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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

Case No. 332837-III

Spokane County Superior Court No. 14-2-02958-1

SCOTT SHUPE,

Appellant,

vs.

SPOKANE POLICE DEPARTMENT,

Respondent.

BRIEF FOR APPELLANT

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I. APPELLANT'S ASSIGNMENT OF ERROR

1. The Superior Court of Spokane County, State of Washington, erred in affirming the Decision of the City of Spokane Hearing Examiner, denying the Appellant's request to re-conduct an administrative forfeiture hearing, and to enter Findings of Fact and Conclusions of Law.

II. ISSUE PRESENTED

1. Did the Trial Court abuse its discretion in denying the Appellant's request to remand the forfeiture hearing to the Hearing Examiner for a new hearing, and for entry of Findings of Fact and Conclusions of Law?

III. STATEMENT OF THE CASE

1. Factual Background. In September of 2009, the City of Spokane Police Department executed a Search Warrant, and seized numerous items belonging to Scott Shupe. (CP 1). Following Mr. Shupe's timely Claim of Right, an administrative forfeiture hearing was held on May 6, 2010, with Lt. Mullennix as the Hearing Officer, Rocco Treppiedi, Counsel for the City of Spokane, and Frank Cikutovich, Counsel for the Claimant, Scott Shupe. (CP 2). After hearing testimony, and Claimant Shupe's Motion to Suppress, Lt. Mullennix took the matter under advisement. (CP 2). On August 26, 2010, Lt. Mullennix emailed counsel indicating that he had

found in favor of the City of Spokane, and asking the prevailing party to prepare Findings of Fact and Conclusions of Law. (CP 7). Both counsel agreed to not enter Findings of Fact and Conclusions of Law, pending the outcome of Mr. Shupe's criminal appeal, in effect to stay the proceedings. (CP 7).

On April 8, 2012, counsel requested the City Attorney's Office to prepare Findings and Conclusions, so that the decision could be appealed, however Findings & Conclusions were not prepared. (CP 8). On June 12, 2012, the criminal charges against Mr. Shupe were dismissed, following the ruling of the Court of Appeals, Division III, that the search warrant violated the Constitution. (CP 2). The City of Spokane agreed to return some of the items to Mr. Shupe, however some of the items were not returned, and some of the items were damaged. (CP 2-3).

On April 21, 2014, Appellant's counsel submitted a Motion to Schedule a Presentment Hearing to the Hearing Examiner McGinn. (CP 52). Counsel for Appellant attempted to locate a copy of the record of the forfeiture proceeding which was previously conducted, however the City was unable to provide a copy of the record. (CP 21).

On July 10, 2014, Hearing Examiner McGinn prepared a letter denying the request for a presentment hearing. (CP 9-11). On July 18,

2014, Appellant's counsel submitted a Motion/Affidavit for Reconsideration of Hearing Examiner's Decision. (CP 60-64). The City submitted an Objection and Motion to Strike (CP 69-72), and Hearing Examiner McGinn issued a Decision on Request for Reconsideration dated July 29, 2014, denying the request to reconsider. (CP 12-14).

On August 4, 2014, Counsel for Mr. Shupe filed a Notice of Appeal in Spokane County Superior Court. (CP 100-106). On December 22, 2014, Counsel for Mr. Shupe filed a Brief of Petitioner. (CP 1-14). On January 21, 2015, Counsel for the City of Spokane filed a Response to Brief of Petitioner and Declaration of Mary Muramatsu. (CP 77-90, CP19-76).

On February 20, 2015, the matter proceeded to oral argument before The Honorable Kathleen M. O'Connor, and an Oral Ruling was issued, affirming the decision of the Hearing Examiner. (CP 93-98).

On April 10, 2015, Counsel for Scott Shupe filed a Notice of Appeal to this Court. (CP 100-106).

IV. ARGUMENT

The issue presented by this appeal is the failure of the City of Spokane Hearing Examiner to enter Findings of Fact and Conclusions of Law. (VRP 2-7) The Appellant's due process rights were violated when

the administrative forfeiture hearing was not made final, without the required Findings of Fact and Conclusions of Law, in support of the Hearing Officer's decision. Due process requires a complete record, in order to ensure efficient and accurate appellate review. Without a record, or finality at the administrative level, a prevailing party cannot be determined, and an appellant has no ability to assign error to the findings, and determine whether or not the underlying facts of the case support the Hearing Officer's decision.

RCW 69.50.505 (5) states:

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 notice of claim may be served by any method authorized by law or court rule including, but not limited to, service by first-class mail. Service by mail shall be deemed complete upon mailing within the forty-five day period following service of the notice of seizure in the case of personal property and within the ninety-day period following service of the notice of seizure in the case of real property. 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. In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture.

The seizing law enforcement agency shall promptly return the article or articles to the claimant upon a determination by the administrative law judge or court that the claimant is the present lawful owner or is lawfully entitled to possession thereof of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section.

RCW 34.12.060 states:

When an administrative law judge presides at a hearing under this chapter and a majority of the officials of the agency who are to render the final decision have not heard substantially all of the oral testimony and read all exhibits submitted by any party, it shall be the duty of such judge, or in the event of his or her unavailability or incapacity, of another judge appointed by the chief administrative law judge, to issue an initial decision or proposal for decision including findings of fact and conclusions of law in accordance with RCW 34.05.461 or 34.05.485.

In this case, most of the facts are undisputed. The parties agree that an administrative hearing was previously conducted, and the Hearing Officer indicated in writing, via an un-signed email, that the City was the prevailing party. (VRP 7). The City, as the prevailing party, was directed to prepare Findings, however a presentment hearing was not scheduled, and final orders were not entered. Following the decision of this Court to overturn Mr. Shupe's criminal conviction, the City of Spokane has since returned some of the seized items to Mr. Shupe, however some of the items were not returned, and some items were damaged.

RCW 34.05.476 states:

- (1) An agency shall maintain an official record of each adjudicative proceeding under this chapter.
- (2) The agency record shall include:
 - (a) Notices of all proceedings;
 - (b) Any prehearing order;
 - (c) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
 - (d) Evidence received or considered;
 - (e) A statement of matters officially noticed;
 - (f) Proffers of proof and objections and rulings thereon;
 - (g) Proposed findings, requested orders, and exceptions;
 - (h) The recording prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;

- (i) Any final order, initial order, or order on reconsideration;
- (j) Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with RCW 34.05.455; and
- (k) Matters placed on the record after an ex parte communication.

(3) Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings.

Although the parties agree that a forfeiture hearing was conducted in this matter on May 6, 2010, counsel for the Spokane Police Department has indicated that there is no record available of the administrative forfeiture hearing previously held. (VRP 9). Without a recording or transcript, or entry of final orders, the agency record is incomplete. This matter must be remanded to the Hearing Examiner, to conduct a hearing, in accordance with RCW 69.50.505.

Additionally, RCW 69.50.505 (6) provides that:

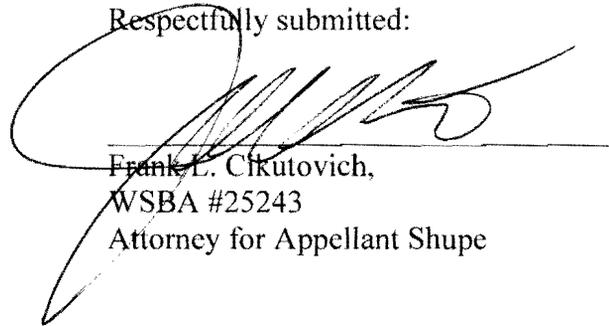
In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant. In addition, in a court hearing between two or more claimants to the article or articles involved, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

V. CONCLUSION

Based upon the foregoing points and authorities, Appellant, Scott Shupe, respectfully requests that the Court remand this matter to the Hearing Examiner to re-conduct a forfeiture hearing, and to issue Findings of Fact and Conclusions of Law. The Appellant further requests the Hearing Examiner to award attorney's fees to the prevailing party.

DATED this 10 day of December, 2015.

Respectfully submitted:



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