

FILED
DEC 09 2016
WASHINGTON STATE
SUPREME COURT
SUPREME COURT NO. 93907-1
Court of Appeals No. 332624

FILED

NOV 24 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

CITY OF SUNNYSIDE

Appellant,

v.

ANDREAS GONZALEZ
IN RE: \$5,940 U.S. CURRENCY AND 2001 SILVER 325i BMW

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner is Andreas Gonzalez, the Respondent in the Court of Appeals.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Washington State Court of Appeals decision reversing the trial court in Case No. 332624 filed on October 20, 2016.

A copy of the decision is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it reversed the Yakima County Superior Court and found forfeiture of personal property was supported by substantial evidence the property was traceable to illegal drug activity as required by statute?

D. STATEMENT OF THE CASE

On or about August 24, 2013, Andreas Gonzalez and his friend Martin Cisneros drove to California in Mr. Cisneros' car to visit relatives. (CP 21, 23, 26). While there, Mr. Gonzalez was offered the chance to purchase a car of his own. (CP 21, 26).

Mr. Gonzalez did not have the money with him to buy the car, but knew he had it available at home. (CP 21). Mr. Cisneros was seasonally

employed in jobs that paid \$17-18 per hour, and did have the funds available, and offered to lend the money to Mr. Gonzalez on the condition that Mr. Gonzalez would pay Martin Cisneros back when they returned home. (CP 21, 26).

Mr. Cisneros lent the money to Mr. Gonzalez to purchase the car (CP 26), and Mr. Gonzalez bought the car. (CP 23). When he bought the car, Mr. Gonzalez did not obtain a bill of sale, however, he did obtain the title from the seller. (CP 27).

On September 1, 2013, a Sunday, Andreas Gonzalez was pulled over for speeding by Sergeant Scott Bailey of the Sunnyside Police Department. (CP 8-9). Mr. Gonzalez was driving the car he had just purchased in California two days earlier with the money Martin Cisneros had loaned him. (CP 21).

At the time he was stopped, Mr. Gonzalez had not had a chance to change the registration for the car because he had returned on a weekend and was waiting until the following Monday to do the paperwork. (CP 21). The car also still had California license plates. (CP 9).

Mr. Gonzalez gave Sergeant Bailey his driver's license and the California registration. (CP 9). When asked who owned the vehicle, Mr. Gonzalez responded "a friend", but the name given was not on the registration. (CP 9-10).

Upon checking, Sergeant Bailey found Mr. Gonzalez was driving on a suspended license and placed Mr. Gonzalez under arrest and took him into custody. (CP 10).

Sergeant Bailey wanted assistance with the impound and while waiting for Officer Lemmon to arrive, one of the two cell phones Mr. Gonzalez had rang. It was Mr. Gonzalez's girlfriend. She asked if she could get the vehicle and was told the vehicle would not be released to her because neither she, nor Mr. Gonzalez were listed as the registered owner. (CP 10). It was also asked if she could take the money that was in the car, whereupon Sergeant Bailey believed a "criminal activity might be at foot", (sic) and determined the cash would not be given to the girlfriend either. (CP 10).

When Officer Lemmon arrived, because he had a canine partner, Mr. Gonzalez signed a consent form to allow a canine search of his car. (CP 10, 17).

The dog alerted on the center console where a user amount of cocaine was found. It was definitely less than an eighth of an ounce. (CP 10, 12, 17). The dog also alerted to cash in the driver side door. (CP 18). The search found nothing else that indicated narcotics were being dealt. There was no cutting powder, baggies, containers, cooking devices or ingesting devices. (CP 13).

Following seizure of the car and the cash, while he was in jail as a result of his arrest, Mr. Gonzalez was served a Notice of Seizure and Intended Forfeiture of the \$5,940.00 and the 2001 Silver BMW seized by the Sunnyside Police P.D. (CP 11, 57). That Notice was filed in the Sunnyside Municipal Court on September 23, 2013. (CP 57).

Acting *pro se* at the time, Mr. Gonzalez filed a request for a court hearing which stated:

To Whom it may concern. I want a Court Hearing have (sic) proof of ownership of the 2001 BMW that was seized when takeing (sic) into custody. Money that was takeing (sic) from me was saving (sic) for the car that I had to purchase the car. (CP 56).

That request was signed by Mr. Gonzalez, dated September 23, 2013 and filed in the Sunnyside Municipal Court on September 23, 2013. (CP 56, italics and underlining added, caps in original).

In response to Mr. Gonzalez's request for a Court Hearing, the matter was assigned a Municipal Court Cause Number and a hearing was held in the Sunnyside Municipal Court before the Honorable Steven L. Michels, Judge, Sunnyside Municipal Court. (CP 7-34). During the course of that hearing, in addition to the facts noted above, the following testimony was given:

Sergeant Bailey admitted it was not unusual for someone to have two cell phones (CP 12), including himself, (CP 12). However, because

Mr. Gonzalez had two cell phones, a user amount of cocaine, cash money the dog alerted on, and a BMW that was not in Mr. Gonzalez's name, Sergeant Bailey believed criminal narcotics activity was involved. He stated it was his experience that a person could be offered a job to drive a vehicle containing contraband from one place to another for pay. (CP 13).

Sergeant Bailey did not do a criminal check on Mr. Gonzalez at the time of arrest and seizure and did recall if he performed one later. (CP 13). When told at the forfeiture hearing that Mr. Gonzalez had no criminal convictions whatsoever and no drug convictions, Sergeant Bailey admitted he was not a surprised. (CP 13). There was an absence of criminal behavior by Mr. Gonzalez.

Officer Lemmon, the canine officer, admitted that U.S. currency goes through counting machines and ATM machines and picks up cocaine residue. He further admitted the federal government has stopped using anything associated with narcotics being on money as evidence. (CP 19).

In contrast, Mr. Gonzalez identified how he came to own the car, why he had cash in the car to repay his friend Martin Cisneros for the loan, and why he hadn't had a chance to change the registration.

Mr. Gonzalez testified he was 28 years old at the time and had been steadily employed at Washington Beef for approximately 5 years

until he was in a car accident and fractured his back. (CP 20). He received insurance money as compensation for his injury. (CP 20).

Mr. Gonzalez also described how he lived with his parents who provided all the basic necessities of life for him. (CP 20). He had no mortgage or rent payments and his parents paid for his groceries. (CP 21). He also received unemployment compensation. (CP 21). His calendar year compensation for 2013 was identified as \$10,621. (CP 14).

Mr. Gonzalez transferred the title to the BMW as soon as he could. (CP 22), and brought it with him to the hearing before Judge Michels. (CP 24). At the time of the hearing, Mr. Gonzalez had a driver's license, insurance and proper title and registration. (CP 25).

At the time of the hearing before Judge Michels, Mr. Cisneros had not been repaid for the money he loaned Mr. Gonzalez to purchase the car. (CP 26).

Following the hearing Judge Michels indicated by letter dated April 17, 2014, he would rule in favor of the City of Sunnyside and order forfeiture. The Order of Forfeiture was entered by Judge Michels on May 22, 2014, signed as Judge of the Municipal Court. (CP 70-71).

In his Order of Forfeiture, Judge Michels found forfeiture was proper because:

1. There were 2 cell phones found under the control of the claimant, Mr. Gonzalez when he was stopped by officers;
2. Cocaine was found in the vehicle;
3. There was a large amount of cash in the vehicle, to wit \$5940.00;
4. Officers testified the cash was “coated” by enough cocaine so that the drug dog alerted to the cash;
5. The vehicle, a 2001 BMW, was not in the name of the claimant at the time of the incident, however, he had driven it from California just prior to being stopped;
6. The fact that the Claimant, (sic) Mr. Gonzalez states he received money from an injury and from unemployment does not seem to explain all of the cash that was present.

(CP 70).

Ultimately appeal of this decision was heard by the Honorable Blaine Gibson, Judge, Yakima County Superior Court. Judge Gibson reversed Judge Michels’ Order of Forfeiture, (2/17/15, RP 23, lines 11-25; RP 24, lines 1-3).

And looking at the findings, even considering them as a whole, I don’t think that a reasonable person could find the money and the vehicle were involved somehow in narcotics trafficking based upon the record we have, so I’m reversing Judge Michael’s (sic) and remanding for further proceedings which I assume would involve trying to get the car back if the car is still around and the money.

Id.

Following the February 17, 2015 hearing, Judge Gibson entered Findings of Fact and Conclusions of Law and Order dated April 3, 2015. (CP 87-89). The Order reflected his previous oral rulings the Yakima County Superior Court had jurisdiction over the case and parties.

Specifically, the Court had jurisdiction over the Appeal per the RALJ rules, and motions to dismiss filed by the City were denied. (CP 88).

The Order noted the standard of proof in a civil forfeiture case is by a “Preponderance of the Evidence”. (CP 88). Judge Gibson found there was no evidence at the hearing before Judge Michels that the U.S. currency or the automobile were the “proceeds of narcotics transactions” under RCW 69.50.505(g).¹ (CP 88). The forfeiture record was “devoid of any evidence drug transactions were occurring”. (CP 88). There was no testimony about the amount of illicit substance that could be on currency and trigger a response from a canine, (CP 88), and the lower court abused its discretion in finding against Gonzalez. Judge Gibson reversed the decision of the Municipal Court per RALJ 9.1(e) and remanded the matter to the Sunnyside Municipal Court. In addition, Judge Gibson found Gonzalez had substantially prevailed. (CP 88-89).

On that same date, the City filed a Notice for Discretionary Review. (Gonzalez’s Supplemental Designation of Clerk’s Papers, court docket sub #20).

On April 13, 2015, the City of Sunnyside filed a Motion and Declaration for Reconsideration Regarding Jurisdiction before Judge

¹ Statutes and rules not set forth in the body of the brief appear in the Appendix B.

Gibson. (CP 90-96). The City argued the forfeiture hearing was subject to the State Administrative Procedures Act and appeal was guided by Title 34 RCW. The City argued Gonzalez had not followed the procedures set forth in the APA and as a result, the Superior Court did not have jurisdiction to hear the appeal.

By Order entered April 14, 2015, Judge Gibson denied the City's Motion for Reconsideration finding the hearing appealed from was not before the seizing agency and the APA did not apply, and the argument had not previously been made. (CP 97).

The City of Sunnyside filed a Motion for Discretionary Review or in the Alternative Review as a Matter of Right. Review as a Matter of Right was granted.

The Court of Appeals found that Judge Michels was the appropriate authority to hear the forfeiture matter as the *de facto* appointee of the seizing agency and no formal appointment as hearing officer was necessary. Further, there was no objection to Judge Michels hearing the matter. (Appendix A, Opinion p.3-4).

While the APA and not the RALJ's applied to the proceedings, the notice of forfeiture and the order allowing forfeiture entered by Judge Michels failed to follow the requirements of the APA. As a result, the Court of Appeals held Judge Gibson of the Yakima County Superior Court

had jurisdiction to hear the matter on review of Judge Michels Order of Forfeiture despite alleged procedural errors under the APA.² (Appendix A, Opinion p.4-5).

Finally, the Court of Appeals found the record before Judge Michels contained substantial evidence the car and cash were sufficiently traced as the proceeds of illegal drug activity in violation of RCW 65.50.505. The Court reversed Judge Gibson's reversal of Judge Michels' Order of Forfeiture. (Appendix A, Opinion p.7).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Evidence produced at Mr. Gonzalez's forfeiture hearing failed to show tracing of the cash and car to illegal activities as required by statute and case law.

The decision is in conflict with a decision in the Court of Appeals in Division 2, and conflicts with the tracing standard established by the Supreme Court. RAP 13.4(b)(2).

Drug seizure and forfeiture actions are guided by RCW 65.50.505.

That statute sets forth what can be forfeited and under what circumstances.

RCW 65.50.505(1)(g) provides in pertinent part:

² On appeal, there was dispute as to whether or not the forfeiture hearing was subject to the APA or RALJ's as a hearing before a court of limited jurisdiction. The Court of Appeals found the APA applied, however, under either scenario, the same requirement for tracing must be met. The evidence provided at the hearing failed establish by a preponderance of the evidence Mr. Gonzalez's cash and car were traceable to an illegal act as required by the statute.

All moneys, negotiable instruments, securities or other tangible or intangible property of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this chapter or chapter 69.41 or 69.52 RCW, all tangible or intangible personal property, proceeds or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.42 RCW, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter or 69.41 or 69.52 RCW.

(Emphasis added).

In all cases, the burden of proof is on the law enforcement agency to establish by a preponderance of the evidence the property is subject to forfeiture under the statute. RCW 65.50.505(5).

Courts have established that if a forfeiture hearing does not reflect any effort was made to trace the property or proceeds to any illegal drug transaction, there is no basis to forfeit the property. Tri-City Metro Drug Task Force v. Contreras 129 Wn.App. 648, 653, 119 P.3d 862 (2005). That decision goes further, however, and indicates it will take more than merely showing an effort was made to trace the property, there must be evidence the property was *actually traceable* to an illegal drug transaction. *Id.* at 653.

Clearly, a token effort to trace the property to an illegal drug transaction will not suffice under the statute. There must be a nexus between the property being forfeited and actual illegal activity. A

hypothetical transaction or an historical anecdote about how drug transactions occur will not meet the statutory requirement. In the instant case, the evidence fails to meet the actual nexus standard and the Court of Appeals erred when it reversed the Superior Court.

The instant case is in conflict with Valerio v. Lacey Police Department, 110 Wn.App. 163, 39 P.3d 332 (2002). There, forfeiture of \$58,300 in cash was reversed because the agency failed to establish the funds were traceable to an actual illegal transaction.

In Valerio, the claimant, Mr. Valerio, had asked a friend to hold on to a safe containing a large amount of money in plastic bags. The friend declined. Mr. Valerio then drove home in his girlfriend's car where he was arrested for a domestic violence assault against his girlfriend which had occurred the day before. *Id.* at 165. The next morning, a locked safe was found in the girlfriend's car's trunk, which, when opened, was found to contain \$58,300 cash. The money was taken to the Lacey Police Department. *Id.* at 166. The police were told it was believed the money belonged to Valerio.

When questioned, Valerio stated he was not the last person to drive the car, he knew nothing about the safe and didn't want to incriminate himself. It was noted the money had a "musty" odor. When a drug dog was later brought into the situation, the dog, on two separate occasions,

alerted to the money, indicating a positive reaction to drug odor. Valerio's home was searched and there was no evidence of controlled substances, drug paraphernalia or any other evidence of drug dealing and Valerio had no criminal history involving drugs. *Id.* at 166.

At the probable cause hearing, Valerio testified he had accumulated the money over several years, yet the evidence showed he never reported annual income over \$5,890 between 1995 through 1998 and he did not keep a record of winnings from gambling. *Id.* at 167-68. The Superior Court hearing the matter ruled there was probable cause to seize the money because 1) the bills appeared to be new and uncirculated; 2) Valerio did not immediately claim ownership; 3) other innocent explanations for the money were not credible; 4) Valerio's girlfriend mentioned Valerio had discussed the possibility of large amounts of money, possibly from drug related business; and 5) a drug sniffing dog alerted to the money.

The trial court concluded the burden then shifted to Valerio to show by a preponderance of the evidence he acquired the money in a manner that did not violate the statute. The trial court ordered forfeiture. *Id.* at 168.

The Court of Appeals reversed. Examining each of the five reasons relied on by the trial court, the Court of Appeals concluded those

reasons did not provide sufficient evidence to support a probable cause seizure for forfeiture under the language of the statute at the time.³ *Id.* at 179, 178.

The Court went on to note there was no clear evidence that Valerio was, or was about to become, involved in illegal drug sales. Also, Valerio was not known to use, to manufacture, or sell illegal drugs, and he had no criminal record. *Id.* at 179.

Compare that to the instant case where the evidence showed that Andreas Gonzalez had no criminal drug history, the arresting officer failed to check Gonzalez's criminal record and admitted during the hearing he was not surprised to learn Gonzalez had no criminal history. Further, when the stop was made, there was no evidence of any drug dealing found in the car or on Gonzalez. There were no baggies, scales, cutting powder or any other indicators of illegal activity. The only evidence of drugs was the user amount of cocaine, for which Gonzalez was charged with possession and not intent to deliver (CP 22), and the cash alerted to by the dog.

³That statute contained essentially the same language as the current statute and provided for seizure and forfeiture when the property was “..used or intended to be used to facilitate any violation of this chapter or chapter 69.41 or 69.52 RCW” RCW 69.50.505(a)(7).

The mere fact a drug detecting dog reacted to Mr. Gonzalez' money is not sufficient to establish the tracing requirement. In rejecting the drug dog alert as sufficient evidence of illegal activity, the Valerio Court stated:

Again, however, the dog's "testimony" did not and could not indicate how the odor transferred to the money. Thus, the dog-sniff evidence did not establish probable cause for the officers to believe that the money had been used in connection with the drug business because: (1) the money had been stored for four days in a City police department safe, where the money could have absorbed controlled substances odors from other evidence stored in the same safe; (2) according to the dog's handler, the dog could have reacted to such absorbed odors; (3) there was no evidence that this dog had been trained to differentiate between odors absorbed from contact with drugs as opposed to odors absorbed from other sources; (4) *there are trace amounts of controlled substances on virtually all circulated U.S. currency*; and (5) the State crime lab could not confirm the presence of traces of illegal drugs on the money.

Id. at 180 (emphasis added).

In the instant case, Officer Lemmon, the canine officer, admitted the dog did not alert on any other areas of the car. He also admitted that in federal cases, the presence of cocaine on money is no longer used as evidence. Further, if the car had been used to transport drugs, it is a reasonable expectation the drug dog would have alerted to those areas of the car used to secret the illegal drugs. There were no such alerts.

In addition, the presence of two cell phones does not establish either the cash or the car were involved in illegal activities. The arresting

officer admitted he also carried two cell phones. There is no evidence the phone records were searched or that any effort was made to connect either phone with illegal drug activity.

The hearing officer and Court of Appeals' disbelief that Gonzalez could have accumulated the amount of cash he was carrying also fails to trace the money to illegal activities as required by statute and case law. Gonzalez testified he lived with his parents essentially for free, had received insurance settlement money, and had received more than the amount of cash involved through unemployment compensation that year. The mere presence of the money, absent tracing to illegal activity, does not establish the tracing element itself.

The situation in the instant case is akin to the argument rejected in Valerio. There, the state argued the amount of cash accumulated by Valerio could not have been attributed to Valerio's legal sources of income. The Valerio court rejected that argument because the argument on its own "did not establish probable cause to believe the that the money was, therefore, the product of an illegal drug business." Valerio at 179.

Also, the fact Gonzalez provided the wrong name for the registered owner of the vehicle when stopped fails to establish evidence of illegal drug activities. Gonzalez testified that at the time he was "probably nervous, scared I'm gonna end up being arrested. (CP 24). The tracing

element of seizure and forfeiture requires evidence of a nexus between the cash and the car involved and illegal drug activity. That is not satisfied by the fact Gonzalez gave incorrect information. Even if a party gives admittedly false information, that is at most evidence there may be some illegal activity involved, but it is not evidence the activity is illegal narcotics. Valerio at 180 (Citing to United States v. \$49,576.00, 116 F.3d 425 (9th Cir. 1997)).

In the instant case, both the hearing officer and the Court of Appeals appeared to rely significantly on the statement of Sergeant Bailey when he said in his experience it is not uncommon that a person gets offered a job to drive a vehicle that contains contraband from one place to another, are paid, and are allowed to keep the vehicle. (CP 13, Opinion at p.7). That is a syllogism based on a false premise.

There was no evidence this cash, this car or this driver actually used the car to transport drugs, or that the cash and car were the proceeds of illegal activity. There was no nexus established between this car and cash, and illegal drug activity. The mere statement that drug dealers have been known to pay people to drive vehicles to transport drugs does not establish the required tracing element in this case.

When analyzing the Valerio opinion, the Court of Appeals in the instant case stated:

The *Valerio* court noted Mr. Valerio *could have* acquired the \$53,300 from legal sources, such as earnings and gambling (despite tax returns stating otherwise). *Id.* at 179. the court also noted, without explanation, the drug canine *could have* alerted to odors which the money “absorbed from sources other than contact with drugs.” *Id.* at 181. The *Valerio* court reversed the trial court because the city of Lacey could not disprove, *to the appellate court’s satisfaction*, the claimant’s assertions. We question this decision and will not rely on it.

(Opinion at p.7, italics in original).

Clearly the court in the instant case misinterpreted Valerio. The Valerio court did not require the City of Lacey to disprove the claimant’s assertions. What the Valerio court did was require there actually be evidence of a nexus between the seized property and illegal drug activity, i.e. tracing. That is the proper standard and that standard was not met in either Valerio or the instant case.

It takes more than a syllogistic argument to support forfeiture of property for illegal drug activity. See Tri-City Metro Drug Task Force v. Contreras, 129 Wn.App. 648, 119 P.3d 862 (2005) (Property not traceable to any illegal drug transaction is not subject to forfeit); King County Dept. of Public Safety v. Real Property Known as 13627 Occidental Avenue S., 89 Wn.App. 554, 950 P.2d 7 (1998) (Property not subject to forfeiture when there was no finding it was acquired in whole or part with proceeds traceable to sale of illegal drugs); State v. Thein, 138 Wn.2d 133, 147, 977 P.2d 582 (1999) (Statement of officer’s belief and knowledge of how drug

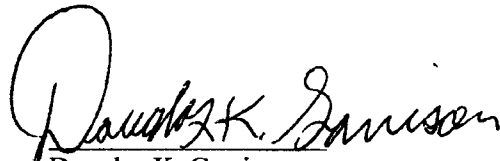
dealers behave was not sufficient to establish nexus between residence and evidence to allow probable cause for warrant.)

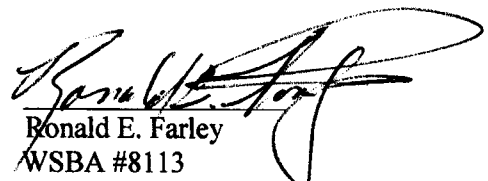
The facts presented by the City of Sunnyside did not meet the statutory standard to prove tracing of the forfeited property to illegal drug activity.

F. CONCLUSION

The City of Sunnyside failed to prove by a preponderance of evidence the money and car seized and forfeited in this case were traced to any illegal drug activity. The Court of Appeals erred when it reversed the trial court on the matter and further erred when it disregarded clear precedential law on the issue. As a result, this Court should accept review.

RESPECTFULLY SUBMITTED this 21 day of November, 2016.


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APPENDIX A

2016 WL 6124670

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

City of Sunnyside, Appellant,

v.

Andreas Gonzalez, Respondent.

No. 33262-4-III

OCTOBER 20, 2016

Appeal from Yakima Superior Court, 14-2-02761-2,
Honorable Blaine G. Gibson, J.

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UNPUBLISHED OPINION

Lawrence-Berrey, J.

*1 The City of Sunnyside (City) notified Andreas Gonzalez of its intent to forfeit his car and approximately \$6,000 in cash found on him following a traffic stop. After a forfeiture hearing, Sunnyside Municipal Court Judge Steven Michels found the car and cash were used and/or intended to be used in furtherance of the sale of an illegal drug. He therefore ordered forfeiture of the property. Mr. Gonzalez appealed to Yakima County Superior Court. That court determined that Judge Michels abused his discretion and reversed the forfeiture order. The City appeals to this court.

The City argues the superior court lacked subject matter jurisdiction because Mr. Gonzalez failed to timely pay the appeal filing fee. The City also argues the superior court failed to apply the applicable standards of review

and erred in interposing its own view of the facts when it reversed the forfeiture order.

We hold that the superior court had subject matter jurisdiction because the time for Mr. Gonzalez to perfect his appeal was tolled due to the failure of the forfeiture order to notify Mr. Gonzalez of his right to appeal or the procedure for doing so. We, however, hold that substantial evidence supported the findings in the forfeiture order. Because appellate courts—including superior courts sitting in an appellate capacity—do not reweigh evidence, the superior court erred when it reweighed the evidence. We, therefore, reverse the superior court and reinstate the forfeiture order.

FACTS

As discussed below, the standard of review is whether there was substantial evidence to support the findings in the original forfeiture order. We, therefore, present the evidence and all reasonable inferences in favor of the party that prevailed at that level, the City.

On September 1, 2013, the City seized Mr. Gonzalez's car and approximately \$6,000 in cash. Also on that day, the City served Mr. Gonzalez a notice of seizure and intent to forfeit the property. The notice explained the forfeiture was because the property was used or intended to be used in connection with a controlled substance violation. The notice warned Mr. Gonzalez the property would be deemed forfeited unless he notified the City within 45 days of seizure¹ of his right to the property. The notice assured Mr. Gonzalez he would be afforded a reasonable opportunity to be heard in accordance with Title 34 of the Revised Codes of Washington. On September 23, Mr. Gonzalez timely notified the City of his claim to the seized property.

¹ The notice erroneously stated the 45 days runs from the date of seizure. Under RCW 69.50.505(4), the 45 days runs from the date the seizing agency provides statutory notice to the owner of the property.

A hearing was scheduled for April 7, 2014, before Sunnyside Municipal Court Judge Steven Michels. Both parties were represented by counsel at that hearing.

The City called Sunnyside Police Sergeant Scott Bailey. He testified that on September 1, 2013, he stopped Mr. Gonzalez for speeding. Mr. Gonzalez was driving a 2001 BMW with California plates. When Sergeant Bailey approached Mr. Gonzalez, he noticed Mr. Gonzalez was talking on his cell phone, and another cell phone was in the car. On request, Mr. Gonzalez provided his license, registration, and proof of insurance. Mr. Gonzalez had a Washington license, but the car had a California registration. Sergeant Bailey noticed the name on the registration was not Mr. Gonzalez's. He asked who owned the car, and Mr. Gonzalez said a friend. He asked who the friend was, and Mr. Gonzalez said a name other than the listed registered owner.

*2 Sergeant Bailey returned to his vehicle and conducted a driver's check. He learned that Mr. Gonzalez's license was suspended. Mr. Gonzalez was placed under arrest for driving with a suspended license. While waiting for a second officer to assist with impounding the car, one of Mr. Gonzalez's phones rang, and he asked the sergeant to answer it. The caller was Mr. Gonzalez's girlfriend. Eventually, Mr. Gonzalez said he wanted his girlfriend to take possession of his personal items, which included a large amount of cash, later determined to be \$5,940. Mr. Gonzalez did not explain why he had this amount of cash on him.

When the second officer arrived to assist with impounding the car, he arrived with his canine partner. Sergeant Bailey gave Mr. Gonzalez his *Ferrier*² warnings, and Mr. Gonzalez consented to a search of the car. The canine found a "user amount" of cocaine in the car, and signaled that drug residue was present on the cash. Clerk's Papers (CP) at 10.

² *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

Sergeant Bailey learned that Mr. Gonzalez later claimed the \$5,940 came from unemployment payments. Without objection, Sergeant Bailey testified he reviewed employment security records and learned Mr. Gonzalez had received \$7,843 in unemployment benefits since 2005.

On cross-examination, counsel for Mr. Gonzalez asked the sergeant why he believed the BMW and the cash were connected to illegal drug sales. Sergeant Bailey answered:

Well, based upon ... your client [telling] me at the time of the stop,

that the vehicle belonged to someone else [then] ... during the search, asking me if it made a difference that he owned the vehicle ... and then from past experience ... where it's not uncommon that a person be selected or offered a job to drive a vehicle that has ... contraband from one place to the other place and they get x amount of money plus the vehicle they used to transport. It's not an uncommon experience

CP at 13.

The second officer who arrived with the canine unit also testified at the forfeiture hearing. He explained the cash with the drug residue was found in the driver's side door. On cross-examination, the officer admitted that drug residue on cash is not uncommon. And because cash passes from one person to another, residue does not mean that the possessor of the cash is connected with drug sales.

Mr. Gonzalez also testified at the hearing. He testified he was employed for five years at a local business, but ceased working there after he fractured his back in a car accident. Thereafter, in about 2009, he settled his personal injury claim for an unspecified amount. Other than that, for the past five years, his only source of income was unemployment benefits. He testified he lived with his parents, and his parents paid his expenses. He testified he paid his parents rent "when I can ... once a month." CP at 20.

Mr. Gonzalez also explained how he came into possession of the BMW. He testified he and a friend went to California in his friend's car to visit some relatives. Once in California, a relative offered to sell the BMW to him, but he did not have the cash on him. Mr. Gonzalez testified his friend had the cash on him, loaned the cash to him, and he bought the car. He then drove the car back to Washington with his friend and towed his friend's car. He claimed he had recently returned to Washington when he was stopped and had yet to register the car in his name. He also claimed that the \$5,940 of cash in the car was money he had saved from his settlement and unemployment benefits, and was to repay his friend.

On cross-examination, Mr. Gonzalez admitted he gave the sergeant a false name for the car's owner. He explained,

"I was probably nervous, scared I'm gonna end up being arrested." CP at 24.

*3 Judge Michels issued a short written decision in favor of the City. A forfeiture order was entered May 22, 2014, together with findings of fact and conclusions of law. The findings of fact reiterated the factors discussed in Judge Michels's short written decision: (1) the presence of two cell phones in the car, (2) cocaine was found in the car, (3) \$5,940 in cash, (4) presence of enough cocaine on the cash to alert the canine, (5) the car being registered to someone other than Mr. Gonzalez, and Mr. Gonzalez having recently driven the car from California, and (6) the injury settlement and unemployment benefits did not explain the amount of cash in the car. These factors preceded the ultimate factual determination: "[T]he seized property, \$5,940.00 U.S. Currency and a 2001 Silver 3251 BMW, was used and/or intended to be used for a controlled substance violation, specifically the furtherance of the sale of an illegal drug." CP at 70.

Mr. Gonzalez appealed the forfeiture order to Yakima County Superior Court. The City sought to dismiss Mr. Gonzalez's appeal because Mr. Gonzalez had failed to pay the appeal fee to the Sunnyside Municipal Court. The superior court denied the City's motion, and permitted Mr. Gonzalez to pay the appeal fee so the merits of the appeal could be determined. Mr. Gonzalez then paid the appeal fee to the municipal court.³

³ The appeal fee was paid to the municipal court instead of the superior court because the parties believed the appeal process was governed by the Rules of Appeal for Courts of Limited Jurisdiction (RALJ).

The parties scheduled a hearing on the merits for February 17, 2015. The superior court reversed the forfeiture order. In its conclusions of law, the court determined:

3. That there is no dispute as to Judge Michel's Findings of Fact and Conclusions of Law, numbers 1, 2, and 3.

....

5. There is no evidence that the US currency or the automobile were the "proceeds of narcotics transactions" RCW 69.50.505(g).

6. There was no testimony about the amount of illicit substance that could be on currency and trigger a response from a canine.

7. The auto was titled in the name of another at the time of his arrest but was titled in the defendant's name on September 5, 2014, four days later.

8. The record is devoid of any evidence that drug transactions were occurring.

9. The lower court abused its discretion in finding against the appellant.

CP at 106.

The City filed a motion for discretionary review, and alternatively argued it had an appeal as a matter of right under RCW 69.50.505(5) and RCW 34.05.526. Our commissioner ruled the City had an appeal as a matter of right. Mr. Gonzalez moved to modify the commissioner's ruling. We denied his motion.

ANALYSIS

A. SUBJECT MATTER JURISDICTION

The City first argues that the superior court lacked subject matter jurisdiction to consider Mr. Gonzalez's appeal. Subject matter jurisdiction is the authority to hear and determine the class of action to which a case belongs. *Bour v. Johnson*, 80 Wn. App. 643, 647, 910 P.2d 548 (1996). If a court lacks subject matter jurisdiction it is "powerless to pass on the merits of the controversy brought before it." *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). A party cannot waive subject matter jurisdiction, and may raise the issue of lack of subject matter jurisdiction at any time. *Id.* Issues of subject matter jurisdiction are questions of law reviewed de novo. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003); *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

1. Judge Michels was the de facto designee and the matter proceeded under the Administrative Procedure Act, chapter 34.05 RCW

The Uniform Controlled Substances Act, chapter 69.50 RCW, provides for the seizure and forfeiture by law enforcement agencies of many types of property used or intended for use in connection with violations of its provisions. RCW 69.50.505(1). A notice of seizure and

intent to forfeit is required to be served on parties whose interests the agency wants to forfeit. RCW 69.50.505(3). If a person notifies the agency in writing of his or her claim of ownership within 45 days of being served with the agency's notice, then the person must be afforded a reasonable opportunity to be heard. RCW 69.50.505(5).

*4 The hearing is before the seizing agency's chief law enforcement officer, or that officer's designee, unless the claimant timely seeks to have the hearing removed to a court of competent jurisdiction. RCW 69.50.505(5). The court to which the matter is removed is the district court if the matter in controversy is within the district court's jurisdictional limit as set forth by RCW 3.66.020. RCW 69.50.505(5). If the proceeding is not removed, the hearing proceeds under chapter 34.05 RCW, Washington's Administrative Procedure Act (APA). RCW 69.50.505(5). Here, there is no record of Mr. Gonzalez seeking to have the forfeiture hearing removed. Therefore, the City's chief of police or his designee was required to serve as the hearing officer.

The parties disagree on whether Judge Michels was the city of Sunnyside's chief of police's designee. Judge Michels had been conducting these forfeiture hearings for several years, and there is no record of the City's chief of police ever appointing Judge Michels.

But RCW 69.50.505(5) does not require a formal written designation. Nor was it necessary for a present or past police chief to testify as to Judge Michels's authority. The parties did not object to Judge Michels hearing the forfeiture proceeding prior to or during the hearing. The parties have thus waived their right to judicial review of his authority. *Cf. ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 736, 862 P.2d 602 (1993) (where a party voluntarily submits an issue to arbitration without challenging the arbitrability of that issue, and where the merits are ruled on by the arbitrator, that party is deemed to have waived his or her right to judicial review of the arbitrability issue). Because Judge Michels conducted the forfeiture as the chief of police's de facto designee, the APA controls the procedure for this appeal.

2. Judge Michels's forfeiture order did not comply with the APA, thus tolling Mr. Gonzalez's time to appeal

Mr. Gonzalez's right to seek review of Judge Michels's forfeiture order required him to properly seek review within 30 days of that order in accordance with RCW 34.05.542(2). It also required him to comply with RCW 34.05.514(1). The provision provides:

[P]roceedings for review under this chapter shall be instituted by paying the fee required under RCW 36.18.020 [to the superior court] and filing a petition in the superior court, at the petitioner's option, for (a) Thurston county, (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located.

RCW 34.05.514(1).

Here, Mr. Gonzalez initially filed his appeal in municipal court and did not pay the filing fee. Months later, he paid the filing fee to the municipal court and that court then transferred its file to the superior court.

Ordinarily, if a petitioner does not comply with the terms of the APA, the superior court does not have jurisdiction to hear an administrative appeal. *City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 926–27, 809 P.2d 1377 (1991); *see also Skagit Surveyors*, 135 Wn.2d at 556–57. However, if the hearing officer or the agency does not comply with its own statutory obligations, the deadline for filing a petition for review is tolled. *See, e.g., Leson v. Dep't of Ecology*, 59 Wn. App. 407, 410, 799 P.2d 268 (1990) (tolling the deadline for filing a petition for review due to the agency's failure to comply with statutory mandates); *Felida Neigh. Ass'n v. Clark County*, 81 Wn. App. 155, 161, 913 P.2d 823 (1996) (same).

Mr. Gonzalez argues that Judge Michels's forfeiture order did not comply with the terms of the APA. Specifically, he argues the order did not contain the statutorily required notice of Mr. Gonzalez's appeal rights and the procedure for filing an appeal. Courts review an order's compliance with the requirements of the APA. RCW 34.05.570(3)(c).

*5 The APA requires every agency to “adopt as much of the model rules [of procedure] as is reasonable under its circumstances.” RCW 34.05.250. Chapter 10–08 WAC

lays out the model rules of procedure for administrative hearings. The model rules “supplement” the provisions of the APA. WAC 10–08–001(1). An agency may adopt a procedural rule different than the model rules, but if it does so, it must provide an explanation. RCW 34.05.250; WAC 10–08–001(2). Here, there is no evidence the city of Sunnyside Police Department adopted any administrative procedural rules. Thus, the model rules supplement the APA and apply here.

The model rules of procedure provide that “Every decision and order, whether initial or final, shall ... [c]ontain a statement describing the *available post-hearing remedies*.” WAC 10–08–210(6) (emphasis added). “Because invariably there is a time within which a petitioner must fulfill jurisdictional requirements, there is no principled basis for allowing an agency to do less than the statute requires it to do before that time begins to run.” *Leson*, 59 Wn. App. at 410; see also *Felida*, 81 Wn. App. at 161. When the agency’s failure to comply with the APA causes a petitioner to not timely invoke the jurisdiction of a reviewing court, the time for filing the petition may be equitably tolled. *Felida*, 81 Wn. App. at 161–62.

Here, Judge Michels’s forfeiture order did not notify Mr. Gonzalez of his posthearing remedies, such as judicial review in superior court or direct review to this court. See RCW 34.05.514 (procedure for seeking review in superior court); RCW 34.05.518 (procedure for seeking direct review in Court of Appeals). Thus, the forfeiture order does not comply with the model rules of procedure, specifically WAC 10–08–210(6). Because the model rules are intended to supplement the APA, failure to comply with the model rules is akin to failure to comply with the APA. For this reason, the superior court had authority to equitably toll the time for Mr. Gonzalez so he could pay the appeal filing fee.⁴

⁴ An additional jurisdictional issue potentially presents itself: Mr. Gonzalez failed to file his petition for review (which he termed a notice of appeal) in superior court. The City’s assignment of error relating to its lack of jurisdiction argument narrowly challenges only the superior court’s decision to allow Mr. Gonzalez to pay the appeal fee late. Although we have discretion to decide an issue beyond how it is framed in an assignment of error, we decline to do so here. Here, the City’s failure to inform Mr.

Gonzalez of his posthearing remedies is the reason Mr. Gonzalez failed to correctly file his appeal.

B. SUBSTANTIAL EVIDENCE SUPPORTED JUDGE MICHEL’S FORFEITURE ORDER

When reviewing agency action under the APA, a reviewing court sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Campbell v. Emp’t Sec. Dep’t*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014); *Dep’t of Ecology v. Douma*, 147 Wn. App. 143, 151, 193 P.3d 1102 (2008); *Bond v. Dep’t of Soc. & Health Servs.*, 111 Wn. App. 566, 571, 45 P.3d 1087 (2002). Thus, this court reviews the agency’s order, not the decision of the superior court. See, e.g., *Pal v. Dep’t of Soc. & Health Servs.*, 185 Wn. App. 775, 781, 342 P.3d 1190 (2015); *King County v. Cent. Puget Sound Growth Mgmt. Hr’gs Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

The party challenging the agency action has the burden of showing the invalidity of the agency action. RCW 34.05.570(1)(a). Here, the superior court invalidated Judge Michels’s forfeiture order on the grounds that there was no evidence that the seized items were traceable to any drug transaction.

*6 When reviewing an agency order, a court may set aside the order if, among other reasons, “[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.” RCW 34.05.570(3)(e).

The City had the original burden of establishing that the seized property could be lawfully forfeited. The City sought to forfeit the seized property under RCW 69.50.505(1)(g). That section provides:

(1) The following are subject to seizure and forfeiture and no property right exists in them:

....

(g) All ... tangible or intangible personal property, proceeds, or assets acquired in whole or in part with *proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW*, and all moneys, negotiable instruments, and

securities used or intended to be used to facilitate any violation of this chapter or chapter 69.41 or 69.52 RCW.

RCW 69.50.505 (emphasis added). If the record does not reflect any effort to trace the proceeds to an illegal drug transaction, and the findings do not address the issue, there is no basis for the forfeiture action. *Tri-City Metro Drug Task Force v. Contreras*, 129 Wn. App. 648, 653, 119 P.3d 862 (2005); *King County Dep't of Pub. Safety v. Real Prop. Known as 13627 Occidental Ave. S.*, 89 Wn. App. 554, 558–60, 950 P.2d 7 (1998).

In *Contreras*, law enforcement sought to seize personal property it believed was linked to drug transactions. 129 Wn. App. at 651–52. At the forfeiture hearing, one of the investigating detectives testified that Mr. Contreras's home and possessions seemed to cost substantially more money than his legitimate income. *Id.* at 652. The detective presented records documenting Mr. Contreras's income and his wife's income. *Id.* The hearing examiner determined that the property was subject to forfeiture as proceeds of an illegal drug transaction. *Id.* at 652–53. Mrs. Contreras appealed. *Id.* at 653. On review, the appellate court noted that the record contained no evidence that traced the forfeited property to an illegal drug transaction, and the hearing examiner's findings did not address the issue. *Id.* Because the property was not traceable to an illegal drug transaction, it was not subject to forfeiture. *Id.* The appeals court reversed the forfeiture order and ordered that Mrs. Contreras's property be returned. *Id.* at 654; see also *King County Dep't of Pub. Safety*, 89 Wn. App. at 560–61 (reversing order for forfeiture and ordering return of property due to lack of any evidence that seized property was traceable to an illegal drug transaction).

In *Valerio v. Lacey Police Department*, the city of Lacey seized \$58,300 in cash, made up of newer \$100.00 bills placed in a safe found in the trunk of Mark Valerio's girlfriend's car. 110 Wn. App. 163, 166, 39 P.3d 332 (2002). After the money was taken to an evidence room, a drug canine repeatedly alerted to the money, indicating the presence of drug residue. *Id.* At the forfeiture hearing, Mr. Valerio's ex-girlfriend testified Mr. Valerio told her he wanted to start a drug-related business. *Id.* Also, an officer testified that Mr. Valerio originally said the money was not his, and later changed this story. *Id.* at 166, 168. At the hearing, Mr. Valerio claimed the money was his and he had acquired it over time. *Id.* at 167. His tax returns however showed he earned \$121 per week from 1995 to

1998, and had gambling winnings of \$16,000 in 1998. *Id.* at 169, 168 n.3. The trial court determined Mr. Valerio's explanations were unpersuasive. *Id.* at 168. Under RCW 69.50.505, the trial court found there was probable cause to believe the seized money was used or would be used for drug dealing, and Mr. Valerio had failed to satisfactorily refute the evidence. *Id.* Mr. Valerio appealed, and the appellate court reversed. *Id.* at 175.

*7 The *Valerio* court noted Mr. Valerio *could have* acquired the \$58,300 from legal sources, such as earnings and gambling (despite tax returns stating otherwise). *Id.* at 179. The court also noted, without explanation, the drug canine *could have* alerted to odors which the money “absorbed from sources other than contact with drugs.” *Id.* at 181. The *Valerio* court reversed the trial court because the city of Lacey could not disprove, *to the appellate court's satisfaction*, the claimant's assertions. We question this decision and will not rely on it.

In *Sam v. Okanogan County Sheriff's Office*, two people were killed when their plane crashed in Okanogan County. 136 Wn. App. 220, 223, 148 P.3d 1086 (2006). Law enforcement discovered the wrecked plane along with \$118,134 in cash and property. *Id.* The Okanogan County Sheriff's Office sought forfeiture of the cash and property. *Id.* at 224. At the forfeiture hearing, a detective testified and noted several oddities about the plane. *Id.* at 224–25. For example, the plane's transponder was off, the passenger seats were removed to make space for extra fuel tanks, extra cargo space had been added, the plane had smaller than normal identifying letters and numbers, and a ledger was found that appeared to document a number of drug transactions. *Id.* The only explanation offered by the opposing party, with no apparent supporting evidence, was that the money was part of an inheritance. *Id.* at 225. Taken as a whole, the appellate court found that these facts showed the money was connected to drug activity and supported a forfeiture order. *Id.* at 229–30.

Here, Judge Michels's forfeiture order sets forth six factors that support his ultimate finding that the seized property “was used and/or intended to be used for a controlled substance violation, specifically the furtherance of the sale of an illegal drug.” CP at 70. We must affirm the finding if it is supported by substantial evidence. *City of Walla Walla v. \$401,333.44*, 164 Wn. App. 236, 255, 262 P.3d 1239 (2011). Substantial evidence is the quantum of evidence sufficient to persuade a rationale trier of

fact. *Id.* at 256. Because we do not reweigh evidence or redetermine credibility, we must consider the evidence and all reasonable inferences in the light most favorable to the City, the party who prevailed before the trier of fact. *Id.*

Mr. Gonzalez recently returned from California in a car he did not own, and there was a user's amount of cocaine found in the car, together with \$5,940 in cash. Mr. Gonzalez did not tell Sergeant Bailey the cash was repayment to a friend. And he lied about who owned the car. Despite having received funds in the form of a personal injury settlement and unemployment benefits during the past five years, he implied those funds were depleted when he answered that he paid his parents rent "when I can ... once a month." CP at 20. Notably, Sergeant Bailey, a 15-year veteran of the city of Sunnyside Police Department, testified the seized property could be traced to illegal drug sales. He testified, based on his experience, it was not uncommon for a person to drive a car with contraband from one place to another, and to receive money and the car as payment. Judge Michels was entitled to consider the above factors and accept Sergeant Bailey's testimony. Judge Michels did not have to believe Mr. Gonzalez's claim that while visiting relatives in California his friend loaned him \$6,000 in cash to buy a used BMW,

and they then towed his friend's car all the way back to Washington. Nor was Judge Michels required to believe Mr. Gonzalez when he claimed he had \$6,000 in cash saved over the past five years to repay his friend. We conclude the ultimate fact—that the seized property can be traced to the sale of illegal drugs—is supported by substantial evidence. The superior court erred in reversing that finding and vacating the forfeiture order. We reverse the superior court and reinstate the forfeiture order.

*8 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Siddoway, J.

Fearing, C.J.

All Citations

Not Reported in P.3d, 2016 WL 6124670

APPENDIX B

RCW 69.50.505.
SEIZURE AND FORFEITURE

(1) The following are subject to seizure and forfeiture and no property right exists in them:

(a) All controlled substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of this chapter or chapter 69.41 or 69.52 RCW, and all hazardous chemicals, as defined in RCW 64.44.010, used or intended to be used in the manufacture of controlled substances;

(b) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter or chapter 69.41 or 69.52 RCW;

(c) All property which is used, or intended for use, as a container for property described in (a) or (b) of this subsection;

(d) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, in any manner to facilitate the sale, delivery, or receipt of property described in (a) or (b) of this subsection, except that:

(i) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter or chapter 69.41 or 69.52 RCW;

(ii) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent;

(iii) No conveyance is subject to forfeiture under this section if used in the receipt of only an amount of marijuana for which possession constitutes a misdemeanor under RCW 69.50.4014;

(iv) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission; and

(v) When the owner of a conveyance has been arrested under this chapter or chapter 69.41 or 69.52 RCW the conveyance in which the person is arrested may not be subject to forfeiture unless it is seized or process is issued for its seizure within ten days of the owner's arrest;

(e) All books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this chapter or chapter 69.41 or 69.52 RCW;

(f) All drug paraphernalia other than paraphernalia possessed, sold, or used solely to facilitate marijuana-related activities that are not violations of this chapter;

(g) All moneys, negotiable instruments, securities, or other tangible or intangible property of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this chapter or chapter 69.41 or 69.52 RCW, all tangible or intangible personal property, proceeds, or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter or chapter 69.41 or 69.52

RCW. A forfeiture of money, negotiable instruments, securities, or other tangible or intangible property encumbered by a bona fide security interest is subject to the interest of the secured party if, at the time the security interest was created, the secured party neither had knowledge of nor consented to the act or omission. No personal property may be forfeited under this subsection (1)(g), to the extent of the interest of an owner, by reason of any act or omission which that owner establishes was committed or omitted without the owner's knowledge or consent; and

(h) All real property, including any right, title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements which are being used with the knowledge of the owner for the manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance, or which have been acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW, if such activity is not less than a class C felony and a substantial nexus exists between the commercial production or sale of the controlled substance and the real property. However:

(i) No property may be forfeited pursuant to this subsection (1)(h), to the extent of the interest of an owner, by reason of any act or omission committed or omitted without the owner's knowledge or consent;

(ii) The bona fide gift of a controlled substance, legend drug, or imitation controlled substance shall not result in the forfeiture of real property;

(iii) The possession of marijuana shall not result in the forfeiture of real property unless the marijuana is possessed for commercial purposes that are unlawful under Washington state law, the amount possessed is five or more plants or one pound or more of marijuana, and a substantial nexus exists between the possession of marijuana and the real property. In such a case, the intent of the offender shall be determined by the preponderance of the evidence, including the offender's prior criminal history, the amount of marijuana possessed by the offender, the sophistication of the activity or equipment used by the offender, whether the offender was licensed to produce, process, or sell marijuana, or was an employee of a licensed producer, processor, or retailer, and other evidence which demonstrates the offender's intent to engage in unlawful commercial activity;

(iv) The unlawful sale of marijuana or a legend drug shall not result in the forfeiture of real property unless the sale was forty grams or more in the case of marijuana or one hundred dollars or more in the case of a legend drug, and a substantial nexus exists between the unlawful sale and the real property; and

(v) A forfeiture of real property encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party, at the time the security interest was created, neither had knowledge of nor consented to the act or omission.

(2) Real or personal property subject to forfeiture under this chapter may be seized by any board inspector or law enforcement officer of this state upon process issued by any superior court having jurisdiction over the property. Seizure of real property shall include the filing of a lis pendens by the seizing agency. Real property seized under this section shall not be transferred or otherwise conveyed until ninety days after seizure or until a judgment of forfeiture is entered, whichever is later: PROVIDED, That real property seized under this section may be transferred or conveyed to any person or entity who acquires title by foreclosure or deed in lieu of foreclosure of a security interest. Seizure of personal property without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;

(c) A board inspector or law enforcement officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(d) The board inspector or law enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

(3) In the event of seizure pursuant to subsection (2) of this section, proceedings for forfeiture shall be deemed commenced by the seizure. The law enforcement agency under whose authority the seizure was made shall cause notice to be served within fifteen days following the seizure on the owner of the property seized and the person in charge thereof and any person having any known right or interest therein, including any community property interest, of the seizure and intended forfeiture of the seized property. Service of notice of seizure of real property shall be made according to the rules of civil procedure. However, the state may not obtain a default judgment with respect to real property against a party who is served by substituted service absent an affidavit stating that a good faith effort has been made to ascertain if the defaulted party is incarcerated within the state, and that there is no present basis to believe that the party is incarcerated within the state. Notice of seizure in the case of property subject to a security interest that has been perfected by filing a financing statement in accordance with chapter 62A.9A RCW, or a certificate of title, shall be made by service upon the secured party or the secured party's assignee at the address shown on the financing statement or the certificate of title. The notice of seizure in other cases may be served by any method authorized by law or court rule including but not limited to service by certified mail with return receipt requested. Service by mail shall be deemed complete upon mailing within the fifteen day period following the seizure.

(4) If no person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(d), (g), or (h) of this section within forty-five days of the service of notice from the seizing agency in the case of personal property and ninety days in the case of real property, the item seized shall be deemed forfeited. The community property interest in real property of a person whose spouse or domestic partner committed a violation giving rise to seizure of the real property may not be forfeited if the person did not participate in the violation.

(5) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section within forty-five days of the service of notice from the seizing agency in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. The notice of claim may be served by any method authorized by law or court rule including, but not limited to, service by first-class mail. Service by mail shall be deemed complete upon mailing within the forty-five day period following service of the notice of seizure in the case of personal property and within the ninety-day period following service of the notice of seizure in the case of real property. The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee, except where the seizing agency is a state agency as

defined in RCW 34.12.020(4), the hearing shall be before the chief law enforcement officer of the seizing agency or an administrative law judge appointed under chapter 34.12 RCW, except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction. Removal of any matter involving personal property may only be accomplished according to the rules of civil procedure. The person seeking removal of the matter must serve process against the state, county, political subdivision, or municipality that operates the seizing agency, and any other party of interest, in accordance with RCW 4.28.080 or 4.92.020, within forty-five days after the person seeking removal has notified the seizing law enforcement agency of the person's claim of ownership or right to possession. The court to which the matter is to be removed shall be the district court when the aggregate value of personal property is within the jurisdictional limit set forth in RCW 3.66.020. A hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW. In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture.

The seizing law enforcement agency shall promptly return the article or articles to the claimant upon a determination by the administrative law judge or court that the claimant is the present lawful owner or is lawfully entitled to possession thereof of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section.

(6) In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant. In addition, in a court hearing between two or more claimants to the article or articles involved, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

(7) When property is forfeited under this chapter the board or seizing law enforcement agency may:

(a) Retain it for official use or upon application by any law enforcement agency of this state release such property to such agency for the exclusive use of enforcing the provisions of this chapter;

(b) Sell that which is not required to be destroyed by law and which is not harmful to the public;

(c) Request the appropriate sheriff or director of public safety to take custody of the property and remove it for disposition in accordance with law; or

(d) Forward it to the drug enforcement administration for disposition.

(8)(a) When property is forfeited, the seizing agency shall keep a record indicating the identity of the prior owner, if known, a description of the property, the disposition of the property, the value of the property at the time of seizure, and the amount of proceeds realized from disposition of the property.

(b) Each seizing agency shall retain records of forfeited property for at least seven years.

(c) Each seizing agency shall file a report including a copy of the records of forfeited property with the state treasurer each calendar quarter.

(d) The quarterly report need not include a record of forfeited property that is still being held for use as evidence during the investigation or prosecution of a case or during the appeal from a conviction.

(9)(a) By January 31st of each year, each seizing agency shall remit to the state treasurer an amount equal to ten percent of the net proceeds of any property forfeited during the preceding calendar year. Money remitted shall be deposited in the state general fund.

(b) The net proceeds of forfeited property is the value of the forfeitable interest in the property after deducting the cost of satisfying any bona fide security interest to which the property is subject at the time of seizure; and in the case of sold property, after deducting the cost of sale, including reasonable fees or commissions paid to independent selling agents, and the cost of any valid landlord's claim for damages under subsection (15) of this section.

(c) The value of sold forfeited property is the sale price. The value of retained forfeited property is the fair market value of the property at the time of seizure, determined when possible by reference to an applicable commonly used index, such as the index used by the department of licensing for valuation of motor vehicles. A seizing agency may use, but need not use, an independent qualified appraiser to determine the value of retained property. If an appraiser is used, the value of the property appraised is net of the cost of the appraisal. The value of destroyed property and retained firearms or illegal property is zero.

(10) Forfeited property and net proceeds not required to be paid to the state treasurer shall be retained by the seizing law enforcement agency exclusively for the expansion and improvement of controlled substances related law enforcement activity. Money retained under this section may not be used to supplant preexisting funding sources.

(11) Controlled substances listed in Schedule I, II, III, IV, and V that are possessed, transferred, sold, or offered for sale in violation of this chapter are contraband and shall be seized and summarily forfeited to the state. Controlled substances listed in Schedule I, II, III, IV, and V, which are seized or come into the possession of the board, the owners of which are unknown, are contraband and shall be summarily forfeited to the board.

(12) Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the board.

(13) The failure, upon demand by a board inspector or law enforcement officer, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored to produce an appropriate registration or proof that he or she is the holder thereof constitutes authority for the seizure and forfeiture of the plants.

(14) Upon the entry of an order of forfeiture of real property, the court shall forward a copy of the order to the assessor of the county in which the property is located. Orders for the forfeiture of real property shall be entered by the superior court, subject to court rules. Such an order shall be filed by the seizing agency in the county auditor's records in the county in which the real property is located.

(15)(a) A landlord may assert a claim against proceeds from the sale of assets seized and forfeited under subsection (7)(b) of this section, only if:

(i) A law enforcement officer, while acting in his or her official capacity, directly caused damage to the complaining landlord's property while executing a search of a tenant's residence; and

(ii) The landlord has applied any funds remaining in the tenant's deposit, to which the landlord has a right under chapter 59.18 RCW, to cover the damage directly caused by a law enforcement officer prior to asserting a claim under the provisions of this section;

(A) Only if the funds applied under (a)(ii) of this subsection are insufficient to satisfy the damage directly caused by a law enforcement officer, may the landlord seek compensation for the damage by filing a claim against the governmental entity under whose authority the law enforcement agency operates within thirty days after the search;

(B) Only if the governmental entity denies or fails to respond to the landlord's claim within sixty days of the date of filing, may the landlord collect damages under this subsection by filing within thirty days of denial or the expiration of the sixty-day period, whichever occurs first, a claim with the seizing law enforcement agency. The seizing law enforcement agency must notify the landlord of the status of the claim by the end of the thirty-day period. Nothing in this section requires the claim to be paid by the end of the sixty-day or thirty-day period.

(b) For any claim filed under (a)(ii) of this subsection, the law enforcement agency shall pay the claim unless the agency provides substantial proof that the landlord either:

(i) Knew or consented to actions of the tenant in violation of this chapter or chapter 69.41 or 69.52 RCW; or

(ii) Failed to respond to a notification of the illegal activity, provided by a law enforcement agency under RCW 59.18.075, within seven days of receipt of notification of the illegal activity.

(16) The landlord's claim for damages under subsection (15) of this section may not include a claim for loss of business and is limited to:

(a) Damage to tangible property and clean-up costs;

(b) The lesser of the cost of repair or fair market value of the damage directly caused by a law enforcement officer;

(c) The proceeds from the sale of the specific tenant's property seized and forfeited under subsection (7)(b) of this section; and

(d) The proceeds available after the seizing law enforcement agency satisfies any bona fide security interest in the tenant's property and costs related to sale of the tenant's property as provided by subsection (9)(b) of this section.

(17) Subsections (15) and (16) of this section do not limit any other rights a landlord may have against a tenant to collect for damages. However, if a law enforcement agency satisfies a landlord's claim under subsection (15) of this section, the rights the landlord has against the tenant for damages directly caused by a law enforcement officer under the terms of the landlord and tenant's contract are subrogated to the law enforcement agency.

RAP
**RULE 13.4. DISCRETIONARY REVIEW OF DECISION TERMINATING
REVIEW**

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file proof of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RALJ
RULE 9.1. BASIS FOR DECISION ON APPEAL

(a) Errors of Law. The superior court shall review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law.

(b) Factual Determinations. The superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction.

(c) [Reserved.]

(d) Final Judgment Not Designated in Notice. The superior court will review a final judgment not designated in the notice of appeal only if the notice designates an order deciding a timely posttrial motion based on (1) CrRLJ 7.4 (arrest of judgment), (2) CrRLJ 7.5 (new trial), or (3) CRLJ 59 (new trial, reconsideration, and amendment of judgments).

(e) Disposition on Appeal Generally. The superior court may reverse, affirm, or modify the decision of the court of limited jurisdiction or remand the case back to that court for further proceedings.

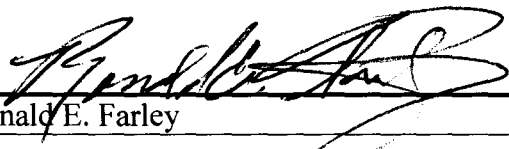
(f) Limitation on Modification of Sentence. The superior court shall not modify the sentence imposed in a criminal case unless the sentence is incorrect as a matter of law.

(g) Form of Decision. The decision of the superior court shall be in writing and filed in the clerk's office with the other papers in the case. The reasons for the decision shall be stated.

(h) Discretionary Review. The decision of the superior court on appeal is subject to discretionary review pursuant to RAP 2.3(d).

1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies under penalty of perjury of the laws of the State of Washington
3 that on the date given below I caused to be served in the manner noted below a copy of
4 Gonzalez's Petition for Review on the following person(s):

<p>5 [X] Counsel of Record 6 Margita Dornay 7 4109 Tieton Dr. 8 Yakima, WA 98908-3346 9 10 Douglas K. Garrison 11 PO Box 269 12 Sunnyside, WA 98944</p>	<p>BY: [X] U.S. Mail [X] E-Mail/PDF Format [] Electronic Filing [] Hand Delivered [] Overnight Mail [] Facsimile to: DATED this <u>21st</u> day of <u>November</u>, 2016 at Spokane, WA.  _____ Ronald E. Farley</p>
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