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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 332624

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

City of Sunnyside, Appellant

v.

Andres Gonzales, Respondent

IN RE: \$5940 US Currency & 2001 Silver 325i BMW

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**CITY OF SUNNYSIDE'S APPELLANT BRIEF**

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## I. INTRODUCTION

The City of Sunnyside appeals the Superior Court's decision in this case as a matter of right. The underlying administrative decision was made on a drug seizure and forfeiture matter processed pursuant to the provisions of RCW 69.50. Under RCW 69.50, RCW 34.05, the Administrative Procedures Act (APA), applies to the administrative hearing unless the hearing is removed to district or superior court -- see RCW 69.50.505.

The APA contemplates that an appeal of the administrative decision can be made to Superior Court. Thereafter, the APA contemplates further appeal (as a matter of right) to the Court of Appeals. RCW 34.05.514. Where a party is aggrieved by the decision of the Superior Court reviewing the administrative decision, that party has a right to bring an appeal to the Court of Appeal or to the Supreme Court. RCW 34.05.526 provides:

Appellate review by supreme court or court of appeals.

An aggrieved party may secure appellate review of any final judgment of the superior court under this chapter by the supreme court or the court of appeals. The review shall be secured in the manner provided by law for review of superior court decisions in other civil cases.

Here, Superior Court erroneously found that RCW 69.50

and the RCW 34.05 Administrative Procedure Act did not apply to Gonzales's appeal of the Hearing Examiner's decision.

## **II. ASSIGNMENTS OF ERROR**

1. The Superior Court's ruling that a failure to pay the filing fee for an appeal did not deprive the Superior Court of jurisdiction is in error and in conflict with Washington case law.
2. The Superior Court erred in allowing Gonzales to proceed with the substantive merits of the appeal on February 15, 2015 where the Court lacked jurisdiction and where Gonzales had failed to file an appellant's brief.
3. The Superior Court failed to apply the applicable standards of review and erred in reversing the administrative ruling that the property in question be forfeited to Sunnyside.

## **III. STATEMENT OF CASE**

On September 1, 2013, Sunnyside Police Officer Sgt. Scott Bailey was working traffic enforcement<sup>1</sup> when he stopped Andres Gonzales for speeding in the city of Sunnyside. RP 2-3, (4/7/14). The vehicle Gonzales was driving was a 2001 Silver BMW with California plates. RP 3,(4/7/14)

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<sup>1</sup> Sgt. Bailey has previous experience as a undercover detective for the LEAD (Law Enforcement Against Drugs) Task Force for Yakima Valley as well. RP 4 (4/7/14)

The vehicle was registered to another party.<sup>2</sup> RP 3-4 (4/7/14). Gonzales had no title paperwork or bill of sale to establish that the vehicle was his although he claimed to have recently purchased it. Later title was transferred to Gonzales' name.<sup>3</sup> RP 16,18, (4/7/14). A Department of Licensing check showed that Gonzales's driver's license was suspended in the third degree (DWLS 3). RP 4 (4/7/14).

Sgt. Bailey placed Gonzales under arrest and proceeded to begin the impoundment of the BMW. RP 4 (4/7/14). Shortly thereafter a call came in on one of the two cell phones Gonzales had at the time of the stop. Gonzales requested that Sgt. Bailey answer the phone because it was Gonzales's girlfriend calling. Sgt. Bailey answered the phone and spoke with a female who asked if she could collect the vehicle and Gonzales's property within the car. Sgt. Bailey advised the female that he could not release the BMW because she was not the registered owner but, if Gonzales so requested, Sgt. Bailey could release Gonzales's personal effects to her. RP 4 (4/7/14) Gonzales advised that he wanted his personal property released to his girlfriend. Gonzales then stated that there was \$6000.00 dollars in the BMW that he wished to be released to her as well. RP 4 (4/7/14)

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<sup>2</sup> Vehicle was registered to Juan Soto of Southgate California. Notice of Seizure was sent by the Sunnyside Police Department shortly after the initial seizure.

<sup>3</sup> No documentation establishing ownership (title) to the vehicle or bill of sale was ever entered into evidence and made part of the record.

In the meantime, K9 Officer Lemmon and K9 Helios arrived on scene to assist. RP 4 (4/7/14)

In the interim, Officer Lemmon had prepared the consent to search form and provided the information including Ferrier warnings to Gonzales. RP 4 (4/7/14). Gonzales consented to the search of the vehicle. RP 3-5, (4/7/14).

Officer Lemmon and K9 Helios began the search and Helios alerted on the BMW's center console. RP 11 (4/7/14). Inside the console was a baggie of white powder. This was field tested and showed presumptive positive for crack cocaine and was later tested and determined, in fact, to be cocaine. RP 6,12 (4/7/14). K9 Helios also alerted on the driver side door map pocket in which US currency in the amount of \$5940.00 consisting of \$100, \$50, \$20 and \$10 denominations was located. RP 5,12 (4/7/14). K9 Helios is not trained to alert on money. RP 12 (4/7/14). At the time, Gonzales had no explanation for the amount of money he had in his possession. RP 5, Ln 10-11.

Gonzales advised the officers that he had just purchased the vehicle the previous Friday and had paid cash for it when he was in California just days before the incident. RP 16 (4/7/14). When asked where he worked, Gonzales advised he was a butcher at Washington Beef in Toppenish. RP 5, (4/7/14)

The silver BMW and the US currency were seized pursuant to RCW 69.50. Gonzales was provided a Notice of Seizure and Intention to Forfeit on the September 2, 2013. *CP 57*. Notice was also sent to the registered owner of the BMW in California.

On September 24, 2013, Sgt. Bailey obtained a subpoena for employment and earning records for the past eight quarters for Gonzales. RP 5-6, (4/7/14). The records showed that Gonzales had been employed at Washington Beef for periods between 2005 and February 2010. RP 5 (4/7/14). There was sporadic employment during 2011 with other employers but nothing steady. Records showed he was receiving unemployment benefits in 2013. RP 5-6, (4/7/14). The total of those benefits received from 2011 through September 15, 2013 was \$7,843.00. RP 6 (4/7/14). Gonzales testified that he had no other source of income other than the unemployment he collected for the year of 2013. RP 17 (4/7/14)

Sunnyside's Hearing Examiner for drug seizure and forfeiture matters under RCW 69.50 is Steven Michels. Mr. Michels also serves as the appointed municipal judge for Sunnyside Municipal Court. Forfeiture hearings are conducted in city council chambers with Steven Michels hearing such matters in his capacity as a Hearing Examiner and not as a

municipal court judge. Municipal Court is also conducted in council chambers.

Gonzales was also charged with felony drug possession for the cocaine in Yakima County to which he was later convicted under Superior Court Cause No. #13-1-01283-4.

#### **IV. PROCEDURAL FACTS**

On September 23, 2013, Gonzales submitted his request for a hearing regarding the seizure of the vehicle and the US currency. *CP 56*. After multiple continuances, the forfeiture hearing was held on April 7, 2014. Attorney Doug Garrison represented Gonzales at the hearing and the City of Sunnyside was represented by attorney Wes Raber. Evidence for Sunnyside was provided by Sgt. Baily and Officer Lemmon. Gonzales testified as did a friend of his identified as Martin Cisneros. Gonzales never petitioned to have the forfeiture hearing removed to district or superior courts.

At the close of the hearing, Examiner Michels stated he would issue his ruling at a later date. On April 22, 2014, Hearing Examiner Michels issued a written opinion finding the vehicle and the cash should be forfeited. *CP 67*. In his written decision, he requested that the City prepare written findings along with an Order pursuant to his opinion.

Prior to entry of the written findings and order Gonzales, through his attorney Garrison, filed pleadings entitled “Notice of Appeal to Superior Court and Motion for Order to Stay on Forfeiture,” with the Sunnyside Municipal Court on April 24, 2014. *CP 68-69*. Gonzales mailed this to Wes Raber, the attorney for the Sunnyside Police Department. RP 2 (11/4/14)

On May 22, 2014, Hearing Examiner Michels signed the Order of Forfeiture of the vehicle and the cash in question. *CP 70-71*. Gonzales’ “Notice of Appeal”, which was filed in Sunnyside Municipal Court and not in Superior Court, was also not accompanied by the required filing fee of \$240.00. On June 6, 2014, Gonzales filed his Designation of Papers with Sunnyside Municipal Court. *CP 52-53*. The filing fee still had not been paid. *CP 49*. The Sunnyside Clerk attempted to transmit the record to Yakima Superior Court; however the filing was not accepted by the Superior Court because of the lack of filing fee. *CP 49*. The Appeal stagnated at that point because Gonzales took no additional action and never paid the filing fee.

Finally on August 19, 2014, three months after the hearing examiner issued his written order, Gonzales directly filed a 3 ½ page “Motion to Dismiss ” (*CP 3-6*) this time directly with the Yakima Superior Court Clerk, along with a filing fee (paid to the Superior Court Clerk’s office)

and included an attachment which was apparently copied from CNN.com (CP 35-36) that was never presented, admitted, or testified to before the hearing examiner, along with a transcript prepared by one of Mr. Garrison's office staff members. CP 7-34. With this new filing, Gonzales had effectively abandoned the prior appeal filed back in April and had initiated a new appeal.<sup>4</sup> The matter was then set for a hearing on November 4, 2014 in Superior Court before the Honorable Judge Bartheld.

Sunnyside, in response, filed a Motion to Dismiss the Appeal because Gonzales failed to perfect his appeal as a result of the failure to pay a filing fee and argued that the Superior Court, therefore, had no jurisdiction to hear the matter. CP 37-39. The record of the forfeiture hearing at that point had still had not been transmitted to Superior Court. RP 4 (11/4/14). Judge Bartheld then continued the case to December 16, 2014 and asked the parties to brief the issue of jurisdiction and stated he would rule on the issue of jurisdiction on the date. CP 40. It was apparent that Judge Bartheld had done some research on the issue and provided the parties some cases that he sought to have addressed by the parties so that he could make a decision at the next hearing. RP 5-8 (11/4/14). Judge Bartheld

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<sup>4</sup> Because this appeal was filed 3 months later, it was not timely. The filing of the new pleadings and the filing fee did not relate back to the April Notice of Appeal which was filed in the wrong court and without a filing fee.

ordered Gonzales to file his brief by 12/2/14 and Sunnyside to file its brief by 12/9/14. *CP 40*.

The parties appeared for argument on December 16, 2014. For reasons unknown, the case had been transferred by the Court Administrator from Judge Bartheld to Judge Gibson.

Judge Gibson expressed confusion on how the matter ended up before him and how the matter ended up as an appeal before him because nothing had been filed from the administrative forfeiture hearing. RP 1 (12/16/14). Again, there was no record before the Superior Court judge because it had not been transmitted as a result of failure to pay the filing fee.

Nonetheless, Judge Gibson orally ruled that the failure to pay the filing fee on a civil case did not create a jurisdictional issue for the reviewing court. RP 12-13 (12/14/14). He then advised counsel for Gonzales to go back to Sunnyside and pay the filing fee so that the record could be transmitted to Superior Court and the appeal perfected. (The Court will recall that the appeal filed with Sunnyside had been filed nearly 8 months prior in April 2014 and that Gonzales had filed a separate appeal in Superior Court in August 2014 some four months later, effectively abandoning that prior appeal.) Judge Gibson issued a written order indicating that Gonzales needed to pay his filing fee to Sunnyside Municipal Court within 10 days

and ordered the clerk to forward the appeal papers. RP 14 (12/4/14) ; *CP* 50.

On December 17, 2014, a filing fee was paid to Sunnyside Municipal Court along with a “3<sup>rd</sup>” Notice of Appeal. *CP* 68-69. On December 19<sup>th</sup>, 2014, the record was transmitted to Superior Court. *CP* 51-71.

Gonzales had provided a copy of his appellant’s brief to Sunnyside but failed to file it with Superior Court. On January 20, 2015 Sunnyside filed its brief. *CP* 72-75.

On February 10, 2015, the matter appeared before the Honorable Judge Elofson. Sunnyside raised the jurisdictional issue again to which Gonzales objected stating that Judge Gibson had ruled on the issue already. Judge Elofson heard argument without ruling and ultimately the matter was reset in front of Judge Gibson without any ruling on the merits coming from Judge Elofson. RP 1-5 (2/10/15). *CP* 86.

The matter was then heard on February 17, 2015, again in front of Judge Gibson. Gonzales still had not filed his appellant’s brief with the Court. RP 10-11, (2/17/15). The docket reflected that Gonzales had failed to file his brief and Judge Gibson did not have a copy in the Court file. Apparently working papers had not been filed either because Judge Gibson did not possess or previously review any briefing provided by Gonzales. Nonetheless, Judge Gibson permitted and heard argument on

the merits. Judge Gibson then found that the hearing examiner's decision was incorrect (although it appears that the judge used the wrong standard of review). He ordered that the vehicle and cash were not properly forfeited and asked the parties to prepare an order to that effect. RP 22-24 (2/17/15).

On April 3, 2015 the parties appeared before Judge Gibson and he entered an Order reversing the hearing examiner's ruling forfeiting the cash and property. *CP 87-89*.

On April 13, 2015, Sunnyside filed a Motion for Reconsideration asserting that the appeal failed to comply with the mandates provided for in RCW 69.50.505 and the Administrative Procedure Act (RCW 34.05). *CP 90-91*. On April 14, 2015, Judge Gibson found that RCW 34.05, the Administrative Procedures Act, did not apply because the "hearing appealed from was not before the seizing agency," and that the City failed to "previously raise" the issue. *CP 97*. This appeal followed.

## **V. ARGUMENT**

The forfeiture proceeding in this matter was governed under RCW 69.50.505. That statute provides that a person claiming a right to property seized can contest the forfeiture of that property. Once a hearing is requested, the seizing agency appoints an administrative hearing officer to preside over the hearing unless

the claimant requests that the matter be removed to district court or superior court. RCW 69.50.505 provides in pertinent part as follows:

Seizure and forfeiture.

(1) The following are subject to seizure and forfeiture and no property right exists in them:

...

(d) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, in any manner to facilitate the sale, delivery, or receipt of property described in (a) or (b) of this subsection . . .

(g) All moneys, negotiable instruments, securities, or other tangible or intangible property of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this chapter or chapter 69.41 or 69.52 RCW, all tangible or intangible personal property, proceeds, or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter or chapter 69.41 or 69.52 RCW. . .

(2) . . . Seizure of personal property without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant; . . .

(3) In the event of seizure pursuant to subsection (2) of this section, **proceedings for forfeiture shall be deemed commenced by the seizure.** The law enforcement agency under whose authority the seizure was made shall cause notice to be served within fifteen days following the seizure on the owner of the property seized and the person in

charge thereof and any person having any known right or interest therein, including any community property interest, of the seizure and intended forfeiture of the seized property.

..

(5) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section within forty-five days of the service of notice from the seizing agency in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right.

...

**The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee**, except where the seizing agency is a state agency as defined in RCW 34.12.020(4), the hearing shall be before the chief law enforcement officer of the seizing agency or an administrative law judge appointed under chapter 34.12 RCW, **except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction**. Removal of any matter involving personal property may only be accomplished according to the rules of civil procedure. The person seeking removal of the matter must serve process against the state, county, political subdivision, or municipality that operates the seizing agency, and any other party of interest, in accordance with RCW 4.28.080 or 4.92.020, within forty-five days after the person seeking removal has notified the seizing law enforcement agency of the person's claim of ownership or right to possession. The court to which the matter is to be removed shall be the district court when the aggregate value of personal property is within the jurisdictional limit set forth in RCW 3.66.020. **A hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW. . . .**

(Emphasis supplied).

In this case, Gonzales did not remove the matter to district or superior court. The City of Sunnyside designated Steve Michels (who also happens to be the Sunnyside Municipal Judge) to serve as the hearing officer for the administrative hearing. The administrative hearing was conducted pursuant to and under the APA, as indicated above, “[a] hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW.” Mr. Michels conducted the administrative hearing and issued an order forfeiting the seized property.

The appeal from that administrative decision, the procedural aspects surrounding the appeal, the manner in which the appeal was handled by the Superior Court, and the Superior Court’s bases for reversing the Hearing Examiner’s decision are at issue in this case.

**1. The Superior Court’s ruling that a failure to pay the filing fee for the appeal did not deprive the Superior Court of jurisdiction is in error and is in conflict with Washington case law.**

In this matter Gonzales failed to meet the minimum requirements to ensure that the Superior Court could properly take jurisdiction over the matter. Despite this failure, the Superior Court, nevertheless, “heard” the matter. The failure to perfect the appeal was not simply procedural in nature, which may arguably be overcome by a showing of substantial compliance. Instead, the failure hits to the heart of whether the Court

could attain subject matter jurisdiction. Where the Court does not have subject matter jurisdiction, it cannot act.

Before the Superior Court could take jurisdiction of this matter the petitioner had to comply with RCW 34.05.514 which provides:

Petition for review — Where filed.

- (1) Except as provided in subsections (2) through (4) of this section, proceedings for review under this chapter **shall be instituted by paying the fee required under RCW 36.18.020 and filing a petition in the superior court**, at the petitioner's option, for (a) Thurston county, (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located. . . .

The Petition for Review had to be filed with the Superior Court within 30 days of the issuance of the administrative order. RCW 34.05.542(2).

Here, Gonzales filed his petition for review which he designated as his Notice of Appeal on April 24, 2014, 2 days after the Hearing Examiner's decision was issued but several days before Examiner Michels entered the Order of Forfeiture. Gonzales filed his appeal in the wrong court. He filed his appeal in Sunnyside Municipal Court not in Superior Court as required by RCW 34.05.514. He also did not pay the required filing fee. He, therefore, missed both necessary prongs under the statute in order to perfect an appeal in the matter. In fact, it was several months later on August 19, 2014, when Gonzales ultimately paid the fee directly to

Yakima County Superior Court along with his “Motion to Dismiss”. Despite these jurisdictional deficiencies, the Superior Court deemed Gonzales to be in substantial compliance and that the failure to pay the fee was not necessary to perfect the appeal although he ordered Gonzales to go back to Sunnyside and pay another \$240.00 for the filing fee. This second filing fee was paid in Sunnyside on December 17, 2014.

In the case, Graham Thrift Group, Inc. v. Pierce County, 75 Wn.App. 263, 877 P.2d 228 (1994), the Court of Appeals was faced with the issue of non-payment of the filing fee for an appeal. The Court acknowledged that courts may not dismiss matters for failing to pay filing fees under the court’s own rules, but distinguished that scenario from statutorily created rules that provide otherwise. In the Graham Thrift case there was a Pierce County ordinance that required that an appeal be accompanied by a filing fee. The Court held:

The Code uses the terms "must file written notice . . . and the appeal fee within ten (10) working days", indicating that the filing fee is a mandatory, statutory requirement. We cannot rewrite or modify the language of the statute under the guise of statutory interpretation or construction. See State v. McAlpin, 108 Wn.2d 458, 465, 740 P.2d 824 (1987) (citing Cooper's Mobile Homes, Inc. v. Simmons, 94 Wn.2d 321, 326, 617 P.2d 415 (1980)).

Rather, we must give full effect to the plain language of the statute, "even when its results may seem unduly harsh". Geschwind v. Flanagan, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993) (citing State v. Pike, 118 Wn.2d 585, 591, 826

P.2d 152 (1992)). Accordingly, Graham Thrift's failure to timely pay the filing fee acts as a jurisdictional bar to its appeal.

The authority cited by Graham Thrift does not compel a different result. . . . Graham Thrift relies on cases examining the jurisdictional effect of a filing fee in the context of appeals to this court pursuant to the Rules of Appellate Procedure, and appeals from courts of limited jurisdiction (RALJ appeals).

We recognize the modern preference of courts to interpret their procedural rules to allow creditable appeals to be addressed on the merits absent serious prejudice to other parties. See, e.g., Hoirup v. Empire Airways, Inc., 69 Wn. App. 479, 483, 848 P.2d 1337 (1993) (service of notice not a jurisdictional element under MAR 7.1); State v. Ashbaugh, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978) (filing fee nonjurisdictional because RAP 18.8(b) does not list failure to pay filing fee as error leading to dismissal and RAP 1.2(a) requires that cases not be decided on the basis of noncompliance with the rules except where justice demands); Davidson v. Thomas, 55 Wn. App. 794, 798-99, 780 P.2d 910 (1989) (RALJ 10.2(a) does not list the failure to immediately serve notice on the other parties or the failure to pay the filing fee as reasons for a dismissal of the appeal -- requirements were deemed nonjurisdictional).

However, these cases involve courts interpreting court rules concerning how appeals are consummated in the courts. Even though this court and others have liberalized jurisdictional rules for appeals to the court, we cannot impose the same liberal interpretation onto legislation enacted by Pierce County. See Geschwind, 121 Wn.2d at 841.

Similarly, in the instant case, there is a statutory provision governing appeals from orders issued under RCW 69.50. The statute specifically

provides that appeals will be governed by the APA, RCW 34.05. The APA specifically and plainly makes clear that the petition for review must timely be filed in Superior Court and that payment of the fee is mandatory in order to perfect an appeal. Where those statutory mandates are not met this is a jurisdictional bar to the appeal. The appeal was not filed with the Superior Court within 30 days. It was not filed with the Superior Court until some three months later. The filing fee was not paid. The appeal should have been dismissed based on these jurisdictional deficiencies.

With respect to compliance with the appeal procedures found in the APA, the Court in Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556-57, 958 P.2d 962 (1998), found that all statutory procedural requirements of the APA must be satisfied before a superior court's appellate jurisdiction is invoked. Skagit involved an appeal from a decision of a Growth Management Hearings Board governed by the APA. The court granted a motion to dismiss as to one party for a failure of service, an element essential to perfect jurisdiction. The court held that substantial compliance with the service requirements of the APA is not sufficient to invoke the appellate jurisdiction of the superior court when the language of the statute is clear. Skagit, 135 Wn.2d at 556.

Because there was a failure to comply with the clear language of the statute here, and because that failure to perfect the appeal goes to the heart of whether the Superior Court had subject matter jurisdiction in this matter, this issue can be raised at any time. Id and RAP 2.5(a)(1).

**2. Gonzales had failed to file his brief and the Superior Court heard argument and rendered a ruling nonetheless. The matter should have been dismissed and it was clear error for the Superior Court not to do so.**

Here, after filing his first “Notice of Appeal” in Sunnyside, Gonzales later, on August 17, 2014, filed his “Motion to Dismiss” with a copy of a transcript of the April 7, 2014 forfeiture hearing with the Superior Court. This 3 ½ page “Motion to Dismiss” was accompanied by an internet document printed from CNN.com which was not presented, admitted or testified to at the forfeiture hearing. Counsel for Gonzales asserted that he presumed Hearing Examiner Michels “read and considered the article” because it was sent as an email to the Hearing Examiner “as an addendum to the testimony that was adduced at the hearing.” *CP 3-36*.

When the parties appeared before Judge Bartheld, the court ordered briefing to be completed on the issue of the failure to pay the filing fee. *CP 40*. The briefing by both parties was submitted on the jurisdictional issues. *CP 41-44 & CP 45-49*.

However, Gonzales never filed an Appellant's brief. While Gonzales served his brief with opposing counsel, Gonzales failed to file it with the court. It was apparent from Judge Gibson's dialogue that Gonzales had also failed to file working papers with the Court Administrator pursuant to Yakima Superior Court Local Rule 7.

Judge Gibson stated "*And this is one of the things that I was again--, when I asked, are we really here on the merits because—and again—maybe I missed it. I have a brief of the respondent here which is Mr. Raber's brief with regard to the appeal, but where is the Appellant's brief? Is there an appellant's brief?*" RP 10 (2/17/15). There is a short dialogue in which Judge Gibson finally states "*So I never got and it's not in the file.*" RP 11 (2/17/15).

Therefore, the only pleading that could be considered a "brief" on the merits from Gonzales that was filed with Superior Court was titled as a "Motion to Dismiss", which was filed with Superior Court on August 17, 2014. CP 3-36. As previously indicated, the Notice of Appeal/Motion to Dismiss and the filing fee paid in August did not relate back to the April Notice of Appeal which was filed in the wrong court and without a filing fee. The Motion to Dismiss was filed 4 months prior to the record being transmitted from the original forfeiture proceeding. Thus, not only did Gonzales's brief contain facts (CNN.com article CP 35-36) not in the

record and therefore impermissible, but also did not cite to the forfeiture record at all because Gonzales could not do so four months prior to the preparation and delivery of the record.

Instead of dismissing the matter for the jurisdictional defects noted above or for failing to comply with the RCWs and court rules, or at the very least continue the matter so Gonzales's appeal brief could be filed and reviewed by the Court, Judge Gibson allowed counsel to argue the merits of the case and ultimately ruled in Gonzales's favor based on an inapplicable standard of review (discussed further below). The Superior Court clearly abused its discretion in permitting the argument on the merits to proceed in this fashion. There were no assignments of error, no references to relevant portions of the record provided, and, therefore, no basis upon which the Court could make an informed and proper decision. This was clear error on the Superior Court's part mandating a reversal.

**3. The Superior Court failed to apply the applicable standards of review and erred in reversing the administrative ruling that the property in question be forfeited to Sunnyside.**

Assuming arguendo that Superior Court had jurisdiction over the appeal, its review was confined to that which is mandated under the APA, which governs the appeal. Judicial review of administrative orders, such as the order of forfeiture is governed by RCW 34.05.570 of the APA. Under the APA, the Courts' review is strictly limited to the record that

was established at the administrative hearing. RCW 34.05.558.

Unchallenged facts are verities on appeal. Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). Therefore, the Superior Court's review of the Hearing Examiner's ruling is limited to whether the findings support the conclusions of law. Fuller v. Dep't of Employment Sec., 52 Wn.App. 603, 605, 762 P.2d 367 (1988). Here, Gonzales did not assign any error to the factual findings at the administrative hearing and therefore Hearing Examiner Michels' findings were verities on appeal.

Hearings on the seizure of personal property under RCW 69.50.505 are heard under the APA, Chapter 34.50 RCW. See RCW 69.50.505(5). Tapper v. Employment Sec. Dep't, supra, Tri-City Metro Drug Task Force v. Contreras, 129 Wn.App. 648; 119 P.3d 862 (2005) citing RCW 34.05.570(3)(e).

A reviewing court may only grant relief if the agency/hearing examiner (1) erroneously interprets or misapplies law, (2) substantial evidence does not support the agency's order, or (3) the agency order is arbitrary or capricious. RCW 34.05.570(3)(d) (e), Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 11 P.3d 726 (2000). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter. King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

Here, the Superior Court reversed Hearing Examiner Michel's decision finding that it did not "*think that a reasonable person could find that the money and the vehicle were involved somehow in narcotics trafficking based upon the record we have.*" RP 23-24. (2/17/15).

The Superior Court went to great lengths to improperly interject its own experience and apply them to the set of facts in this case (which were to be treated as verities in this case) and as a means of attacking the factual findings. For example; (*"Well, but what if what the dog was smelling was, say marijuana and it's been my experience that these dogs are trained to detect three or four different kinds of drugs, but you can't tell from the—when the dog alerts what the dog is smelling..."*) RP 15 (2/17/15) (*"Now the money was in the car, too, but the fact that somebody has roughly \$6,000 in cash in there doesn't necessarily mean anything. You know I had a case not too long ago where a police officer was talking about what drug dealers do as a matter of practice. And I know police have these ideas about what is common practice among drug dealers and the officer testified that this particular defendant had he (sic) bills in this wallet also segregated by denomination and said drug dealers do that so they can find the bills they're looking for and I thought I do that. Lots of people do that so they can find the bills they're looking for. It has nothing to do with drug dealing..."*) RP 23 (2/17/15) (*"The next one, the officers describe the cash*

*was coated by enough cocaine so that the drug dog alerted to the cash but there's no evidence of how much—how much does that take? Dogs have incredibly sensitive noses and enough to alert—to cause the dog to alert may be an infinitesimally small amount, so the fact that there's a tiny amount of cocaine on the money, you know I'm not sure what that proves.”* RP 22 (2/17/15).

RCW 69.50.505 generally provides for the forfeiture of property used to facilitate the sale, delivery, or receipt of controlled substances, or of property that is the proceeds of such activity. RCW 69.50.505(a)(1)-(8).

The seizing agency must establish by a preponderance of the evidence that the property in question is subject to forfeiture. RCW 69.50.505(5), City of Walla Walla v. \$401,333.44, 150 Wn.App. 360 , 208 P.3d 574 (2009).

The evidence before Examiner Michels was that Gonzales was stopped for speeding and upon contact was observed to have two cell phones. He had just under \$6000 in cash (in small denominations) in his possession and a BMW that he allegedly just purchased in California to which he had no bill of sale or proof of title. He had a baggie of cocaine in the vehicle on which the drug dog alerted. The dog also alerted on the driver's door in which the cash in multiple denominations was located. RP 1-13 (4/7/14). The dog does not alert on cash only on drugs. RP 12 (4/7/14).

The records of Gonzales employment showed that he worked at Washington Beef until 2010 and other than occasional odd jobs and short term employment he relied completely on state unemployment. RP 5-6 (4/7/14). Records showed that his unemployment compensation totaled \$7,843.<sup>5</sup> RP 6 (4/7/14). This is an extremely minimal amount of funds to live on for several years even assuming that Gonzales, at 28 years old, was living at home with his parents who were assisting with his living expenses. RP 14 (4/7/14).

Yet according to Gonzales, he had sufficient funds to purchase cocaine, travel to California, purchase a BMW for \$6,000 and pay for two cellular phones. This defies logic and the Hearing Examiner found the same. *CP 70-71*. Gonzales had no other income other than his unemployment.

Sunnyside clearly met its burden of establishing by a preponderance of the evidence that the vehicle and cash were used for the purposes describes in RCW 69.50.505. City of Walla Walla v. \$401,333.44, supra. These factual findings are clearly supported by the record. Further, as previously stated, unchallenged facts are verities on appeal. Hearing Examiner Michels found that the money in question was sufficiently

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<sup>5</sup> Gonzales provided unemployment payment records at the original hearing which included the full year of 2013 which included total benefits of \$10,621, an additional four months after the original event. TR 8 (4/7/14).

coated by enough cocaine that the K9 alerted on it. Yet the Superior Court questions what that amount of cocaine was and goes even further to assume it was a very small amount because dogs have sensitive noses. RP (4/7/14). The Superior Court, speculated that maybe the dog smelled marijuana instead of cocaine although there was no evidence that the dog smelled marijuana. Nor was there any evidence submitted by either party at the original forfeiture hearing regarding marijuana. Again, Examiner Michel's findings that the K9 alerted on cocaine coated cash is a verity on appeal.

The Superior Court's speculations were not a valid basis to reverse the Hearing Examiner. The Superior Court's ruling that "*I don't think that a reasonable person could find that the money and vehicle were involved somehow in narcotics trafficking based on the record we have*" is not the proper standard to apply. The Court was required to make a determination on whether there was evidence in the record to support the Hearing Examiner's decision, not whether a reasonable person might disagree with the Hearing Examiner's conclusion. The Court, in its written "Finding of Fact and Conclusions of Law and Order" found that the "lower court abused its discretion in finding against the appellant." CP 87-89. This is not the correct standard to apply.

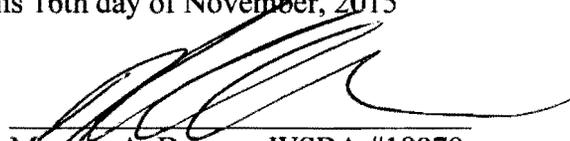
The Superior Court shifted the burden of demonstrating the validity of agency action from the party asserting invalidity to the seizing agency. Whether the Hearing Examiner's decision and the action of the agency was valid had to "be determined in accordance with the standards of review provided in this section as applied to the agency action at the time it was taken." RCW 34.05.570. The Superior Court did not engage in any analysis or make any determinations utilizing the statutorily required standards. The Superior Court was required to "make a separate and distinct ruling on each material issue on which the court's decision is based" and here the Superior Court failed to do so. RCW 34.05.570. The Superior Court applied the wrong standard, improperly interjected its own opinion to rebut factual findings, failed to comply with the mandates for judicial review under the APA, and abused its discretion, warranting a reversal in this matter.

## **VI. CONCLUSION.**

Based on the foregoing the Appellant is requesting that this Court set aside the Superior Court ruling revering the Hearing Examiner's decision to forfeit the property in question. Appellant further requests that Gonzales's appeal of the Hearing Examiner's decision be dismissed for failure to comply with RCW 69.50 and RCW 34.05.

Further, pursuant to RAP 18.1, the Petitioner requests attorney's fees and expenses. Gonzales failed to comply with statutory mandates to perfect his appeal and the City has incurred unnecessary fees and expenses as a result of his failure to comply with those mandates.

Respectfully submitted this 16th day of November, 2015



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