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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

No. 288871

CITY OF WALLA WALLA, Respondent,

v.

\$401,333.44, Defendant *in rem*,

and

ADRIAN IBARRA-RAYA, Appellant.

APPELLANT'S REPLY MEMORANDUM

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I. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's "Counter-statement of the Case" makes a number of assertions that are, at best, confusing, or simply unsupported by the record. Most confusing is Respondent's repeated insistence on referring to more than one actor in the case, in-part, as "Adrian." This is puzzling, as the City does not appear to dispute that the Claimant is Adrian Ibarra-Raya, and provided no factual evidence that anyone other than the Claimant put himself forward as Adrian Ibarra-Raya in any circumstances relevant to this case. References to "Gilberto/Adrian" and "Jairo/Adrian" seem to suggest to this Court that the City may be disputing the identity of the Claimant, which is not supported by any argument or fact. The City claims this is "for clarity," because much is made of extraneous goings-on with immigration and license applications; but this appears to be an affectation to confuse the Court as to the actions of Mr. Ibarra-Raya and his brother, and to draw attention to unrelated acts of the Claimant, rather than a clarifying device. The fact remains that the Claimant is Adrian Ibarra-Raya, and the so-called "Gilberto/Adrian" is not a party to this case, and his actions should not be confused with Claimant's. It would probably have been simpler if a footnote explained that Gilberto Ibarra-Cisneros tried to use his brother's name once, if it were relevant. The Claimant

would refer the Court's attention to page 9, footnote 5 of the Opening Memorandum.

The Claimant stands by his original statement of the case.

II. REPLY TO RESPONDENT'S ARGUMENT

A. Respondent Confuses the Claimant's Argument Regarding Subject Matter Jurisdiction.

Respondent's first argument is based upon the faulty assumption that the Claimant's argument regarding subject matter jurisdiction is the exact same argument as Claimant had made in the first appeal of this matter, and that the Court ruled definitively on that argument. Respondent also throws in a number of its usual, but irrelevant, accusations that Claimant and his counsel are bad people who waste judicial resources, ask for cases to be stayed, and "abuse" discovery. This type of *ad hominem* argument featured heavily in the City's oral argument during the first appeal.

The City correctly states two holdings of the prior decision by this Court: (1) that illegal seizure does not bar a forfeiture action; and (2) the trial court may consider the property at issue for the purpose of establishing *in rem* jurisdiction. *City of Walla Walla v. \$401,333.44*, 150 Wn. App. 360, 364-66, 208 P.3d 574 (2009). Claimant respectfully submits that this Court did not definitively hold that subject matter

jurisdiction did in fact exist in this case. The Claimant's argument is related to the second holding—that the superior court was able to consider the money to establish whether or not jurisdiction existed. The trial court determined, over objection, that subject matter jurisdiction did exist; it is that decision of the trial court, based upon the holding in the first appeal, that the Claimant asks this Court to review, not the holding of this Court in the first appeal. In fact, the heading of the argument on this issue in Appellant's Opening Memorandum was "The Trial Court Erred by Refusing to Dismiss the Case for Lack of Subject Matter Jurisdiction." (App. Memo. p. 30.)

Respondent's argument is based on an assumption that the Claimant asks this Court to reconsider its earlier decision, and spends a number of pages discussing "The Law of the Case Doctrine," which is not applicable to review by this Court of a superior court decision, but simply states that an appellate court's holding must be followed at all subsequent stages of litigation. *State v. Roy*, 147 Wn. App. 309, 314, 195 P.3d 967 (2008).

Respondent further argues that forfeiture in this case was sought not only under statute, but that there are two additional ways for the City to keep the money—if it could be proved that Claimant was not the rightful owner, or that the money was contraband. The City has not

provided any prior argument that the money was contraband, but has argued that the Claimant is not the rightful owner. This argument does not answer the question of whether the trial court had subject matter jurisdiction over the forfeiture of this property under statute, it merely restates the City's position that Claimant is not the rightful owner, which is a separate argument.

The City finally spends seven pages asking this Court to reconsider its earlier decision that the search and subsequent seizure of the property, and other excluded evidence, in this case was illegal. The City did not preserve this issue for review at trial, and the Court should disregard this argument. RAP 2.5.

The trial court lacked subject matter jurisdiction over the forfeiture of illegally-seized money, and the denial of Claimant's motion should be reversed.

B. The City's Position on Judicial Estoppel Belies the Facts.

The City next argues that judicial estoppel does not apply in this case. First, the City argues that no inconsistent position was ever taken by the City or State. This Court is well aware of the facts. When attempting to justify a warrantless entry into the home for criminal matters, police officers testified that they thought they were responding to complaints of noise at an empty house, and worried about safety of individuals inside.

State v. Ibarra Raya, 145 Wn. App. 516, 519-21, 187 P.3d 301 (2008), *reconsideration denied*. When it was more convenient to argue that they always had strong evidence of a “drop house,” the officers testified to such. ((RP 269:16 – 25; RP 227:11 – 14; RP 227:22 – 228:1; RP 228:10 – 16; RP 228:17 – 21.) The latter inconsistent statements were relied upon heavily in the final decision in this case. (CP 1567-68.)

Second, the City asserts that the prior inconsistent statement did not lead to a successful outcome in the criminal matter. In fact, the trial court in the criminal matter *did* accept the testimony of officers that they were investigating a vacant house, and held that they entered legally for community caretaking reasons. *Ibarra-Raya*, 145 Wn. App. at 521. The police officers successfully sold their first story to the trial court, and were rewarded for it. The City did succeed in its first inconsistent position, and now it has succeeded again on the current story.

Lastly, the City argues that no harm has been done by the changes in positions. Again, the trial court in this matter relied heavily upon the story of the investigating officer that they “knew” there was drug activity going on at Claimant’s home all along. (CP 1567-68.) Similarly, the lower court in the criminal matter relied upon assurances from the same witnesses that they thought the home was empty. *Ibarra-Raya*, 145 Wn. App. at 521-22.

Common sense should prevail, and the Court must be aware of the trick that the Walla Walla City Police have tried to pull in three different courts, including this one. When it suited them, the police broke into Mr. Ibarra-Raya's home because they heard noises suggesting that some innocent individual may be in danger, that the house was being burglarized, and that they had no intention of trying to get evidence of drug activity. In this forfeiture action, it suits the same officers to tell the courts that they had no doubt that Claimant, and Claimant's home, were being used for drug activity, and that they were just waiting for a break in the case. In oral argument in the prior appeal, the Respondent apologized profusely, saying that the police officers involved "just felt horrible" about this terrible mistake, and should not be punished any more. At trial on this matter, another story was presented of canny cops on the beat trying to bring evildoers to justice. The City, and State before them, have presented conflicting stories that caused the Claimant no end of criminal and civil trouble in two different lawsuits and now three appeals. It's time for this to stop, and for the police and City to pick a story and stick with it. Judicial estoppel should apply in this case.

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C. The “Substantial Evidence” Cited by the City is Insufficient.

The City next claims that there was sufficient evidence to link the money found at Mr. Ibarra-Raya’s home with drug activity. The City offers examples of the evidence they claim supports this link.

1. Milton-Freewater Storage Unit.

The City lists a number of “facts” that it claims establish, by preponderance of the evidence, that the money found at Mr. Ibarra-Raya’s home was connected to the storage unit in Milton-Freewater. Claimant’s argument is that the link between the storage unit and the Claimant is scant, not that the storage unit was devoid of drug evidence. The only issues as to connection between Claimant and the storage unit that the City cites is that: (1) a similar, or the same, white pickup truck was at both the Claimant’s home and made visits to the storage unit facility; (2) car parts found in the storage unit match two cars which regularly visited the Claimant’s home; (3) the Claimant’s brother paid rent on the storage unit, and visited his brother; (4) Claimant was with his brother once when his brother paid rent on the storage unit, and rode as a passenger in the white pickup a number of times; (5) bottles with DNA and fingerprints of the Claimant were found in the storage unit for which his brother paid rent; (6) the Claimant’s brother’s girlfriend helped claimant’s friend move Claimant’s property out of Claimant’s home, at night; (7) that the

individual in whose name the storage unit was rented also helped clean the Claimant's home after he had to move out.

Even in the light most favorable to the city, the evidence shows that Claimant had a brother who drove a white truck, that Claimant's brother took him as a passenger on errands, that Claimant's brother paid rent on a storage unit, and may have visited it on a number of occasions, and that two bottles from which Claimant drank ended up in his brother's storage unit, as did his brother's pickup's old taillights. In the light most favorable to it, the City also has proven that Claimant had a number of friends who helped him clean his house after he was forced to move, one of which was listed as the tenant of the storage unit. In the light most favorable to the City, it has also shown that one of Claimant's friends either stored his old Mercedes wheels in the Claimant's brother's (or friend's) storage unit, or maybe gave those wheels to the Claimant's brother or friend, and they were placed in the unit. None of the evidence presented is sufficient to link the Claimant to the illegal items in the storage unit to the degree necessary to establish that the money found in his home was illegally obtained through drug trafficking or otherwise. The City provided no DNA or fingerprint evidence from illegal items in the unit, provided no evidence that Claimant was a frequent visitor to the unit out of the company of his brother, provided no evidence that Claimant had

any connection to the illegal items in the unit. Insufficient evidence, circumstantial or otherwise, existed to connect the Claimant with the illegal items in the storage unit, and thus no sufficient evidence existed to show that the money seized illegally from Claimant's home was forfeitable, or did not belong to him.

The City did not prove its case by preponderance of the evidence, and the decision of the trial court should be reversed.

2. The City Misrepresents the Burden of Proof in Forfeiture Proceedings to this Court.

The Court may recall from the first appeal of this matter that the City continually asserted that the Claimant had the initial burden of proof in this case. The Court pointed this out and corrected the City's understanding of the law when it pointed out that the cases cited by the City were decided prior to the revision of the forfeiture statute in 2001, years prior to the seizure and forfeiture in this case. *\$401,333.44*, 150 Wn. App. at 367.

Again, in this case, the City cites pre-revision and contextually distinguishable cases which mislead the Court as to the burden of proof. The City cites *State v. Everett District Court*, 90 Wn. 2d 794, 585 P.2d 1177 (1978) on the issue of the burden of proof in this case. In that case, the claimant sought return of property under a now non-existent district

court rule. That rule is not applicable in this case, for numerous obvious reasons, and the interpretation of that rule should be irrelevant to this Court's decision of the proceedings in this case.

Similarly, *State v. Card*, 48 Wn. App. 781, 741 P.2d 65 (1987) deals with return of property to a defendant under court rule following a guilty plea to Possession of Stolen Property. *State v. Card*, 48 Wn. App. 781, 782-83, 741 P.2d 65 (1987). There is no indication that the search in that case was illegal. The trial court ordered that any unclaimed personal property seized from the defendant be returned to her by the State. *Id.* The trial court in that case reasoned that possession of the property, under a claim of right, was evidence of true ownership as against all the world, save the true owner. *Id.* at 787. The State appealed, believing, as the Respondent does, that the initial burden of proof should be on the individual seeking return of the property. *Id.* at 783. This Court disagreed, and remanded for an evidentiary hearing, holding that:

[o]nly if the State can make a substantial showing that the merchandise, or at least a significant part of it, is stolen, will the claimant be required to show the court sufficient facts of her right to possession.

Id. at 791. In other words, the Claimant needed provide no proof of right to possession unless and until the City made a substantial showing

that there is no right to possession. The City, for the reasons detailed herein and in the Opening Memorandum, did not meet this initial burden.

The City has used the term “serious reasons to doubt” a claimant’s claim to property. The City seems to suggest that the burden of proof it carries, if at all, is to raise “serious doubts” about the Claimant’s claim. This is simply not the law. The law is that the City must prove “by a preponderance of the evidence” that the property claimed by the Claimant is subject to forfeiture. RCW 69.50.505(5). “Serious doubts” is not the burden of proof.

The City’s arguments to attempt to show that the Claimant did not live at his home are ridiculous, given the attention paid by the City at fact-finding to show that Claimant rented the home using his friend’s name and help, and not in his own name. Again the City attempts to take whatever factual position necessary to win, regardless of logic or truth. When it suits the City to attack Claimant’s credibility, then he rented the house dishonestly. When it suits the City to attempt to prove that the Claimant did not live at his home, then he didn’t rent the house at all, someone else did.

The City did not prove its case by preponderance of the evidence, and the decision of the trial court should be reversed.

3. *Alford*¹ Pleas Contradicted.

The City in this case introduced an *Alford* plea by the Claimant to a charge of false swearing; this was for a charge wherein the Claimant swore that he was the lawful owner of the money. Claimant also entered an *Alford* plea to a charge of providing false information, arising from his denial that the money was his. (RP 75:14 – 20.)

Although the trial court may consider the *Alford* plea as a statement against interest, here there are two problems: first, as earlier stated, an *Alford* plea is not conclusive of guilt in a subsequent civil action, because the defendant does not admit to committing a crime. *In re: Detention of Stout*, 159 Wn.2d 357, 365-66, 150 P.3d 86 (2007). Second, two conflicting *Alford* pleas make a statement against interest for both the proposition that the City is attempting to prove, and the facts that the Claimant is attempting to prove. Equal evidence existed for both propositions, and as the pleas were not conclusive evidence of guilt, they are unhelpful.

Reliance upon the *Alford* plea introduced by the City for determination of guilt was error, and the finding in the memorandum opinion was indicative of error in the final order of the trial court. The decision of the trial court should be reversed.

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

D. Current Law in this Jurisdiction Forbids the Consideration of Amount of Illegally-Seized Currency; this Court Should Decline the City's Invitation to Adopt the Law of Other States and Circuits.

Finally, the City urges the Court to depart from current law established by the United States Court of Appeals for the Ninth Circuit and Washington's courts, and find that consideration of the amount of money seized illegally herein is "harmless error." The City cites cases from other jurisdictions to support its claims, and calls established law in this jurisdiction merely "one learned view" on forfeiture law.

Unfortunately for the City, that "one learned view" happens to be the view of the various courts of Washington, both State and Federal. The Claimant cited numerous cases from this jurisdiction to show that this is the case, and will not re-cite them here; suffice it to say, the City has not shown any compelling reason to depart from accepted law of the Ninth Circuit and the State of Washington in this case, and the Court should maintain current standards of evidentiary law in this matter.

The trial court's decision to consider the amount of money at issue constituted reversible error, and the trial court's decision should be reversed.

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III. CONCLUSION

Based upon the authorities cited and the reasons aforesaid, the Appellant respectfully requests that this Court grant the relief requested in his Opening Memorandum.

RESPECTFULLY SUBMITTED this 8th day of October, 2010.

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CERTIFICATION OF SERVICE

I, MORGAN CARTER, hereby certify that on this date, I mailed the original and one copy of the Appellant's Reply Memorandum to the Washington State Court of Appeals, Division III. I included this declaration of service in that mailing.

On this same date, I delivered copies of these documents to T. Donaldson at the Office of the City Attorney, 15 N. 3rd Street, Walla Walla, Washington, 99362. I also mailed the documents to Claimant Ibarra-Raya c/o 51156 Lawson Ave., Milton-Freewater, Oregon 97862, via U.S. mail, postage prepaid.

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

Signed at Walla Walla, Washington, this 8th day of October, 2010.


MORGAN CARTER
Legal Assistant