

09560-6

09560-6

NO. 69560-6-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**JEFFREY HUYNH,**  
Appellant.

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

The Honorable Susan K. Cook, Judge

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**RESPONDENT'S BRIEF**

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SKAGIT COUNTY PROSECUTING ATTORNEY  
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Office Identification #91059

Courthouse Annex  
605 South Third  
Mount Vernon, WA 98273  
Ph: (360) 336-9460

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SKAGIT COUNTY PROSECUTOR  
RICHARD A. WEYRICH

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## **I. SUMMARY OF ARGUMENT**

Jeffrey Huynh was convicted of Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance for arranging a drug deal with a local drug task force where he obtained \$4,000 for being the broker. The task force forfeited the money after Huynh failed to respond to his forfeiture notice.

After conviction and while his appeal was pending, Huynh filed a pro se motion under CrR 2.3 to obtain the money which had been in his possession upon arrest. Since the property had been forfeited, the trial court struck the hearing and did not rule upon the motion.

Because Huynh's right to the property had been adjudicated in the prior proceeding, Huynh does not have the right to appeal under RAP 2.2(a)(13) because the trial court order was not the final order affecting a substantial right.

Furthermore, the trial court did not err in determining no factual hearing was required under CrR 2.3 and CrR 3.6(a) given the prior adjudication.

## **II. ISSUES**

Where property previously forfeited in a statutory forfeiture proceeding, is a defendant entitled to review as of right to under RAP

2.2(a)(13) of a decision denying a hearing as final order affecting a substantial right?

Is review more appropriately treated as discretionary review under RAP 2.3(b)?

Where the property had been forfeited previously and the trial court was aware of the facts of the case from trial, did the trial court err in failing to require an evidentiary hearing under CrR 2.3 and CrR 3.6(a)?

### **III. STATEMENT OF THE CASE**

#### **1. Statement of Procedural History**

On May 24, 2011, Jeffrey Huynh was charged with Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance alleged to have occurred on May 20, 2011. CP \_\_ (Supplemental Designation of Clerk's Paper's Pending, Sub. No. 1, Information filed May 24, 2011).

Jeffrey Huynh was a broker who arranged with an undercover police officer to buy drugs. CP \_\_ (Supplemental Designation of Clerk's Paper's Pending, Sub. No. 2, Affidavit/Declaration of Probable Cause filed May 24, 2011). The deal was discussed and finalized at a Mount Vernon restaurant with a Raymond Mak and Huynh present. *Id.* During the exchange of money, Huynh took \$2,000 from Mak. *Id.* After exchanging the money, the undercover officer gave two kilograms of cocaine and a smaller bag of

cocaine to Mak. Id. Mak concealed the cocaine in the trunk of his vehicle. Id. The undercover officer then paid Huynh the remaining commission of \$2,000. Id. Officers stopped Mak's vehicle a short distance away. Id. Mak and Huynh were arrested. Id. Huynh had \$4,105 on his person when arrested. Id at pages 4-5. A search warrant executed on the vehicle revealed the bag with cocaine, the jacket used to conceal the money, and numerous cell phones. Id.

No suppression motion of motion for return of property under CrR 2.3 was raised prior to trial.

On January 23, 2012, the case went to trial. 1/24/12 RP 3.<sup>1</sup>

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<sup>1</sup> The State will refer to the verbatim report of proceedings which were filed in the Court of Appeals in case number 68369-1-I by using the date followed by "RP" and the page number. The report of proceedings in this case were as follows:

7/28/11 RP	Continuance Hearing
8/16/11 RP	3.5 Hearing
9/8/11 RP	Continuance Hearing
9/22/11 RP	Continuance Hearing
10/14/11 RP	Continuance Hearing
11/23/11 RP	Continuance Hearing
12/1/11 RP	Continuance Hearing
12/14/11 RP	Suppression Motion and Continuance Hearing
1/4/11 RP	Suppression and Severance Motions
1/13/13 RP	Suppression and Severance Motions
1/23/12 RP	Trial Day 1 (in volume with second day of trial)
1/24/12 RP	Trial Day 2 (in volume with first day of trial)
1/25/12 RP	Trial Day 3
1/26/12 RP	Trial Day 4
1/27/12 RP	Trial Day 5
2/10/12 RP	Sentencing
6/15/12 RP	Motion for Discovery
10/17/12 RP	Motion for Return of Property/Findings.

On January 27, 2012, the jury returned verdicts finding Huynh guilty of Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance. The jury also returned special verdicts finding that the Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance were major violations of the uniform controlled substances act.

On February 10, 2012, the trial court sentenced Huynh to an exceptional sentence of 96 months of prison time on Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance. 2/10/12 RP 44.

On February 24, 2012, Huynh appealed from the conviction.

On October 1, 2012, Huynh filed a motion for return of the buy money and the cell phone in the trial court. CP 18-21. In the motion, Huynh contended that the money and phone were seized from his person. CP 18-9. Huynh also contended that the money and phone “were seized without any form of paper that Mr. Huynh signed and forfeited.” CP 19. The Statement of Relevant Facts in the motion was limited to the assertion that the money was that the money and phone were “to used evidence entitled case was seized by the State specifically \$4,100 in currency and a T-mobile cell phone value \$1,000 which was taken from Mr. Huynh’s possession.” CP 20.

Huynh filed a declaration along with the motion contending that he was just on his way to the Casino and that he was arrested based upon a cocaine transaction for drugs found in Mr. Mak's vehicle. CP 16, at paragraphs, 3 & 4. Huynh contended that he did not receive any notification of the seizure and contended that he was the rightful owner of both items. CP 17, paragraphs 6 & 7.

Huynh also filed a "Certificate of Authenticity of Documents" attaching correspondence between Huynh's prior trial counsel. CP 12-5. In the e-mail, defense counsel indicated that Mr. Huynh wanted "his telephone and \$2000 released from evidence." CP 15. The e-mail also provided information to Huynh's counsel that \$4,105 and a T-mobile phone were seized from Huynh and forfeited long months before. CP 15..

On October 17, 2012, the State replied with copies of the Notice of Seizure and Intended Forfeiture as well as the statement of the drug task force commander that the forfeiture was completed since no requests for hearings were received. CP 5-10. Huynh had been personally served with the notice of seizure and forfeiture on May 24, 2011. CP 8. He failed to request a hearing and the forfeiture was entered on July 28, 2011. CP 10.

On October 17, 2012, the hearing came before the judge who had heard the trial in the case. 10/17/12 RP 1, 6. The trial court found there was

no need for a hearing since the property had previously been forfeited and struck the hearing. CP 42, 10/17/12 RP 8.

On October 29, 2012, Huynh filed a Notice of Appeal from the trial court's order striking the motion hearing. CP 33-4.

Huynh contended in his motion for discretionary review that the trial court erred in denying the defendant's motion for return of property, and in the alternative he requested an evidentiary hearing about whether it was in fact his signature on the notice of seizure and intended forfeiture. Huynh also sought appointment of counsel to handle review.

On August 12, 2013, the Court of Appeals issued a decision in Huynh's direct appeal affirming his conviction. See *State v. Huynh*, C.O.A. No. 68369-1-I Slip Op. issued August 12, 2013. No issues regarding unlawful search or seizure of the money were raised by Huynh's counsel or by Huynh himself in his pro se supplemental issues. Huynh filed a petition for review which was assigned Supreme Court Number 89294-6.

On December 2, 2013, this Court requested the State to file an answer to the defendant's motion for discretionary review.

On December 11, 2013, the Supreme Court entered an order denying a petition for review of Huynh's direct appeal. See *State v. Huynh*, S. Ct. No 89294-6.

On February 26, 2014, a commissioner of the Court of Appeals determined that several cases treat a denial of a motion to release property as an appealable order, and therefore treated the challenge as the denial of an appealable order. The order appointed Huynh counsel. The order also directed “that in addition to addressing the merits, the parties shall address whether an order denying a motion for return of property brought under CrR 2.3(e) is an appealable order under RAP 2.2(a) or subject to the discretionary review criteria of RAP 2.3(b).”

## **2. Summary of Trial Testimony Pertaining to Huynh.**

Seim Delacruz is an agent with border patrol who was working as an undercover officer with the Skagit County Interlocal Drug Enforcement Task Force in 2011. 1/24/12 RP 57, 59. Agent Delacruz worked trying to dismantle drug trafficking organizations by acting as a mid-level dealer. 1/24/12 RP 61.

Delacruz became aware of a person named Jeff who wanted to purchase kilograms of cocaine. 1/24/12 RP 61. Jeff wanted to broker a deal in Skagit County as it is a hub for dealing. 1/24/12 RP 62. Delacruz was used given his Hispanic descent. 1/24/12 RP 62.

On January 26, 2011, Delacruz spoke with Jeff by phone and represented he was a kilo-level dealer. 1/24/12 RP 62. Delacruz sent Jeff a photograph of drugs. 1/24/12 RP 64. To gain Jeff’s confidence, Delacruz

had a number of conversations with Jeff until May 20, 2011. 1/24/12 RP 65. Delacruz met with Jeff on February 10, 2011, at a restaurant in Mount Vernon to provide samples. 1/24/12 RP 67, 68. Officers put two kilograms of drugs which had been seized from the border in the back of a car to show to Huynh. 1/24/12 RP 72-3, 92. Jeff said he was coming from Portland and was bringing the person who was actually going to purchase the drugs. 1/24/12 RP 68, 75. Delacruz identified the co-defendant Jeffrey Huynh in court as the person he met with. 1/24/12 RP 67. Officers never identified the other person at that meeting. 1/24/12 RP 91. Delacruz met Huynh outside, and they went inside the restaurant. 1/24/12 RP 75. Delacruz was talking mostly with Huynh, but the other person was sitting across from Delacruz, looking at Delacruz and not saying anything. 1/24/12 RP 76. Huynh asked to see the cocaine. 1/24/12 RP 76. Delacruz asked another officer to bring the drugs by. 1/24/12 RP 76. Huynh and the other man had a conversation in their native Asian language, which Delacruz could not understand. 1/24/12 RP 86, 107. Huynh and Delacruz went outside. 1/24/12 RP 77. Huynh and Delacruz got inside a vehicle and Huynh was shown the two packages of drugs. 1/24/12 RP 77. Huynh took pictures and they spoke about the quality of the cocaine. 1/24/12 RP 77. After they returned inside, Huynh and the other man spoke again, and they told Delacruz they would decide about the purchase in a couple of days. 1/24/12

RP 79-80. After the call, Delacruz complained to Huynh about the way the other person conducted himself during the meeting. 1/24/12 RP 110.

Over the next few months, Delacruz and Huynh had conversations about the drugs twenty to thirty times and they arranged on prices. 1/24/12 RP 81, 102, 1/25/12 RP 108. Huynh appeared to be working for three different buyers. 1/25/12 RP 150. Huynh wanted a broker's fee as part of the price. 1/24/12 RP 81-2. The drugs they were talking about dealing were of a quality to be cut before being sold to others who would then use or re-sell the drugs. 1/24/12 RP 80, 82. The price for the cheaper of the two packages was \$21,000, with the broker's fee. 1/24/12 RP 81-2, 85-6. The more expensive package was to be sold at \$24,000 with the broker's fee. 1/24/12 RP 85.

Huynh arranged to set up a three kilogram deal in March of 2011, at the Burlington Haggen's store. 1/25/12 RP 108. Huynh had initiated the call, but ended up canceling the delivery. 1/25/12 RP 109. Huynh also sent text messages scheduling the deal. 1/25/12 RP 110. Huynh told Delacruz the drugs were going to be sent to Canada. 1/25/12 RP 110. On April 15, 2011, Huynh started contacting Delacruz to set up a deal for a certain group. 1/26/12 RP 9. This group was the one that eventually lead up to a deal. 1/26/12 RP 9, 11. Huynh tried to arrange the deal again on April 22<sup>nd</sup> and

May 6<sup>th</sup>, but both fell through. 1/25/12 RP 113, 1/26/12 RP 11-12. Huynh texted Delacruz on May 7<sup>th</sup> saying:

Chino got the money squared away, having them send it to me to prove it, and I will send it to you to see, and if you still down, sorry man.

1/26/12 RP 12. Huynh appeared to be arranging the transactions to get the finder's fees in cash and also to get samples. 1/25/12 RP 167-8. On May 17, 2011, Delacruz got a text message from Huynh to arrange a deal for Friday, May 20<sup>th</sup>. 1/26/12 RP 14, 1/25/12 RP 167

On May 20<sup>th</sup>, Huynh contacted Delacruz again between noon and 2:00 and said that he was ready to do the deal. 1/25/12 RP 115. They agreed on a price of \$42,000 for two kilograms plus the \$2,000 fee. 1/25/12 RP 115. Delacruz was not sure it was going to happen until Huynh called back from Seattle indicating he was with the buyer. 1/25/12 RP 116-7. They arranged to meet at the same restaurant. 1/25/12 RP 121. Officers couldn't get DEA agents available so they set up other officers as surveillance. 1/25/12 RP 122. Delacruz wore a body wire. 1/25/12 RP 125. Delacruz parked outside and went in to the restaurant. 1/25/12 RP 125. Huynh and two other individuals were sitting at a table next to the bar. 1/25/12 RP

Agent Delacruz identified Raymond Mak, one of the defendant's sitting in court, as one of the other individuals he met on May 20, 2011.

1/24/12 RP 83, 126. The other individual was Mr. Lin. 1/25/12 RP 126.<sup>2</sup> Huynh took Delacruz outside to talk. 1/25/12 RP 126. Huynh told Delacruz he was getting \$2,000 for each kilogram. 1/25/12 RP 127. Huynh also talked about future transactions. 1/25/12 RP 127. Huynh wanted to use the term BMW for one kilogram, Cadillac for two kilograms, and use east coast times for meetings. 1/25/12 RP 127. Huynh indicated future buys would be three to five kilograms per week, every other week. 1/25/12 RP 127. Delacruz and Huynh went back inside with the other two men. 1/25/12 RP 128. At the table, Delacruz spoke with both Mak and Huynh. 1/25/12 RP 129. During the conversation, it appeared to Delacruz that Huynh had not told Mak about the sample that Huynh was asking for because Mak did not know about the sample. 1/25/12 RP 156. Delacruz said he wasn't going to show them anything until they showed him the money. 1/25/12 RP 129. Huynh and Mak went to the bathroom. 1/25/12 RP 129. Huynh then called Delacruz telling him to come to the bathroom. 1/25/12 RP 130. Mak was in the bathroom with Huynh, when Huynh pulled up his jacket sleeve and showed Delacruz bundles of \$100 bills stacked together. 1/25/12 RP 130. Photographs of the money bundled in amounts easier to count were admitted at trial. 1/25/12 RP 130-2. Mak wanted to see the cocaine. 1/25/12 RP 132-

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<sup>2</sup> Agent Delacruz later found out that Lin and Mak were Chinese and Huynh was Vietnamese. 1/26/12 RP 20

3. At that point, Delacruz had just Mak accompany him outside the restaurant and took him to the vehicle in which the cocaine was stored. 1/25/12 RP 134. Delacruz opened the trunk and Mak opened the bag, reached in and grabbed the kilo on top and looked at it. 1/25/12 RP 134. Delacruz also showed Mak the sample. 1/25/12 RP 134.

During the walk to the vehicle and the walk back inside, Mak and Delacruz talked about Mak wanting to buy more. 1/25/12 RP 135. Outside Mak pointed to his car, a BMW, which was parked in the lot in the first stall. 1/25/12 RP 136. They walked back inside the restaurant. 1/25/12 RP 136. They agreed to do the deal. 1/25/12 RP 140. Delacruz tried to get Huynh not to be present but Huynh insisted on being there. 1/25/12 RP 141.

They exited the restaurant to Delacruz's vehicle with Huynh as the front passenger and Mak seated behind Delacruz. 1/25/12 RP 141-2. Huynh brought out the jacket with the money. 1/25/12 RP 142. Delacruz drove around the lot to the back. 1/25/12 RP 142-3. Mak said he wanted his cocaine and they again showed Delacruz the money offering him to count it. 1/25/12 RP 143. Delacruz said he would not. 1/25/12 RP 143. Delacruz told Mak he would pop the trunk so Mak could grab the cocaine and go. 1/25/12 RP 143. Huynh handed Delacruz the money. 1/25/12 RP 144. Delacruz popped the trunk, and Mak got out. 1/25/12 RP 143. Mak took the bag with cocaine, closed the trunk and walked away. 1/25/12 RP 144, 186.

Huynh told Delacruz he wanted the \$2,000, so Delacruz took \$2,000 from the bundle and counted it out to Huynh to get him to leave. 1/25/12 RP 144. Once Huynh left, Delacruz saw Mak walking north. 1/25/12 RP 144. Delacruz then saw Mak in his BMW exiting the restaurant. 1/25/12 RP 144. Delacruz saw a commotion behind him believing Lin and Huynh had been arrested but Mak was getting away. 1/25/12 RP 144. Delacruz notified two officers who pulled over Mak. 1/25/12 RP 144. Delacruz and Detective Dave Floyd later counted out the money and determined there was \$42,000 and the commission of \$2,000 given to Huynh. 1/25/12 RP 146. Delacruz also saw the bag which had been in his car in the back of Mak's car after Mak was stopped and the trunk to his vehicle opened. 1/25/12 RP 186, 188.

#### **IV. ARGUMENT**

**1. Where there had already been a forfeiture of the money in a separate statutory forfeiture proceeding, the trial court's order was not a final order affecting a substantial right.**

The determination of whether the trial court's order in this case is appealable is dependent upon what was actually decided. Since there had already a forfeiture proceeding under RCW 69.50.505, the trial court did not conduct an evidentiary hearing and there was no final order in the superior court.

Huynh has a remedy to attempt to pursue recovery of his property in the forfeiture proceeding.

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

...

(13) Final Order after Judgment. Any final order made after judgment that affects a substantial right.

RAP 2.2. The forfeiture proceeding had already addressed the defendant's right to possession. Therefore the trial court order here did not affect a substantial right.

According to federal authority, **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**. See, e.g., *United States v. Farrell*, 606 F.2d 1341, 1347 (D.C. Cir. 1979); *United States v. Wright*, 610 F.2d 930, 939 (D.C. Cir. 1979); *United States v. Wilson*, 540 F.2d 1100, 1101 (D.C. Cir. 1976); *United States v. Brant*, 684 F. Supp. 421, 423 (M.D.N.C. 1988).

*State v. Alaway*, 64 Wn. App. 796, 798, 828 P.2d 591 (1992) (emphasis added). Huynh's substantial right was affected by the forfeiture proceeding, not by the decision of the trial court denying a hearing.

Huynh has the remedy to challenge the forfeiture proceeding. He is not entitled to an additional challenge to the forfeiture by challenge under CrR 2.3.

In the cases that have reviewed rulings under CrR 2.3, there had actually been a factual hearing or the State sought review. And in no case

did the State contest the ability to appeal under RAP 2.2(a)(13) because there had previously been a separate statutory forfeiture action.

In *State v. Card*, 48 Wn. App. 781, 741 P.2d 65 (1987), the defendant plead guilty to possession of stolen property in the second degree. After sentencing, she filed a motion to retrieve property unclaimed by victims. The trial court decided to return the property to the defendant without an evidentiary hearing. The State appealed the decision. The Court of Appeals determined there should have been a factual hearing. *State v. Card*, 48 Wn. App. at 786-7, 741 P.2d 65 (1987). In that case, the property had not been the subject of a statutory forfeiture action.

In *State v. Pelkey*, 58 Wn. App. 610, 794 P.2d 1286 (1990), the defendant had been charged with bribery but the charge was dismissed. The defendant sought return of the items offered as a bribe under CrR 2.3. The State contended the property had not been the subject of a seizure. The trial court granted the defendant's motion and the State appealed from a hearing under CrR 2.3. The Court of Appeals reversed the return since there had been an illegal contract and left the parties where they were. Again the case did not involve property resolved in a separate statutory forfeiture proceeding.

In *State v. Marks*, 114 Wn.2d 724, 790 P.2d 138 (1990), the State appealed from both a motion to dismissal and a motion for return of

property following a suppression hearing. The trial court had ordered return of property to the defendants after dismissal despite different individuals claiming the property was theirs. The Supreme Court reversed the case for a hearing to allow individuals to assert their claim. Again, the situation was not one where the property had been adjudicated in a prior proceeding.

In *State v. Alaway*, 64 Wn. App. 796, 828 P.2d 591 (1992), the defendant appealed from an order forfeiting his real property which was used to grow marijuana. The defendant was charged with, plead guilty to and sentenced on a charge of manufacture of marijuana. No action was taken with regard to forfeiture or return of the real property. The defendant appealed. There had been no attempt by the State to comply with the statutory provisions for forfeiture under RCW 69.50.505. Thus, the defendant was entitled to return of his property. *State v. Alaway*, 64 Wn. App. at 800, 828 P.2d 591 (1992). In contrast to the present case, there was no forfeiture proceeding at which the defendant could resolve his right to possession. In addition, in that case there was no indication that the State challenged the ability to appeal the order under RAP 2.2(e)(13).

Likewise, in *State v. Brandt*, 172 Wn. App. 463, 290 P.3d 1029 (2012), there was no indication that the State contested the ability to appeal an order entered pursuant to CrR 2.3. And in *Brandt*, the trial court had

conducted an evidentiary hearing after the claim and determined that the Brandt failed to present the trial court with any evidence showing his right to possess the seized property by rebutting his agreed forfeiture in a separate plea agreement. *State v. Brandt*, 172 Wn. App. at 466, 290 P.3d 1029 (2012). Thus, the Court in *Brandt* was dealing with a hearing, rather than referencing a prior statutory forfeiture proceeding at which the interest in the property was determined.

Other cases interpreting RAP 2.2(a)(13) show that there are limitations on what is considered to be a final order. Where other remedies exist, a trial court ruling can be determined not to constitute a final order that affects a substantial right.

In *State v. Campbell*, the defendant sought to challenge a death warrant under RAP 2.2(a)(13). The Supreme Court acknowledged the order was a final order after judgment. *State v. Campbell*, 112 Wn.2d 186, 189, 770 P.2d 620 (1989). However it was determined not to affect a substantial right within the meaning of the rule. *Id.* In rule, the court held as follows.

A final order entered after judgment is appealable under RAP 2.2(a)(13) only if it affects a right other than those adjudicated by the earlier final judgment.

*State v. Campbell*, 112 Wn.2d 186, 190, 770 P.2d 620 (1989), *citing*, *Seattle-First Nat'l Bank v. Marshall*, 16 Wn. App. 503, 508, 557 P.2d 352 (1976).

In *State v. Howland*, 180 Wn. App. 196, 321 P.3d 303 (2014), a defendant sought review of trial court decision dismissing her petition for conditional release following an acquittal for first-degree murder. The Court of Appeals specifically considered whether appeal was available as of right under RAP 2.2(a)(13). The court considered the recent case of *In re Detention of Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999) in which the Supreme Court determined that review of a decision about whether probable cause existed to permit review of a sexually violent predator commitment was not a final order given court's continuing jurisdiction over the commitment. The Court in *Howland* determined that similarly, a defendant's ability to seek review of the conditional release at a later time resulted in the decision denying the motion was not a final order. *State v. Howland*, 180 Wn. App. at 203, 321 P.3d 303 (2014). Both *Howland* and *Petersen* present situations where there was continuing authority of the trial court over the matter.

In contrast, here the trial court concluded the matter had already been disposed of in a prior proceeding as such the trial court's order would

not be setting aside the forfeiture decision. Thus, the trial court decision did not affect Huynh's right to possession.

In *State v. Richardson*, 177 Wn.2d 351, 302 P.3d 156 (2013), extensively relied upon by Huynh, the case involved a motion to unseal a criminal file brought by a third party. The Supreme Court in that case granted direct discretionary review of the trial court decision. In deciding the case, the Supreme Court determined that denial of a motion to unseal is appealable as of right. The Supreme Court determined that review was available under RAP 2.2(a)(13).

Accordingly, we hold that an intervenor seeking to unseal criminal records has a right to appeal as a matter of right under RAP 2.2(a)(13), where the order denying unsealing is entered after final judgment in the underlying criminal proceeding and the right affected was not previously adjudicated.

*State v. Richardson*, 177 Wn.2d 351, 365, 302 P.3d 156 (2013). In contrast to *Richardson*, here the right had been previously adjudicated in the forfeiture proceeding.

None of the cases cited by Huynh require a court to hear a motion under CrR 2.3(e) where matters were or could be resolved in a statutory forfeiture proceeding.

Since the trial court could decline to hear the matter, review is not as of right under RAP 2.2(a)(13).

**2. Discretionary review under RAP 2.3(b) adequately protects a defendant's rights.**

Discretionary review is limited to specific circumstances under RAP 2.3(b).

(b) Considerations governing acceptance of review. Except as provided in section (d), discretionary review may be accepted only in the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless; or
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation

RAP 2.3. Huynh cannot establish any of these circumstances because the trial court was properly exercising authority under CrR 2.3 and CrR 3.6(a) as described below. Just because a defendant cannot establish that there was situation meriting review of the trial court decision, does not mean that a defendant challenging a concluded forfeiture is without remedy.

A defendant has the ability to appeal from the forfeiture decision. In addition, a defendant may have the ability to pursue a civil action against the agency for impropriety of the forfeiture. Just because a defendant does not avail himself of those remedies should not require a court to give the defendant another avenue to challenge a forfeiture proceeding.

**3. Where the property had already been forfeited, the trial court did not err in denying a factual hearing.**

In the present case, the trial court was made aware that there had been a seizure and forfeiture action which resolved the ownership right to the property in question. CP 8, 10. Under these circumstances, the court's order striking the motion was consistent with the rule, recited in *Alaway*, that a request for return of property may be denied if the property has been the subject of a forfeiture proceeding. *State v. Alaway*, 64 Wn. App. 796, 798, 828 P.2d 591 (1992) Here there was a separate forfeiture proceeding under RCW 69.50.505.

Given the evidence before the court from the trial and the defendant's vague claims, the trial court did not err in denying the defendant a hearing.

(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 a motion to suppress.**

CrR 2.3(e) (emphasis added). There is no dispute that the present motion was brought after the information was filed. Thus, the motion must be treated as a motion to suppress. CrR 3.6 provides the mechanism for a trial court dealing with a motion to suppress, allowing initial consideration without an evidentiary hearing.

(a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. **The court shall determine whether an evidentiary hearing is required** based upon the moving papers. If the court determines that no evidentiary is required, **the court shall enter a written order setting forth its reasons.**

CrR 3.6 (emphasis added).

In the present case, the trial court in addition to having the defendant's moving papers and the State's response was also aware of the full testimony from trial under oath. At the time of Huynh's motion, he acknowledged his awareness that the money and phone had already been the subject of a forfeiture action, since he attached e-mail correspondence between his trial counsel and the prosecutor. But Huynh made no assertion

as to what steps he did to seek to address his contentions that he did not receive the notice of seizure and intended forfeiture, instead just forging ahead with his motion. The trial court was well aware of the facts of the case. The trial court was in a position to determine whether an evidentiary hearing was required. By the time of the hearing, the record before the trial court indicated the property had already been disposed of under RCW 69.50.505. Based upon the record before the trial court, including the forfeiture order and Huynh's copy of an e-mail showing that forfeiture had already occurred, the trial court correctly determined that Huynh's interest in the property had already been adjudicated.

## **V. CONCLUSION**

Because the interest in the cash and cell phone had already been adjudicated in a prior proceeding, the trial court's order denying a hearing was not a final order affecting a substantial right. Thus, Huynh is not entitled to appeal as of right.

And further, given the prior adjudication, the trial court did not err in denying an evidentiary hearing under CrR 2.3 and CrR 3.6(a).

For the foregoing reasons, review must be denied and the decision not to require a hearing affirmed.

DATED this 14<sup>th</sup> day of October, 2014.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by;  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Mick Woynarowski, addressed as Washington Appellate Project, 1511 Third Avenue, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 14<sup>th</sup> day of October, 2014.

  
KAREN R. WALLACE, DECLARANT