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STATE OF WASHINGTON

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No. 81116-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SNOHOMISH REGIONAL DRUG TASK FORCE, Respondent

v.

IN THE MATTER OF THE FORFEITURE OF ONE 1970 CHEVROLET CHEVELLE (WLN CV02849).

IN THE MATTER OF THE FORFEITURE OF ONE 2004 NISSAN SENTRA (WLN 93724L)

ALAN and STEPHNE ROOS, Petitioners

PETITIONERS' SUPPLEMENTAL BRIEF

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Pursuant to RAP 13.7(d), Alan and Stephne Roos submit the following Supplemental Brief.

A. ASSIGNMENTS OF ERROR

The Rooses incorporate Assignments of Error in Appellants' Brief and Issues for Review by the Supreme Court in their Petition for Review. Further:

3. The Court of Appeals erred in imputing a "willful blindness" standard into the innocent owner exception to the forfeiture of conveyances.

4. The Court of Appeals erred in failing to acknowledge the ambiguity its decision created in the "innocent owner" exception and in failing to construe any ambiguities in favor of the Rooses.

B. STATEMENT OF THE CASE

The Rooses incorporate the Statement of the Case sections of Appellant's Brief and their Petition for Review.

This appeal concerns the proper interpretation of Washington's forfeiture statutes; specifically, the knowledge element of the "innocent owner" exception to the forfeiture of conveyances.

C. ARGUMENT

RCW 69.50.505(1)(d) provides in pertinent part, for the seizure and forfeiture of:

> All conveyances, including ... vehicles, ... which are used, or intended for use, in any manner to facilitate the sale, delivery, or receipt of [controlled substances]...

Emphasis added.

RCW 69.50.505(1)(d)(ii), commonly referred to as the "innocent owner" exception to the forfeiture of conveyances, provides that:

> (ii) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent.

Emphasis added.

The Roos' vehicles were seized when police found their son behind the wheel of the vehicles while he possessed illicit controlled substances, money, etc. The principal issue in this case is whether the Rooses presented sufficient evidence at the forfeiture hearing to establish that they lacked knowledge of their son's use of their vehicles to engage in illicit drug activity.

Despite acknowledging that "scant hard evidence"[1] existed regarding the Rooses knowledge of their son's use of their vehicles, the hearing officer issued two decisions forfeiting both vehicles. He reasoned that the Rooses "should have wondered whether and may well have

[1] Petitioners' Petition for Review, Appendix 2, hereinafter App. 2, pg.10, App. 3, pg.10. All references herein to materials provided as Appendices to Petitioners' Petition for Review will remain as cited therein, by noting Petition for Review (PR), followed by the Appendix number and page number, except the Court of Appeals opinion, which was subsequently published and will be cited herein accordingly.

actually feared" that their vehicles were being used by their son to engage in illicit drug transactions. [2]

The lower courts affirmed the hearing officer's decisions, finding that substantial evidence supported the hearing officer's decisions based upon findings that the Rooses should have known that their son was using their vehicles to facilitate illicit drug transactions.[3]

I. The Plain Language of the "Innocent Owner" Exception to the Forfeiture of Conveyances Requires a Finding of Actual Knowledge.

Administrative agency orders not supported by substantial evidence when viewed in light of the whole record must be reversed.[4] The court applies this standard directly to the record before the administrative agency.[5] An agency decision will not be upheld unless it is supported by a sufficient quantity of evidence to persuade a fair minded person of the truth or correctness of the order.[6]

The meaning of a statute is a question of law subject to de novo review.[7] The fundamental objective in determining the meaning of a

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[2] PR, App.2, pg.12, App. 3, pg. 11.
[3] *In the Matter of the Forfeiture of One 1970 Chevrolet Chevelle. In the Matter of the Forfeiture of One 2004 Nissan Sentra, et al v. Snohomish Regional Drug Task Force*, 140 Wn.App. 802, 807, 167 P.3d 599 (2007). PR, App. 4, pg.3 .
[4] RCW 34.05.570(3)(e), *Callecod v. Washington State Patrol*, 84 Wn.App. 663, 670, 929 P.2d 510 (1997).
[5] *Id.* at 670.
[6] *Id.* at 673
[7] *Dep't of Ecology v. Campbell & Gwinn*, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

statute is to ascertain and carry out the legislature's intent.[8] If a statute's meaning is plain on its face, the plain meaning must be given effect as an expression of legislative intent.[9]

"Knowledge" is not defined in either RCW 69.50.505 or anywhere else in the controlled substances statutes, RCW 69.50 chapter.

a. The Hearing Officer and the Court of Appeals Improperly Defined "Knowledge" as Willful Blindness.

The language employed by the hearing officer, and expanded by the Court of Appeals into the new definition of "knowledge", is very similar to a willful blindness standard. In both decisions, the hearing officer reasoned that the Rooses could not "'stick his/her head in the sand' to avoid the knowledge".[10] Also, "[t]he Rooses should have wondered whether and may well have actually feared that Thomas was using their family cars to traffic in drugs."[11] The hearing officer appeared to reason that because the Rooses "failed to effectively stop that use", that deprived them of their status as "innocent owners". [12]

The Court of Appeals said the word "knowledge" in the statute:

> encompasses not only that which the claimant knew, but that which the claimant should have known under the circumstances, including any information that would have

[8] *Id.*
[9] *Id.* at 9-10.
[10] PR, App. 2, pg.12, App. 3, pg.11.
[11] *Id.*
[12] *Id.*

> been revealed by a reasonable inquiry into the vehicle's use.[13]

Washington State's forfeiture statutes do not have a willful blindness standard. However, the federal forfeiture statutes, prior to 2000 employed a willful blindness standard in their "innocent owner" exception to the forfeiture of conveyances.

The federal equivalent of our state's forfeiture act is contained in 21 U.S.C. § 881. 21 U.S.C. § 881(a)(4), governs forfeiture of conveyances and provides, in pertinent part, for the seizure and forfeiture of:

> All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, **receipt, possession**, or concealment of [illicit controlled substances].

Emphasis added.

Prior to 2000, the "innocent owner" exception to forfeiture of conveyances, 21 U.S.C. § 884(a)(4)(C), read as follows:

> no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent or willful blindness of the owner.[14]

Emphasis added.

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[13] *In the Matter of the Forfeiture of One 1970 Chevrolet Chevelle*, 140 Wn.App. at 603-604.

[14] DAVID B. SMITH, PROSECUTION and DEFENSE of FORFEITURE CASES, Chp. 4.02[4], p. 4-9. (2007).

Willful blindness has been defined by federal courts as:

> the failure to make reasonable inquiries to confirm whether property will be or in fact has been used to facilitate a drug transaction, when the owner is aware of a high probability that the property will be or has been so used.[15]

In 2000, after years of negotiations between lawmakers and law enforcement agencies, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA).[16] By passing CAFRA, Congress revamped federal statutes governing civil forfeitures and exceptions to civil forfeitures and, importantly, created a uniform "innocent owner" exception to the forfeiture of both real and personal property.[17]

The uniform "innocent owner" defense, codified in 18 U.S.C. § 983(d) provides:

> (1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.
>
> (2) (A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who- -
>
> (i) did not know of the conduct giving rise to forfeiture; or

[15] *Id.* at p. 4-10, citing *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 806 (3d Cir. 1994). *Accord, United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172, 1174-75 (8th Cir. 1992).
[16] *Id.* at § 4.02[6][c], pp. 4-31 – 4-34 (2007).
[17] *Id.*

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

Emphasis added.

The new uniform "innocent owner" exception is similar to our own "innocent owner" exceptions in that § 983(d)(2)(A)(i) requires knowledge, and § 983(d)(2)(A)(ii) states that if knowledge is found, an innocent owner is still eligible to invoke the defense if the claimant revokes consent.[18] As with Washington State's forfeiture statutes, the federal forfeiture statutes do not contain a definition of "knowledge".

Also similar to Washington State's forfeiture statutes, the federal uniform "innocent owner" exception does not contain a willful blindness prong. However, in application, some federal courts find actual knowledge by imputing willful blindness back into the statute.[19] Those courts that impute willful blindness do so through allowing for an "inference" of actual knowledge by finding that an owner may not turn a "blind eye" to

[18] If the statute is construed in the disjunctive. However, some courts construe similar statutes to mean that a claimant must negate both elements to be an innocent owner. *SMITH, supra*, § 4.02[6][d], citing *Unites States v. Parcel of Real Property Known as 6109 Grubb Rd.*, 890 F.2d 659, 663 (1989).

[19] *SMITH, supra, at* § 4.02[6][c], pp. 4-35 [FN 60.8] (2007), citing *United States of America v. 2001 Honda Accord EX, VIN # 1HGCG22561A035829*, 245 F.Supp. 2d 602, 611 (M.D. Pa, 2003), *United States of America v. One 1988 Checo Let 410 Turbo Prop Aircraft, Dominican Republic Registration Tail Number H1698CT*, 282 F.Supp. 2d 1379, 2003 U.S. Dist. LEXIS 21255 (S.D. Fla, 2003).

circumstantial evidence showing a high probability that the conveyance was used, or intended for use, to facilitate a drug transaction.[20]

Nonetheless, Washington State's forfeiture statutes do not contain a willful blindness standard and Washington State's Legislature has never included a willful blindness standard into the forfeiture statutes. Ultimately, the Court of Appeals' published opinion authorizing the hearing officer's decision to impute a willful blindness standard of knowledge into the plain language of the statute eviscerates the plain language of the statute until the remnant of the definition of knowledge lies somewhere between a recklessness standard and a negligence standard. Surely, this remnant is not the safeguard our Legislature intended to protect the property rights of its citizens against unlawful seizures and forfeitures.

Thus, Washington State's "innocent owner" exception to the forfeiture of conveyances requires actual knowledge. Because there was no evidence of actual knowledge in this case, the Court of Appeals' opinion should be reversed and the vehicles should be returned to the Rooses.

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[20] *Id.*

b. Even if Willful Blindness May Be Imputed Into the "Innocent Owner" Exception, there is No Evidence of it in this Case.

Most courts hold that willful blindness is "rarely appropriate" and should be used only where the government presents "specific evidence" that the claimant suspected he might be involved in criminal activity and "deliberately avoided" taking steps to confirm or deny those suspicions in order to provide himself with a defense in the event of prosecution.[21]

At the forfeiture hearings, the Rooses established that they lacked actual knowledge of their son's use of their vehicles to engage in illicit drug transactions. No evidence exists to support the theory that the Rooses "deliberately avoided" learning of their son's activities to prevent themselves from being criminally prosecuted.

Accordingly, the hearing officer and the Court of Appeals erred in depriving the Rooses of their vehicles based upon a finding that the Rooses were willfully blind and the Roos' vehicles should be returned to them.

c. The Rooses Proved that they Lacked Actual Knowledge that their Vehicles were Used or Intended for Use to Facilitate Drug Transactions.

At a forfeiture hearing, the seizing agency bears the initial burden of proof to show, by a preponderance of the evidence, that a conveyance is

[21] *Id. at* § 4.02[6][c], pp. 4-35 (2007) citing, *Accord United States v. Alston-Graves*, 435 F.3d 331, 340-41, 369 U.S. App. D.C. 219 (D.C. 2006) (collecting and discussing authority).

subject to forfeiture.[22] The burden then shifts to the claimant of any exception to prove, by a preponderance of the evidence, that they fall within the class that precludes the forfeiture of the conveyance.[23] To meet their burden of proof by a preponderance of the evidence, the claimants must present evidence that is "more probably true than not true".[24]

The plain language of the "innocent owner" exception to the forfeiture of conveyances requires that the claimant prove, by a preponderance of the evidence, that the claimant lacked knowledge that the vehicle was used, or intended for use, in any manner to facilitate the sale, delivery, or receipt of [illicit controlled substances].[25]

Emphasis added.

The evidence presented at the forfeiture hearing showed that, at most, the Rooses were aware that their son had a drug problem and "possessed" illicit drugs while using their 2004 Nissan.[26] After the seizure of the Nissan, the Rooses were also aware that their son "possessed" a large quantity of drugs while using their vehicle.[27]

The hearing officer concluded, in both decisions, that the vehicles were subject to forfeiture under RCW 69.50.505(d)(i) because "a vehicle

[22] RCW 69.50.505(5).
[23] RCW 69.50.506(a).
[24] WPI 21.01.
[25] RCW 69.50.505(1)(d)(ii).
[26] PR, App. 2, pp. 4-6, FF 10-12.
[27] PR, App. 2, pg. 6, FF 13, pg. 8, FF 17.

is used to facilitate trafficking if it transports a person carrying drugs for sale or transports containers holding drugs which are for sale."[28] The current forfeiture statute[29], in place at the time of the decisions, does not contain the term "transport" although it was included in an earlier version of the forfeiture statute.[30]

Nonetheless, the trial court found that substantial evidence existed to uphold the hearing officer's decision forfeiting both vehicles based, in part, on emphasizing the fact that the forfeiture statute includes the word "receipt" and concluded that there was substantial evidence supporting a finding that the Rooses should have known that their vehicles were used to "get drugs".[31]

Clearly, "receipt", in the above statute, is being used as a transactional term, as it is grouped with the transactional terms of "sale" and "delivery" in the statute.[32]

The Court of Appeals agreed with the transactional sense of the term "receipt" when it determined that receipt means to "acquire

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[28] PR, App.2, pg.12, CL 3, [FN6], App. 3, pg.10-11, Discussion: "The evidence of its use to transport drugs for sale is simply too persuasive."
[29] RCW 69.50.505(d), *supra*.
[30] *Kahler v. Kernes*, 42 Wn.App. 303, 305-306, 711 P.2d 1043 (1985), discussing a prior version of the forfeiture statute, RCW § 69.50.505(a)(4), that contained the term "transport".
[31] PR, App. 4, pg. 2.
[32] *Burns v. City of Seattle*, 161 Wn.2d 129, 148, 164 P.3d 475 (2007). A doubtful turn of phrase in a statute takes its meaning from associated words or phrases.

possession".[33] In fact, the Court of Appeals acknowledged that "the legislature did not intend to subject to forfeiture those vehicles used by individuals in mere possession of controlled substances, as evidenced by the absence of the term "possession" in the relevant provision of the statute."[34] The fact that "receipt" is not synonymous with "possession" is further evidenced by the fact that the federal forfeiture statute contains both the words "possession" and "receipt", in its language governing the forfeiture of conveyances.[35]

Nevertheless, the Court of Appeals concluded that substantial evidence existed that the Rooses should have known that their son used the vehicles to "acquire possession" of controlled substances.[36] The Court of Appeals' conclusion fails to acknowledge the distinction between "possession" and "receipt".

In both cases where the vehicles were seized, the Roos' son was found in the vehicles in "possession" of drugs, money, etc.. In neither incident was he engaged in activity facilitating, in any manner, the receipt, delivery, or sale, of controlled substances when the vehicles were seized. It was apparent to the hearing officer that the son was leading a "secretive

[33] *In the Matter of the Forfeiture of One 1970 Chevrolet Chevelle*, 140 Wn.App. at 604.
[34] *Id.* at 605-606.
[35] 21 U.S.C. § 881(a)(4), supra, pg.5.
[36] *In the Matter of the Forfeiture of One 1970 Chevrolet Chevelle*, 140 Wn.App. at 609.

life" and keeping things from his parents.[37] The only information the Rooses possessed as to their son's illicit activities came from the arrests and seizures. As such, the appellate court's finding, that "receipt" equates to "acquiring possession", does not detract from the Rooses claim that they were not aware that their son was using their vehicles to engage in illicit drug transactions.

Therefore, even if this Court agrees with the appellate court's definition of "receipt", the Rooses met their burden of proof by showing, by a preponderance of the evidence, that they lacked knowledge that their son was using, or intended to use, their vehicles to facilitate illicit drug transactions.

The hearing officer, in both decisions, improperly created a new burden of proof for innocent owner claimants, that of objective knowledge, to justify denying the Rooses the status of "innocent owners". The plain language of the statute requires actual knowledge. The hearing officer also improperly imputed a willful blindness standard into the statute. Washington State's forfeiture statutes do not have a willful blindness prong. The Rooses met their burden of proof by showing a lack of knowledge that the vehicle was used to facilitate drug trafficking. There

[37] App.2, pg.12, App.3, pg. 11, Discussion: "your son is being very secretive, your son is not living at home, your son has been stealing mail and erasing voice mail messages for over two years...."

is absolutely no evidence in the record that the Rooses had knowledge that their son was using their vehicles to facilitate drug trafficking. The hearing officer's decisions are not supported by substantial evidence when the record is viewed as a whole, and the Roos' vehicles should be returned to them.

d. The Forfeiture Statutes are Quasi-Criminal and Any Ambiguity Must be Resolved in Favor of the Claimant.

Washington's forfeiture statutes are quasi-criminal statutes.[38] The rule of lenity requires that any ambiguities in a statute be interpreted in the light most favorable to the claimant.[39]

The plain language of the innocent owner exception to the forfeiture of conveyances requires actual knowledge. If this Court finds that the hearing officer and the Court of Appeals imputed an objective standard of knowledge into the "innocent owner" exception to the forfeiture of conveyances, then the statute is ambiguous and any such ambiguities must be resolved in favor of the Rooses and their vehicles should be returned.

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[38] *Kahler,* 42 Wn.App. at 308. Although this Court, in *State v. Catlett*, ruled that Washington's forfeiture statutes were not punishment for purposes of 5th Amendment double-jeopardy provision, it did note [FN9] that the statutes remain subject to an 8th Amendment argument regarding excessive fines. "Like the federal statute ...RCW 69.50.505 is not so punitive as to constitute criminal punishment for purposes of double jeopardy." 133 Wn.2d 355, 368-69, 945 P.2d 700 (1997).
[39] *Id.*

Further, if this Court finds that the hearing officer and the Court of Appeals, imputed a "willful blindness" standard into the "innocent owner" exception to the forfeiture of conveyances, then the statute is ambiguous and any ambiguities must be resolved in favor of the Rooses and their vehicles should be returned.

Finally, if this Court finds that "possession" of controlled substances subjects a vehicle to forfeiture, then the statute is ambiguous and all ambiguities must be resolved in favor of the Rooses and their vehicles should be returned.

II. Attorney Fees

Pursuant to RCW 34.05.574 and RCW 69.50.505(6), as the prevailing party, the Rooses are entitled to reasonable attorney fees incurred as a result of this litigation. The Rooses hereby request that this Court award them reasonable attorney fees.

D. CONCLUSION

The "innocent owner" exception to the forfeiture of conveyances requires actual knowledge. The Rooses met their burden of proof at the forfeiture hearing by showing, by a preponderance of the evidence, that they lacked actual knowledge that their vehicles were used, or intended for use, to facilitate drug transactions. The hearing officer took great liberty with the plain language of the "innocent owner" exception to conclude

that the Rooses did not meet their burden. To do so, the hearing officer imputed an objective standard of knowledge into the statute because, according to the hearing officer, the Rooses should have known of their son's use of their vehicles to engage in illicit drug transactions. The hearing officer's decisions took the Rooses to task for their lack of knowledge, using language implicating a willful blindness standard; a standard that the Washington State Legislature has not included in our forfeiture statutes. By doing so, the hearing officer erroneously compounded the burden of proof that claimants must meet in order to avail themselves of the innocent owner exception to forfeiture of conveyances.

The hearing officer also glossed over the fact that the Rooses proved, by a preponderance of the evidence, that they lacked knowledge that either vehicle was used, or intended for use, to facilitate illicit drug transactions. Once again, the hearing officer relied on the theory that the Rooses should have known those facts.

The Court of Appeals summarily agreed with the hearing officer's analyses and then took the opportunity for review to create, without authority, an entirely new, onerous burden of proof. The new burden of proof created by the Court of Appeals will be extremely difficult for any "innocent owner" claimant to meet. The fact that the hearing officer, and the lower appellate courts, were willing to go to such lengths to deprive

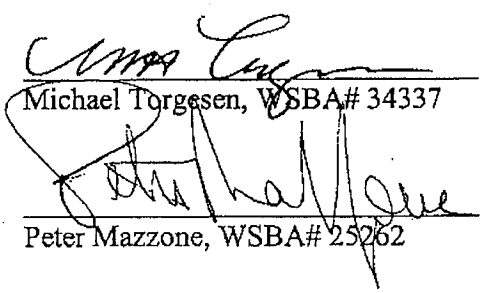
the Rooses of innocent owner status reinforces the Rooses arguments for strict construction and oversight in this area of law.

If the "innocent owner" exception to the forfeiture of conveyances contains any of the language imputed by the hearing officer and authorized and expanded upon in a published opinion by the Court of Appeals, then the statutory exception is ambiguous and, since the forfeiture statutes are quasi-criminal, any ambiguities must be resolved in favor of the Rooses.

For the foregoing reasons, the Rooses respectfully request that this Court reverse the decision of the Court of Appeals, and return the vehicles to the rightful owners, the Rooses.

Respectfully submitted, this 24th day of October, 2008.

MAZZONE AND MARKWELL, LAWYERS



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