Case No. 313611

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON DEPARTMENT OF FISH AND WILDLIFE,

Appellant/Cross Respondent,

v.

ONE FORD 1999 F350 DIESEL PICKUP TRUCK, and a REMINGTON MODEL 77, 7mm RIFLE

and

JOHN R. COON and SABRINA K COON,

Respondents/Cross-Appellants.

OPENING BRIEF OF THE RESPONDENTS/CROSS-APPELLANTS

Submitted by:

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I. INTRODUCTION

John and Sabrina Coon write to answer the opening brief of the State Department of Fish and Wildlife, and write to explain their cross-appeal on the trial court's denial of their request for attorneys' fees.

II. ASSIGNMENT OF ERROR RE: CROSS-APPEAL

1. The trial court erred in finding that the Coons were not entitled to attorney fees and in finding that the actions of the Department were substantially justified.

2. The trial court erred in concluding that only attorney Stephen Graham worked on the Petition for Removal of Forfeiture.

III. ISSUES

1. Did the trial court err in ordering the State to return seized property for violating the 15-day statutory forfeiture deadline?

2. Did the trial court err in not awarding the requested attorney fees to the claimants?

IV. STATEMENT OF THE CASE

Fish and Wildlife agents investigated a report of poaching on November 19th, 2011 in Ferry County. CP 32. The agents stopped a vehicle driven by John Coon, interviewed the occupants, took a tissue sample of what appeared to be blood on the truck, and responded to the

suspected scene of the crime. CP 32-33. The agents inspected the scene, observed signs of hunting of a deer, and again interviewed John Coon when he returned. CP 33. Agent Weatherman interrogated John Coon and threatened forfeiture by indicating to him that he faced "closed season charges that could cost him his rifle and his vehicle." CP 39. Mr. Coon refused to make a statement. Id. The agent continued to attempt to coerce Mr. Coon into making a statement by informing him that the State had the authority to seize his vehicle and rifle and he "faced the possibility of losing both." Id. When Mr. Coon continued to invoke his right to remain silent, he was arrested. Id. Two days later, Mr. Coon called to ask if he could have his truck back, and was told that he "would not get it back" and that he would hear from the WFDW "legal staff." CP 43. Mr. Coon did hear from WDFW, but not until January 31st, 2013 when the department wrote that they were seizing the vehicle for forfeiture. CP 57. After Mr. Coon hired a lawyer and contested the forfeiture, the department wrote that on "...November 19th, 2011, Fish and Wildlife Officers seized for forfeiture to the State of Washington a 1999 Ford F350 diesel pickup and a Remington mod 77, 7mm rifle, Marline Model 336 .35 caliber, for forfeiture to the State of Washington." CP 61. The case proceeded along the administrative track until May 2nd, 2012 when a petition for removal to Superior Court was filed. CP 1-7. On September 20th, 2013 the Coons

filed a motion to dismiss the forfeiture proceeding on the grounds that the notice of forfeiture was not timely made. CP 12-15. A hearing was held on December 14th, 2012, and the court granted the Coons' motion. CP 66-67.

The State filed a "motion for reconsideration", and attempted to get the court to consider additional evidence. CP 68-73. The additional evidence included a "property receipt" signed by Agent Weatherman which purports to take the vehicle as "evidence." CP 78. The motion for reconsideration was denied, and a written order resulted. CP 110-114. The Coons, having prevailed in the case, asked for an award of attorney's fees because the forfeiture was not substantially justified. CP 115-130. That motion was denied. CP 114. A timely appeal was filed by the State, and a timely cross-appeal was filed by the Coons on the denial of attorneys' fees.

IV. RESPONSE ARGUMENT

A. The Trial Court Properly Construed the Forfeiture Statute

In Washington State, forfeiture sought by a government agency is governed by statute. See RCW 77.15.070(2). "Every jurisdiction that has considered the question has held that the power to order forfeiture is purely statutory. State v. Alaway, 64 Wash. App. 796, 800, 828 P. 2d 591, 593 (1992)[citing United States v. Farrell, 606 F. 2d 1341 (D.C. Cir. 1979)].

Moreover, "according to federal authority, a court may refuse to return a 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." Id. at 798. Pursuant to RCW 77.15.070(2):

> In the event of a seizure of property under this section, jurisdiction to begin the forfeiture proceedings shall commence upon seizure. Within *fifteen days* following the seizure, the seizing authority shall serve written notice of intent to forfeit property on the owner of the property seized and on any person having any known right or interest in the property seized. (emphasis added).

Consequently, "there is no authority anywhere . . . that the court had the inherent power to order forfeiture." Id. at 801. Finally, the State must comply with the statute governing forfeiture otherwise the defendant will be entitled to have the property returned. Id.

Coon's motion was properly granted because the WDFW failed to adhere to the statutory requirement that notice be provided within 15 days after the seizure. RCW 77.15.070(1) states "fish and wildlife officers . . . may seize . . . vehicles . . . they have probable cause to believe have been held with intent to violate . . . this title." However, pursuant to RCW 77.15.070(2) "within fifteen days following the seizure, the seizing authority shall serve written notice of intent to forfeit property."

In this instance, WDFW seized Coon's pickup truck on November 19, 2011 due to an allegation that Coon committed Unlawful Hunting of Big Game. Consequently, "jurisdiction to begin forfeiture proceedings shall commence

upon seizure." RCW 77.15.070(2). It was not until January 31, 2012, that Coon received a letter from the WDFW regarding a notice of intent to forfeit. These facts are similar to the facts of Alaway referenced above. 64 Wash. App. 796, 828 P. 2d 591 (1992). In Alaway, the defendant was arrested for a marijuana growing operation and the defendant's personal property was seized on October 6, 1988. Id. Consequently, the State moved for an order forfeiting the property to the authorities on May 30, 1989. Id. at 797. Ultimately, the court found that the State failed to follow the statutory forfeiture procedures as prescribed by RCW 69.50.505(c) and ordered the defendant be returned his property. Id. at 801. In this instance, the WDFW waited 52 days before it provided Coons with notice that the State was pursuing forfeiture. However, pursuant to RCW 77.15.070(2), WDFW was required to provide Coons with notice of intent to forfeit property with 15 days after the seizure. The State did not comply with forfeiture procedure prescribed by RCW 77.15.070(2) and as a consequence, the return of the truck and the firearm were proper.

The State points out that RCW 77.15.094 authorizes game agents to "seize evidence as needed for law enforcement." One problem with this argument is that the State never did show why the seizure was needed for law enforcement. Even if you assume that the truck was used to commit a crime, that doesn't mean the agents can hold the truck as evidence. The police do not seize vehicles for evidence when the evidence is used in the commission of a DUI, or Reckless Driving offense. Likewise, vehicles are not seized in instances

when the vehicle transports marijuana or alcohol for underage drinking. The State would have us believe that the WDFW can hold the vehicle as "evidence" until the two-year statute of limitations has run. It would seem odd that the legislature would envision such a draconian remedy for misdemeanor offenses. At the time that the offense was allegedly committed, the Unlawful Hunting of Big Game was a minor bail-forfeitable offense. The rule of law that the State asks this court to adopt would allow an officer to seize a vehicle for evidence and hold it for a year until the statute of limitations was up even for offense such as fishing without a license.

The State argues that the interpretation of the statute by the trial court would lead to absurd results, i.e. that the forfeiture seizure would have to occur contemporaneously with an evidentiary seizure, or would have to occur after the property was returned for evidentiary purposes. Appellant's Brief at 16. This may be impractical, but it is not absurd, and it is the State legislature that set these guidelines. If the WDFW doesn't like the statute, they should lobby for a legislative change. Additionally, the scenario the State fears is not likely to occur very often at all. It is not clear at all why WDFW would ever need to seize a person's car for evidence purposes anyway. The State had not shown this to be a common scenario. WDFW should operate just like every other police agency in the State, i.e. they should process the car for evidence and return it in the next couple of days. It is really only in such cases as vehicular

homicides do you really see traditional law enforcement retain a car until a case goes to trial.

The State argues that requiring simultaneous seizure for evidence and seizure for forfeiture would lead to a rush and "which would compromise the forfeiture..." of property. It is possible that this could put the State under some pressure. However, it has never been a policy goal of any government to routine, quick and certain forfeitures. "Forfeitures are not favored...." Bruett v. Real Prop. Known as 18328 11th Ave. N.E., 93 Wash. App. 290, 295, 968 P.2d 913, 915 (1998) (interpreting the drug forfeiture laws in 69.50.401). It is said in a somewhat different context that "equity abhors a forfeiture." Esmieu v. Hsieh, 20 Wash. App. 455, 460, 580 P.2d 1105, 1108 (1978) aff'd, 92 Wash. 2d 530, 598 P.2d 1369 (1979).

B. The Forfeiture Occurred on November 19th, 2011.

We know in this case that WDFW envisioned forfeiture on November 19th, 2011. It was Agent Weatherman who threatened forfeiture as a way to try to get a confession from Mr. Coon. CP 39. This coercion that was attempted is disturbing. Additionally, we know that WDFW envisioned forfeiture on November 19th, because that is what their notice of forfeiture said. CP 61.

The State makes much of the fact that Agent Weatherman claims to have provided a receipt to Mr. Coon that references only a seizure for evidence. Appellant's Brief at 13, citing CP 78. However, this "receipt" was not properly

before the court. The Coons argued against this declaration being considered. CP 107-09. The WDFW's Motion for Reconsideration should be denied because the WDFW is attempting to supplement the record with the additional evidence, specifically, the Declaration of Donald Weatherman.

C. The 12/26/12 WDFW Declaration Should be Disregarded.

Pursuant to CR 59, a motion for reconsideration "may be granted for any one of the following causes materially affecting substantial rights of such parties:"

> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
> (2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;
> (3) Accident or surprise which ordinary prudence could not have guarded against;
> (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;
> (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
> (6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;
> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or
(9) That substantial justice has not been done.

None of these factors apply here. In this instance the WDFW is attempting to argue that the evidence shows "that on November 19, 2011, when the Coons' property was initially seized, the Officers intended to seize the property for evidentiary purposes only." (WDFW's Mot. Recon. 3). In support of this contention, the WDFW has attempted to supplement the record with the affidavit of Officer Donald Weatherman. Both parties had ample opportunity to present evidence during the initial Coon hearing where civil forfeiture was being contested. New evidence can be admitted for the purposes of a motion for reconsideration hearing when it is newly discovered and could not have previously been discovered "with reasonable diligence" at the time of trial. CR 59. However, that is not the case in this instance. Rather, "[I]f the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence." Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland, 95 Wash. App. 896, 907, 977 P. 2d 639, 645 (1999)(citing Adams v. Western Host, Inc., 55 Wash. App. 601, 608, 779 P. 2d 281 (1989)("The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence")).

This court should not accept parties submitting new declarations after a court ruling if the material could have been presented earlier. To tolerate this

would wreak havoc in the trial court, and remove any sense of finality in their judgments.

It is true that the agents conducted further DNA tests on the vehicle after the forfeiture. However, this wasn't done out of necessity. Rather it was done because the agents failed to collect the proper samples in the first place.

V. CROSS-APPEAL ARGUMENT

RCW 4.84.350(1) provides:

> Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

In this case at bar the agency action was not substantially justified. WDFW purported to seize this vehicle well after the 45 day deadline, even after it admitted in its forfeiture letter that the vehicle was seized on November 19th, 2011. CP-61. It has been explained:

> Substantially justified means justified to a degree that would satisfy a reasonable person. It requires the State to show that its position has a reasonable basis in law and fact. The relevant factors in determining whether the Department was substantially justified are, therefore, the strength of the factual and legal basis for the action, not the manner of the investigation and the underlying legal decisions.

Silverstreak, Inc. v. Washington State Dep't of Labor & Indus., 159 Wash. 2d 868, 892, 154 P.3d 891, 904 (2007) (internal citations omitted). Here, WDFW has not met its burden in showing that that its position had a reasonable basis in fact and law.

We would ask this court to remand this matter for an award of attorneys' fees to Mr. and Mrs. Coon. We would request attorney's fees for the work at the trial court, and also for the work on appeal. "It is the general principle in Washington that those entitled to an award of attorney fees below are also entitled to attorney fees on appeal." Xieng v. Peoples Nat. Bank of Washington, 63 Wash. App. 572, 587, 821 P.2d 520, 528 (1991) aff'd, 120 Wash. 2d 512, 844 P.2d 389 (1993). Additionally, the court should have provided attorneys fee for legal work prior to the petition of removal being filed. The record shows that the legal work to fight the agency action began prior to the filing of the petition. CP 115-130. In any civil case, an attorney must do a lot of preparation in reviewing the case in preparation to file the complaint. This work was done by Kevin Curtis, and billed to Mr. Coon. CP 125-130. Mr. Coon should be reimbursed for this.

VI. CONCLUSION

In conclusion, we would ask that this court affirm the decision of trial court as to the dismissal of the forfeiture, but reverse the denial of attorneys' fees.

DATED this 23rd day of May 2013

By _____
Stephen Graham, WSBA #25403
For Mr. and Mrs. Coon

I, Stephen Graham, swear under penalty of perjury under the laws of the State of Washington that I served a copy of Appellant's Supplemental Brief by postage paid, first class, U.S. Mail, on the following persons:

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DATED this 29th day of May, 2013

_____
STEPHEN T. GRAHAM