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SUPREME COURT NO. 93907-1

Division III Court of Appeals No. 332624

SUPREME COURT
STATE OF WASHINGTON

CITY OF SUNNYSIDE,

Respondent

v.

ANDREAS GONZALEZ
IN RE: \$5,940 U.S. CURRENCY AND 2001 SILVER BMW 325i,

Petitioner

**ANSWER IN OPPOSITION TO
PETITION FOR REVIEW**

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I. IDENTITY OF RESPONDENT

Respondent is the City of Sunnyside, Washington.

II. COURT OF APPEALS DECISION AT ISSUE

Petitioner is requesting that this Court accept review of an unreported Division III Court of Appeals' decision. Petitioner asserts that the Division III decision is in conflict with a published decision of the Court of Appeals Division II (RAP 13.4(b)(2)). The Division III decision at issue is appended to the Petition for Review.

III. INTRODUCTION

This case is about a court sitting in an appellate capacity (the Superior Court) improperly re-weighing evidence, considering matters outside of the record, and then supplanting its decision in place of the trier of fact's findings and decision.

In this case, a hearing officer found sufficient evidence to support the forfeiture of cash and a motor vehicle under the provisions of RCW 69.50 as property (proceeds) traceable to illegal drug transactions. On appeal to Superior Court, the Superior Court re-weighed the evidence that

was presented to the hearing officer, interjected its own beliefs concerning the evidence, introduced its own experiences as part of the evidence, and then reversed the hearing officer's decision.

On appeal the Court of Appeals Division III found, in an unreported decision, that the Superior Court erred when it "reweighed the evidence", and it reinstated the forfeiture order. Petitioner does not like this outcome. Petitioner does not believe that the evidence produced at the forfeiture hearing was sufficient to show "tracing" of the property seized to illegal drug transactions. Petitioner now argues, in an attempt to get the Supreme Court to grant review, that the Division III Court of Appeals' decision conflicts with a Court of Appeals in Division II because Division III failed to apply the "tracing standard".

Contrary to Petitioner's assertion, Division III clearly applied the tracing standard and simply found that the Superior Court erred when it reweighed the evidence that was produced before the hearing officer. The Court of Appeals found that there was sufficient evidence to support the hearing officer's finding of traceability and that the Superior Court erred in re-weighing the evidence as it was not the trier of fact.

IV. ISSUE PRESENTED

Should the Supreme Court accept review of an unpublished Court of Appeals' decision where the Court of Appeals applied the correct legal standard (whether the item seized and forfeited was traceable to illegal drug activity) in a drug forfeiture and seizure matter and simply reversed the Superior Court where the Superior Court erred by re-weighing evidence and considering matters outside of the record?

V. STATEMENT OF THE CASE

On September 1, 2013, Sunnyside Police Officer Sgt. Scott Bailey was working traffic enforcement when he stopped Andres Gonzalez for speeding in the city of Sunnyside. RP 2-3, (4/7/14). The vehicle Gonzalez was driving was a 2001 Silver BMW with California plates. RP 3,(4/7/14) The vehicle was registered to another party. RP 3-4 (4/7/14). Gonzalez 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 Gonzalez's name. RP 16,18, (4/7/14). A Department of Licensing check showed that Gonzalez's driver's license was suspended in the third degree (DWLS 3). RP 4 (4/7/14).

Sgt. Bailey placed Gonzalez 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 Gonzalez had at the time of the

stop. Gonzalez requested that Sgt. Bailey answer the phone because it was Gonzalez's girlfriend calling. Sgt. Bailey answered the phone and spoke with a female who asked if she could collect the vehicle and Gonzalez'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 Gonzalez so requested, Sgt. Bailey could release Gonzalez's personal effects to her. RP 4 (4/7/14) Gonzalez advised that he wanted his personal property released to his girlfriend. Gonzalez 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)

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 Gonzalez. RP 4 (4/7/14). Gonzalez 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 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, Gonzalez had no explanation for the amount of money he had in his possession. RP 5, Ln 10-11.

Gonzalez told 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, Gonzalez said 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. Gonzalez 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 Gonzalez. RP 5-6, (4/7/14). The records showed that Gonzalez 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). Gonzalez 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.

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

VI. ARGUMENT

Division III's decision in this matter is very narrow. It simply found that the Superior Court erred by re-weighing the evidence and found that there was substantial evidence produced before the hearing officer to support the hearing officer's conclusion that the vehicle and cash should have been forfeited as proceeds traceable to drug transactions.

Division III did not take a position contrary to a Division II reported decision. Division III did not hold that "traceability" was not

required to support forfeiture. In fact, it held that this was required and that the hearing officer's finding of the same was supported in the record before the hearing officer.

Division III found, in reviewing the evidence before the hearing officer:

Here, Judge Michels's forfeiture order sets forth six factors that support his ultimate finding that the seized property "was used and/or intended to be used for a controlled substance violation, specifically the furtherance of the sale of an illegal drug." CP at 70. We must affirm the finding if it is supported by substantial evidence. *City of Walla Walla v. \$401,333.44*, 164 Wn. App. 236,255, 262 P.3d 1239 (2011). Substantial evidence is the quantum of evidence sufficient to persuade a rationale trier of fact. *Id.* at 256. Because we do not reweigh evidence or redetermine credibility, we must consider the evidence and all reasonable inferences in the light most favorable to the City, the party who prevailed before the trier of fact. *Id.*

Mr. Gonzalez recently returned from California in a car he did not own, and there was a user's amount of cocaine found in the car, together with \$5,940 in cash. Mr. Gonzalez did not tell Sergeant Bailey the cash was repayment to a friend. And he lied about who owned the car. Despite having received funds in the form of a personal injury settlement and unemployment benefits during the past five years, he implied those funds were depleted when he answered that he paid his parents rent "when I can ... once a month." CP at 20. Notably, Sergeant Bailey, a 15-year veteran of the city of Sunnyside Police Department, testified the seized property could be traced to illegal drug sales. He testified, based on his experience, it was not uncommon for a person to drive a car with contraband from one place to another, and to receive money and the car as payment. Judge Michels was entitled to consider the above factors and accept Sergeant Bailey's testimony. Judge Michels did not have to believe Mr. Gonzalez's claim that while visiting relatives in California his friend loaned him \$6,000 in cash to buy a used BMW, and they then towed his friend's car all the way back to Washington. Nor was Judge Michels required to believe Mr. Gonzalez when he claimed he had \$6,000 in cash saved over the past five years to repay his friend. We conclude the ultimate fact-that

the seized property can be traced to the sale of illegal drugs—is supported by substantial evidence.

Division III’s decision at pages 18-20.

Contrast this with the Superior Court’s review of the record. The Superior Court went to great lengths to improperly interject its own experience and apply them to the set of facts in this case, as a means of attacking the hearing officer’s factual findings. The following are examples:

“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).

The Superior Court clearly re-weighed the evidence. It interjected its own opinion as to the credibility of the evidence. The Superior Court was not the trier of fact. Sitting in an appellate capacity, the Superior Court must affirm findings supported by evidence in the record produced before the trier of fact.

Petitioner argues that Division III's opinion is in conflict with Division II's decision in the Valerio v. Lacey Police Department, 110 Wn.App. 163, 39 P.3d 332 (2002). Division III did not take the position that traceability was not required. Instead, Division III distinguished the factual scenario found in Valerio with the instant case. Division III indicated that it "questioned" the Valerio decision because that decision lacked explanation concerning some of the conclusions reached by that Court. Valerio involved cash only and because Valerio did not have a good explanation for having the cash, Lacey's Police Department decided to seize and forfeit it without any evidence establishing traceability. Valerio was not in possession of any drugs nor were any found in the vehicle where the cash was found.

Valerio asked a friend to "hold onto" a safe containing a large amount of money in plastic bags for him. His friend declined. Later that

evening, Valerio was driving home in his girlfriend's car when police arrested him for a domestic violence assault against his girlfriend earlier that day.

The following day, his girlfriend's, who was helping her move from the residence that she had been sharing with Valerio found a locked safe in the back of her car. They opened the safe and discovered \$58,300 cash. They took the safe and the money to the City of Lacey Police Department. They said that they believed the money belonged to Valerio. Police questioned Valerio about the money and he responded by saying that that he was not the last person to have driven the vehicle, he knew nothing about the safe, and he did not want to incriminate himself. Police noticed that some of the money had a musty odor.

The City police stored the safe and money in its evidence room. They then engaged a drug-detecting dog which alerted on the cash on two separate tests. Id. at 165-166. Lacey had no other evidence tracing the cash to drug transactions. The only other evidence Lacey relied upon was the failure of Valerio to explain how he saved the amount of money over the years since his income level was low. Id. at 167

As indicated above, the evidence present in the instant matter concerning traceability is present. Gonzalez did not tell Sergeant Bailey

the cash was repayment to a friend. He lied about who owned the car. Despite having received funds in the form of a personal injury settlement¹ and unemployment benefits during the past five years, he implied those funds were depleted when he answered that he paid his parents rent "when I can ... once a month." CP at 20.

Division III also indicated "Notably, Sergeant Bailey, a 15-year veteran of the city of Sunnyside Police Department, testified the seized property could be traced to illegal drug sales. He testified, based on his experience, it was not uncommon for a person to drive a car with contraband from one place to another, and to receive money and the car as payment." Drugs were found in the vehicle Gonzalez was driving. Similar testimony was not present in the Valerio case, thus there was never any possible nexus or connection to drug transactions in the Valerio case. Further, because Gonzalez did have drugs on him at the time of the incident and was subsequently convicted of the same in Yakima Superior Court, this renders the Division III decision based on a situation significantly factually distinguishable from the Valerio fact pattern.

Division III indicated that when weighing and considering the evidence, the hearing officer was "entitled to consider the above factors

¹ There was never any evidence presented by Gonzalez as to how much this personal injury settlement was for and only that it had occurred approximately 4 years prior to the original forfeiture hearing.

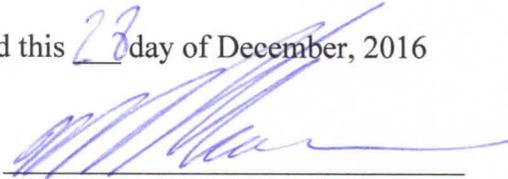
and accept Sergeant Bailey's testimony. Judge Michels did not have to believe Mr. Gonzalez's claim that while visiting relatives in California his friend loaned him \$6,000 in cash to buy a used BMW, and they then towed his friend's car all the way back to Washington. Nor was Judge Michels required to believe Mr. Gonzalez when he claimed he had \$6,000 in cash saved over the past five years to repay his friend.”

Division III concluded that “the ultimate fact-that the seized property can be traced to the sale of illegal drugs-is supported by substantial evidence.” Division III’s analysis included acknowledgment of the tracing requirement. Its decision is consistent with Division II’s Valerio decision. It distinguished its decision from Valerio based on the facts of the case, not based on a disagreement of the law or legal standards.

VII. CONCLUSION

Because review is sought of an unreported decision based upon Divisions III’s finding that the Superior Court erred in re-weighing evidence presented to a hearing officer as the trier of fact, because Division III’s decision is not in conflict with a published Court of Appeals’ decision, and because there is no basis upon which this Court can grant review under RAP 13.4(b)(2), review should be denied.

Respectfully submitted this 28 day of December, 2016



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