No. 33267-5-III

Court of Appeals, Div. III, of the State of Washington

City Of Yakima, on behalf of the Yakima City Narcotics Unit, Detective Division of the Yakima Police Department,

Respondent,

v.

Real Property Known as 1606 W. King Street, located in the City of Yakima, Washington,

Defendant,

John E. Gangwish, property owner/claimant,

Appellant.

Reply Brief of Appellant

Kevin Hochhalter
Attorney for Appellant
kevinhochhalter@cushmanlaw.com
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
T: 360-534-9183
F: 360-956-9795
WSBA # 43124

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1. Introduction

The Brief of Respondent is full of inaccuracies and factual allegations not supported by the superior court's findings, or, at times, by any evidence in the record. For example, the City's repeated assertion that the trial court found Gangwish to have committed multiple uncharged crimes (*E.g.,* Brief of Respondent at 8, 10) is patently false. The only crime the trial court found to have been committed that has any relevance to forfeiture under RCW 69.50.505(1)(h) was Luppino-Cronk's crime of possession with intent to deliver. CP 49 (finding #25).

The City also improperly relies upon a substantial evidence standard of review. Gangwish has not challenged any of the trial court's factual findings. Rather, Gangwish argues that the trial court's findings do not support its conclusions. The City has not addressed Gangwish's arguments. The trial court's findings do not support a conclusion that there was a substantial nexus between the commercial sale of methamphetamine and the defendant property or that Gangwish had actual knowledge and participated in Luppino-Cronk's crime. This Court should reverse and vacate the judgment of forfeiture.

2. Counter-Statement of the Case

While the City's Statement of the Case is more true to the record than the factual assertions made in its argument, it also contains some unsupported assertions that should be disregarded.

The City asserts that Gangwish "had been using, and arranging sales of, methamphetamine with his nephew in the residence" for many years. Br. of Resp. at 2 (citing RP 40-41). This assertion is based on inadmissible hearsay statements related by Detective Horbatko. Although the trial court erred in admitting the statements, it did not make any findings of fact based on the matters asserted.[1] This Court, like the trial court, should not consider this inadmissible testimony that is outside the findings of fact.

The City asserts that on the day of the search, "Those found in the residence were there to use methamphetamine and several had possession of

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[1] Detective Horbatko testified that he interviewed Gangwish's nephew, Andrew Edgar, who told Horbatko that he (Edgar) had sold methamphetamine for Gangwish. RP 39-41. The trial court conditionally admitted the testimony under ER 804(b)(3), assuming Edgar was unavailable under ER 804(a)(5). RP 35, 38-39. Edgar appeared on the second day of trial and testified that he did not remember talking to Horbatko about dealing drugs for Gangwish. RP 95-96. Gangwish moved to strike Horbatko's hearsay testimony, but the court declined on the basis of unavailability for lack of memory under ER 804(a)(3). RP 97-98.

The trial court erred in admitting the hearsay statements because Edgar was not shown to be unavailable. A declarant is unavailable for lack of memory if the declarant "[t]estifies to a lack of memory **of the subject matter of the declarant's statement."** ER 804(a)(3) (emphasis added). Edgar testified only to a lack of memory of his conversation with Horbatko. He did not testify to a lack of memory of the subject matter of the statements—that is, whether he sold methamphetamine for Gangwish. RP 95-96 (Q: "Do you remember **talking to him about** dealing drugs for your uncle?" A: "No." (emphasis added)). Under the plain language of the rule, Edgar was not unavailable for lack of memory and therefore the hearsay statements were inadmissible.

Although the admission of the hearsay statements was error, Gangwish did not assign error on appeal because the trial court corrected its own error when it entered its final findings of fact and conclusions of law, containing no reference to the matters asserted in the hearsay statements. *See* CP 48-50.

methamphetamine." Br. of Resp. at 2 (citing RP 25-26). The trial court made no finding regarding anyone's reason for being at the residence early that morning. CP 48-49. Horbatko provided no basis for his opinion that they were there to use methamphetamine. RP 25. Even if it were true that these people were at the residence for the purpose of using methamphetamine, that fact would be irrelevant to the forfeiture analysis, because the statute allows forfeiture of real property only on the basis of "manufacturing, compounding, processing, delivery, importing, or exporting" of drugs, not on the basis of use. RCW 69.50.505(1)(h).

3. Argument

3.1 Standard of Review

Gangwish's opening brief specified that he was not making a substantial evidence challenge to any of the trial court's findings of fact. Br. of Appellant at 5. Rather, Gangwish argued that the trial court's findings did not support its conclusions. *Id.* Whether the findings support the conclusions is a question of law this Court reviews de novo. *Buck Mountain Owners' Ass'n v. Prestwich*, 174 Wn. App. 702, 713-14, 308 P.3d 644 (2013). There is no presumption in favor of the City.

The City is incorrect when it argues the Court should not consider any facts favorable to Gangwish. Rather, this Court should consider all of the facts expressly found by the trial court, and nothing more, no matter which party the facts may favor. This Court can confidently conclude that the trial court was not persuaded by any evidence outside of its formal findings

of fact. This Court should not disturb the trial court's findings and should not search the record for evidence the trial court did not find sufficiently persuasive to warrant a formal finding of fact.

The City's analysis relies heavily upon evidence and inferences outside of the findings of fact, and therefore fails to address Gangwish's arguments. The City does not argue that the trial court's conclusions can be supported by its findings alone. The task before this Court is not to examine the underlying evidence, but to apply the law, de novo, to the trial court's unchallenged findings of fact. Because the trial court's findings do not support a conclusion that there was a substantial nexus between the commercial sale of methamphetamine and the defendant property or that Gangwish had actual knowledge and participated in Luppino-Cronk's crime, this Court should reverse and vacate the judgment of forfeiture.

3.2 The forfeiture of Gangwish's home of 20 years was an unconstitutionally excessive penalty under the Eighth Amendment.

In the opening brief, Gangwish argued that forfeiture of his home was an unconstitutionally excessive penalty under the Eighth Amendment because Gangwish's home was not instrumental in Luppino-Cronk's drug sales and because forfeiture was excessive in proportion to Gangwish's culpability. Nothing in the trial court's findings indicates any link between the property and Luppino-Cronk's drug enterprise other than that it was one place where she had sold drugs. Eviction of Gangwish and his innocent

renters is disproportionate when they had no direct involvement in Luppino-Cronk's crime.

The City argues that this Court should not address this constitutional argument because it was raised for the first time on appeal. Gangwish concedes that he failed to raise the Eighth Amendment issue in the trial court. However, a party is entitled to raise for the first time on appeal a "manifest error affecting a constitutional right." RAP 2.5(a). The record must be sufficiently complete to evaluate the merits of the claim, and the claim must have a likelihood of succeeding. *State v. WWJ Corp.*, 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999).

The City argues that the record is insufficient because it lacks certain details relevant to the proportionality analysis. Br. of Resp. at 5. Yet, at the same time, the City seems to have no problem constructing a proportionality analysis based on its reading **of the record.** *Id.* at 8-10. It would seem the record is, in fact, sufficient.

Even if this Court finds the record insufficient as to proportionality, the record is still sufficient to review instrumentality. The City concedes that the instrumentality analysis under the Eighth Amendment is essentially the same as the substantial nexus analysis under the forfeiture statute. *Id.* at 10. There is no dispute that the trial court's findings of fact are sufficient to review substantial nexus. The findings are therefore sufficient to review the instrumentality factors under the Eighth Amendment.

3.2.1 Gangwish's home was not instrumental in Luppino-Cronk's crime.

The City argues that the forfeiture was "based upon a series of crimes, not a single crime." Br. of Resp. at 7. This revision of the City's theory is contradicted by the record. In closing arguments, the City explained its theory. First, the City quoted the forfeiture statute, which requires "manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance … if such activity is not less than a class C felony." RCW 69.50.505(1)(h); *see* RP 140. The City then related the activity upon which it based its forfeiture claim: "Mr. Gangwish pled guilty to a Class C felony, and I think Ms. Luppino pled guilty for a Class B felony out of the – out of the location. And that was Possession with Intent to Deliver. So I think clearly we're talking about a delivery case." RP 140. Gangwish's crime of possession does not give rise to forfeiture because possession and use of methamphetamine is not "manufacturing, compounding, processing, delivery, importing, or exporting," as required by the statute to support forfeiture. That leaves only Luppino-Cronk's crime as a predicate offense for the City's forfeiture claim. The City only discussed Luppino-Cronk's other, uncharged, sales as circumstantial evidence that Gangwish may have known about Luppino-Cronk's activities. RP 141-42.

Even if Luppino-Cronk's other sales could support the City's forfeiture claim, the trial court's findings cannot support a conclusion that the property was instrumental to Luppino-Cronk's drug sales. The City goes

outside of the findings,[2] placing unwarranted emphasis on acts of possession or use,[3] to argue that "defendant property acts as the common factor in all of these controlled substance related crimes." Br. of Resp. at 7-8. "Common factor" is not the same as "instrumental." As the federal court explained, "[F]or the property to be the site of illegal activity, without more, does not render the property an integral part of the activity." *United States v. 6625 Zumirez Drive*, 845 F.Supp. 725, 737 (C.D. Cal. 1994).

The trial court's findings do not demonstrate any unique quality of Gangwish's house that made it instrumental to Luppino-Cronk's drug sales. Luppino-Cronk's base of operations was her car, not the house. *See* CP 49 (finding #20). There is no evidence or finding that Luppino-Cronk had access to, or gained any benefit from, Gangwish's security system. *See Id.* (finding #22). There is no evidence or finding that Luppino-Cronk had access to, or gained any benefit from, the tunnel or moldy marijuana in the

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[2] There is no finding that Gangwish or his nephew used the house to sell drugs. There is no finding that other residents used the house to purchase or sell drugs. There is no finding that Gangwish participated in drug crimes other than his own possession. To the contrary, there is a finding that Gangwish **was not observed** during any of the controlled buys at the house. CP 48 (finding #7). There is no finding that Gangwish committed the crime of maintaining a drug dwelling. The City does not define the crime or point to any evidence in the record that would establish the elements beyond a reasonable doubt. The record **does** contain evidence that the drug dwelling charge was dismissed. RP 119, 137-38. There is no finding or evidence that the house was used to manufacture any controlled substance. There is no finding or evidence of a plan to use the house as a "central location" for methamphetamine sales.

[3] As noted above, acts of possession or use do not support forfeiture. RCW 69.50.505(1)(h).

back yard. *See Id.* (finding #21). Baggies and scales are portable personal property not unique to Gangwish's home (and not part of this forfeiture proceeding). *See Id.* (findings #18-19). Gangwish's home was, apparently, a **convenient** place for Luppino-Cronk to sell, but it was not **instrumental** to her illegal activities. Luppino-Cronk can just as easily continue to sell methamphetamine from any other location.

Because the trial court's findings sufficiently demonstrate that the house was not instrumental to Luppino-Cronk's drug sales, this Court should review the Eighth Amendment issue, find that forfeiture of Gangwish's home is an excessive fine, and reverse and vacate the judgment of forfeiture.

3.2.2 The punishment of forfeiture of Gangwish's home is excessive in proportion to his culpability.

The City argues that no innocent third parties would be negatively affected by forfeiture because, according to the City, they were all "involved in controlled substances." Br. of Resp. at 9. The City is wrong. There is no finding or evidence that any residents of Gangwish's home other than Luppino-Cronk were involved in "manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance." Gangwish and his renters are innocent of any illegal activity that would support forfeiture of the house. All will be evicted for conduct they did not commit if the forfeiture is not reversed.

The City attempts to distinguish *Zumirez Drive*. The City argues that Gangwish, unlike Wall, was not acquitted of all crimes. The City notes that Gangwish was convicted of possession and asserts that he "was found to

have committed uncharged crimes by the trial court." Br. of Resp. at 10. As noted above, this assertion is patently false. There is no finding that Gangwish committed any crime other than possession. CP 49 (finding #26). Gangwish, like Wall, was innocent of any crime that could support the City's forfeiture claim.

The City also argues that, unlike Wall, Gangwish did not have a familial relationship with the person who sold drugs from the house. Although the court noted that the familial relationship had to be considered, the crux of the analysis was that the penalty—permanent and complete deprivation of all rights of ownership, and eviction from the home—"is unquestionably a severe penalty when [the owner] himself has not been found guilty" of any crime that could form the basis for forfeiture. *Zumirez Drive*, 845 F.Supp. at 736-37.

> Wall's failure to prevent his son's illegal drug activities, if he could have done so, is perhaps grave, but certainly not as grave as direct involvement in the crime itself. Yet the penalty is as severe and permanent as it would have been if Wall had committed the crime. … [T]he Court can fairly conclude that the fine imposed in this case greatly exceeds that which would be appropriate in light of the offensive behavior involved.

Id. at 737. The essential facts here are the same. Forfeiture of Gangwish's home is excessive in proportion to his culpability. The record is sufficient for the Court to review the Eighth Amendment issue and to reverse and vacate the judgment of forfeiture.

3.3 There was no substantial nexus between the drug sales and the real property.

The forfeiture statute requires "a substantial nexus exists between the commercial production or sale of the controlled substance and the real property." RCW 69.50.505(1)(h). The City concedes that the substantial nexus analysis under the forfeiture statute is essentially the same as the instrumentality analysis under the Eighth Amendment. As shown above, the trial court's findings cannot support a conclusion that Gangwish's house was instrumental to Luppino-Cronk's drug sales.

The City asserts that the house "was used to store, weigh, package, sale, and use methamphetamine for a long period of time." Br. of Resp. at 11. However, the trial court did not find that the house was so used. The trial court only found that sales had taken place there. CP 48-49 (findings #3, 4, 5, 24, 25). The fact that the house happened to be the place where sales occurred does not, without something more, make the house instrumental to the drug sales or establish a substantial nexus.

The City asserts that on the day of the first raid, Luppino-Cronk was found with "eighty to one hundred ten doses of methamphetamine." Br. of Resp. at 11. It is unclear where the City finds the evidence to support this assertion. The trial court found only that Luppino-Cronk was in possession of ½ ounce of methamphetamine. CP 48 (finding #11).

The City asserts that there is no evidence that Luppino-Cronk had drugs in her car, where her ledgers were kept. Br. of Resp. at 11. Although the trial court did not make a finding on this point, Detective Horbatko

testified that drugs were, in fact, found in Luppino-Cronk's car. RP 33. Gangwish's house was not Luppino-Cronk's base of operations.

As shown above, the trial court's findings do not demonstrate any unique quality of Gangwish's house that made it instrumental to Luppino-Cronk's drug sales. The drugs, the people, the baggies, and the scales are not features unique to Gangwish's home. Any and all of them could be moved to a different location. While Gangwish's home may have been a **convenient** place for Luppino-Cronk to sell, it was not **instrumental** to her activities. Luppino-Cronk can just as easily continue to sell methamphetamine from any other location. The City has failed to demonstrate a **substantial** nexus between Luppino-Cronk's drug sales and Gangwish's house. This Court should reverse and vacate the judgment of forfeiture.

3.4 The City failed to prove that Gangwish had actual knowledge of the drug sales at his home.

In the opening brief, Gangwish argued that the City had the burden of proving that Gangwish actually knew (not should have known) that Luppino-Cronk was selling drugs from his home. Gangwish argued that the trial court's findings show, at most, that Gangwish should have known, and therefore forfeiture was improper.

The City argues that it had only a burden of production and that Gangwish bore the burden of persuasion of showing lack of knowledge and consent. This is inconsistent with the plain language of the statute. The City is required to prove that the property is subject to forfeiture. Under RCW 69.50.505(1)(h), this includes proving that the real property is "being

used with the knowledge of the owner" for specified illegal activities. Thus the City must first prove that Gangwish had actual knowledge. There is then a defense available to Gangwish, to show that the "act or omission [was] committed or omitted without the owner's knowledge **or consent."** RCW 69.50.505(1)(h)(i) (emphasis added). However, Gangwish has not argued this defense on appeal; rather, Gangwish argues that the City failed to meet its initial burden to prove actual knowledge.

The City argues that there is direct evidence of actual knowledge. The City refers to testimony from Mr. Edgar, which, as shown above, was inadmissible and was not relied on by the trial court in making its findings of fact. This Court should not consider it.

The City relies on the trial court's finding that Gangwish purchased methamphetamine from Luppino-Cronk at the property (finding #24). However, the fact that Gangwish purchased drugs from a visitor in his own home on one occasion does not compel a conclusion that Gangwish had actual knowledge that she was using the house as a location for her commercial drug operations.

The City relies on the presence of Gangwish's security system. However, there is no finding that Luppino-Cronk had access to, or gained any benefit from, this system. The security system is consistent with Gangwish's admission that he is a methamphetamine addict and allows others to use methamphetamine in the home. *See* CP 49 (finding #23). It is also consistent with the fact that his bedroom is in the basement, where he

might not otherwise be able to know when someone came to the door. *See* CP 48 (finding #15).

The trial court's findings show, at most, that Gangwish knew that others were using drugs in the house. Perhaps he should have known about the traffic in and out of the house or about the baggies and scales. Perhaps another person in his position would have recognized that Luppino-Cronk was selling drugs out of the house. But "should have known" is not enough to justify forfeiture of real property for the criminal conduct of another. The City was required to prove that Gangwish **actually knew.** The trial court's findings do not support a conclusion that Gangwish had actual knowledge of Luppino-Cronk's drug sales. This Court should reverse and vacate the judgment of forfeiture.

3.5 Gangwish is entitled to attorney fees on appeal.

Gangwish argued that if he prevails on appeal, he is entitled to an award of attorney fees under RCW 69.50.505(6) and RAP 18.1. The City does not argue otherwise. This Court should award Gangwish his reasonable attorney fees on appeal.

4. Conclusion

The forfeiture of Gangwish's house of 20 years as a consequence of a crime committed by a transient friend of a renter is excessive punishment under the Eighth Amendment to the U.S. Constitution. The trial court's findings of fact do not support its conclusions that there was a substantial nexus between the house and the transient's crime or that Gangwish had

actual knowledge that the house was being used to sell drugs. The City has failed to demonstrate that trial court's findings support its conclusions. This Court should vacate the judgment of forfeiture and award Gangwish his reasonable attorney fees on appeal.

Respectfully submitted this 2nd day of December, 2015.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
kevinhochhalter@cushmanlaw.com
Attorney for Appellant
Cushman Law Offices, P.S.
924 Capitol Way S.
Olympia, WA 98501
T: 360-534-9183
F: 360-956-9795

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on December 2, 2015, I caused the original of the foregoing document, and a copy thereof, to be served by the method indicated below, and addressed to each of the following:

Court of Appeals Division III 500 N. Cedar Street Spokane, WA 99201	____ U.S. Mail, Postage Prepaid ____ Legal Messenger _____ Overnight Mail _____ Facsimile XX Electronic Mail
Bronson Faul Assistant City Attorney City of Yakima Legal Dept. Civil Forfeiture Unit 200 S. 3rd Street Yakima, WA 98901-2830 Bronson.faul@yakimawa.gov	____ U.S. Mail, Postage Prepaid _____ Legal Messenger _____ Overnight Mail _____ Facsimile XX Electronic Mail

DATED this 2nd day of December, 2015.

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant
Cushman Law Offices, P.S.
rdavidson@cushmanlaw.com
924 Capitol Way S.
Olympia, WA 98501
T: 360-534-9183
F: 360-956-9795