potts during the forfeiture hearing (CP 349-50 and CP 353); this fact was part of the Findings determined by the hearing officer at the forfeiture

hearing (CP 303); and this fact is known to both the Cowlitz County Superior Court and Court of Appeals (*see, e.g.*, Case No. 45724-5-II).

Also not in dispute is the fact that Longview seized many of Potts' assets, and that Longview held a forfeiture hearing in an effort to obtain a decision that Potts had forfeited certain designated assets. CP 301-310; CP 339-371. The Longview administrative forfeiture hearing was conducted on December 19, 2013. *Id.*

B. Potts was provided with notice of the forfeiture hearing.

It is apparent from the record that Potts received notice of the forfeiture hearing and the parties rescheduled the hearing in coordination with Potts' prisoner transportation requirements. CP 312; CP 314. Potts stated in writing that he had "received [Longview's] notice of forfeiture hearing..." CP 312. The hearing was at one point scheduled to occur in April 2013 and Potts indicated he would need transportation. *Id.* The hearing was rescheduled, and it was ultimately held on December 19, 2013, which was the same day Potts was sentenced for his crimes. CP 312; CP 314. Potts acknowledged at the forfeiture hearing held in December 2013 that he was advised of the hearing "by law a seven-day notice..." CP 314.

Potts now argues seven years later that his affirmation during the forfeiture hearing to receiving appropriate notice was focused on the notice

served for the hearing that had at one point been scheduled for April 2013, but that he did not admit to receiving notice for the rescheduled hearing in December 2013. *See*, VRP January 16, 2020, hearing at page 18. However, it is undisputed that Potts was on notice for several months prior to the forfeiture hearing that Longview had seized Potts' property and intended to hold a hearing to request forfeiture. *See, e.g.*, CP 314. Notably, Potts had two witnesses present at the forfeiture hearing, and the apparent issue for which Potts claimed he needed more time to prepare was in regards to providing alleged evidence that some of the property seized was owned by Potts Family Motors and not Potts personally. *See, e.g.*, CP 359-369. The Hearing Officer allowed Potts an additional two weeks after the hearing to submit supplemental documentation. CP 367-68 and CP 371.

Potts never complained/objected during the forfeiture hearing or at any time leading up to the hearing that it was being held too late. *See, e.g.*, CP 312 and CP 339-371. Until recently, Potts only argued that: (1) he thought he should have received more notice of the December 2013 forfeiture hearing despite admitting he had received notice of an earlier hearing; and (2) notice to Potts personally was a moot point for the most part because the real entity that should have been notified was Potts Family Motors. *See, e.g.*, CP 10-12 and CP 314. There is no dispute that Potts was

served with the notice of seizure and intent to forfeit, and not Potts Family Motors. And there is no dispute that Potts claimed an ownership interest in the seized property and requested a hearing. However, the notices of hearings have been lost and are not part of the record except for an undated notice that Potts has submitted related to the scheduling of the forfeiture hearing for April 2013. CP 412. The best evidence at this point of the procedural-scheduling facts are contained in the hearing transcript and the Findings of Fact set forth by the hearing officer who was involved in scheduling. CP 301-310 and CP 314.

C. Potts Family Motors was not entitled to notice of the hearing.

Potts stated at the forfeiture hearing that he did not own the vehicles seized from his business' primary lot—he stated the vehicles were owned by Potts Family Motors. CP 366. However, Potts also claimed to have “control” and “an ownership interest” in the vehicles. *Id.* Longview provided evidence at the forfeiture hearing that the vehicles were titled in Potts' name personally, and the hearing officer found Potts was the owner of the seized [and forfeited] assets. *See*, CP 304-05. There is no record that Potts ever produced supplemental information establishing the vehicles or any other of the assets were owned by Potts Family Motors. Further, Potts Family Motors filed a lawsuit, and this Court stated in an unpublished

opinion, “[Potts Family Motors] provided no evidence that it had an ownership interest in any of the vehicles seized from its lot.” *Unpublished Opinion dated April 28, 2020, at page 2 (Case No. 52751-1-II)*.

D. The hearing was conducted properly and the outcome was just.

Longview called Detective Rocky Epperson to testify at the forfeiture hearing. Detective Epperson described in detail the investigation of Potts that led to Potts’ felony criminal drug-trafficking convictions, including testimony explaining why Longview believed assets seized from Potts’ primary business location had been purchased with illegitimate money that was the product of drug trafficking. The Hearing Officer interjected during direct examination of Detective Epperson in an effort to move the process along more efficiently, and at that point Potts indicated he stipulated to the evidence that had been presented at his criminal trial. CP 339-350.

Potts testified with respect to his finances that he had a bank account started with money he received in a disability settlement with the government, but that he withdrew money from that account for his business. Longview argued the bank account that had been opened with a disability settlement was subject to forfeiture once funds from the bank account were withdrawn and intermingled with funds used in drug trafficking. Longview

argued the intermingling was obvious and a necessity for Potts given Potts' lack of legitimate income—if the money went to Potts Family Motors, it was used to promote drug trafficking. CP 350-356.

Potts testified he had other accounts that included money from friends and family. Longview argued the accounts that had been opened with funds allegedly from friends and family were subject to forfeiture because the funds were obviously illegitimate given there was no evidence that Potts' friends and family had a legitimate source of income. CP 350-356.

Longview had Sergeant Ray Hartley available to testify about the ownership of vehicles that were subject to forfeiture. The vehicles forfeited to Longview were established as being titled in Potts' name. CP 361-366.

The hearing officer set forth written Findings of Fact and Conclusions of Law in a document dated January 29, 2014, which was served on Potts and appealed. From the hearing records and based on well-known, uncontroverted facts it is undisputed that: Potts was arrested in August 2012; Potts' property was seized in August 2012; Potts was given notice of the seizure in August 2012; Potts claimed an ownership interest in the seized property and requested a hearing; a hearing was scheduled, but rescheduled at Potts' request while his criminal case was pending; Potts

made numerous attempts to recover his seized property in his criminal case; the forfeiture hearing was conducted immediately after Potts' sentencing hearing, on the same day; the hearing officer allowed Potts two weeks following the forfeiture hearing to submit supplemental records; the hearing officer determined the seized property was forfeit; and Potts appealed. *See, e.g.*, CP 298-372. The evidence presented at the forfeiture hearing supports that funds seized from Potts' bank accounts and personal property seized from Potts' primary business location were tied to drug trafficking. CP 298-372. Evidence of a list of seized assets from searches of Potts' residence and secondary business location were immaterial with respect to findings of fact and conclusions of law that have a bearing on the assets that were seized independent of the two invalid searches. CP 298-372.

E. The hearing decision was reviewed and properly affirmed.

No argument, objection, and/or claim made prior to or during the forfeiture hearing suggested Potts disputed the timeliness of the hearing. And there was nothing in Potts' notice appeal of the hearing or supplemental notice of appeal to indicate that Potts believed the hearing was untimely. Potts raises the issue of untimeliness for the first time on appeal, but even now seems to suggest the issue is not the timing of notice to Potts and is instead the lack of any notice to Potts Family Motors. The only argument

about notice that Potts made previously is whether the forfeiture should be upheld even where Longview cannot presently produce a copy of the communication notifying Potts of the rescheduled hearing in December 2013. *See, e.g.*, VRP January 16, 2020, hearing; *and see*, CP 16-17, CP 54-59, CP 298-372, and CP 424-430.

The Superior Court reviewed the transcript from the forfeiture hearing and reviewed the Findings of Fact and Conclusions of Law set forth by the hearing officer. The Superior Court reviewed evidence that Potts had been aware of the forfeiture hearing for several months before it was held. The Superior Court accepted Longview's representation that it does not currently possess copies of original hearings notices sent to Potts. The Superior Court properly concluded the forfeiture hearing was procedurally proper based on the evidence before the Court and in light of the arguments Potts made to the Superior Court. *See, e.g.*, VRP January 16, 2020, hearing; *and see*, CP 298-372.

The Superior Court also properly determined that assets forfeited were owned by Potts at the time they were seized, and that the assets forfeited were connected with drug trafficking. Potts admitted during the hearing that he was convicted of drug-related felonies and he stipulated to the evidence that had been offered against him during the criminal trial.

Additionally, Longview had law enforcement personnel testify as to the evidence against Potts and in support of forfeiture. CP 339-371.

III. SUMMARY OF ARGUMENT

Potts has flip-flopped repeatedly as to whether Potts Family Motors or Potts personally is the owner of seized/forfeited property. That issue has clearly been put to rest at this point—Potts Family Motors has failed to establish any ownership interests in the property, and whether or not notice to Potts of the seizure was effectively notice to Potts Family Motors is a moot point. Potts was the owner of the property and Potts Family Motors has nothing more to do with this case.

Potts was given notice of the seizure and intent to forfeit, and he requested a hearing. The parties cooperated in setting a forfeiture hearing to be conducted at the conclusion of Potts' criminal case. Longview lost its copies of the original hearing notices, but it is apparent from the transcript of the forfeiture hearing and the hearing officer's findings that notice was provided and was timely. Further, there was never any issue raised as to the timeliness of the hearing until a third appeal in the forfeiture case approximately eight years after the property had been seized. This new issue raised by Potts should not be considered at this point. Regardless, Potts' new argument fails on its merits even if the notice issue is properly

before this Court as a procedural matter and has not been waived. Potts received adequate due process, was not unreasonably deprived of his property [while he was in jail and/or the property was held as evidence pending the conclusion of his criminal trial], and Potts had the opportunity to be heard in a timely fashion as coordinated with his schedule in his criminal case.

A secondary notice issue of whether Potts received appropriate notice of the rescheduled hearing conducted in December 2013 is similarly without merit. Potts had ample notice of Longview's intent to seek forfeiture prior to the hearing, and Potts was given an extra two weeks to present evidence after the hearing. Potts was afforded adequate due process.

Searches of Potts' residence and secondary business were later determined invalid, and property seized from those locations has been returned to Potts. But the search of Potts' primary business was valid, and the forfeiture of property seized from Potts' primary business is supported on grounds independent of the two invalid searches. It would be unreasonable to invalidate part of the hearing officer's decision because one forfeiture hearing was conducted instead of three or four.

IV. ARGUMENT

A. Potts received notice in compliance with due process requirements established by Washington case law.

RCW 69.50.505 provides for the forfeiture of assets used in drug trafficking—and that is the relevant statute under which Potts' property was forfeited as set forth in the hearing officer's Findings of Fact and Conclusions of Law. RCW 69.50.505 additionally outlines the procedures for declaring property forfeit following a seizure. One of the procedures is the requirement of a hearing if a person claiming ownership of the property requests a hearing. RCW 69.50.505(5). RCW 69.50.505 references the Administrative Procedures Act, which itself references hearing requirements. *See, e.g.*, RCW 34.05.413.

A person claiming ownership of property subject to forfeiture is entitled to due process, which Washington courts have held requires the forfeiture hearing to be commenced within ninety days. *In re the Forfeiture of One 1988 Black Chevrolet Corvette Automobile...*, 91 Wn. App. 320, 323-24, 963 P.2d 187 (Div. 1 1997). Washington courts have consistently held that due process is satisfied and the hearing is deemed commenced within ninety days as long as a hearing is scheduled within ninety days—not that a hearing is conducted, but merely scheduled even if the scheduled hearing is set to occur outside the ninety-day period. *See, In re the*

Forfeiture of One 1988 Black Chevrolet Automobile, 91 Wn. App. at 323-25; *City of Des Moines v. Personal Property Identified as \$81,231 in U.S. Currency*, 87 Wn. App. 689, 697-700, 943 P.2d 669 (Div. 1 1997); *Valerio v. Lacey Police Dept.*, 110 Wn. App. 163, 171-75, 39 P.3d 332 (Div. 2 2002); and *City of Seattle v. 2009 Cadillac CTS*, 2 Wn. App.2d 44, 409 P.2d 1121 (Div. 1 2017). The Court in *Valerio* even suggested the proceedings were commenced upon notice of seizure and intent to forfeit—even before a forfeiture hearing was scheduled. *Valerio*, 110 Wn. App. at 172 (citing RCW 69.50.505).

The crucial consideration is due process. *See, e.g., “Tellevik I”*, 120 Wn.2d 68, 838 P.2d 111 (1992); and *“Tellevik II”*, 125 Wn.2d 364, 884 P.2d 1319 (1994). “Due process requires only an opportunity to be heard and to contest the seizure.” *Tellevik II*, 125 Wn.2d at 375 (dissent opinion) (citing *Tellevik I*, 120 Wn.2d at 86-87). Factors to be considered as to whether a hearing’s timing satisfies due process requirements are: (1) length of delay; (2) reason for delay; (3) claimant’s assertion of his rights to a hearing; and (4) whether the claimant suffered any prejudice. *In re the Forfeiture of One 1988 Black Chevrolet Automobile*, 91 Wn. App. at 324; *City of Seattle v. 2009 Cadillac CTS*, 2 Wn. App.2d at 52.

Potts argues in Appellant's Opening Brief that due process was not afforded based on: (1) the hearing taking place outside the ninety-day window; and (2) allegedly not receiving a seven-day notice in advance of the hearing after it was rescheduled to be held following Potts' sentencing hearing in his criminal case. The first argument was raised for the first time in this pending appeal—the third appeal of this case to the Court of Appeals, which appeal is taking place eight years after Potts' property was seized. Potts at some point brought up the second argument to the Superior Court, but the Superior Court deemed the argument to have been waived. Each of Potts' arguments fail for the reasons set forth below.

1. The forfeiture hearing was timely.

Longview seized Potts property in August 2012. Longview served Potts with notice of the seizure and its intent to seek forfeiture in August 2012. And Potts requested a hearing in August 2012. It is evident from the record that Longview then set a forfeiture hearing, which was continued one or more times until the hearing eventually occurred in December 2013. It is not evident from the record when Longview first notified Potts of a scheduled hearing after Potts requested a hearing.

However, Potts never argued the hearing was delayed in a manner that violated his due process rights until the pending [third] appeal in this

civil forfeiture matter, which appeal is taking place eight years after Potts' property was seized. If, for argument's sake, the notice of seizure and intent to forfeit did not commence the proceedings, and a notice of hearing was required to commence the proceedings—then the original notice of hearing would have needed to be sent sometime before December 1, 2012, even if the hearing were going to occur sometime in 2013. Potts could have raised the issue of untimely notice in 2012 instead of waiting until 2020 if Potts truly did not receive a notice of hearing within ninety days. The fact that Potts did not raise this issue leads to a reasonable inference that Potts originally was notified of a hearing within the ninety-day window.

Potts has decided for the first time to raise this issue—not because there is suddenly some merit to the argument, but only because Potts has confirmed Longview lost their copies of notices and Potts now believes he might be able to get away with making a false claim. It would have been more likely that Longview could have produced copies of the original notice had Potts made this argument sooner. Importantly, the Hearing Officer was involved in scheduling Potts' hearing and found Potts had received timely notice and the hearing was continued at Potts' request.

Notably, the Trial Court was not addressing the “ninety-day” argument when the Trial Court ruled that Potts waived his notice argument.

This is because this argument is new on appeal and was never raised to the Trial Court; the notice argument Potts raised previously will be discussed in the next section of Respondent's Brief. Longview acknowledges that due process arguments may be raised for the first time on appeal. *See, Irwin v. Mount*, 47 Wn. App. 749, 737 P.2d 277 (Div. 1 1987). However, Potts' new argument is not required to be considered, and it should not be considered under the circumstances in this case. *See, RAP 2.5; and see, State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999).

Allowing an issue to be raised for the first time on appeal is an exception to the general rule, and the exception must be narrowly construed. An alleged due process issue should only be considered when raised for the first time on appeal if the appellant demonstrates that an issue concerns a manifest error that is truly of constitutional magnitude. An appellant must show actual prejudice—*i.e.*, practical and identifiable consequences—as a result of the alleged due process violation in order to make an appropriate demonstration that an issue should be considered for review. *State v. WWJ Corp., supra.* (citations omitted).

Potts has not demonstrated that the alleged due process violation had any practical or identifiable consequences affecting the result of the forfeiture hearing. Moreover, since Potts was charged with felonies related

to drug trafficking, the seized property was properly withheld from him as potential evidence to the extent he could have used it anyhow during times he was incarcerated. Additionally, to the extent Potts continues to assert Potts Family Motors was the owner of seized property, Potts has no rights to press with respect to the property. Potts' due process arguments should not be considered based on the passage of time since the seizure and forfeiture hearing, Potts' failure to raise the issue prior to this appeal, and Potts' failure to demonstrate manifest error.

Getting back to the merits of this issue—first, there is an inference that Longview provided notice of the original hearing within ninety days, which inference is supported not only by Potts' failure to raise the issue sooner, but also by the Hearing Officer's findings that notice was timely and the hearing was reschedule to accommodate Potts' request; and second, the proceedings were commenced when Longview served Potts with notice of the seizure and intent to seek forfeiture. There is no doubt that Potts knew in August 2012, which was the same month his property was seized, that Longview intended to seek forfeiture.

The forfeiture hearing was not conducted until December 2013, which was over a year after the seizure and Potts' request for a hearing. But it is undeniable there had been an earlier scheduled hearing and the hearing

date was continued to coincide with the date of Potts' sentencing in his criminal case. Looking at the due process factors: (1) the hearing occurred about fifteen months after the seizure of Potts' personal property and during which time Potts had a criminal case pending and/or he was incarcerated; (2) the hearing was delayed until after Potts' criminal case concluded, which was at Potts' request and was efficient in light of prisoner transfer needs, and also efficient because Potts probably would have been unwilling to testify at the forfeiture hearing before his criminal case was concluded; (3) Potts asserted his right to a civil forfeiture hearing, but also attempted to recover property through his criminal case, and additionally argued a third-party, Potts Family Motors, was the true owner of forfeited property; and (4) Potts suffered no prejudice by holding the hearing in December 2013—he had several months to prepare for the hearing, he was given additional time to supplement the record after the hearing, and he was incarcerated so did not miss out on the use of his property. Potts clearly had the opportunity to be heard and contest the forfeiture.

Potts received due process in that he was notified of the seizure and intent to forfeit; he was given a hearing at his request; the hearing was conducted at a time convenient for Potts after his criminal sentencing; Potts had time to prepare for the hearing; Potts was given time to supplement the

record after the hearing; and Potts did not lose the use of his property since he was incarcerated after his property was seized and/or the property was held as potential evidence while the criminal case was pending. It was appropriate in this instance to hold the forfeiture hearing in December 2013 following the seizure of Potts' property in August 2012.

2. Potts received adequate notice.

Due process was satisfied, as argued above, based on Longview's notice to Potts of the seizure and intent to forfeit, and based on the original notice of hearing timely provided to Potts as apparent by his failure to complain of timeliness prior to 2020. The issue of notice to Potts for the rescheduled December 2013 hearing was "not of constitutional magnitude but are merely procedural" since due process was satisfied. *Tellvik II*, 125 Wn.2d at 376 (dissent opinion).

Potts argues that RCW 34.05.434 required seven days' notice of the specific hearing date that was scheduled for December 19, 2013. Potts admits he knew for months that Longview intended to hold a forfeiture hearing and there is a writing indicating Potts was aware of an earlier scheduled hearing. But now Potts claims, despite his representations during the hearing he had received a seven-day notice, that he actually had less than a week's notice of the hearing date before the hearing was held.

Potts confirmed during the forfeiture hearing that he received a seven-day notice, and he should not be permitted to change his story at this point. However, whether Potts received a new seven-day notice is really a moot point given that: (1) he received some amount of notice, which he acknowledged; (2) he knew for months that a forfeiture hearing was coming; and (3) he was provided with an additional two weeks after the hearing to supplement the record with evidence to support his position.

Here again, there is no question that Potts had the opportunity to present his case. Any defect in not providing Potts with a new seven-day notice—to the extent Potts' current story is believed over his testimony in December 2013 that he had received notice—was cured when the Hearing Officer gave Potts an additional fourteen days following the hearing to present supplemental evidence. All in all, Potts had notice of the hearing, Potts testified at the hearing, Potts had other witnesses present at the hearing and they participated in the hearing, Potts presented documents to the Hearing Officer during the hearing, and Potts was given an extra two weeks following the hearing to present additional evidence. Potts' argument that he was not afforded the opportunity to be heard is absurd.

Potts' argument that the forfeiture decision should be reversed fails on its merits even if the argument had not been waived. But the Superior

Court was correct in concluding the argument had been waived. Here again, it must be noted that Potts admitted at the forfeiture hearing that he had received notice—this point cannot be stressed enough. Potts has in the past argued the forfeiture hearing was improper based on Potts Family Motors having never received notice of a hearing, but this is distinct from Potts' argument that a copy of a supplemental seven-day notice must be produced even though receipt of a previous notice months earlier was confirmed in writing. Potts argues he was not in position to make this new, distinct argument until he had received a transcript of the forfeiture hearing. Potts' timing argument makes little sense. If Potts had not received a notice of hearing, he would have known that supposed fact without needing to review a hearing transcript.

The waiver doctrine provides that a party may waive an argument if assertion of the argument is inconsistent with the party's prior behavior, or if the party has been dilatory in asserting the argument. The waiver doctrine is designed to promote efficiency (*e.g.*, address potentially dispositive issues as early as reasonably practicable) and prevent parties from using delay to gain an advantage. *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002).

In *King*, the defense argued the plaintiff's claims should have been barred due to defective notice. The defective notice argument was asserted as an affirmative defense in the early stages of the case. However, the defense participated in years' worth of litigation activities and did not file a motion to dismiss based on the notice defense until three days before trial. The Court in *King* held the notice argument had been waived. *King*, 146 Wn.2d 420.

Potts has filed many pleadings in the last seven years, but did not properly note a motion to dismiss based on improper notice arguments. Potts arguably made an oral motion on these grounds during a hearing on January 16, 2020. Potts then filed a Motion for Summary Judgment dated January 22, 2020 without setting a hearing. Potts' attempts to make this argument came too late. Potts waived his argument like the defense in *King*.

B. Potts Family Motors did not own the seized property as a matter of law.

1. *Res Judicata* and/or Collateral Estoppel prevents Potts from arguing that Potts Family Motors was entitled to notice.

Res judicata bars re-litigation of a claim that has previously been litigated and where final judgment has been entered. *Res judicata* applies where the subsequent proceedings are identical as to subject matter, claim or cause of action, persons and parties, and the quality of the persons for or

against whom the claim is made. *See, Pederson v. Potter*, 103 Wn. App. 62, 11 P.3d 833 (Div. 3 2000).

Similarly, collateral estoppel prevents the re-litigation of an issue that has previously been litigated. Collateral estoppel applies where the issue has been decided in a previous case, final judgment on the merits was entered in the previous case, the party against whom collateral estoppel is asserted was a party or in privity with the party to the prior adjudication, and application of the doctrine does not work an injustice. *State v. Vasquez*, 148 Wn.2d 303, 59 P.3d 648 (2002).

Potts repeatedly argues the forfeiture hearing is invalid because notice of the hearing was never served upon Potts Family Motors. Potts claims at times that Potts Family Motors was the owner of a substantial portion of the seized assets. Potts argues service of a notice of hearing on him personally is not effective service on Potts Family Motors. However, evidence was presented during the forfeiture hearing that Potts was in charge of Potts Family Motors, and during the years since the forfeiture hearing Potts has frequently held himself out as the decisionmaker and mouthpiece for the business.

Potts' arguments with respect to Potts Family Motors' alleged ownership of seized assets have no merit because the Superior Court and

Court of Appeals have held in previous litigation that Potts Family Motors did not own the seized assets. It would be convoluted to hold that Potts Family Motors did not own the assets in a case filed by the business, but then reach a different result in this forfeiture action appealed by Potts. The argument that Potts Family Motors has any ownership interest in the seized assets, and was therefore entitled to notice of the forfeiture hearing, is barred.

2. Potts lacks standing to challenge forfeiture of property he alleges he did not own.

RCW 69.50.505 sets forth the procedures for a forfeiture action and gives rights to those claiming an ownership interest in property subject to forfeiture. There is no provision in the law that indicates a third party can request a forfeiture hearing on behalf of an entity the third party believes may have an ownership interest.

Potts has argued off and on that Potts Family Motors was the owner of seized assets. If that were true, Potts lacks standing to contest the forfeiture hearing in the context of the case that gives rise to this pending appeal. However, it is not true, as this Court has already determined in a separate case that Potts Family Motors did not own the seized property.

- C. **Longview has returned assets to Potts that were determined to have been seized pursuant to invalid searches. The seized and forfeited items that have not been returned to Potts have been appropriately forfeited to Longview based on Potts' drug-trafficking convictions and valid investigative conduct.**

In the *City of Walla Walla v. \$401,333.44*, 150 Wn. App. 360, 208 P.3d 574 (Div. 3 2009), a criminal defendant had property seized and the City sought to have the seized property forfeited. The criminal defendant sought to have his forfeiture hearing conducted by the Superior Court as opposed to having the hearing conducted by a hearing examiner. The forfeiture hearing was stayed pending resolution of the criminal case. The criminal defendant was convicted, and as a result of that conviction the City obtained forfeiture via summary judgment. However, the criminal conviction was reversed based on the criminal defendant's argument on appeal that a search leading to his arrest was illegal. The criminal defendant then requested the return of the forfeited property. 150 Wn. App. 360.

The Court in *City of Walla Walla v. \$401,333.44* held that the City was correct in its argument that "illegal seizure does not bar its action to forfeit." 150 Wn. App. at 364. But the Court also held the City could not argue for purposes of the forfeiture hearing that a search was valid when it had been determined illegal in a related criminal case. *Id.* Thus, the Court of Appeals remanded the case back to the Superior Court for forfeiture

proceedings based on whatever evidence the City had that was not excluded as being related to the invalid search. *Id.* at 368-69.

City of Walla Walla v. \$401,333.44 was cited in this Court's unpublished opinion related to Potts' second appeal of the civil forfeiture action. *Unpublished Opinion at page 10*. And in that unpublished opinion, this Court held the forfeiture order "was void as it related to property seized from Potts's home and his second dealership." *Unreported Opinion at page 11*. This Court did not state that the forfeiture Order was void related to assets seized outside of the scope of those two specific invalid searches—*i.e.*, the searches of Potts' residence and second business location.

Arguably, Longview could have made a case to seek the forfeiture of property seized pursuant to illegal searches based on the holding in *City of Walla Walla* that an illegal seizure does not bar forfeiture. But this Court's instructions in its unpublished opinion(s) foreclosed that possibility. However, it was appropriate for the Superior Court to conduct its review of the forfeiture hearing to determine if decisions related to forfeiture of some assets could be segregated from decisions related to assets seized pursuant to the two invalid searches.

In the present matter, Potts' conviction was not overturned because his conviction was not reliant upon property seized from invalid searches.

Similarly, the forfeiture of funds in Potts' bank accounts and the forfeiture of property seized at Potts' primary business location was not reliant upon property seized from invalid searches. The property seized from invalid searches was not a focus of the forfeiture hearing—mainly, the property was simply referenced as having been seized. The basis of the forfeiture was Potts' criminal conviction and the testimony of law enforcement that described a very thorough investigation of Potts' illegal activities.

The hearing officer properly concluded based on Potts' conviction and the testimony given at the forfeiture hearing that Potts' bank account funds and property seized from Potts' primary business location was forfeit to Longview. And the Superior Court Judge properly confirmed the hearing officer's decision, while at the same time ensuring Longview compensated Potts for property seized pursuant to invalid searches in accordance with instructions from the Court of Appeals.

No evidence supports Potts' argument that bank account funds and property from his primary business location should be returned to him—these assets were obviously tied to drug trafficking. If there were evidence to support Potts' arguments, he had plenty of time to come up with it prior to the forfeiture hearing and had an extra two weeks after the hearing to submit any such evidence. There was no reason for the Superior Court to

allow discovery on appeal. And the only discovery Potts requested was documents pertaining to notice that have been lost, which Potts argues supports his arguments to invalidate the forfeiture hearing based on a technicality. But as Longview has previously explained: (1) Potts' arguments lack merit; and (2) Potts could have made his arguments based on notice many years ago, if it were in fact true that Potts did not receive notice.

As a final matter, Longview notes that not much has been said so far in this Response about Potts' bank accounts. This is because Potts has not made a good faith argument to support his request that bank account funds be returned to him. Instead, Potts' arguments are based on gross misrepresentations of prior decisions by this Court and the Superior Court.

For example, Potts' heading for his Sixth Assignment of Error suggests the Superior Court disregarded this Court's opinion in Potts' criminal appeal. But at pages 51-52 of this Court's opinion in Potts' criminal case, this Court stated it was not error for the trial court to decide that Potts' bank account funds were subject to forfeiture under RCW 69.50.505 independent of the trial court's decision to suppress records of Potts' bank accounts for purposes of the criminal trial. Notably, the trial court decided to exclude bank account records on grounds different from

those argued by Potts, and the exclusion does not necessarily state the subpoena to discover bank account information was improper for purposes of forfeiture.

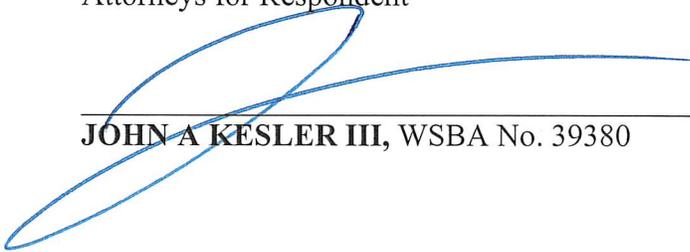
At the forfeiture hearing, Potts himself presented evidence of his finances as he testified about his bank account totals and source of funds, and he produced some bank statements. Additionally, law enforcement testified as to their investigation, which established independent of any searches and/or seizures of Potts' property that Potts was guilty of the drug-trafficking crimes for which the jury convicted him. Moreover, law enforcement testimony and evidence Potts stipulated to that was admitted in his criminal trial proved that Potts lacked a legitimate source of income and Potts comingled bank account funds at issue with funds that were used for drug trafficking. Given there was enough evidence for the jury to convict Potts without considering bank records and/or evidence of property seized pursuant to searches later determined to be invalid, which evidence the prosecuting attorney did not present at trial, it was proper for the Superior Court to conclude there was evidence that the Hearing Officer could rely upon to find Potts' assets were tied to drug trafficking and order them forfeit.

V. CONCLUSION

For the foregoing reasons, Longview requests that the Court of Appeals affirm the Orders and rulings of the Trial Court most recently appealed by Potts. This matter has reached its end.

RESPECTFULLY SUBMITTED this 5th day of October 2020.

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PROOF OF SERVICE

I certify that I caused to be served a copy of the foregoing document
on all parties or their counsel of record on the date below as follows:

Sidney A. Potts #626771
MCC/WSR C-309 L
P. O. Box 777
Monroe, WA 98272

U. S. Mail Postage Prepaid.

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

DATED this 5th day of October, 2020, at Olympia, Washington.

s/Pamela R. Armagost
Pamela R. Armagost

BEAN GENTRY WHEELER & PETERNELL

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