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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 332837

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SCOTT SHUPE,

Appellant,

v.

SPOKANE POLICE DEPARTMENT,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION.

This matter pertains to an administrative drug forfeiture proceeding that never came to conclusion. The criminal conviction associated with the seized items was reversed by this Court in 2012. *State v. Shupe*, 172 Wn. App. 341 (2012). Although a forfeiture hearing took place in 2010, no items were ever actually forfeited because the parties agreed to defer the entry of findings and conclusions by the Hearing Examiner pending the outcome of the criminal appeal. As such, an order was never drafted or signed by the Hearing Examiner.

Following this Court's decision to reverse the Appellant's criminal conviction, all items seized and subject to forfeiture were returned to the Appellant. Appellant is nonetheless seeking a final order regarding the forfeiture of the returned property. He is asking this Court to overturn the Superior Court's affirmation of the Hearing Examiner's decision to deny Appellant a new hearing since forfeiture never occurred in the first place. There was never a final order of forfeiture and therefore nothing from which he can appeal. The matter has since become moot by the return of the Appellant's property.

II. STATEMENT OF THE CASE.

In September of 2009, detectives of Respondent Spokane Police Department seized property from Appellant's business, known as "Change", which they believed was operating as an illegal marijuana dispensary. Some of the items seized as evidence also became the subject of a forfeiture seizure pursuant to RCW 69.50.505. Respondent served the Appellant with a Notice of Seizure & Forfeiture, dated September 23, 2009, listing the items to be forfeited and providing him with an opportunity for a hearing pursuant to RCW 69.50.505. The Notice of Seizure and Forfeiture listed the following items:

Item 1 - 8 Ballasts	Item 32 fan
Item 10 - 11 grow bulbs	Item 33 bulb
Item 12 Electrical box	Item 38 - 40 light hood
Item 13 - 15 fans	Item 41 light track
Item 16 - 17 grow hoods	Item 43 \$100
Items 27 - 28 ballasts	Item 44 \$8,176
Item 29 fan	Item 56 \$745
Item 30 CO2 regulator	Item 62 scale
Item 31 light hood	Item 69 scales
	Item 77 scales

(CP p. 26) These items were received and stored at the Spokane Police and Sheriff Property Evidence Facility and logged in as evidence in the electronic system known as "Bar Coded Evidence Analysis Statistical Tracking System" (BEAST). (CP p. 15:24-CP p.

16:1-2) Other items not listed on this notice were either seized from other individuals or illegal to possess under state and/or federal laws.¹

On October 20, 2009, Appellant made a claim for the items listed on the Notice of Seizure and Forfeiture. (CP p. 28) In his claim notice, he stated:

Please take notice that Scott Shupe, hereby claims an interest in the ballasts, grow bulbs, electrical box, fans, grow hoods, ballasts, fan, CO2 regulator, light hood, fan, bulb, light hood, light track, \$100, \$8,176, \$745, scale, scales, scales, seized on September 10, 2009.

A forfeiture hearing on Appellant's claim was held on May 6, 2010. At that time, current counsel for the Respondent was not employed in her current capacity and cannot confirm what precisely occurred at the forfeiture hearing. (CP p. 19:12-21) Assistant City Attorney Rocco N. Treppiedi represented Respondent in 2010 and was present at the hearing. (VRP 3:10-11) Unfortunately, no

¹ Respondent served separate Notices of Seizure and Forfeiture on Appellant's business associates. Those Notices listed only the items seized from those individuals, even though the seizure was part of the same criminal investigation. Those items were indexed in the Property Evidence system under the same police incident number 09-803116 under each respective owner's name. Items listed in those Notices are not part of the Appellant's Claim nor are they the subject of this appeal. Appellant's business associates entered into stipulations with the Respondent as to the forfeiture of some of their items of property seized. Pursuant to these stipulations, some items of property were returned to those individuals.

record exists of the hearing that took place in 2010. The hearing was not successfully captured on an audio recording. (CP p. 20:12-14)

There is one email, however, which gives an indication of how the hearing was to have resulted. Lt. Scott Mullenix, a former police employee who acted as the Hearing Officer for this forfeiture hearing, wrote in an email dated August 26, 2010, that he found in favor of the City of Spokane and asked that the prevailing party "prepare findings of fact and conclusions of law consistent with my decision." (CP p. 44; CP p. 7, CP p. 20:15-19) This email was sent to Rocco Treppiedi and counsel for Appellant. There is no indication, however, that findings and conclusions were ever prepared or filed. Moreover, counsel for Appellant proposed entering a "stay" until the resolution of the criminal case (CP p. 7) and, according to counsel for Appellant, the parties agreed to defer entering findings of fact from the hearing. (VRP 4:1-3; VRP 17:8-9) Both Mr. Treppiedi and Lt. Mullenix have since separated from City employment. (CP: p. 20:6-9)

On April 18, 2012, Appellant's counsel mailed a letter to City Attorney Nancy Isserlis, requesting that the City, nearly two years hence, prepare Findings from the May 6, 2010 forfeiture hearing so

that Appellant could formally appeal the decision. (CP p. 8, CP p. 46) Because the Assistant City Attorney who handled the hearing had left employment with the City, counsel for the Respondent was unable to recreate the record. Without a record of the proceedings, counsel for Respondent was unable to establish the basis for the Hearing Officer's decision or even ascertain the facts upon which he relied. (CP p. 20:2-4) Additionally, without a record of the proceedings, counsel for Respondent was unable to enter into a stipulation as to what occurred at the forfeiture hearing.

Following the Court of Appeals reversal of the Respondent's criminal conviction, however, counsel for Respondent authorized the release of all property belonging to the Appellant held on property on this forfeiture matter. (CP p. 21:9-13) On December 11, 2013, Appellant went to Property Evidence Facility to retrieve items that were held in his name in this forfeiture matter. (CP pp. 10-12) On May 14, 2014, the Evidence Facility Supervisor provided a detailed report regarding the property in this case and noted that Appellant had picked up all items authorized for release that are legal to possess under State and Federal law. (CP p. 34)

On April 21, 2014, Appellant moved the City of Spokane Hearing Examiner to schedule a presentment hearing. (CP pp. 52-

53) On July 10, 2014, the City's Hearing Examiner Brian McGinn issued a letter stating that a further hearing would not be conducted in this matter (CP p. 9; CP pp. 56- 58), concluding, inter alia, that conducting a second forfeiture hearing would be a "pointless exercise" since there was no order or decision in the forfeiture matter that needs to be vacated. (CP p. 11).

On July 18, 2014, counsel for Appellant submitted a Motion for Reconsideration. (CP pp. 60-63) The City objected to this motion. (CP pp. 69-71) On July 29, 2014, the Hearing Examiner issued a decision denying Appellant's Request for Reconsideration, holding that Appellant had not alleged any errors from which the court could consider vacating its decision pursuant to CR 59. (CP pp. 74-76)

On August 4, 2014, Counsel for Scott Shupe filed a Notice of Appeal to Superior Court of the Hearing Officer's letter dated July 10, 2014. (CP p. 100) In an oral ruling dated February 15, 2015, the Honorable Kathleen O'Connor found that there was never a final order issued in the forfeiture matter, and therefore there is no prevailing party. (VRP 19:4-8) (CP pp. 93-98) Upholding the decision of the Hearing Examiner, the court stated:

There was no decision in this case. Lt. Mullenix asked the City to prepare findings of fact and conclusions of law, they did not, and that is not contested. Nor did Mr. Cikutovich file any motions asking for a reason for the decision or attempting to prepare some findings of fact and conclusions of law. It looks like nothing was done by anyone. (CP p. 95)

The risk that everybody runs by not getting an order entered is obvious in this case. It does not put any finality on it so one can argue it has never been decided because there is no decision. (CP pp. 95-96)

My legal view is this e-mail does not constitute a decision. The parties elected not to pursue that, it was mutual.... The failure to have a decision as I recognize a decision, one in writing signed by the decision maker, means there is no prevailing party. (CP pp. 95-96)

III. STANDARDS OF REVIEW

The Administrative Procedures Act governs judicial review of agency orders in adjudicative proceedings. In reviewing an agency order, an appellate court may grant relief from the order if it determines that: (1) the order, or the statute or rule on which the order is based, is unconstitutional on its face or as applied; (2) the order is outside the agency's statutory authority or jurisdiction; (3) the agency has engaged in an unlawful procedure or decision-making process or failed to file a prescribed procedure; (4) the agency erroneously interpreted or applied the law; (5) the order is not supported by substantial evidence when viewed in light of the

whole record before the court; (6) the agency has not decided all issues requiring resolution by the agency; (7) a motion for disqualification was made and improperly denied; (8) the order is inconsistent with an agency rule; or (9) the order is arbitrary or capricious. RCW 34.05.570(3). The party asserting the invalidity of the order has the burden of demonstrating the invalidity. RCW 34.05.570(1)(a). The appellate court sits in the same position as the superior court in reviewing an administrative decision. *Stewart v. Dep't of Soc. & Health Servs.*, 162 Wn. App. 266, 268, 252 P.3d 920 (2011).

Appellate courts review legal issues de novo, including whether a decision is arbitrary and capricious. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003). A decision is arbitrary and capricious if it is willful and unreasoning, and disregards or does not consider the facts and circumstances underlying the decision. *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 421, 216 P.3d 451 (2009). A decision is not arbitrary or capricious if there is room for more than one opinion and the decision is based on honest and due consideration, even if this court disagrees with it. *Id.* at 421-22. Additionally, "the harshness of the sanctions imposed is not the test

for arbitrary or capricious action.” *Id.* at 421 (citing *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995)).
Stewart v. Dep’t of Soc. & Health Servs., *supra* at 273.

IV. ARGUMENT.

A. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT’S REQUEST TO REMAND THE FORFEITURE HEARING TO THE HEARING EXAMINER FOR A NEW HEARING AND FOR THE ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Appellant’s request for a “remand” and new hearing suggests the need for the Hearing Examiner to rectify or replace a decision that the court has found to be deficient or erroneous. It assumes that an original determination took place that must be corrected. This was not the case, however. In the appeal before this Court, there is nothing to “send back” to the Hearing Examiner because the parties, of their own accord, agreed back in 2010 to take no action to finalize a decision that was based on a hearing actually held and for which the directive was given to prepare findings and conclusions. Counsel for the Appellant even acknowledged that the idea was his to defer the entry of findings to allow the criminal case to weave through the appeal process. (CP p. 7)

Whatever the motivation, the decision not to prepare findings and conclusions had the effect of abandoning the forfeiture process. The result of that decision could only lead to one result: the return of the Appellant's property. Whether driven by the reversal of the criminal case or by the lack of finality in the forfeiture process, the Appellant was in a position to have his property returned to him. That was accomplished.

The Appellant now comes before this Court lacking the most essential element for judicial review: he cannot show that he has been aggrieved in any manner by a forfeiture of his property or that the Respondent agency has taken any prejudicial action against him by way of asset forfeiture in this case. That there was never a judgment of forfeiture entered means that the Appellant cannot show he suffered prejudice of any sort that a judgment in his favor would substantially eliminate or redress. As no order was ever issued on the matter of forfeiture, any intended ruling in favor of the City never took place, and therefore there is no action from which relief can be granted. RCW 34.05.570(3).

The Administrative Procedures Act sets forth the circumstances that may be cause for an appellate court to grant relief from an administrative order. But, in this case, there was no

order at all. The administrative proceeding, although commenced, was never brought to a conclusion by way of a final order and, as such, the agency never acted in any manner contrary to the interests of the Appellant with respect to forfeiture of his property. There was no application by any decision maker of a statute or constitutional provision nor was any decision made by the Hearing Examiner which could be considered arbitrary and capricious. Appellant's property, after being held in the Property Evidence Facility for a period of time, was released back to him. Given no signed order, there was no forfeiture action taken against the Appellant and therefore no adverse action suffered by the Appellant which can form the basis of a judicial review.

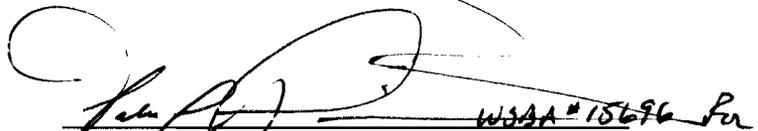
There is additionally no basis to hold a hearing since the return of all property has rendered the issue moot. It is a general rule that, where only moot questions or abstract propositions are involved, or where the substantial questions involved in the trial court no longer exist, the appeal, or writ of error, should be dismissed. *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). A case is moot "if it is deprived of its practical significance or becomes purely academic." *In re Marriage of Irwin*, 64 Wn. App. 38, 59, 822 P.2d 797 (1992). Because all issues

related to the forfeiture action have become moot, there is no reason to order a new hearing for purposes of a final order.

V. CONCLUSION.

Although a forfeiture action was commenced and a hearing took place in 2010, no items were ever actually forfeited to the Respondent because the parties agreed to defer the entry of findings and conclusions pending the outcome of the criminal appeal. The criminal case was subsequently reversed and all property subject to forfeiture was returned to the Appellant. No order was ever entered on the forfeiture and therefore there was no administrative forfeiture from which Appellant can appeal. This appeal should therefore be dismissed.

Respectfully submitted this 8th day of January, 2016.



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DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 8th day of January, 2016, I caused a true and correct copy of the foregoing "Brief of Respondent," to be delivered to the parties below in the manner noted:

Frank Cikutovich	<input type="checkbox"/> VIA FACSIMILE
Stiley & Cikutovich	<input checked="" type="checkbox"/> VIA U.S. MAIL
1403 W. Broadway Ave.	<input type="checkbox"/> VIA OVERNIGHT SERVICE
Spokane, WA 99201	<input type="checkbox"/> VIA HAND DELIVERY


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