

09560-6

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NO. 69560-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY HUYNH,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 4

 1. The outcome of a motion for an evidentiary hearing to return seized property pursuant to Criminal Rule 2.3(e) is subject to direct appellate review 4

 2. The order denying Mr. Huynh’s Criminal Rule 2.3(e) motion should be reversed because the trial court failed to hold the required evidentiary hearing 9

F. CONCLUSION 12

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Campbell, 112 Wn.2d 186, 770 P.2d 620 (1989) 7

State v. Marks, 114 Wn.2d 724, 790 P.2d 138 (1990) 9, 10, 11, 12

State v. Richardson, 177 Wn.2d 351, 302 P.3d 156 (2013) 6, 7, 8, 9

Washington Court of Appeals Decisions

Seattle–First Nat’l Bank v. Marshall, 16 Wn. App. 503,
557 P.2d 352 (1976) 6

State v. Alaway, 64 Wn. App. 796, 828 P.2d 591 (1992)..... 4, 5, 8

State v. Brandt, 172 Wn. App. 463, 290 P.3d 1029 (2012)..... 4, 5

State v. Card, 48 Wn. App. 781, 741 P.2d 65 (1987)..... passim

State v. Huynh, 175 Wn. App. 896, 307 P.3d 788,
review denied 179 Wn.2d 1007 (2013) 2, 8

State v. Pelkey, 58 Wn. App. 610, 794 P.2d 1286 (1990) 5

Constitutional Provisions

Const. art. I, § 7 4, 8

U.S. Const. amend. IV 8

Rules

Criminal Rule 2.3 passim

Rule of Appellate Procedure 2.2 passim

Rule of Appellate Procedure 2.3 8

A. SUMMARY OF ARGUMENT

Over four thousand dollars and a cell phone was seized from Jeffrey Huynh when he was arrested. The underlying judgment and sentence is now final. Mr. Huynh filed a post-conviction motion to return seized property under Criminal Rule 2.3(e), which has been interpreted to require an evidentiary hearing. The trial court failed to provide an evidentiary hearing, denying Mr. Huynh's motion based on the State's argument alone at a hearing at which Mr. Huynh's presence was not allowed. The order denying the motion should be reversed and the matter remanded for the required evidentiary hearing.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Criminal Rule 2.3(e) by failing to hold an evidentiary hearing on Mr. Huynh's motion to return seized property.
2. The trial court erred in striking Mr. Huynh's motion to return seized property.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An order after final judgment is appealable as of right. Our courts have always reviewed as an appeal of right orders on a post-conviction or post-dismissal motion to return seized property. Should

this Court review the post-judgment order denying Mr. Huynh's motion for return of seized property without an evidentiary hearing on direct appeal?

2. Criminal Rule 2.3(e) provides a motion procedure for persons aggrieved by the government's unlawful search and seizure of property to request return of the seized property. Our courts have held that CrR 2.3(e) requires an evidentiary hearing prior to the court determining the propriety of the motion. Should this Court reverse the trial court and remand for an evidentiary hearing where the court struck Mr. Huynh's motion to return property without him present and without evaluating the evidence before it?

D. STATEMENT OF THE CASE

Over four thousand dollars in cash and a cellular phone were seized from Jeffrey Huynh when he was arrested and charged with possession of a controlled substance with intent to manufacture or deliver. He was convicted following a jury trial, and the judgment and sentence were upheld on appeal. *State v. Huynh*, 175 Wn. App. 896, 307 P.3d 788, *review denied* 179 Wn.2d 1007 (2013).

After the conviction, Mr. Huynh filed a pro se motion for return of property pursuant to CrR 2.3(e). CP 16-22. He noted a hearing and

requested transport from prison to secure his presence at the hearing. CP 17, 19-20; CP __ (Sub # 163, 164).¹ In the briefing on the motion, the parties filed affidavits in addition to argument. CP 12-28. However, Mr. Huynh was not transported for the hearing. RP 6. Rather, at a hearing on October 17, 2012, the State argued an evidentiary hearing was not necessary because it asserted the property had been forfeited. RP 6-8. Based on the State's argument, and without any reference to the affidavits or evidence presented, the Court denied Mr. Hunynh's CrR 2.3(e) motion, striking it based on the State's purported forfeiture. RP 8; CP __ (Sub # 172 (10/17/12 order)).

Mr. Huynh appealed the order denying his motion. CP 33-34. The appeal was initially designated as a motion for discretionary review and the parties filed the corresponding briefing. Notation Ruling, No. 69650-6-I (Oct. 29, 2012). However, Commissioner Mary Neel declined to apply the motion for discretionary review criteria because our courts have consistently directly reviewed appeals from motions to return seized property. Notation Ruling, No. 69650-6-I (Feb. 26, 2014). Counsel was appointed for Mr. Huynh and a briefing schedule set. *Id.* The Court requested that, in addition to the merits,

¹ A supplemental designation of clerk's papers has been filed for all documents designated by subfolder number.

the parties address whether an order denying a motion for return of property is subject to direct review on appeal. *Id.*

E. ARGUMENT

1. The outcome of a motion for an evidentiary hearing to return seized property pursuant to Criminal Rule 2.3(e) is subject to direct appellate review.

Although the Court has redesignated Mr. Huynh's motion for discretionary review as a direct appeal, the parties were asked to address the appealability of an order on a motion to return seized property. The Rules of Appellate Procedure list those categories of claims that are appealable as of right via a direct appeal. RAP 2.2(a). RAP 2.2(a)(13) provides specifically for direct appeal from any final order after judgment that affects a substantial right. The trial court's order denying Mr. Huynh's motion was entered after the judgment in his case and it affects his substantial right to his personal effects. *See* Const. art. I, § 7.

As Commissioner Neel recognized in ruling this appeal is subject to direct review, our courts have regularly reviewed appeals from a CrR 2.3(e) motion as a direct appeal. *State v. Brandt*, 172 Wn. App. 463, 290 P.3d 1029 (2012); *State v. Alaway*, 64 Wn. App. 796, 828 P.2d 591 (1992); *State v. Card*, 48 Wn. App. 781, 741 P.2d 65

(1987); *see* Notation Ruling, No. 69650-6-I (Feb. 26, 2014). In *Alaway*, this Court reviewed on direct appeal “whether the [trial] court erred by denying the defendant’s [post-conviction] motion for return of property and, conversely, by granting the State’s motion to retain and sell the property.” 64 Wn. App. at 798 (reversing order forfeiting property to State under trial court’s proclaimed “inherent authority”). In the recent *Brandt* case, the defendant appealed from the trial court’s denial of his post-conviction motion for return of seized property under CrR 2.3(e). 172 Wn. App. at 464-65. On direct review, this Court affirmed because the State satisfied its burden by showing at an evidentiary hearing that Mr. Brandt had forfeited all seized property in a combined plea agreement, to which Mr. Brandt presented no competing evidence or challenge. *Id.* at 465-66. In *Card*, 48 Wn. App. 781, this Court also heard, as a direct appeal, the State’s appeal from the trial court’s order to return seized property entered without a hearing. Likewise, in *State v. Pelkey*, 58 Wn. App. 610, 611-12, 794 P.2d 1286 (1990), this Court took direct review of a post-dismissal order for return of property.

Direct review not only satisfies the letter of the Rules of Appellate Procedure and comports with prior decisions, but it also

comports with our Supreme Court’s recent interpretation of RAP 2.2(a)(13). *State v. Richardson*, 177 Wn.2d 351, 302 P.3d 156 (2013). In *Richardson*, a third-party intervenor moved to unseal records in a criminal matter, after judgment had been entered. *Id.* at 356. The trial court denied the motion and the intervenor filed a notice of direct appeal to the Supreme Court. *Id.* at 356-57. The deputy clerk denied appeal as of right and redesignated the matter as a motion for discretionary review. *Id.* at 357. But the parties were allowed to argue the appealability issue when review was granted. *Id.* The Supreme Court reversed the reclassification of the appeal as a motion for discretionary review. *Id.* at 363-65.

The *Richardson* Court held that RAP 2.2(a)(13) applies “in cases where the underlying criminal action has concluded.” 177 Wn.2d at 364. “For [RAP 2.2(a)(13)] to apply, the order must affect a substantial right ‘other than those adjudicated by the earlier final judgment.’” *Id.* (quoting *State v. Campbell*, 112 Wn.2d 186, 190, 770 P.2d 620 (1989) (citing in turn *Seattle–First Nat’l Bank v. Marshall*, 16 Wn. App. 503, 508, 557 P.2d 352 (1976))). Because the motion to unseal was ruled on six years after the final judgment in the criminal matter, because the motion was not adjudicated in the final judgment,

and because the motion affected the substantial right of public access to court records, an appeal as of right under RAP 2.2(a)(13) lies. *Id.* at 364-65.

The Court also found the lack of effective alternatives relevant to its decision that appeal lies as a matter of right. *Richardson*, 177 Wn.2d at 365. The Court noted that “discretionary review is seldom granted.” *Id.* Because so few discretionary review motions are granted, the trial court would effectively become the ultimate arbiter of the open trial issue raised by the intervenor in *Richardson*. *Id.* The Court found that result would have been unacceptable. *Id.* Moreover, the Court reasoned it might simply compel intervenors to file independent actions or writs of mandamus. *Id.* For all these reasons, the Supreme Court accepted the intervenor’s challenge on direct review. *Id.*

Like the motion to unseal proceedings in *Richardson*, direct appeal is the proper means of review of Mr. Huynh’s post-judgment motion for return of property. As in *Richardson*, the underlying criminal case has concluded, and Mr. Huynh filed his motion well after the judgment and sentence was entered. *See* Mot. for Discr. Review at 2 (sentencing held Jan. 2012). This Court affirmed the convictions and

judgment and sentence. *State v. Huynh*, 175 Wn. App. 896, 307 P.3d 788, *review denied* 179 Wn.2d 1007 (2013). Because Mr. Huynh's judgment and appeal are final, he has no subsequent opportunity for direct appeal. Unlike the typical motion for discretionary review, Mr. Huynh does not seek review on an interlocutory basis. *See* RAP 2.3. Moreover, the motion for return of seized property raises an issue not adjudicated in the final judgment and sentence; appeal as of right is proper. RAP 2.2(a)(13); *Richardson*, 177 Wn.2d at 364-65.

As in *Richardson*, Mr. Huynh raises an issue that affects his substantial rights. In *Richardson*, the intervenor's motion related to the substantial interest in open proceedings. 177 Wn.2d at 364-65. Here, property was seized from Mr. Huynh during the investigation of the underlying charges. He seeks return of his property and has a "protectable property interest in the seized materials." *Card*, 48 Wn. App. at 790; *see* U.S. Const. amend. IV; Const. art. I, § 7.

In *Alaway*, the defendant also sought return of property seized during investigation of criminal charges. 64 Wn. App. at 797. This Court reviewed the trial court order on direct appeal and reversed, holding the trial court did not have inherent authority to order forfeiture of the property. *Id.* at 797, 801; *see State v. Marks*, 114 Wn.2d 724,

790 P.2d 138 (1990) (reviewing trial court order returning confiscated property and remanding for evidentiary hearing). The same should occur here.

In short, this Court's treatment of this and other appeals from an order on a CrR 2.3(e) motion to return seized property as a direct appeal is proper under the RAP 2.2 and the case law interpreting it.

2. The order denying Mr. Huynh's Criminal Rule 2.3(e) motion should be reversed because the trial court failed to hold the required evidentiary hearing.

Criminal Rule 2.3(e) provides:

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 a motion to suppress.

Prior to ruling on a motion under CrR 2.3(e), the trial court must hold an evidentiary hearing. *Marks*, 114 Wn.2d at 734-35; *Card*, 48 Wn. App. at 786. Quite simply, "CrR 2.3(e) requires an evidentiary hearing." *Card*, 48 Wn. App. at 786.

In *Card*, the defendant moved to return unclaimed personal property seized by the State from her property after she pled guilty to

possession of stolen property. 48 Wn. App. at 782. The parties submitted briefs supporting their positions on the defendant's motion. *Id.* at 786. The court ruled in the defendant's favor without considering any evidence—in the form of live testimony or affidavits. *Id.* This Court reversed the ruling because the procedure was “defective” due to the lack of evidentiary hearing. *Id.* at 786-87.

In *Marks*, our Supreme Court affirmed *Card* and set forth four guidelines for motions under CrR 2.3(e). 114 Wn.2d at 734-35. The first requirement is that “[a]n evidentiary hearing is required under CrR 2.3(e) where the State and the defendant can offer evidence of their claimed right to possession.” *Id.* at 735. In *Marks*, the State had requested a hearing but the trial court denied a hearing, simply ordering the property returned to the defendant. *Id.* at 729. Because the trial court failed to abide by the required procedure, the Supreme Court reversed and remanded for an evidentiary hearing. *Id.* at 736.

Here, the State and Mr. Huynh submitted briefs and affidavits on his CrR 2.3(e) motion. CP 12-28. Mr. Huynh noted a hearing and requested his presence for an evidentiary hearing. CP 17; CP __ (Sub # 163 (note for motion docket), 164 (proposed order to return Huynh to Skagit County for hearing)). But at the hearing on October 17, 2012,

without transporting Mr. Huynh or making him available by telephone, the court denied Mr. Huynh's motion based on the prosecutor's argument alone. RP 6-8; CP __ (Sub # 172 (10/17/12 order)). The court did not look at the evidence presented through affidavits; it did not hold an evidentiary hearing. RP 6-8. Rather, the court accepted the State's argument as true and struck the motion. RP 8 ("Alright. I see no reason then to have Mr. Huynh brought here, nor is there any reason for a hearing. The property is gone and it has been gone for over a year."). The court's procedure was "defective" under *Marks* and *Card*. *Marks*, 114 Wn.2d at 734-36; *Card*, 48 Wn. App. at 786. As in those cases, the order should be reversed and the matter remanded for an evidentiary hearing.

At the hearing on remand, the State has the initial burden "to prove a greater right of possession than the defendants." *Card*, 48 Wn. App. at 790-91. If the State satisfies its burden, Mr. Huynh can counter the State's evidence. Mr. Huynh contends the State's evidence is invalid. *See* CP 17 (affirming he never received notice of forfeiture); Mot. for Discr. Review at 1 & App. 2 (Apr. 10, 2013) (asserting the forfeiture notice presented by the State does not contain his signature).

Criminal Rule 2.3(e) requires an evidentiary hearing to determine these competing claims to rightful ownership.

F. CONCLUSION

The denial of Mr. Huynh's motion for return of seized property is reviewable as of right. Moreover, the trial court erred when it failed to hold an evidentiary hearing on the motion. The denial of Mr. Huynh's motion should be reversed and the matter remanded for an evidentiary hearing in accordance with Criminal Rule 2.3(e) and the decisions interpreting it.

DATED this 11th day of August, 2014.

Respectfully submitted,



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

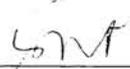
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69560-6-I
v.)	
)	
JEFFREY HUYNH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF AUGUST, 2014.

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