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Division III
State of Washington

No. 31361-1

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON DEPARTMENT OF FISH AND
WILDLIFE,

Appellant,

v.

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

Defendant,

JOHN R. COON and SABRINA K. COON,

Claimants.

BRIEF OF APPELLANT

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I. INTRODUCTION

As the agency charged with enforcing Washington's fish and wildlife laws, the Washington Department of Fish and Wildlife (WDFW) is authorized to seize property for evidentiary purposes under RCW 77.15.094 (WDFW's evidence search and seizure statute) and is also authorized to seize and forfeit property under RCW 77.15.070 (WDFW's civil forfeiture statute). These authorities are separate and distinct and have their own procedures and requirements. This case examines the relationship between these two authorities where there is an initial seizure solely for evidentiary purposes and a later determination that the property already seized for evidence should be forfeited.

In the course of its investigation of the illegal killing of a deer, WDFW initially seized John and Sabrina Coons' vehicle and rifles solely for evidentiary purposes. WDFW's limited intention in seizing the property for evidence was manifest in its initial seizure notice and its later actions and communications about the seized property. About two months later, at the conclusion of its investigation, and while still in possession of the seized property, WDFW determined that forfeiture of the Coons' property was warranted and issued the Coons a written notice indicating that the agency now intended to forfeit the property pursuant to RCW 77.15.070.

The Coons timely appealed the forfeiture of the property to Ferry County Superior Court. Before that court, the Coons moved to dismiss the forfeiture, arguing that WDFW had not provided notice of its intent to seek forfeiture of the property within 15 days of its *initial* seizure—the seizure for evidentiary purposes. According to the Coons, under RCW 77.15.070(2), WDFW was required to provide them notice of its intent to forfeit the property within 15 days of that initial seizure. WDFW responded that RCW 77.15.094 provides a basis to seize property for evidentiary purposes separate and distinct from the forfeiture provisions of RCW 77.15.070 and that the initial seizure—manifestly for evidentiary purposes only—did not trigger the notice requirements of the separate forfeiture statute. The superior court agreed with the Coons’ argument and ordered dismissal of the forfeiture and return of the property.

Contrary to the superior court’s holding, WDFW provided timely notice of its intent to forfeit the property pursuant to RCW 77.15.070. WDFW was not required to provide notice of intent to forfeit the property at the time of the initial seizure for evidence because it had not yet determined that forfeiture was warranted. Conflating the two seizure authorities and requiring the agency to provide notice of any intention to seek forfeiture within 15 days of a seizure solely for evidence is inconsistent with the express provisions of these two statutes and would,

contrary to the Legislature's intent, hinder WDFW's law enforcement mission. This Court should reverse the superior court's dismissal order and remand this matter for further proceedings.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering the Order on Claimant's Motion to Dismiss (Clerk's Papers (CP) 66-67).

2. The superior court erred in concluding that the seizure for forfeiture occurred on November 19, 2011, when WDFW manifestly expressed a limited intention to seize the property for evidentiary purposes only, rather than on January 31, 2012, when WDFW issued express notice of its intent to forfeit the property.

3. The superior court erred in concluding that, under the provisions of RCW 77.15.070(2), WDFW was required to provide notice of its intent to forfeit the property within 15 days of its initial seizure, which was manifestly for evidentiary purposes only and done as part of its ongoing criminal investigation.

III. ISSUE STATEMENT

Where WDFW initially seizes property solely for evidentiary purposes as part of an ongoing criminal investigation, and then later, while still in possession of the property, decides to forfeit the property and issues express notice of that intent, does the seizure for forfeiture that triggers

RCW 77.15.070(2)'s 15-day notice requirement occur contemporaneously with the issuance of the express notice of intent to forfeit the property?

IV. STATEMENT OF THE CASE

A. WDFW's Statutory Law Enforcement, Seizure, and Forfeiture Authority

WDFW is charged with enforcing fish and wildlife laws and rules in Washington State. *See generally* RCW 77.15. In aid of this mission, WDFW has authority to seize property for evidentiary purposes as part of an investigation of a fish and wildlife offense. RCW 77.15.094 allows WDFW officers to seize and hold property for evidence "as needed for law enforcement."

WDFW also has separate authority to seize and forfeit property used, or held with intent to be used, in the commission of a fish and wildlife offense. RCW 77.15.070(1) provides that WDFW officers may seize and proceed to forfeit "boats, airplanes, vehicles, motorized implements, conveyances, gear, appliances, or other articles they have probable cause to believe have been held with intent to violate or used in violation of this title or rule of the commission or director."

As discussed in detail below, the authority to seize property *for evidence* and the authority to seize evidence *for forfeiture* are separate and distinct, each with its own procedures and requirements. The forfeiture

statute, RCW 77.15.070(2), requires that notice of intent to forfeit be given to the property owner within 15 days of a seizure for forfeiture, but RCW 77.15.094 does not contain a notice requirement for a seizure for evidence.

B. Investigation of Crimes Related to Illegal Deer Kill

This case involves illegal hunting and possession of big game by Sabrina and John Coon, the investigation of those crimes by WDFW, and WDFW's attempt to forfeit certain property used in the commission of those crimes pursuant to RCW 77.15.070. On November 19, 2011, WDFW Enforcement Police Officer Donald Weatherman and Captain Chris Anderson received an anonymous report that a large whitetail buck had recently been shot and killed in a field along State Highway 395 in Ferry County and was hanging by a mobile home nearby. CP 32, 36, 74. At the time the kill occurred, Ferry County was closed to modern firearm deer hunting. CP 32.

That same day, Officer Weatherman and Captain Anderson began an investigation of this reported illegal deer kill. CP 32-42. Based on evidence they initially gathered, they developed a preliminary suspicion that the deer had been shot and killed by Sabrina Coon at the site described by the reporting party and that the deer carcass was transported

in John Coon's 1999 Ford F-350 truck from a site near where it was killed to the nearby mobile home where it was hung up. *Id.*

Based on these preliminary suspicions, Officer Weatherman and Captain Anderson seized certain property belonging to the Coons for evidentiary purposes pursuant to RCW 77.15.094, which, as noted above, allows WDFW officers to seize property for evidence as part of a criminal investigation.¹ CP 34, 41-42, 75, 78. Among the property seized for evidence as part of the investigation was a 1999 Ford F-350 truck registered to John Coon, two rifles (a Remington Model 77, 7mm, and a Marlin Model 336 .35 caliber), and the illegally killed deer. CP 45-46, 78.

During their initial investigation, Officer Weatherman and Captain Anderson had observed blood and tissue in the back of the Coons' truck. CP 32, 36-37. On November 23, 2011, Officer Weatherman took samples

¹ At the time of this initial seizure for evidence, Officer Weatherman provided a Property/Evidence Report to John Coon. *See* CP 78. On the Property/Evidence Report, there are separate boxes to indicate either a seizure for evidence, a seizure for forfeiture, or that the property is held for safekeeping; only the checkbox for seizure for "Evidence" is marked; the checkbox for "Seizure for Forfeiture" is not marked. *Id.* The acknowledgement of seizure for forfeiture was not filled out and was not signed by John Coon. *Id.* The Property/Evidence Report was issued to Mr. Coon on November 19, 2011, when the Coons' property was seized by WDFW officers for evidentiary purposes. *Id.*

On November 21, 2011, Officer Weatherman "received a cell phone call from Mr. Coon asking when his vehicle would be returned. [Officer Weatherman] advised him it was being held *for evidence* and would not get it back [sic]. [Officer Weatherman] advised him that he would hear from [WDFW] legal staff in Olympia regarding his vehicle." CP 43 (emphasis added).

In a December 27, 2011, memorandum from Officer Weatherman to Ferry County Deputy Prosecuting Attorney Mike Sandona, Officer Weatherman stated: "The vehicle was seized *for evidence* on 11-19-11 and has been in a storage compound under my care to this point." CP 84 (emphasis added).

of the blood and tissue found in the back of the Coons' truck (which had by then been seized for evidence) and on certain articles found in the truck.² CP 44, 75-76. Officer Weatherman and Captain Anderson delivered these samples to the WDFW Molecular Genetics Laboratory so that the lab could conduct a DNA comparison between the blood and tissue samples taken from the truck and samples the Officers had taken from the carcass of the illegally killed deer and at the kill site. CP 44, 75, 82.

The WDFW Molecular Genetics Lab's test results, relayed to Officer Weatherman by telephone on January 27, 2012, confirmed that the blood and tissue collected from the Coons' truck on November 23, 2011, matched the tissue taken from the illegally killed deer and from the kill site.³ CP 76. The lab results, together with the other evidence collected during the investigation, indicated that Sabrina Coon shot the deer at the kill sight in Ferry County and that John Coon possessed the deer and used his truck to transport it. CP 56, 76.

With all of the evidence in hand and the investigation complete, Officer Weatherman and Captain Anderson determined that forfeiture of

² Later, on December 23, Officer Weatherman again took blood and tissue samples from the Coons' truck and articles in the truck. CP 75-76. This second collection occurred because Officer Weatherman was not sure whether he collected a sufficient amount of blood and tissue the first time he collected samples. *Id.*

³ These results of the testing on the samples collected November 23, 2011, were later reported in a written Wildlife Forensics Report dated May 7, 2012. CP 103-06.

the property was warranted. *Id.* On January 31, 2012, WDFW sent to John Coon, via certified mail, notice of its intent to forfeit the truck and rifle, thus commencing the forfeiture process. CP 56.

C. Procedural History

After receiving notice of WDFW's intent to forfeit the truck and rifle, the Coons sought an administrative appeal of the forfeiture. CP 58. Later, the Coons removed the administrative appeal to Ferry County Superior Court pursuant to RCW 77.15.070(4). CP 1-3. Before the superior court, the Coons moved to dismiss the forfeiture, arguing that WDFW did not provide timely notice of its intent to forfeit the property as required by RCW 77.15.070(2) because notice was not provided within 15 days of the initial seizure on November 19, 2011. CP 12-15. WDFW argued in response that no notice was required following the seizure for evidence on November 19, 2011, and that it provided notice of its intent to forfeit the property contemporaneously with its seizure of the property for forfeiture on January 31, 2012, thus fully complying with RCW 77.15.070(2). CP 16-21. The superior court agreed with the Coons and issued an order dismissing the forfeiture and requiring return of the property. CP 66-67. WDFW later moved for reconsideration, CP 68-72, which was denied in a written order issued by the superior court on January 16, 2013. CP 110-113.

V. STANDARD OF REVIEW

This Court's review of the superior court's order of dismissal is *de novo*. First, "a trial court's ruling to dismiss a claim under CR 12(b)(6) is reviewed *de novo*." *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Furthermore, the superior court's ruling in this case turned on the meaning of RCW 77.15.070 and RCW 77.15.094. As such, this case presents questions of law, which are reviewed *de novo*. See, e.g., *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

VI. ARGUMENT

A. Seizure for Evidence and Seizure for Forfeiture are Separate and Distinct and May Occur Seriatim

As discussed previously, RCW 77.15, the fish and wildlife enforcement code, allows for seizure of property for *evidence* and seizure of property for *forfeiture* and makes a clear distinction between the two. RCW 77.15.094 provides that WDFW officers may seize property for evidence "as needed for law enforcement." That statute also provides that "[s]eizure of property as evidence of a crime does not preclude seizure of the property for forfeiture as authorized by law." RCW 77.15.094. RCW 77.15.070(1), the forfeiture statute, provides, in relevant part, that WDFW officers:

[M]ay seize without warrant boats, airplanes, vehicles, motorized implements, conveyances, gear, appliances, or

other articles they have probable cause to believe have been held with intent to violate or used in violation of this title or rule of the commission or director. However, [WDFW officers] may not seize any item or article, *other than for evidence*, if under the circumstances, it is reasonable to conclude that the violation was inadvertent.

(Emphasis added.)

The plain language of these statutes clearly demonstrates that there are two kinds of seizures: seizures *for evidence* and seizures *for forfeiture*. In RCW 77.15.094, the distinction is expressly stated: “Seizure of property as evidence of a crime does not preclude seizure of the property for forfeiture as authorized by law.” And in RCW 77.15.070(1), the distinction is clearly apparent: “[WDFW officers] may not seize any item or article, *other than for evidence*, if under the circumstances, it is reasonable to conclude that the violation was inadvertent.” (Emphasis added.)

Seizure for evidence and seizure for forfeiture may occur simultaneously, but nothing in either RCW 77.15.070 or RCW 77.15.094 so requires. Seizure for forfeiture may occur subsequent to seizure for evidence, especially in cases where the evidence on which the forfeiture is based is discovered after the seizure for evidence. For example, WDFW officers may initially seize property for evidence as they are conducting their investigation of a crime and only after all the evidence is collected

and analyzed and their investigation is concluded decide that forfeiture of that property is warranted because there is at that point probable cause to believe the property was used in the commission of a fish and wildlife offense.

B. Notice Is Required Within 15 Days of Seizure for Forfeiture, But No Notice Is Required for a Seizure for Evidence

Under RCW 77.15.070(2), notice of intent to forfeit property must be provided within 15 days of seizure for forfeiture. RCW 77.15.070(2) provides, in relevant part:

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 a 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.)

While RCW 77.15.070(2) allows the option of providing written notice as late as 15 days after the seizure for forfeiture, the essential requirement is timely notice of the intent to forfeit, and such notice may be issued contemporaneously with the seizure for forfeiture. In contrast, a

seizure for evidentiary purposes pursuant to RCW 77.15.094 does not require any express written notice.⁴

C. The November 19, 2011, Seizure Was Manifestly for Evidentiary Purposes Only; Therefore, No Notice Was Required

In this case, two seizures occurred—one for evidence and one for forfeiture. The seizure that occurred on November 19, 2011, was manifestly a seizure for evidentiary purposes only. As discussed above, on November 19, 2011, in the course of their investigation of the illegal deer kill, Officer Weatherman and Captain Anderson seized the Coons' truck and rifles *for evidence*. CP 34, 41-43, 75, 78, 84. At that point in time, the officers intended only a seizure for evidence; they had not yet decided that forfeiture of the property was warranted. *Id.* The conclusion that WDFW's initial seizure was for the limited purpose of evidence associated with its ongoing criminal investigation is amply demonstrated by the following:

First, the Property/Evidence Report, which was signed and dated November 19, 2011, by Officer Weatherman, and which was provided to Mr. Coon that same day, shows that *only* a seizure for evidence was intended at that time. CP 78. As noted above, the Property/Evidence

⁴ However, in practice, WDFW officers furnish notice of seizure for evidence in the form of a Property/Evidence Report provided to the property owner upon a seizure for evidence. *See, e.g.*, CP 78.

Report form includes three check-boxes: one for “Evidence,” one for “Safe Keeping,” and one for “Seizure for Forfeiture.” *Id.* Only the “Evidence” box was checked on the November 19, 2011, Property/Evidence Report; the “Seizure for Forfeiture” box was not checked. *Id.* Further, the acknowledgement of seizure for forfeiture section of the Property/Evidence Report form was left blank. *Id.* Had Officer Weatherman intended to effectuate a seizure for forfeiture on November 19, 2011, he would have checked the “Seizure for Forfeiture” box, would have completed the seizure for forfeiture notification section, and would have obtained Mr. Coon’s signature on the acknowledgment of receipt of the seizure for forfeiture notice. That none of these occurred shows that a seizure for forfeiture was not intended on November 19, 2011.

Second, just two days after the November 19, 2011, seizure, Officer Weatherman advised Mr. Coon that his truck “was being held *for evidence.*” CP 43. Third, in a memorandum dated December 28, 2011, Officer Weatherman informed Ferry County Deputy Prosecutor Mike Sandona, that “[t]he vehicle was seized *for evidence* on 11-19-11 and has been in a storage compound under my care to this point.” CP 84. These facts further demonstrate that a seizure for evidence, not a seizure for forfeiture, was intended on November 19, 2011.

Finally, the key evidence showing that the property at issue was used in the commission of the illegal killing of the deer—the DNA match between the tissue samples taken from the Coons’ truck and the tissue samples from the illegally killed deer and the kill site—did not exist on November 19, 2011. The results of the DNA analysis comparing the tissue samples taken from the Coons’ truck, the illegally killed deer, and the kill site, which showed that the illegally killed deer had been in the Coons’ truck, were not reported to Officer Weatherman until January 27, 2012. CP 76.

Because the November 19, 2011, seizure was solely for evidentiary purposes, as demonstrated above, no notice of seizure was required to be provided at that time. Nevertheless, the Coons were provided notice of the seizure for evidence in the form of the Property/Evidence Report provided to them at the time the property was seized for evidence. *See* CP 78.

D. The Seizure for Forfeiture Occurred on January 31, 2012, When WDFW Issued Written Notice Its Intent to Forfeit the Property

On January 31, 2012, after the results of the tissue analyses were received and the investigation concluded, WDFW decided to proceed with forfeiture of the property and effectuated a seizure of the property for that purpose by issuing notice of its intent to forfeit. CP 56, 76. As it was mailed on January 31, 2012, the notice of WDFW’s intent to forfeit the

property was issued contemporaneously with the seizure for forfeiture. *Id.* And as the notice was issued contemporaneously with the seizure of the property for forfeiture, it was performed within 15 days as required by RCW 77.15.070(2).

Because WDFW already held the subject property, having previously seized it for evidence, no actual *physical* seizure occurred on January 31, 2012. But no physical act was required to effectuate the seizure for forfeiture on January 31, 2012; WDFW effectuated the seizure for forfeiture by issuing notice of its intent to forfeit the property to the Coons. As discussed in greater detail below, it would be absurd and impractical for WDFW to have to engage in some ritualistic physical act, such as physically returning the property to the owner, in order to effectuate a seizure for forfeiture. To avoid such an absurd, impractical result, the Court should recognize that a seizure for forfeiture occurred in this case on January 31, 2012, when WDFW expressly manifested its intent to forfeit the property by issuing notice to that effect, even though no other physical act of seizure occurred.

Because the seizure of the subject property *for forfeiture* occurred on January 31, 2012, and because John Coon was mailed notice of the seizure for forfeiture that same day, the Coons' argument that timely notice of the forfeiture was not provided is incorrect. In fact, WDFW

provided notice within 15 days of the seizure *for forfeiture* as required by RCW 77.15.070(2).

E. The Superior Court Erred in Holding That Notice Was Required Within 15 Days of the Seizure for Evidence

The superior court erred by conflating WDFW's authority to seize property for evidentiary purposes with its authority to forfeit property, and engrafting the 15-day notice requirement applicable to a seizure for forfeiture onto a seizure for evidence. The superior court's erroneous interpretation of the statutes results in absurdities and must be contrary to the Legislature's intent.

Under the superior court's interpretation of RCW 77.15.070 and RCW 77.15.094, WDFW cannot seize property for forfeiture that it holds as a result of an earlier seizure for evidentiary purposes, unless it returns it to its owner prior to seizing it for forfeiture. This interpretation would compromise WDFW's law enforcement mission because it would require WDFW officers to either (1) seize property for forfeiture simultaneously with seizing it for evidence or (2) return property seized for evidence in order to later effectuate a seizure for forfeiture (in other words, return the property to the owner, and then seize it back). This absurd set of options cannot have been the Legislature's intent.

Requiring simultaneous seizure for evidence and for forfeiture would require either a delayed seizure for evidence (which would compromise the investigation, possibility allowing crucial evidence to be lost or destroyed) or a rushed seizure for forfeiture (which would compromise the forfeiture by requiring the forfeiture to be commenced before it was necessarily warranted by the evidence).

The other option—requiring that WDFW undertake a ritualistic return of property seized for evidence before seizing it for forfeiture—is also absurd. Such a process would be highly inefficient and disruptive to WDFW’s law enforcement mission. Returning property held for evidence in order to effectuate a seizure for forfeiture would break the evidentiary chain of custody and would create an opportunity for the property to be altered, destroyed, or lost. This could seriously compromise WDFW’s ability to seek the successful prosecution of fish and wildlife offenses.

Nothing in the statute indicates either result was intended and this Court should avoid such an absurd interpretation of RCW 77.15.070. As the Supreme Court has recognized, “[a] court must also avoid constructions that yield unlikely, absurd or strained consequences.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

Furthermore, the superior court’s interpretation of RCW 77.15.070 and RCW 77.15.094 is contrary to the Legislature’s intent as expressed in

RCW 77.15.094. RCW 77.15.094 expressly provides that “[s]eizure of property as evidence of a crime does not preclude seizure of the property for forfeiture as authorized by law.” But, as discussed above, the superior court’s interpretation of the statutes would have the practical effect of precluding the seizure for forfeiture of property seized for evidence in some, if not many, cases. The superior court’s holding is thus, in practical effect, directly contrary to the express language of RCW 77.15.094.

F. Contrary to the Coons’ Claim, WDFW May Not Indefinitely Hold Property Seized for Evidence Before Commencing Forfeiture; It May Only Hold Property Prior to Commencing Forfeiture if Required for Law Enforcement Purposes

Before the superior court, the Coons argued that if WDFW is not required to give notice of its intent to forfeit property within 15 days of an initial seizure, even if that initial seizure is for evidentiary purposes only, WDFW will be able to seize property for evidence, hold it indefinitely, and months or even years later, proceed to forfeit the property. The superior court shared this concern and held that “[t]his is an absurd consequence in that the claimant is not able to request a cash bond to recover his property.”⁵ CP 112.

The Coons’ argument and the superior court’s holding are misplaced and further reflect their conflation of WDFW’s seizure for

⁵ At his or her option, the owner of property subject to forfeiture can post a bond equal to the value of his or her property and have his or her property returned, with the bond then subject to forfeiture to WDFW. RCW 77.15.070(1).

evidence authority with its forfeiture authority. In fact, WDFW may seize and hold property for evidentiary purposes under RCW 77.15.094 only if the property is “needed for law enforcement.” This means that as long as property seized for evidence is needed for law enforcement purposes (for example, if needed as evidence in a criminal trial), WDFW can continue to hold the property. But once property seized for evidence is no longer needed for law enforcement, WDFW must return the property, regardless of whether it is still contemplating forfeiture of the property pursuant to RCW 77.15.070.

If WDFW has seized property for evidence pursuant to RCW 77.15.094, it may continue to hold the property as long as needed for law enforcement, even if the owner has posted bond pursuant to RCW 77.15.070(1) and would otherwise be entitled to return of his or her property on that basis. Were this not the case, a criminal defendant whose property was subject to forfeiture could always post bond and have his or her property returned to him or her. If the property is evidence in a pending criminal case, the evidentiary chain of custody would be broken and WDFW would be powerless to stop its alteration, destruction, or loss. For this reason, the superior court’s concern that “the claimant is not able to request a cash bond to recover his property,” CP 112, if notice of intent

for forfeiture is not provided within 15 days of an initial seizure for evidence, is misplaced.

Furthermore, because WDFW can only hold property seized for evidence under RCW 77.15.094 as long as the property is needed for law enforcement and must return it when that need is no longer extant, the Coons' argument that WDFW can seize property for evidence and hold it indefinitely before deciding to commence forfeiture is also misplaced.

VII. CONCLUSION

WDFW provided notice of its intent to seize and seek forfeiture of the Coons' truck and rifles within 15 days of the seizure for forfeiture. Therefore, WDFW complied with the notice requirements of RCW 77.15.070(2). For that reason, this Court should reverse the superior court's order dismissing the case and remand this matter for further proceedings.

RESPECTFULLY SUBMITTED this 11th day of March, 2013.

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DATED this 11th day of March, 2013, at Olympia, Washington.

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