

No. 63096-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

KING COUNTY SHERIFF's OFFICE,

Respondent

V

\$45,513.00 in UNITED STATES CURRENCY

Defendant in Rem

and

LARRY LONNELL HOWARD,

Appellant

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 SEP 24 AM 11:58

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

REPLY BRIEF OF APPELLANT

F. Hunter MacDonald, Attorney at Law

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SUMMARY REGARDING TIMELINESS REPLIES

The Sheriff claims Howard is raising certain objections for the first time on appeal. The Sheriff is mistaken. The record clearly shows otherwise. See below.

Oral Objection to Deputy Savage's K9 Testimony - Deputy Savage's testimony on the K9 activities was admitted over Howard's foundational objection. **(See Appellant's Opening Brief).**

Oral Objections on Remaining Issues – At the close of evidence, Howard's attorney told the Examiner that he was making his legal arguments in writing and explained what they were:

I have legal arguments that I wanted to make in writing concerning probable cause for the stop and seizure and the pending forfeiture of the property seized [and] what I would prefer to do is just hand you the brief and hand counsel a brief and I understand you may want to get a response brief from counsel, but I don't have any oral argument. I will just limit my response to your review of the record and your review of the written argument. (See Opening Brief).

After some colloquy between counsel, the Examiner stated he wanted to move ahead and either party could make a motion for reconsideration if it had authority in opposition to his rulings. (Opening Brief). The Examiner proceeded to, in essence, give an oral ruling. (Opening Brief).

Written Objections on Remaining Issues - When the Examiner finished giving his oral rulings, Howard's counsel stated: "Okay. At this time, your honor, what I would do is I would submit a written brief" and handed copies of his brief to the Examiner and opposing counsel. **(Opening Brief)**.

Howard's motions, objections, and arguments were submitted, in writing, in accordance with the Examiner's instructions. (See preceding section, *supra*). They are part of the administrative record. **(Opening Brief)**.

Specifically, Howard argued that:

First, at the time of seizure Deputy Savage had no idea if Howard was the man sought by the warrant hit and did not have probable cause to order Howard to do anything. Therefore, Howard was within his rights to ignore Savage's commands and Savage had no right to grab Howard from behind.

Second, the Sheriff was without probable cause to seize Howard's money, even if the drugs on, or near, Howard's person were legally seized, because the Sheriff had not performed any review of Howard's assets at that time.

Third, the money, suspected drugs, and a knife found in Howard's car were insufficient to show or prove that the money is

proceeds of a drug transaction because there is no known “link” to any drug transaction and an officer “hunch” is simply not enough to justify seizure of the money.

Fourth, any items seized from Howard’s trunk were seized without a warrant and could not be considered by the Hearing Officer in making his decision.

Finally, Howard’s attorney argued that the seizures were punitive and violated either double jeopardy or the 8th Amendment Excessive Fines Clause because the Sheriff could not trace the money to a drug sale.

REPLY

1. Howard Was Entitled to a Hearing Examiner Ruling on All Pertinent Issues and His Failure to Note Motions is Irrelevant because the APA is not Governed by the Civil Rules and Has No Specific Noting or Motions Rules

An application for an agency to enter an order includes an application to conduct appropriate adjudicative proceedings. RCW 34.05.413(4).

Any opportunity to present motions or objections is set by the Hearing Examiner. RCW 34.05.437.

2. Howard’s Appeal Issues Should Be Heard because Howard is Legally Entitled to Make Objections to Findings or Make Motions to Dismiss after Evidence Is Entered Given the Relaxed Rules of Evidence in APA Hearings, the Hearing Examiner’s Wide Discretion, and the Requirement that the

Hearing Examiner Provide an Opportunity for Objections and Motions.

RCW 34.05.413(4) requires the courts to review constitutional or statutory issues for the first time on appeal if the hearing examiner was otherwise required to make preliminary or constitutional or statutory findings at the agency's adjudicative hearing. See RCW 34.05.070, 34.05.413(4), and 34.05.452(1). Review appears to be required here because *Barlindal* requires that constitutional prerequisites be satisfied before forfeiture. See RCW 34.05.452(1), 69.50.505(2)(c) and (d), and *Barlindal v City of Bonney Lake*, 84 WnApp 135, 141, 925 P2d 1289 (1996).

Making statutory or constitutional objections before the evidence is considered, however, is next to meaningless, especially if the Hearing Examiner has not set a preliminary hearing, because nearly all evidence offered will probably be admitted during the presentation of the case. The only admissibility requirement is that the presiding officer finds the evidence to be the kind upon which reasonably prudent persons are accustomed to rely. RCW 34.05.452(1).

Findings may be based on such evidence even if that evidence would be inadmissible in a civil trial. RCW 34.05.461(4). In spite of the above, however, "nothing ... may be held to diminish the constitutional rights of

any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law and, except as authorized by law, all requirements or privileges relating to evidence or procedure shall apply ...

“ RCW 34.05.020. These are the exact challenges which Howard is raising and the Court should hear them.

3. Any Objection Related to the Timeliness of Howard’s Objections to the Hearing Examiner’s Findings of Fact and Conclusions of Law Should be Viewed in conjunction with the Procedurally Defective Nature of the Hearing Examiner’s Own Findings, Conclusions, and Decisions.

The Hearing Examiner did not specifically adopt any evidence or testimony in his findings as required by RCW 34.05.461(3). He also provided no reference to the credibility of Deputy Savage where that was the basis for a finding or conclusion. See RCW 34.05.461(3). Finally, the Hearing Examiner cited his own personal opinion concerning K9 searches as the basis for certain findings. This violates RCW 34.05.461(4).

4. The Sheriff is Incorrect in Asserting that Howard’s Hearing Was Timely because the Personal Property Forfeiture Deadline is Controlled by RCW 69.50.505, not the APA.

RCW 69.50.505(5) states that a personal property claimant is entitled to a reasonable opportunity to be heard if he/she notifies the seizing law enforcement agency in writing of the person’s claim of ownership within 45 days of the seizure. A real property claimant is entitled to a hearing if

he/she notifies law enforcement within 90 days. RCW 69.50.505(5). RCW 69.50.505, however, set no explicit deadline as to when, after notice of a claim is served, the forfeiture must take place.

In the *Tellevik* cases, it was determined, without referencing any specific deadline language in the statute, that a hearing must take place within 90 days. *Tellevik 1* and *Tellevik 2* involved real property claims. *Tellevik 1*, 120 Wn2d 68, 838 P2d 111 (1992) and *Tellevik 2*, 125 Wn2d 364, 884 P2d 1319 (1994).

The deadline of 90 days for real property cases had to be implied by the *Tellevik* Courts based on the only language that was in the statute which concerned timing, i.e., 90 days for a person to file a real property claim. There is simply no other language in the statute from which the *Tellevik* Courts could have drawn to imply a 90 day deadline.

The personal property portion of the statute, however, gives only 45 days for a person to file a personal property claim. See RCW 69.50.505(5). As such, the only applicable deadline for personal property hearings is 45 days. Otherwise, the statute would be found unconstitutional for its failure to provide for a definite deadline ensuring a prompt hearing. See *Tellevik 1* and *Tellevik 2*.

The inapplicability of RCW 34.05.419, and, therefore, *One 1988 Black Corvette*, was explained in Howard's opening brief, i.e., that the APA's rules regarding when a hearing is deemed commenced are the date that notice of a future hearing is sent, not the date of the hearing itself. This does not ensure a prompt post-deprivation hearing in accordance with the requirements of *Tellevik 1* and *Tellevik 2*. (See RCW 34.05.413 and Howard's Opening Brief, pp 23-4).

Counsel for Howard is aware of the fact that *One 1988 Black Corvette* is a Division 1 case, but urges the Court of Appeals to take a closer look at *Tellevik 1* and *Tellevik 2* and re-evaluate whether *One 1988 Black Corvette* really complies with the requirements of *Tellevik 1* and *Tellevik 2*. See *One 1988 Black Corvette*, 91 WnApp 320, 963P2d 187 (1997).

5. The Sheriff's Citation to 13627 Occidental Ave. S. and Contreras Supports Howard. Its Other Citations are Inapposite.

Howard argued that the Sheriff could not trace his cash to a drug transaction because the Sheriff did not perform any financial investigation of Howard which ruled in, or ruled out, legitimate sources of income. This is essentially the basis for dismissal in the *Occidental Ave* and *Contreras* cases. The Sheriff's remaining cases, except *Okanogan County v Sam*, deal with whether there is probable cause for a seizure, not

whether a preponderance of the evidence supported forfeiture. *Sam*, though, while dealing with preponderance, is distinguishable from Howard's case. In *Sam*, there was actual evidence that the deceased parties were engaged in a financial crime, i.e., spiriting money out of the country without filing a currency transaction report, and a drug crime, flying a plane with modified compartments for smuggling.

There is no evidence that Howard engaged in a financial crime, other than Deputy Savage's opinion, and Howard did not have any modifications to his person or his car indicating he was a smuggler. As a result, there is no precedential value in any of the Sheriff's cited cases, including *Sam*.

The Sheriff also clearly mis-cites cases for its allegation that forfeiture is never punitive. Clearly, it can be in certain cases and the Washington Supreme Court has said so. See *State v Clark*, 124 Wn 2d 90, 103, 875 P2d 613 (1994).

6. The Court of Appeals Has Previously Denied Howard's Motions to Remand this Case to the Hearing Examiner for Insertion of Exhibit 1 into the Administrative Record. Howard Maintains His Arguments for the Remand / Insertion of Exhibit 1.

Howard previously briefed his argument for the Court of Appeals to remand this case to the hearing examiner to insert Exhibit 1 into the

Administrative Record. That motion was denied. Howard maintains his arguments listed in his opening brief. The Court of Appeals should not have upheld the Hearing Examiner's *sua sponte* objection to the Exhibit without at least viewing the Exhibit because it affected substantial constitutional rights of Howard.

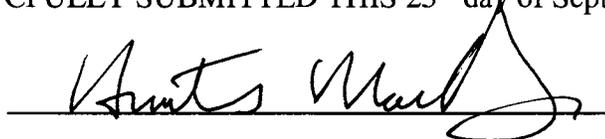
7. There Was No Substantial Evidence Upon Which to Forfeit Howard's Money.

The substantial evidence alleged by the Sheriff is that money and drugs were found, literally, on the body, or in the pockets, of Howard. The meaning of this evidence is ambiguous in that both items are where they normally would be expected, whether the person is a drug user or a drug seller. Ambiguity does not meet a preponderance standard. To rule otherwise means the Court must uphold every forfeiture where a claimant has both money and drugs in his / her possession, regardless of whether there is any evidence the person actually sells drugs or makes money in the drug business. Simple possession will, in effect, become sufficient for forfeiture.

The evidence which the Sheriff emphasizes, i.e., Howard had roughly \$45,000.00 in his pockets, molded together in clumps, and only \$200.00 listed in the lone bank statement that Deputy Savage found in Howard's car, is emblematic of the dilemma. The evidence, without any

additional financial investigation into whether Howard had regular income from legitimate sources, could mean Howard was living out of his car, which Deputy Savage admitted was a possibility, or making his money from drugs, or both. Ambiguity does not provide probable cause, let alone a preponderance of the evidence.

RESPECTFULLY SUBMITTED THIS 23rd day of September, 2009.

A handwritten signature in black ink, appearing to read "F. Hunter MacDonald", is written over a horizontal line. The signature is stylized and cursive.

F. Hunter MacDonald, WSBA #22857

Attorney for Appellant Larry Lonnel Howard

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WASHINGTON COURT OF APPEALS
DIVISION I

In re the Forfeiture of \$45,513.00 IN UNITED STATES CURRENCY	Ct. of Appeals No. 63096-2 Super. Ct. No. 07-2-38651-3 KNT
Larry Lonnell Howard, Appellant / Claimant	DECLARATION OF SERVICE OF APPELLANT's REPLY BRIEF
v.	
The King County Sheriff's Office Respondent / Seizing Agency	

TO: CLERK OF THE COURT
ALL NAMED PARTIES AND/OR THEIR ATTORNEYS OF RECORD

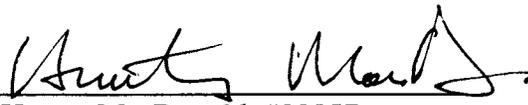
The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

- 1) That he/she is now and at all times herein mentioned was a citizen of the United States of America.
- 2) That he/she is now and at all times herein mentioned has been a resident of the State of Washington and is over 18 years of age.
- 3) That he/she is not now and has never been a party to the above-captioned action but is competent to be a witness therein; and, that **on or around the 24th day of SEPTEMBER, 2009**, declarant did deliver a copy of **APPELLANT's REPLY BRIEF** by delivering a copy thereof to the RESPONDENT by hand to the Respondent's attorney's business address.

DECL. OF SERVICE

THE MACDONALD LAW OFFICE
Post Office Box 3814
Seattle, WA 98124-3814
206-280-0079 tel
206-937-0125 fax

EXECUTED AND DECLARED UNDER PENALTY OF PERJURY this 24 day of
September, 2009, at Seattle, King County, Washington.

BY: 
F. Hunter MacDonald, #22857

DECL. OF SERVICE

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