

NO. 63096-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KING COUNTY SHERIFF'S OFFICE,

Respondent,

v.

\$45,513.00 IN UNITED STATES CURRENCY

DEFENDANT in REM

and

LARRY LONNELL HOWARD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
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A. ISSUES PRESENTED

1. Case law and statute requires that an administrative hearing be set within 90 days of a claim to property. The King County Sheriff's Office (KCSO) set a hearing within 77 days of Howard's claim. Did the Hearing Examiner properly conclude that a hearing had been timely set?

2. RCW 34.05.476 requires the agency to maintain an official record of evidence received or considered. RCW 34.05.534 requires a claimant to exhaust all administrative remedies before filing a petition for review. Howard marked an exhibit that he then did not authenticate or admit as evidence. Howard did not petition the Hearing Examiner to include the marked exhibit as part of the official record. Has Howard waived any right to argue that the exhibit should have been maintained as part of the official record? In the alternative, does RCW 34.05.476 require that an official copy be maintained of an exhibit that was never authenticated or admitted and was not considered by the Hearing Examiner?

3. The day before the administrative hearing, Howard submitted a Motion to Dismiss for failure to timely set a hearing. The Hearing Examiner ruled that the agency had timely set the hearing. This ruling was memorialized in the official transcript of

the hearing. Howard did not petition the Hearing Examiner to provide a written ruling. Has Howard waived any right to argue that the Hearing Examiner should have provided a separate written ruling and was the ruling memorialized in the official transcript?

4. An alternative argument to the evidence can not be raised for the first time on appeal. The Hearing Examiner ruled that the deputy had probable cause to stop Howard based on the infraction the deputy observed. Howard did not object to this ruling or make an alternative argument based on the evidence admitted. Has Howard waived the right to raise these arguments on appeal?

5. Claimants are under a duty to raise appropriate objections at the appropriate time and to seek final rulings when none have been made. Howard encouraged the Hearing Examiner to take testimony regarding the use of a K-9, but requested the opportunity to provide the Hearing Examiner with a brief on the foundational requirements. After the testimony was completed, including cross-examination, Howard did not object to the testimony and did not provide any additional briefing on the topic. Did Howard waive his objection?

6. The deputy testified that an unloaded pistol was found in the trunk of Howard's vehicle. Howard did not object to this

testimony and any perceived constitutional issues were not developed or preserved for review. Has Howard waived the right to raise this argument on appeal?

7. The Hearing Examiner has wide discretion to admit evidence at a hearing. Here, over Howard's objection, the Hearing Examiner admitted evidence that a knife was located in the exact place where Howard was reaching just prior to a fight that ensued between Howard and the deputy. The Hearing Examiner specifically found the evidence relevant to the ultimate issue. Has Howard shown that the Hearing Examiner abused his discretion?

8. The Hearing Examiner ruled that the King County Sheriff's Office had proven by a preponderance of the evidence that money found on Howard was subject to forfeiture under RCW 69.50.505 after hearing evidence that Howard escalated an otherwise innocuous infraction stop, including reaching for a 10" curved blade, and was in possession of a large piece of cocaine, had over \$45,000 located in various places on his person, and had banking accounts that showed he had about \$200.00 in the bank. When viewed in light of the whole record, did substantial evidence support the Hearing Examiner's decision?

9. Howard did not raise any tracing issues at, or prior to, the hearing and the agency can rely on circumstantial evidence to connect money to drug activity. Has Howard waived the right to raise this argument on appeal?

10. Howard did not raise an Eighth Amendment proportionality analysis at or prior to the hearing and drug proceeds are not subject to such an analysis. Has Howard waived the right to raise this argument on appeal?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS AT THE ADMINISTRATIVE LEVEL.

On May 25, 2007, the King County Sheriff's Office seized for forfeiture \$45,513.00 in United States currency under RCW 69.50.505. CP 449. Larry Howard was personally served with the Notice of Seizure and Intended Forfeiture. CP 449. On July 6, 2007, F. Hunter MacDonald, Attorney, timely submitted a Notice of Claim on behalf of Howard. CP 450-51. A hearing was set, and occurred, on September 21, 2007; notice of the hearing was sent to F. Hunter MacDonald by certified mail on September 7, 2007. CP 452-53. Larry Howard did not appear, but his attorney, F. Hunter

MacDonald, represented to the Hearing Examiner that Mr. Howard wished to appear through his attorney. CP 42 ¹; CP 511.

The KCSO presented one witness, Deputy Kevin Savage. CP 43. At the conclusion of the KCSO's case, the Hearing Examiner found that the KCSO had proven by a preponderance of the evidence that the money was subject to seizure under RCW 69.50.505 as proceeds of a violation of the Uniform Controlled Substances Act. CP 94-95.

The Hearing Examiner (hereinafter H.E. or Hearing Examiner) then invited Howard to put on his case. CP 95. Howard himself was not present; he presented no witnesses, admitted no evidence, and made no oral argument. CP 95-96. Rather, Howard immediately submitted a brief for a Motion to Reconsider the H.E.'s ruling. CP 474-84. The H.E. then ruled that the money was forfeited to the King County Sheriff's Office. CP 97. The KCSO later submitted its response to the Motion to Reconsider. CP 485-98. The H.E. entered Findings of Fact and Conclusions of

¹ The Verbatim Report of Proceedings consists of one volume of transcript, dated September 21, 2007. It appears in the Court Papers transmitted to the Court of Appeals as CP 42-99 and will be referred to as CP with the corresponding page number.

Law dated October 7, 2007, and denied the Petition to Reconsider dated October 26, 2007. CP 499-512; CP 513-14.

2. SUBSTANTIVE FACTS AT THE ADMINISTRATIVE HEARING.

Deputy Kevin Savage is a seasoned law enforcement officer who, prior to joining the King County Sheriff's Office, a narcotics officer in California and had in excess of 200 hours of self-initiated training in the field of narcotics and 300-400 hours of departmentally authorized training in the field of narcotics. CP 43-44, 53-56; CP 500.

On May 25, 2007 at about 3:10 a.m., Deputy Savage was in a fully marked patrol vehicle patrolling the area of S. 206th St. and Military Rd. S., SeaTac. He was heading east on S. 206th St. approaching Military Rd. S. when he observed a white Toyota Corolla pass him. The driver, later identified as Larry Howard, made eye contact with Deputy Savage; Howard looked surprised and nervous at seeing the deputy. CP 44; CP 500-01. As Howard passed the deputy, Howard immediately initiated his right turn signal and turned into a Shell gas station located at 20619 Military Rd. S. There were two entrances into the station, Howard turned into the farthest entrance from Military Road and pulled up to a gas

stall. CP 89. The deputy noted Howard failed to initiate his right turn signal 100 feet before turning and, in fact, turned on his signal as he was making the right turn, an RCW violation. CP 44; CP 501.

Deputy Savage maintained visual contact with the vehicle and also checked the plate; within seconds, the deputy received a computer response that there was an associated warrant hit on the vehicle and that the description given roughly matched that of the driver. CP 45. Deputy Savage entered the Shell station from the other entrance, pulled his vehicle through the lot and approached the driver, Howard, who had gotten out of his vehicle and was about 5 feet from the opened driver's side door. CP 45, 89.

Deputy Savage asked Howard what his name was, Howard replied, "Lonnell, what's this about?" The deputy told him that he had failed to signal 100 feet before executing his turn into the gas station and that there was an associated warrant with the vehicle. Deputy Savage told Howard that he needed to make sure Howard was not the subject of the warrant. Howard began patting his pockets as if to check them for his identification. CP 45; CP 501.

Deputy Savage, who was still seated in his vehicle at this time, was confused by the name that Howard had given him and he looked down at his computer to again check the name of the

registered owner and the name associated with the warrant.

Howard began moving toward his vehicle; Deputy Savage looked back up at Howard and he could see that Howard had a Washington State DOL card in his left hand and an unknown large item balled in his right fist (the item turned out to be a golf ball-sized chunk of cocaine. CP 45-57; CP 501-02.

Deputy Savage exited his patrol unit and asked Howard not to get into his vehicle and to just let him see the identification in his hand. Howard ignored the deputy and set his identification on the arm rest. Howard then began to lean into the vehicle. Deputy Savage said, "Sir, do not reach into your vehicle." Howard stopped and stood up straight facing away from the deputy. Deputy Savage said, "Why don't you just hand me your license that you put right there on the arm rest of your car." Howard immediately bent down toward the area of the driver's side seat between the seat and the door frame. At this point, not knowing what Howard had in his right hand, not knowing what Howard was reaching for inside the car, and knowing that Howard was refusing to provide his license, the deputy grabbed Howard and stood him up. As he did so, he could feel Howard trying to pull away from him. The deputy was able to

get Howard to his feet and push him against the vehicle in the driver's door well. CP 46; CP 502.

As the deputy pushed Howard against the vehicle, Howard placed his left hand on top of the vehicle and his right hand inside the vehicle. Deputy Savage was able to control Howard's left hand and was able to extract Howard's right hand from inside the vehicle and place it on top of the vehicle. The deputy could see a white powder rock substance in his right fist with clear plastic packaging around it. The rock powder substance was the size of a golf ball and the deputy immediately recognized the substance, based on his experience and training as a former narcotics officer, as being cocaine base. Deputy Savage told Howard he was under arrest for the suspected cocaine and to release what was in his right hand. Howard did not release the suspected cocaine and began actively and violently resisting. A fight ensued that took both Howard and the deputy across the parking lot, into a dark grassy area. CP 46-47; 502-03.

During that struggle, Howard continued to resist and also began crushing and dispersing the suspected cocaine despite the deputy's commands to stop. He also made attempts to pull at the deputy's taser. After multiple warnings, the deputy discharged his taser, however it did not subdue Howard. The deputy then used his baton;

striking Howard several times. Deputy Savage eventually managed to tackle Howard to the ground; Howard began fighting for the baton. Deputy Savage was able to get the baton out of Howard's grasp and throw it out of reach. Soon after backup units arrived and assisted in gaining control of Howard. CP 46-67; CP 502-03.

Later, Deputy Savage recovered multiple pieces of the suspected cocaine that had landed on the asphalt; including two pieces that were the size of a 50 cent piece in diameter and about ¼ inch in thickness. Deputy Savage was not able to recover all of the suspected cocaine because some had fallen down a storm drain and other pieces had disappeared in the wet bushy and grassy area where Howard was ultimately arrested. CP 50-52; CP 502-03.

In a search incident to arrest of Howard's person, Deputy Savage located \$15,450.00 in U.S. currency in Howard's left front pants pocket, \$9,000.00 in U.S. currency in Howard's right front pants pocket, \$9,731.00 in U.S. currency in a black wallet located in Howard's right rear pants pocket, and \$11,040.00 in U.S. currency in a blue wallet (located by another officer) in his left rear pocket. Howard also had two cell phones on his person. Deputy Savage located a check book in Howard's name showing a balance under \$200.00, and

a bank statement, also in Howard's name, from a different account showing a balance of under \$100.00. CP 50-51; CP 505.

In the vehicle, other officers located a knife with a wood handle and an approximately 10" curved blade. The knife was located between the driver's seat and the door frame, right where Howard had been reaching when the deputy first placed his hands on Howard. CP 51; CP 505. Additionally, there was about \$232.00 in U.S. currency found throughout the vehicle. A glass jar containing suspected cut was also found in the vehicle along with two quantities of suspected cocaine base in packaging. An unloaded Derringer pistol was found in the trunk. CP 51; CP 505.

A King County Sheriff's Office K-9 officer was called to the scene. Outside of the presence of the K-9 officer and his dog, Jetson, Deputy Savage placed the money in one plain brown paper bag, a cell phone in another plain brown bag, and some other items in a third plain brown bag. The dog then walked past the three bags and alerted on the bag with the money. Deputy Savage testified that Deputy Sheridan and Jetson are certified, having attended a six-week course through the King County Sheriff's Office. Jetson has been certified as a narcotics detection dog, having a success rate in the 90th percentile bracket. CP 63-64, 74-75; CP 505-06.

Deputy Savage field-tested the suspected cocaine; it tested positive. Deputy Savage was trained both in California and in Washington on the use of this kit. Deputy Savage testified that, based on his training and experience, there was no doubt in his mind that the substance was cocaine. CP 64, 91-92; CP 505-06.

During the hearing, the deputy testified that one quantity of money, \$15,450.00, was of particular interest to the deputy because the bills were very worn and of old script and folded in three quantities of \$5,000 intricately folded on top of one another. The deputy knew it was common in the drug culture to use specified amounts of money that can be moved around the drug world easily; it can be easily identified by weight or by thickness. CP 55-56, 58-60; CP 506-07.

The different amounts of money carried in different locations was significant to the deputy because it suggested Howard was a person who moved drugs and/or money for other persons; not the person actually calling the shots. Also, in his experience it is uncommon for a person outside of the drug culture to have that large a sum of cash on his person without also some accompanying bank slip or documentation. CP 61-62; CP 506-07. The deputy also found it significant that there was no drug paraphernalia located; this added to

the deputies belief that Howard was a “mule” (a person running drugs and/or money for other narcotics dealers). CP 64-65; CP 506-07.

3. HEARING EXAMINER’S DECISION.

The day before the hearing Howard submitted one brief with one issue; a motion to dismiss for failure to set a hearing within 45 days of his claim. CP 147-48; CP 93. The KCSO submitted its reply brief arguing that the KCSO had 90 days to set the hearing. CP 153-59. The H.E. ruled that KCSO had 90 days from the date of claim to set a hearing and it had been timely set. CP 99.

The H.E. ruled that Deputy Savage had the right to stop the vehicle based on the traffic violation he observed. Based on both the traffic violation and the associated warrant hit the deputy had the right to immediately ask Howard for his license. CP 94-95; CP 510.

The H.E. found that based on the huge amount of cash located on Howard’s person, the two separate bank accounts showing that the amount of cash located on Howard was not typical of his lifestyle, the ferocity with which Howard fought the officer, the way the money was clumped together and aged, the large amount of cocaine, and the K-9 alert on the money, that the money was connected to drug activity, the deputy had right to seize the money, and that the seizing agency had proven by a preponderance of the evidence that the money was

subject to forfeiture. CP 94-95; CP 510-11. Presented with no statutory defense or alternative evidence from Howard, the H.E. found that the money was properly forfeited to the King County Sheriff's Office. CP 97; CP 449-512.

After the hearing, other than the Motion to Reconsider, Howard submitted no additional briefs to the H.E.² Howard did not submit any proposed findings of fact and did not object to the Findings of Fact and Conclusions of Law entered by the H.E. CP 499-512.

4. PROCEDURAL FACTS IN SUPERIOR COURT.

On December 5, 2007, claimant filed a Petition for Review in Superior Court seeking reversal of the Hearing Examiner's decision at the administrative hearing held on September 21, 2008. CP 1-11. After numerous delays that are not pertinent to this motion, a final hearing (oral arguments) date was set for December 15, 2008.

Howard filed his brief in preparation for the final appeals hearing on September 3, 2008; Howard did not assign error to any findings of fact or conclusions of law. CP 23-38. The KCSO filed its response brief. No further briefing, requests to continue, petitions, or motions were filed until December 2, 2008 at 4:38 p.m.,

² Howard's Motion to Reconsider includes several notations regarding supplemental briefs, but none were ever provided.

two court days beyond the briefing schedule set by Howard. On that date and time, Howard filed two reply briefs and a separate motion to strike the H.E.'s findings and assign errors. CP 100-10; CP 111-26; CP 127-29. On December 5, 2008, Howard filed a petition to remand back to the H.E. and a petition to dismiss. CP 130-34; CP 135-37. The KCSO filed replies and the Superior Court judge denied Howard's motions, but granted Howard's motion to postpone the final hearing until January 5, 2009. CP 162-68; CP 143-44.

On January 5, 2009, at oral arguments, Superior Court judge asked both sides what issues needed to be decided. Howard listed the following issues:

1. Whether the Hearing Examiner properly ruled that the petitioner/claimant's administrative hearing was timely set under RCW 69.50.505.
2. Whether the King County Sheriff's Office deputy had probable cause to stop the petitioner/claimant on the date of the incident; May 25, 2007.
3. Whether substantial evidence supported the Findings of Fact and Conclusions of Law.
4. Whether there was probable cause to seize the currency at the time of the stop; May 25, 2007.
5. Whether the seizure of the currency was an excessive fine under the Eighth Amendment.

Later, Howard added an additional issue of whether the H.E. was required to, sua sponte, do an excessive fine analysis. CP 169-71; CP 235-37.

The Judge ruled that the hearing had been timely set, that excessive fine arguments must be raised at the hearing to be preserved, and that substantial evidence supported the H.E.'s decision. CP 235-37. At the request of Howard, the Judge issued an additional order in which he ruled that Howard had not timely challenged any findings and that all the findings are verities on appeal. Additionally, the Judge ruled that any appeal issues related to the K-9 evidence, probable cause to stop, search of the trunk, the knife located in the vehicle, the deputy's testimony regarding the condition and location of the currency, and Eighth Amendment/Excessive fine arguments were not preserved for appeal and/or not timely raised on appeal. CP 239-42.

C. ARGUMENT

1. STANDARD OF REVIEW.

The principles governing judicial review are set out in RCW 34.05.570(1). The petitioner has the burden of demonstrating invalidity of agency action. RCW 34.05.570(1)(a).

The standard of review of orders in adjudicative proceedings is set out in RCW 34.05.570(3)(e):

- (3) Review of agency orders in adjudicative proceedings. The Court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

...

(f) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court....

Findings of fact are subject to review under the “substantial evidence” standard. Terry v. Employment Sec. Dep’t, 82 Wn. App. 745, 748, 919 P.2d 111 (1996). However, the general rule concerning appeals is that in order for a finding to be reviewed, the appellant must assign error to the finding; otherwise it will be considered a verity. Forsman v. Employment Sec. Dep’t, 59 Wn. App. 76, 79, 795 P.2d 1184 (1990); RCW 34.05.558.

The “substantial evidence” standard as used in RCW 34.05.570(3)(e) is defined as “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” Heinmiller v. Dep’t of Health, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). This standard is “highly deferential” to the agency fact finder. Arco Products Co. v. Utilities and Transportation

Comm'n, 125 Wn.2d 805, 812, 888 P.2d 728 (1995), and the evidence is viewed in the light most favorable to the prevailing party, "a process that necessarily entails acceptance of the fact finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." City of Univ. Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). Thus, in reviewing the whole record, the findings will be upheld, if there are sufficient facts from which a fair-minded person could make the same finding; and this is so, even if the reviewing Court may have ruled differently had it been the trier of fact. Callecod v. Washington State Patrol, 84 Wn. App. 663, 676, 929 P.2d 510 (1997).

2. HOWARD'S HEARING WAS TIMELY SET WITHIN 90 DAYS AS REQUIRED BY CASE LAW AND STATUTE AND THE H.E.'S RULING WAS MEMORIALIZED IN THE OFFICIAL TRANSCRIPT.

Howard does not dispute that he received notice of a hearing within 90 days from his request for a hearing in that the hearing was held within 77 days of his request. Hearings that are based on the seizure of personal property under RCW 69.50.505 are heard under the authority of the Administrative Procedure Act (hereinafter

“APA”), RCW 34.50, RCW 69.50.505(5). RCW 34.05.419 states, in pertinent part:

After receipt of an application for an adjudicative proceeding....

(1) ...within ninety days after receipt of the application....the agency shall.....

(a) Commence an adjudicative proceeding in accordance with this chapter...

In Tellevik 1, a case involving the forfeiture of real property, the forfeiture statute itself was upheld but the court held that a full adversarial hearing was required within 90 days of the seizure of real property. 120 Wn.2d 68, 87, 838 P2d 111 (1992).

Later, a motion for reconsideration was denied but the Tellevik court amended its opinion to remove the specific reference to the “the seizure of real property” and also added a citation to RCW 34.05.419 following this sentence. The revised sentence now reads:

Moreover, the statute requires a full adversarial hearing with judicial review within 90 days if the claimant notifies the seizing agency in writing. RCW 69.50.505(e); RCW 34.05.419.

845 P.2d at 1325 (Order Clarifying Op. and Denying Mots. for Recons. and Reh'g).³

³ The case came back before the Washington Supreme Court due to a failure to set a trial date within 90 days of the Court's mandate, resulting in the decision in Tellevik II, which reaffirmed Tellevik I.

In re Forfeiture of One 1998 Black Chevrolet Corvette Automobile, 91 Wn. App. 320, 323, 963 P.2d 187 (1997), a personal property case, this Court of Appeals further clarified that under the APA forfeiture proceedings must be commenced within 90 days of a claim of ownership and that “commencement” occurs when the seizing agency notifies the claimant that a hearing will take place.

In Assignment of Error #3, Howard argues that the H.E. failed to provide a written ruling regarding the timeliness issue. RCW 34.05.534 requires Howard to exhaust all administrative remedies available before filing a petition for review. At no time has Howard ever asked the H.E. to reduce the oral ruling to a written ruling. Additionally, in Howard’s appeal brief to Superior Court, he never raised this issue.⁴ CP 23-38.

Furthermore, RCW 34.05.476 requires the agency to maintain an official record of each adjudicative proceeding. Here, the only proceeding occurred on September 21, 2007. At that time, the Hearing Examiner ruled that case law gave the agency the

⁴ Howard did attempt to raise the issue in Superior Court after the briefing deadlines and less than six court days before final oral arguments, but the Judge denied the petition. CP 135-42; CP 143-44.

authority “to have a hearing within ninety days, and notice of the hearing is sufficient to actually begin the hearing.” CP 99.

As part of the agency record, the King County Sheriff's Office transmitted to Superior Court a copy of Howard's brief on the timeliness issue, the King County Sheriff's Office response brief, and the transcript containing the H.E.'s ruling on the issue of timeliness. Howard fails to articulate how this record denies him the ability to challenge the ruling on appeal.

In fact, while the KCSO argued in Superior Court that Howard did not timely raise this issue on appeal, the Superior Court did hear argument on the issue of timeliness and did rule that the hearing had been timely set. CP 236.

Howard's hearing was timely set within 90 days of his written claim and the H.E.'s ruling on the issue was memorialized in the official transcript of proceedings.

- 3. HOWARD DID NOT EXHAUST THE ADMINISTRATIVE REMEDIES BY REQUESTING THAT THE MARKED EXHIBIT BE MADE PART OF THE OFFICIAL RECORD AND HE DID NOT TIMELY RAISE THIS ISSUE IN SUPERIOR COURT. FURTHER, THE AGENCY WAS NOT REQUIRED TO MAINTAIN A RECORD OF THE EXHIBIT.**

In Assignment of Error #2, Howard marked an exhibit (copies of “Google Earth” photographs) but did not ask the H.E. to

admit and/or consider the exhibit; he now complains that the H.E. failed to place the exhibit in the administrative record.⁵ The entire transcript regarding Howard's exhibit is contained in CP 85-87 and is attached for the convenience of this court as Attachment 1.

Over KCSO objection, Howard's attorney marked an exhibit that he represented was "a Google Earth picture of supposedly where this [the stop] happened" RP 85. The record reflects that Howard did not provide a copy of the exhibit to either the H.E. or to the KCSO attorney. RP 85-87. It is also clear from the transcript that Deputy Savage only looked at the first page of the apparent multi-page exhibit and never definitively indicated that the picture accurately depicted the area where the stop occurred. RP 85-87.

After it was apparent that the picture was causing confusion, the H.E. inquired about the relevance of the exhibit and suggested that the attorney just ask some direct questions. RP 87. The H.E. never told Howard's attorney that he couldn't refer back to the exhibit or use it again after some general facts were established.

⁵ Howard has raised this issue in a separate motion to the Clerk of the Court and both parties fully briefed the issue. A ruling on this motion has not yet been made.

However, Howard's attorney never did again refer to the exhibit and never asked that it be admitted or considered by the H.E.

RCW 34.05.534 requires Howard to exhaust all administrative remedies available before filing a petition for review. At no time has Howard ever asked the H.E. to include the unadmitted evidence as part of the official record. Additionally, in Howard's appeal brief to Superior Court, he never raised this issue.⁶

RCW 34.05.476 states in pertinent part:

- (1) An agency shall maintain an official record of each adjudicative proceeding under this chapter.
- (2) The agency record shall include:
 - (d) Evidence received or considered.

RCW 34.05.476 does not require that the agency maintain an official record of an exhibit that: 1) Howard barely used, 2) Howard did not request be admitted, 3) was not admitted, 4) was not authenticated and, 5) was not received or considered by the Hearing Examiner.

Additionally, despite Howard's elaborate argument to this court, Howard did not argue to the H.E. that the deputy could not

⁶ Howard did attempt to raise the issue in Superior Court after the briefing deadlines and less than six court days before final oral arguments, but the Judge denied the petition. CP 135-42; CP 143-44.

have observed the infraction, nor did he raise it as an issue in his appeals brief in Superior Court. CP 87; CP 23-38.

At the hearing, Howard never asked the deputy any questions regarding the distance available to Howard in signaling, what the deputy was or was not able to observe, or even whether the exhibit was a fair and accurate depiction of the way the scene looked at the time of the stop. Howard presented no witnesses to contradict the deputy's testimony and never argued to the H.E. that he should admit or consider the Google Earth images.

The H.E. ruled, without argument, that there was probable cause to stop the vehicle based on the infraction that the deputy observed. RP 95-96. Howard did not even contest this ruling in his Motion to Reconsider and did not timely assign error to the specific finding of fact or conclusion of law regarding the stop. CP 474-84.

Generally issues can not be raised for the first time on appeal. RAP 2.5(a). Similarly, with the exception of some limited exceptions that do not apply here, "Issues not raised before the agency may not be raised on appeal" to Superior Court. RCW 34.05.554.

Lastly, Howard meets none of the criteria set out in RAP 9.11 for accepting additional evidence on appeal.⁷

4. ASSIGNMENT OF ERRORS #4, #5, #10, #11. GENERALLY, NEW ISSUES AND ARGUMENTS CAN NOT BE RAISED FOR THE FIRST TIME IN A MOTION TO RECONSIDER OR TO AN APPELLATE COURT; HOWARD CAN NOT NOW RAISE THESE ISSUES.

RCW 34.05.470, by analogy of CR 59, does not permit Howard to propose new theories of the case that could have been raised before the entry of an adverse decision. Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 241, 122 P.3d 729.

Under the APA, the Court of Appeals reviews the superior court proceedings de novo. Issues not raised at the agency level may not normally be raised for the first time on judicial review. In re MacGibbon, 139 Wn. App. 496, 503-04, 161 P.3d 441 (2007).

RAP 10.3(g) requires Howard to assign error to specific findings of fact, with reference to each finding by number. A court, in its appellate capacity, will review only a specific assignment of error or an error clearly disclosed in an associated issue.

RAP 10.3(g). Errors raised for the first time in a reply brief are

⁷ Howard has separately submitted a Motion to Remand the Matter back to the H.E. for inclusion of the exhibit. In KCSO response brief, it more fully briefed the requirements under RAP 9.11. A ruling has not yet been received.

generally too late. Cowiche Canyon Conservancy v. Bosley,
118 Wn.2d 801, 809, 828 P.2d 549 (1992).

a. Assignment Of Error #4. The H.E. Properly Ruled That Deputy Had Probable Cause To Stop Howard Based On The Evidence Admitted At The Hearing.

As noted above, Howard never requested that the Google Earth exhibit that he marked be admitted into evidence. More importantly, even if the exhibit had been admitted or made part of the official record, Howard never argued that, contrary to the deputy's testimony, the deputy could not have observed the infraction that formed the basis for the stop. Howard never asked the deputy any questions about his ability to observe the infraction and, again, never asked the H.E. to consider the marked exhibit as contrary evidence to the deputy's testimony.

Furthermore, Howard did not even raise this issue in his Motion to Reconsider. CP 474-84. In Howard's appeal brief to the Superior Court, Howard did not timely assign error to the specific findings of fact or conclusions of law related to the stop, nor did Howard make the argument that he now attempts to make. CP 240; CP 501, 510. This issue was not preserved for appeal.

b. Assignment Of Error #5. The Hearing Examiner Properly Considered The K-9 Evidence Because Howard Did Not Object To The Testimony And Made No Arguments Regarding Any Foundational Requirements. The Issue Was Not Preserved For Appeal And Can Not Now Be Raised.

For the first time Howard now makes an elaborate argument regarding the foundational requirements necessary for K-9 alert evidence and the probative value of such evidence. However, Howard never made these arguments to the H.E., either at the hearing or in his Motion to Reconsider.

During the hearing Howard raised an objection to the K-9 testimony but specifically invited the H.E. to hear the testimony regarding the K-9. Howard requested the opportunity to submit a brief regarding the foundational requirements of K-9 testimony; the Hearing Examiner granted that request. RP 62.-63. Howard's attorney extensively cross-examined the deputy regarding his K-9 testimony. However, Howard did not then object to the admission of the testimony and did not follow-up with any briefing on the foundational requirements of K-9 evidence. CP 62, 69-71. Howard did not assign error to the relevant Finding of Fact #27. CP 505-06.

Howard abandoned his tentative objection, and any argument on appeal, by failing to raise the issue again, or by failing

to obtain a final ruling on the issue. In State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994), the Court held that a defendant who does not seek a final ruling on a motion in limine after a court issues a tentative ruling waives any objection. Similarly, in State v. Koloske, the Court said that, when a trial court makes only a tentative ruling, the "parties are under a duty to raise the issue at the appropriate time with proper objections at trial." State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).

Here, it is clear that the H.E. issued no ruling to the tentative objection raised. The H.E. clearly indicated that he would consider additional briefing on the foundational requirements. Nonetheless, after the testimony was completed Howard never raised the issue again and he provided no supplemental briefing on the topic. Further, Howard did not assign error to the specific finding of fact or conclusion of law. Therefore, Howard has waived this argument on appeal. CP 505-06, 511; CP 23-38.

Howard now suggests that the K-9's alert was tainted by the fact that the deputy picked the cocaine up. Again, Howard never made this argument to the H.E., either at the hearing or in his

Motion to Reconsider. Further, Howard never questioned the deputy as to whether he was wearing gloves. From a commonsense standpoint, it is inconceivable to imagine that the deputy would have picked up wet and dissolving pieces of cocaine with his bare, unprotected, hands. CP 52; CP 474-84.

Arguments not raised below will not be considered on appeal unless they concern a manifest error affecting a constitutional right. RAP 2.5(a). State v. Sengxay, 80 Wn. App. 11, 15, 906 P.2d 368 (1995). Failure to lay an adequate foundation does not create manifest constitutional error and the failure to specifically object to an inadequate foundation will not preserve the issue for appeal. State v. Newbern, 95 Wn. App. 277, 288, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999). This issue was not developed or preserved for appeal and is therefore without merit.

c. Assignment Of Error #6. Evidence Of A Pistol Located In The Trunk Was Admitted Without Objection.

Howard indicates in his brief that he objected to the admission of the unloaded Derringer found in the trunk. However, Howard does not, and can not, cite to the objection in the official transcript because no objection was ever made. Howard raised no pre-hearing motion to suppress the evidence located in the trunk

and did not object at the hearing to the deputy's direct testimony regarding the location of the unloaded Derringer pistol. Though Howard asked three questions on cross-examination regarding the search of the trunk he did not then raise any objections. Additionally, no questions were ever asked as to whether Howard consented to a search of his trunk. CP 68-69.

While generally it is too late to raise new issues in a Motion to Reconsider or on appellate review, even those briefs relegated the issue to a one sentence assertion that the Hearing Examiner should not consider the items found in the trunk because they were seized without a warrant. CP 479; CP 23-38.

Howard did not raise the issue of suppression of evidence at the hearing and he did not make a sufficient record from which any reviewing court could determine if suppression was warranted. This issue should not be considered on appeal.

d. Assignment Of Error #10. A Preponderance Of The Evidence Established That The Money Seized Was Connected To Illegal Drug Activity; Tracing To A Specific Drug Transaction Is Not Required.

Again, Howard did not raise any issues related to tracing either prior to or during the hearing, despite the fact that KCSO specifically requested that notice of any motions be provided six

days before the hearing date. CP 452-54. While Howard did brief this issue in his Motion to Reconsider and in his appeal brief to Superior Court, it was, by then, too late. CP 474-75; CP 23-38.

However, even if it had been timely raised, it is without merit. Howard essentially argues that the KCSO is not able to “trace” the money to a known drug transaction. Howard cites to Tri-Cities Drug Task Force v. Contreras, 129 Wn. App. 648 (2005) and Contreras’ cite to King County Dep’t of Pub. Safety v. 13627 Occidental Ave. S., 89 Wn. App. 554 (Div. 1 - 1998), to support his position. See Appeals Brief at Page 43-46. However, in both of the above cases, the reversal of the forfeiture order by the Court of Appeals occurred, at least in part, because there had been no findings that the forfeited property represented proceeds of any illegal activity.⁸

In King County Dep’t of Pub. Safety v. 13627 Occidental Ave. S., real and personal property had been forfeited after a doctor continued to sell certain legend drugs at his clinic and at his

⁸ In Howard’s Motion to Reconsider to the Hearing Examiner and in his appeal to Superior Court, Howard made extensive use of United States v. Garcia-Guizar, 160 F.3d 511 (9th Cir. 1998) to bolster his tracing, co-mingling, and excessive fines arguments. CP 476-79; CP 23-38. In its response briefs, the KCSO argued that Howard had completely misinterpreted the statutory basis for the holding in Garcia-Guizar and that the statute in that case was in no way analogous to RCW 69.50.505. CP 485-98. Apparently, Howard now agrees as he does not reference the case in his Appeals Brief.

personal residence after his license had been revoked. The Court of Appeals determined that the only section of former RCW 69.50.505 that applied under the facts of the case was the second clause of former RCW 69.50.505(a)(8) which allowed for forfeiture of real property that had been “acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of ... chapter 69.41.” King County Dep’t of Pub. Safety v. 13627 Occidental Ave. S., 89 Wn. App. 554, 558 (1998). The Court of Appeals determined that the trial court had made no findings that the real property had, in fact, been acquired, in whole or in part, with proceeds traceable to the doctor’s illegal sale of legend drugs and that no such finding could be made since the evidence introduced at trial showed that the clinic had been acquired some 45 years prior to the illegal sale of legend drugs and there had been no evidence introduced as to when the doctor’s personal residence had been purchased. King County Dep’t of Pub. Safety v. 13627 Occidental Ave. S., 89 Wn. App. 554, 558 (1998). The Court of Appeals made a similar finding as to the doctor’s personal property, specifically, that the trial court made no finding that the personal property had been purchased with proceeds from the illegal sale of

the legend drugs. King County Dep't of Pub. Safety v. 13627 Occidental Ave. S., 89 Wn. App. 554, 560 (1998).

Similarly, in Tri-Cities Drug Task Force v. Contreras, 129 Wn. App. 648 (Div 3. - 2005), the Court of Appeals reversed the forfeiture of personal property because there had been no findings that the forfeited property represented proceeds of illegal activity, and, thus the "hearing examiner had misapplied the statute." Tri-Cities Drug Task Force v. Contreras, 129 Wn. App. 648, 653 (2005).

A different result was reached in Escamilla v. Tri-City Metro Drug Task Force, 100 Wn. App. 742, 999 P.2d 625 (Div. 3 - 2000). The petitioner in that case, Alfonso Escamilla, was arrested when police found three kilos of cocaine in his vehicle. Both the truck and \$180 in U.S. currency were seized in anticipation of forfeiture. Pursuant to a search of Escamilla's home, also seized, were three packages of U.S. currency totaling \$14,000 and another \$3,289 found in a drawer. Finally, the \$10,000 in cash that Escamilla's wife brought to bail him out also was seized, for a total cash seizure of \$27,397. Escamilla, 100 Wn. App. at 744.

On appeal, Escamilla conceded to the forfeiture of the \$14,000 and the \$180, but argued that there was insufficient

evidence to support the forfeiture of the \$10,000 seized from Mrs. Escamilla at the jail, and the \$3,289 seized at the Escamillas' home because the plaintiff did not properly segregate or trace drug money from untainted money. Escamilla, 100 Wn. App. at 751.

The Court of Appeals disagreed finding:

(t)he hearing officer found that the \$3,289 seized from the Escamillas' dresser, and the \$10,000 seized from Mrs. Escamilla at the jail represented proceeds from illegal drug sales. In support, the hearing officer found that '[t]here were vast amounts of money coming into the Escamilla household for several years before Mr. Escamilla was arrested, much more than was substantiated by claimants' salaries and other income.' The money seized was decided to be 'either proceeds from drug transactions or commingled with proceeds from drug transactions.' Mr. Escamilla was involved in a conspiracy to deal drugs and launder money at the time he was arrested. Based upon this evidence, the hearing officer was not clearly erroneous in his findings.

Escamilla, 100 Wn. App. at 752.

In should be noted that in 2003, the legislature changed the burden of proof required by the seizing agency from a probable cause standard to a preponderance standard. "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." RCW 69.50.505(5); see Laws of 2003, ch. 53, § 348. In meeting this burden, the plaintiff is not required to demonstrate a

direct connection between the property and the illegal activity.

United States v. Twenty One Thousand Dollars (\$21,000) in U.S. Postal Money Orders and Seven Hundred Eighty-Five Dollars (\$785.00) in U.S. Currency, 298 F.Supp.2d 597, 601-02 (E.D.Mich. 2003); United States v. \$174,206.00 in United States Currency, 320 F.3d 658, 662 (6th Cir. 2003) (finding burden of proof satisfied by lack of evidence of legitimate income alone).

Further, in Sam v. Okanogan County Sheriff's Office, 136 Wn. App. 220 (Div. 3 - 2006), the Court of Appeals noted that Federal law had gone through a similar change in the standard of proof, from probable cause to a preponderance of the evidence, and was thus instructive. Sam, at 229. The Court of Appeals in Sam held that the seizing agency "may meet its burden through direct or circumstantial evidence." Sam, at 229, citing United States v. \$22,991.00 more or less, in United States Currency, 227 F.Supp.2d 1220, 1231 (S.D.Ala. 2002).

Sam v. Okanogan County Sheriff's Office, 136 Wn. App 220, is instructive as it is a case involving cash. In Sam, an airplane was located just south of the Canadian border four months after it had been reported missing. The remains of Lewton and Nichols were found, along with \$118,134 contained in three separate containers,

and some cash on each of the remains. Detectives also located a ledger which they believed showed drug transactions and a small amount of marijuana located in Nichols' shaving kit. The Okanogan Sheriff instituted forfeiture proceedings for the cash and other personal items. Sam, at 223. At the bench trial a detective testified as to the items found in the plane and that the plane had been modified with extra fuel tanks and extra cargo space. Sam, at 224. A U.S. Immigration and Customs officer testified that he believed the money was "drug money" by the way the money was packaged. He also testified that any cash over \$10,000 must be reported before transporting it to Canada; no such report existed for the money located in the plane. It was his opinion that the airplane was headed to Canada for the purpose of purchasing drugs. Sam, at 225. Mr. Sam, the executor of Lewton's estate, testified that Lewton had inherited money and that he dealt mainly in cash. Sam, at 225.

The trial judge ordered the items to be forfeited. Sam appealed and argued that there was insufficient evidence to support the forfeiture. Sam, at 228. The Court of Appeals affirmed the lower court's order of forfeiture, finding that the circumstantial evidence supported finding that the money was connected to drug

activity. The court specifically noted that a large sum of money “is highly probative of illegal activity and can help establish a link to illegal drug activity.” Sam, at 229. The court also noted that the money was found close to a small amount of marijuana, and said “[t]his is also circumstantial evidence of illegal drug activity.” Sam, at 229.

Similarly, in United States v. U.S. Currency \$83,310.78, 851 F.2d 1231 (9th Cir. 1988), the U.S. Court of Appeals reaffirmed previously held case law that possession of a large amount of cash “is strong evidence that the money was furnished or intended to be furnished in return for drugs.” \$83,310.78, at 1236, citing United States v. \$93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir.) (per curiam), cert. denied sub nom. Willis v. United States, 469 U.S. 831, 105 S. Ct. 119, 83 L. Ed. 2d 61 (1984). See also United States v. \$30,670 in U.S. Funds, 403 F.3d 448 (7th Cir. 2005) (courts look to the totality of the circumstances).

In United States v. U.S. Currency \$83,310.78, 851 F.2d 1231 (9th Cir. 1988), officers went to the home of Ms. Harris to investigate a battery allegedly committed by her son, Robert Batteau. Officers entered the residence and ultimately located Batteau in a locked bathroom. After being ordered out of the

bathroom, Batteau attempted to kick aside a brown, plastic shopping bag containing a large amount of cash. All the household members denied ownership of the money. \$83,310.78, at 1235. Before Batteau came out of the locked bathroom, officers heard the toilet running. At trial, officers testified to two prior drug convictions of Batteau. \$83,310.78, at 1236. A final judgment of forfeiture against the currency was entered. \$83,310.78, at 1233.

On appeal, Harris argued that the district court erred in concluding that there was probable cause to believe that a nexus existed between the seized currency and illegality because there “must be some evidence of drugs or drug paraphernalia in order to adequately establish a ‘connection’ with a drug enterprise.” \$83,310.78, at 1235-36.

The Court of Appeals upheld the district court’s finding noting that in a civil forfeiture proceeding “the government initially must demonstrate probable cause to believe that the property was involved in an illegal drug-related transaction.” \$83,310.78, at 1235, citing United States v. \$5,644,540.00 In U.S. Currency, 799 F.2d 1357, 1362 (9th Cir. 1986). The court further noted that probable cause is shown if “the aggregate of facts gives rise to more than mere suspicion that the property was exchanged for or

intended to be exchanged for drugs,” and that “no single fact is dispositive with regard to the probable cause issue....” \$83,310.78 at 1235, citing United States v. \$5,644,540.00 In U.S. Currency, 799 F.2d at 1363.

The Court of Appeals held that the district court properly applied the “aggregate of facts” test and noted that the fact that a controlled substance or drug paraphernalia was not found in the residence was not dispositive. Rather the aggregate of facts, including the large sum of money, Batteau's attempt to hide the money, and evidence of his prior drug convictions demonstrated “more than a mere suspicion of his involvement in illegal drug transactions.” \$83,310.78, at 1236.

Looking at the totality of the circumstances, or the “aggregate of facts,” in the instant case, the findings of fact show that Howard refused to show Deputy Savage his driver's license and then relentlessly escalated an otherwise apparently innocuous infraction stop; including an attempt to reach for a 10” curved bladed weapon capable of delivering life threatening injuries. CP 501-05. Howard had a golf ball-sized amount of suspected cocaine; an amount indicative of drug sales. Howard made numerous successful attempts to destroy the golf ball-sized cocaine

in his hand; breaking up the ball and throwing pieces into the street, down a storm drain, and into a wet bushy area while engaged in an all out fight with the deputy. CP 503-04. Even so, the deputy was able to recover two pieces that were the size of 50 cent pieces in diameter and about ¼ inch in thickness, and a smaller piece, of the cocaine. CP 504. The substance field-tested positive for cocaine. CP 506. Howard had, on his person, over \$45,000 in cash. That money was distributed in a bundle of cash in his right front pocket, a bundle of cash in his left front pocket, cash in a black wallet in his right rear pocket, and cash in a blue wallet in his left rear pocket. CP 505. In particular, of the \$15,460 located in the front pocket, the deputy noticed that \$15,000 of the money was folded into three quantities of \$5,000 each. The stacks were folded intricately on top of each other and had almost been worn to the point where they were molded into each other. The money was old script and appeared to have aging and wear marks around the edges. The deputy testified that, through his training and experience, he knows that this type of money is indicative of drug sales in that money in set-amount packets gets passed from one drug deal to another. CP 506. Howard had in his car a glass jar containing suspected cut along with two quantities of suspected cocaine base in packaging.

CP 505. Howard had bank documents from two different accounts showing he had a total amount of about \$200.00 in the bank.

CP 505. No drug paraphernalia indicative of a user, such as a pipe, steel wool, or push rod was located on Howard or in his vehicle. The deputy testified that he rarely, if ever, encounters users of cocaine who do not have either a pipe, steel wool, or a push rod on them leading the deputy to conclude that Howard possessed the narcotics for the purposes of sales/distribution.

CP 506. Howard had two cell phones on his person, one of them ringed continuously during the contact and arrest. CP 505, 508.

A certified narcotics detection dog alerted on the money which had been placed in a fresh brown paper bag alongside two other fresh brown paper bags containing other items. CP 505-06.

The deputy, a highly trained officer with more than 300 hours of narcotics specific training, and a former narcotics officer, testified that based on his training and experience, all of the above facts led him to believe that Howard was not a user of cocaine, but was in fact a mule – someone who bought and/or sold narcotics for another person or persons and that the money, located in different places and wallets was from different persons in connection with drug activity. CP 500-08.

These unchallenged findings of fact provided the H.E. with significant facts from which to conclude that the money seized was connected to narcotics activity. These conclusions were not contradicted by any evidence or testimony by Howard. CP 509-12.

e. An Eighth Amendment Analysis Does Not Apply Because The Seized Currency Was Connected To Illegal Drug Activity and the Issue Was Timely Raised.

Again, Howard attempts to confuse what objections he raised at the hearing, with what he then attempted to object to in his Motion to Reconsider or what he argued in Superior Court. While Howard suggests in his brief that he objected to the forfeiture on Eighth Amendment and tracing grounds, his “request to examine the forfeiture’s proportionality fell on deaf ears,” and that the Hearing Examiner neglected to address this issue “either orally or in his written rulings.” Appeals Brief at Page 47. Howard’s objections could not have fallen on any ears, nor could the Hearing Examiner have addressed the issues during his oral rulings at the conclusion of the hearing, because Howard never raised the issue either at the hearing or in any pre-hearing motion or briefing.

Again, the first time Howard raised the issued of excessive fines was in his Motion to Reconsider. CP 480-81. Even then it

was only briefly discussed and intermingled with Double Jeopardy issues (Howard apparently decided not to further pursue Double Jeopardy issues). Furthermore, for his argument Howard relied heavily on a ninth circuit case that the Superior Court judge found was completely inapplicable. CP 474-84; CP 485-78; CP 236-37.

At oral argument in Superior Court, Howard additionally argued that the H.E. was required to conduct an excessive fines analysis regardless of whether it was raised as an issue at the hearing. CP 235-37. On the day of oral arguments, Howard presented the judge with the case of Chavez to support this argument. Tellevik v. Chavez, 83 Wn. App. 366 (1996). The judge did not agree and even Howard now concedes in his appeals brief that a litigant must expressly ask for a proportionality analysis. CP 235-57; Appeals Brief at Page 47.

Additionally, forfeiture of drug proceeds is not a punishment but is remedial in nature and, therefore, is never considered excessive. United States v. Salinas, 65 F.3d 551 (6th Cir. 1995). See also United States v. One Parcel of Real Property Known as 16614 Cayuga Road, 2003 WL 21437207 (10th Cir. 2003) (“As a matter of law, forfeiture of drug proceeds pursuant to § 881(a)(6) can never be constitutionally excessive.”).

In United States v. Real Property Located at 22 Santa Barbara Drive, 264 F.3d 860 (9th Cir. 2001), 72 percent of the sale price of Darnell Garcia's home was forfeited because there was probable cause to believe that Garcia was a DEA agent who had led a double life as a drug dealer and that 72 percent of the purchase price came from illegal drug activity proceeds. 22 Santa Barbara Drive, at 865-67. On appeal, Garcia argued that the forfeiture of the real estate constituted an excessive fine in violation of the Eighth Amendment. 22 Santa Barbara Drive, at 874.

The U.S. Court of Appeals, 9th Circuit disagreed, reasoning that generally forfeitures are considered punitive and within the ambit of the Eighth Amendment's Excessive Fines Clause, however proceeds are not subject to the excessive fines clause "as it simply parts the owner from the fruits of the criminal activity." United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994). 22 Santa Barbara Drive, at 874. The Court of Appeals indicated its intention to follow the Seventh, Eighth, and Tenth Circuits and held "that the excessive fines clause of the Eighth Amendment does not apply to a forfeiture action brought under 21 U.S.C. § 881(a)(6)." 22 Santa Barbara Drive, at 875.

The wording in 21 U.S.C. § 881(a)(6) and RCW 69.50.505(1)(g) are very similar in that no property right exists in money “furnished or intended to be furnished by any person in exchange for a controlled substance in violation.” RCW 69.50.505(1)(g). Howard cannot make an excessive fine argument for money that he has no right to.

5. ASSIGNMENT OF ERROR #7. THE H.E. DID NOT ABUSE HIS DISCRETION WHEN HE ADMITTED EVIDENCE CONCERNING A KNIFE THAT HOWARD REACHED FOR DURING HIS ALTERCATION WITH THE DEPUTY.

At the hearing, Deputy Savage testified that early in his encounter with Howard, who was outside of his vehicle and holding something in his right hand, began to lean into his vehicle. The deputy ordered Howard to stop, but a moment later Howard bent down toward the area of the driver’s side seat between the seat and the door frame. The deputy physically restrained Howard and a fight ensued. CP 46; CP 502. After Howard was in custody, detectives located a knife with a wood handle and an approximately 10" curved blade, right where Howard had been reaching when the deputy first placed his hands on Howard. CP 51; CP 505.

Howard did object to this testimony on relevance grounds; his objection was overruled. CP 50. The standard for admission of evidence is set forth in RCW 34.05.452(1):

Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of the state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

The standard of review for evidentiary rulings is abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). The trial court has wide discretion to determine the admissibility of evidence. State v. Rivers, 129 Wn.2d 697, 709-10, 921 P.2d 495 (1996). Abuse of discretion occurs when the decision is manifestly unreasonable or based on untenable grounds. Stenson, at 701. Where reasonable persons could take differing views regarding the propriety of the actions, it is not abuse of discretion. State v. Sutherland, 3 Wn. App. 20, 22, 472 P.2d 584 (1970). The defendant bears the burden of proving abuse of discretion. State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989).

The H.E. properly exercised his wide discretion in receiving evidence that a weapon located in the exact place where Howard attempted to reach just before the deputy physically stopped him was relevant. Contrary to Howard's assertion that the presence of the knife did not make the existence of a "drug fact, more, or less, likely," the H.E. specifically found this piece of evidence relevant. Appeals Brief Page 36. In looking at the totality of the circumstances, the Hearing Examiner found that it was one additional piece of information that went toward the extreme measures Howard intended to undertake in order to keep the deputy from discovering Howard's drugs and money in what should have been an otherwise routine and innocuous encounter. CP 94-95; CP 510. Howard does not articulate how the H.E. abused his discretion in admitting the testimony and again, Howard did not timely assign error to the associated findings of fact and conclusions of law. CP 499-512. This issue is without merit.

6. ASSIGNMENT OF ERRORS #8, #9. THE HEARING EXAMINER'S DECISION THAT THE MONEY WAS PROPERLY FORFEITED WAS BASED ON SUBSTANTIAL EVIDENCE.

Howard picks at each individual piece of evidence that the Hearing Examiner relied on and argues that, it, standing alone, does not connect the seized money to drug sales. While that may be true, it is the totality of the circumstances that connected the money to drug sales. Furthermore, Howard made none of the arguments that he now makes. Howard presented no evidence, or even argued, that Howard had acquired the money over a long period of time, or that he was, in fact, living out of his vehicle; nor did Howard argue that the substance was not in fact cocaine.

The H.E. found, and the Superior Court agreed, that the KCSO proved by a preponderance of the evidence that the money seized was connected to drug sales. CP 94-94; CP 499-512; CP 235-37; CP 239-42. This decision was clearly based on the totality of the circumstances as articulated above.

Once the H.E. found by a preponderance of the evidence that the agency had the right to seize the money, the burden then

shifted to Howard to prove by a preponderance of the evidence that the money was not furnished, in whole or in part, or was not intended to be furnished, in whole or in part, in exchange for a controlled substance, or that some other statutory defense applies. CP 42; CP 511.

Howard waived his presence at the hearing and presented no evidence. CP 42; CP 411. His attorney elected not to make any oral argument and admitted no evidence.⁹ RP 93, 96. The H.E. found that Howard presented no evidence to establish that the money was acquired by any other means besides proceeds acquired in whole or in part by drug trafficking and that the money was properly forfeited under RCW 69.50.505. RP 94-95, 97, 5; CP 63, 511-12. These findings were upheld by the Superior Court acting in its appellate capacity.

⁹ Howard suggests that the Sheriff's Office "did not bother to do an income or debt analysis." Appeals Brief at Page 42. This is disingenuous as Howard is well aware that KCSO had employment securities records that it intended to introduce as rebuttal evidence. Howard had received a copy of this evidence. CP 479. The KCSO did not ultimately have a rebuttal because Howard presented no evidence to contradict the KCSO's case.

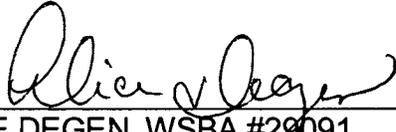
D. CONCLUSION

For the foregoing reasons, the King County Sheriff's Office asks this court to affirm both the Hearing Examiner's decision and the Superior Court's rulings.

DATED this 21 day of August, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

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Deputy Prosecuting Attorney
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ATTACHMENT 1

KS: Absolutely, that's why I wanted to contact him and find out who he was because I had the PC for the traffic violation I observed.

FHM: After – you said that there's, I think your report said there's a Shell Station at that location?

KS: Um hm (affirmative).

FHM: Right? I'm going to have something marked as an exhibit and see if I can hand it to you and see if you can – you want me just to mark it exhibit at the bottom?

HE: Okay.

FHM: You have exhibit stamp?

HE: Defense exhibit one. Well, claimant's exhibit one.

DPA: I would object, I asked for any discovery, anything that would be used during the hearing in advance of the hearing.

FHM: Well, let me just tell you what it is. That's a picture, that's a Google Earth picture of supposedly where this happened – the deputy can either say he recognize it and it's consistent with where he pulled him over and where it's not. I don't really think it's a sandbagging technique. It just, it either is or it isn't.

HE: I'll allow it under that circumstance.

DPA: Just note my objection.

KS: Well, before we get too much further and before I even look at it, I will say this. I might note some similarities, however, if you were to Google Earth my old home in California, it'll show you that it's a dirt lot, however we developed it five years ago. So there might be some similarities, but there might be some differences too.

FHM: Understood.

KS: Okay.

HE: Hearing Examiner Alfred Matthews
DPA: DPA Alice Degen
FHM: F. Hunter MacDonald
KS: Deputy Kevin Savage

FHM: Now take -- take a look at defense exhibit one. It's -- it's a multipage document, they're basically all pictures of the same thing but some of them, as you flip through there, will be closer going down.

KS: I'm looking at the top one, the one you marked exhibit one. What would you like to know?

FHM: Does the top page look like the area where you pulled over Mr. Howard?

KS: It looks like it could be the general area, yes.

FHM: Okay, but you can't say for sure?

KS: Well, no, I can't read the addresses on the buildings, so --

FHM: Okay.

KS: -- I can't be positive.

FHM: Okay. Where it says 20619 Military Road South and where it indicates that location is, is that, based on your recollection, where you pulled over Mr. Howard?

KS: Well I don't see where it's -- oh, you mean this square right here? No, that's not where I pulled over Mr. Howard.

FHM: Can you do a circle where you pulled over Mr. Howard?

KS: I've got a pen.

(Crosstalk)

FHM: Okay.

KS: Well, you can't really see it --

FHM: (Unintelligible due to crosstalk) in color.

KS: -- 'cause there's an awning over it.

FHM: There's an awning over it?

HE: Hearing Examiner Alfred Matthews
DPA: DPA Alice Degen
FHM: F. Hunter MacDonald
KS: Deputy Kevin Savage

KS: Yeah.

FHM: Okay, you want – you want to put a blue circle, that's why I gave you the blue pen. Put a blue circle over the awning.

KS: At least down here where you can see?

HE: Well, why is this relevant here?

KS: I don't know. (Laughter)

HE: (Unintelligible due to background noise) of the questions counsel.

FHM: I'm trying to get some idea of when, during these proceedings, he ran the plate, because there may be a probable cause issue here, there may not, but I don't – won't know until I can get the question answered.

HE: Well, I don't think that the lot itself is going to make any difference on that. Why not just ask him that question, when he ran the plate, at what point? I want to give you the latitude you need, but I think it can go too far. I don't – it seemed more like now it's preparation for after – for another hearing almost.

FHM: Well, that's not how I intended it, but I can understand your concerns.

HE: Okay.

FHM: I'm actually not the criminal defense attorney on the case.

HE: Alright.

FHM: I think you said that you were going eastbound on two hundred and sixth, either you were or he was, but basically you're passing in opposite directions on two hundred and sixth, right?

KS: Yes.

FHM: Okay, and is two hundred sixth a through street, meaning does it go either – does it cross all the way over Military Road South?

KS: No.

HE: Hearing Examiner Alfred Matthews

DPA: DPA Alice Degen

FHM: F. Hunter MacDonald

KS: Deputy Kevin Savage

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to F. Hunter MacDonald, Attorney at Law, PO Box 3814, Seattle, WA 98124, containing a copy of the Brief of Respondent, in LARRY L. HOWARD v. KING COUNTY SHERIFF'S OFFICE, Cause No. 63096-2-I, (King County Superior Court No. 07-2-38651-3 KNT) in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Julie Richter
Done in Kent, Washington

8-21-09

Date