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NO. 67170-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
OCT 31 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

HARRY OLEBAR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary Yu, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The trial court erred when it denied appellant's motion to return property and motion for reconsideration.

Issues Pertaining to Assignment of Error

1. Under RAP 2.2(a)(13), a party may appeal from "[a]ny final order made after judgment that affects a substantial right." Traditionally, orders on motions for return of property have been treated as appealable as of right. Where these orders satisfy the requirements of RAP 2.2(a)(13), should this Court find that appellant has the right to appeal in this case?

2. CrR 2.3(e) authorizes defendants to file motions for the return of property gathered during a criminal investigation. Once such a motion is filed, the trial court is required to hold an evidentiary hearing on the matter. In appellant's case, the court denied his motion without an evidentiary hearing and based on hearsay that only addressed some of the property at issue. Should this Court vacate the court's denials of appellant's motion and remand for the required hearing?

B. STATEMENT OF THE CASE

On December 1, 2009, the vehicle Harry Olebar was driving became disabled in an eastbound lane of SR 520. Troopers

responded and arrested Olebar for suspected DUI. A search incident to arrest revealed a large amount of currency in his pants and jacket pockets, totaling \$7,470.00. Troopers also discovered a vial containing a liquid that they suspected was PCP and a white chunky substance they suspected was cocaine. In addition to the cash, officers confiscated a cell phone and address book Olebar was carrying, and a second cell phone found inside the car. Supp. CP ____ (sub no. 1, Information/Certification for Determination of Probable Cause).

Initially, the King County Prosecutor's Office charged Olebar with possessing PCP. Id. In exchange for a guilty plea, that charge was reduced to a non-felony: solicitation to possess PCP. CP 1, 4-22. On February 17, 2011, Olebar pled guilty and was sentenced to 90 days' incarceration. CP 2-3.

On March 14, 2011, Olebar filed a motion to return the property confiscated at his arrest. Supp. CP ____ (sub no. 17, Motion to Release/Return Any and All Property/Evidence). Citing RCW 10.105.010, which authorizes forfeiture upon conviction for a felony, Olebar argued that since he had not been convicted of a felony, there were no grounds for forfeiture and no grounds for continued retention of the personal property. Id. He informed the

court that he was prepared, if necessary, to present evidence supporting his request. CP 27.

The State filed a response in which it contended – by way of hearsay – that the confiscated cash had been forfeited under RCW 69.50.505, the statute addressing forfeitures for violations of the Uniform Controlled Substances Act.¹ CP 24. The hearsay response indicated that notice of the intended forfeiture had been timely sent to the address Olebar provided when arrested in December 2009 and to the address on file with the Department of Licensing. When no claim was made within 45 days, the currency was forfeited. CP 24-25.

On March 30, Olebar submitted a reply to the State's response. Supp. CP ____ (sub no. 22, Motion to Return/Release Property/Evidence). Among other authorities, Olebar cited CrR 2.3. He challenged the reliability of the Assistant Attorney General's statements concerning the currency and asked the court to find the statements "void." He also noted again that in addition to the

¹ The State's response included a declaration from a Deputy Prosecutor relating what an Assistant Attorney General told him concerning what had happened to the cash. See CP 23-24.

currency, he sought return of the cell phones and address book.

Id.

On April 1, 2011, without yet receiving Olebar's March 30 reply,² the Honorable Mary Yu denied Olebar's motion for return of property, finding that the Washington State Patrol had administratively forfeited the currency in accordance with RCW 69.50.505. CP 28.

On April 12, Olebar filed a motion for reconsideration, arguing that none of the confiscated property and currency was properly forfeited under RCW 69.50.505. CP 29-33. Judge Yu denied the motion for reconsideration on May 6, 2011, and Olebar timely filed a Notice of Appeal. CP 34-38.

Commissioner Mary Neel appointed Nielsen, Broman & Koch and asked the parties to address whether the orders Olebar challenged were appealable as of right under RAP 2.2 or only subject to discretionary review under RAP 2.3(b). See Order dated 8/1/11. After the State and defense filed responsive pleadings, Commissioner Neel decided to refer the issue to the panel of this

² The court stamped Olebar's March 30th reply "received" on April 4, 2011. Supp. CP ____ (sub no. 22, Motion to Return/Release Property/Evidence).

Court that decides the appeal on its merits. See Order dated 10/12/11.

C. ARGUMENT

1. OLEBAR HAS THE RIGHT TO APPEAL DENIAL OF HIS MOTIONS.

RAP 2.2 identifies those decisions of the Superior Court that may be appealed as a matter of right. These include “[a]ny final order made after judgment that affects a substantial right.” RAP 2.2(a)(13). Denial of motion for return/release of property and denial of the motion for reconsideration of that ruling qualify under this rule.

First, since judgment was entered in February 2011, the trial court’s orders on Olebar’s motions (filed in April and May 2011) were made “after judgment.”

Second, the orders are “final” because there is nothing left for Judge Yu to decide. In State Gossage, 138 Wn. App. 298, 156 P.3d 951 (2007), reversed in part on other grounds, 165 Wn.2d 1, 195 P.3d 525 (2008), the defendant, who had been convicted of multiple sex offenses years earlier and served his sentence, filed a petition in the Superior Court seeking a certificate of discharge, restoration of civil rights, and early termination of his registration

obligations. His petition was denied and he appealed. Gossage, 138 Wn. App. at 301-302.

This Court found the matter appealable by right, reasoning that the court's order denying the petition was final because it left nothing more to be done, the trial court did not have continuing jurisdiction over the offender, and there was no set review of the matter. Id. at 302. This Court contrasted the situation with review of sexually violent predator annual show-cause hearings, dependency review hearings, and other similar matters where, by statute, the court has continuing jurisdiction and is required to conduct scheduled reviews. Id. at 302 (citing In re Detention of Peterson, 138 Wn.2d 70, 980 P.2d 1204 (1999); In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989); In re Marriage of Greenlaw, 67 Wn. App. 755, 840 P.2d 223 (1992)).

Like Gossage, the trial court in Olebar's case does not have continuing jurisdiction in this matter – there is no statute or rule requiring future consideration of his motion for return/release of property. Once the court denied that motion and the motion for reconsideration, there was nothing left to decide. Therefore, the denials are final.

Finally, Judge Yu's orders "affect[] a substantial right." As discussed further below, CrR 2.3(e) provides the right to request return of property collected during a criminal investigation. The property at issue in Olebar's case includes not only significant cash, but also cell phones and an address book. The wrongful denial of a motion for the return of seized property may improperly deny individuals the right to ownership or possession of valuable property.

Undersigned counsel is unaware of a decision directly addressing the appealability of orders for the return of property under CrR 2.3(e). Frequently, however, either the defendant or the State has been permitted to appeal these orders by right. See, e.g., State v. Marks, 114 Wn.2d 724, 726, 790 P.2d 138 (1990) (State's appeal of order returning property); State v. Nusbaum, 126 Wn. App. 160, 163, 107 P.3d 768 (2005) (defendant appeals order forfeiting property); State v. Alaway, 64 Wn. App. 796, 797, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992) (defendant appeals); State v. Pelkey, 58 Wn. App. 610, 611, 794 P.2d 1286 (1990) (State appeals); State v. Card, 48 Wn. App. 781, 782-783, 741 P.2d 65 (1987) (State appeals).

Moreover, the circumstances in State v. Ransom appear somewhat analogous. Ransom was held in custody on a robbery charge and probation detainer but was released upon posting \$10,000 cash. State v. Ransom, 34 Wn. App. 819, 820, 664 P.2d 521 (1983). Following conviction on the robbery, but before he could be booked into jail, Ransom fled. The bond money was forfeited, and a motion to vacate the forfeiture was denied. Id. at 821-822. On appeal, citing RAP 2.2(a)(13), this Court found that both the original order of forfeiture and the subsequent order denying the motion to vacate that order were “final orders made after judgment which affect a substantial right.” Id. at 824. Thus, Ransom also suggests that the denial of a motion to return forfeited currency and property satisfies RAP 2.2(a)(13). In short, property rights are substantial rights.

Indeed, in the State’s response to this Court’s query about appealability, it conceded that “Olebar may be correct that some orders denying the return of property held by the court or by police are appealable under RAP 2.2(a)(13), especially if the motion was premised on CrR 2.3(e) (Motion for Return of Property).” See Response to Court’s Inquiry Regarding Appealability, at 2-3. The State added, however, that because the currency had already been

forfeited in Olebar's case, that property was "unreturnable" and therefore the order denying its return could not "affect a substantial right as required under RAP 2.2(a)(13)." *Id.* at 3.

This second part of the State's response confuses the question of appealability with the potential merits of the appeal. "Substantial right" obviously refers to the nature of the right at issue. Once it is established that a substantial right is involved, the defendant can move forward with the appeal as of right, and the parties can *then* address the merits of the claims. The State's approach puts the cart before the horse by asking this Court to assess the potential merits of the defendant's claims before deciding whether he can appeal. The State has cited no authority for this novel approach.

Olebar satisfies RAP 2.2(a)(13), and he has the right to appeal.

2. THE COURT ERRED WHEN IT DENIED OLEBAR'S MOTIONS WITHOUT AN EVIDENTIARY HEARING OR FACTUAL BASIS.

Criminal Rule 2.3 authorizes motions for the return of property seized during a criminal investigation:

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the court for the return of the property on the

ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. If the motion is granted the property shall be returned. If a motion for return of property is made or comes on for hearing after an indictment or information is filed in the court in which the motion is pending, it shall be treated as motion to suppress.

CrR 2.3(e).

“A motion for return of property under CrR 2.3(e) is in the nature of a replevin action.” Pelkey, 58 Wn. App. at 613. Although the rule refers to property “illegally seized,” it authorizes motions for the return of any seized property. Card, 48 Wn. App. at 785-786. A motion to return property can be made at any time, including after a determination of guilt. Moreover, the rule requires an evidentiary hearing, and the failure to conduct such a hearing requires remand. Marks, 114 Wn.2d at 735; Card, 48 Wn. App. at 786-787.

“[A] court may refuse to return seized property no longer needed for evidence only if (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute.” Barlindal v. Bonney Lake, 84 Wn. App. 135, 139, 925 P.2d 1289 (1996) (quoting Alaway, 64 Wn. App. at 798). The seizure of property from an individual is prima facie evidence of entitlement to that property, and the State bears

the burden to prove a greater right to possession than that of the defendant. Espinoza v. City of Everett, 87 Wn. App. 857, 871, 943 P.2d 387 (1997), review denied, 134 Wn.2d 1016 (1998).

“RCW 69.50.505 provides the exclusive mechanism for forfeiting property used in the commission of drug crimes.” Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 297, 968 P.2d 913 (1998). RCW 69.50.505(1)(g) renders all money and other property related to the manufacture or delivery of controlled substances subject to seizure and forfeiture. Any forfeiture, however, is subject to compliance with specific requirements regarding notice, an opportunity to object, and the opportunity to be heard. RCW 69.50.505(3)-(5).

Although Olebar moved for the return of the currency, cell phones, and the address book, the State’s response in the Superior Court was limited to the currency. The State has never attempted to defend its continued possession of the cell phones and address book. CP 23-25. It is not clear on what grounds Judge Yu denied Olebar’s request for the return of these items. And it was certainly error to deny the request without an evidentiary hearing.

The only information the State offered regarding the currency is the prosecuting attorney's affidavit. See CP 23-24. Evidence can be submitted in the form of affidavits. See Card, 48 Wn. App. at 788; Pelkey, 58 Wn. App. at 614. But this one used inadmissible hearsay to describe the Assistant Attorney General's claims. See ER 802 ("Hearsay is not admissible except as provided by these rules, by other court rules, or by statute."). Olebar correctly objected to the court's consideration of this information at his first opportunity. Similar to the cell phones and address book, there was no proper basis on which to deny Olebar's request for the currency, and it was error to do so without an evidentiary hearing.

Consistent with the requirements of CrR 2.3(e), Judge Yu should hold an evidentiary hearing on Olebar's motion. If the State demonstrates (using admissible evidence) the currency was properly forfeited under RCW 69.50.505, Olebar is not entitled to its return. If, however, it was improperly forfeited, it should be returned to him. See Alaway, 64 Wn. App. at 800-801 (State's failure to comply with RCW 69.50.505 required return of property under CrR 2.3(e)).

If the cell phones and address book were not forfeited under RCW 69.50.505 – the sole mechanism for doing so – there is no lawful authority for the State Patrol to deny Olebar possession of these items, and Judge Yu should order their return. On the other hand, if the phones and address book were forfeited with the currency,³ the State will have an opportunity to demonstrate compliance with RCW 69.50.505 at the mandatory evidentiary hearing.

³ Determining this should be relatively easy. A seizing agency is required to maintain records of all forfeited property for at least seven years. See RCW 69.50.505(8)(a)-(b).

D. CONCLUSION

Olebar can appeal denial of his motions as of right under RAP 2.2(a)(13). Judge Yu erred in denying Olebar's motions where (1) the only information regarding the currency was inadmissible hearsay, (2) there was no information regarding the remaining property, and (3) she failed to hold the mandatory evidentiary hearing. This matter should be remanded for that hearing.

DATED this 31st day of October, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67170-7-1
)	
HARRY OLEBAR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF OCTOBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HARRY OLEBAR
611 12TH AVENUE S. #300
SEATTLE, WA 98144

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER 2011.

x *Patrick Mayovsky*

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