NO. 94135-1
(COURT OF APPEALS NO. 75026-7-I)

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN URQUHART, ET AL.,

Respondent,

v.

$6,510.00 in U.S. CURRENCY, DEFENDANT *IN REM*
RICHARD MENDALL,

Appellant.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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A IDENTITY OF RESPONDENT

The King County Sheriff John Urquhart is the Respondent in this case.

B. FACTS AND COURT OF APPEALS DECISION

King County Sheriff's Deputies seized drugs, weapons, and cash from Richard Mendall during a traffic stop. On June 9, 2014, the King County Sheriff's Office (KCSO) mailed a notice of seizure and intended forfeiture to Mendall. On July 3, 2014, Mendall responded by mailing to KCSO a notice of claim and request for hearing to contest the forfeiture. On September 22, 2014, KCSO sent Mendall a notice of hearing set for September 30, 2014.

On September 27, 2014, the hearing examiner granted KCSO a continuance to "the first week of December" due to a serious health emergency involving counsel's family, which rendered counsel unavailable until October 22, 2014. The hearing examiner had previously advised that her first availabilities after October 22 would be December 2-3, December 8-11, or December 16-18. On November 17, 2014, KCSO emailed Mendall, stating that the hearing examiner had advised that she was not available until the second week of December. Mendall's hearing was then

set for December 9, 2014, and was held as scheduled. The hearing examiner denied Mendall's two motions to suppress and his motion to dismiss for due process, and found that the cash was properly forfeited to the Sheriff's Office.

Mendall sought direct appeal in the Court of Appeals solely of the due process (continuance) issue. The superior court denied his motion to certify pursuant to RCW 34.04.518(2)(a) and affirmed the hearing examiner. Mendall sought direct review from this Court, which was denied. The case was transferred to the Court of Appeals, which affirmed the decision of the hearing examiner and Superior Court and denied Mendall's motion for reconsideration.

C. ISSUES PRESENTED FOR REVIEW

Should discretionary review be denied when the decision of the Court of Appeals is grounded in established precedent regarding civil asset forfeiture and basis for continuances from all three divisions of the Court of Appeals and this Court, and the question involves neither a significant question of law under the State or Federal Constitution, nor an issue of substantial public interest?

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) governs consideration of a petition for review. It provides that 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 another 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.

Mendall's petition does not meet the standard for review pursuant to RAP 13.4(b) because there is no conflict among decisions of the Court of Appeals or inconsistency in decisions of the Supreme Court. Mendall simply asks the Court to overturn well-settled precedent relating to civil asset forfeiture procedure. All three divisions of the Court of Appeals are in accord. The hearing examiner and the superior court relied upon the Court of Appeals' due process analysis for forfeiture hearings under the Administrative Procedure Act (APA) in In re Forfeiture of One 1988 Black Chevrolet Corvette, 91 Wn. App. 320, 323, 963 P.2d 187 (1997), in which Division One of the Court of Appeals adopted a

test consistent with Tellevik I and II.[1] *See* 91 Wn. App. at 324, n.13. Division Two adopted the Black Corvette analysis in Valerio v. Lacey Police Dep't, 110 Wn. App. 163, 174, 39 P.3d 332 (2002), and Division Three adopted it in Escamilla v. Tri-City Metro Drug Task Force, 100 Wn. App. 742, 747, 999 P.2d 625 (2000), *abrogated on other grounds by* In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 215 P.3d 166 (2009).

Further, the Court of Appeals' decisions do not conflict with the Tellevik cases; the case law collectively recognizes that under either the APA or civil rules, forfeiture hearings may be continued for good cause and that the agency's obligation to provide a hearing is not strictly constrained to 90 days post-claim. Review should be denied on that basis alone; Mendall's arguments for review under RAP 13.4(b)(3) and (4) are based on a bright-line rule that the *Tellevik* cases simply do not provide. Moreover, Mendall's sweeping assertion that "countless drug forfeiture claimants" have been denied due process[2] is baseless hyperbole, unsupported by the record.

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[1] Tellevik v. Real Prop. Known as 31641 W. Rutherford St., 120 Wn.2d 68, 838 P.2d 111 (1992) (Tellevik I) and Tellevik v. Real Prop. Known as 31641 W. Rutherford St., 125 Wn.2d 364, 884 P.2d 1319 (1994) (Tellevik II).

[2] Petition at 4.

The Sheriff's Office responds to Mendall's petition for review primarily for two reasons. First, Mendall argues at length about the applicability of Hutmacher v. State, 81 Wn. App. 768, 915 P.2d 1178 (1996) and RCW 34.05.419, asserting that the Court of Appeals failed to follow its own precedent. Although the Court of Appeals did not explicitly distinguish Hutmacher in its opinion, the court explained the applicability of RCW 34.05.419(1)(b) and noted that the same sound reasoning had governed the result in Black Corvette. Slip Op. at 5. Surely, the court, having the benefit of its 1996 decision in *Hutmacher* would have followed it in 1997 in *Black Corvette* if it was applicable.

Further, RCW 34.05.413 and RCW 34.05.419 are in harmony; the former states that an agency shall commence an adjudicative proceeding when required by law or a constitutional right (such as a property seizure and forfeiture) and that an adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted. RCW 34.05.413(1),(5). The latter provides a timeline and process for agency action. The Court of Appeals properly construed a notice of claim and request for hearing as an

application for an adjudicative proceeding in RCW 34.05.419 because the agency does not commence an adjudicative proceeding unless the claimant requests one by filing a claim. Asset forfeiture procedure is more analogous to the Employment Security Department proceedings described by Mendall than the Board of Nursing proceedings in Hutmacher. A law enforcement agency seizes assets based on probable cause that they were a conveyance in or profit from a crime; that decision is final unless a claim is filed challenging the seizure.

Nonetheless, Mendall concedes that the hearing initially set for September 30, 2014 was timely when set within 90 days of his claim; which is consistent with RCW 34.05.419(1). Thus, even if the applicability of RCW 34.05.419 was questionable, Mendall cannot show that it made any difference in his case.

Second, despite previously conceding good cause for KCSO's counsel's family medical emergency and being aware that the hearing examiner had overlapping unavailability until December 2, 2014, Mendall claims 1) that the record lacks a basis for the continuance to the first week of December, and 2) that KCSO violated the hearing examiner's order by setting Mendall's hearing for December 9. Petition at 42.

The hearing examiner has authority to grant continuances, including those upon her own motion. WAC 10-08-090. Mendall's argument that there was not good cause for the continuance to December 2, 2014 for the hearing examiner's unavailability must be either that the hearing examiner was required to inform him of the reason for her unavailability, or that she is a party, which is patently wrong. Mendall's argument is unsupported by any authority and should be rejected. Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193, 195 (1962).

Further, as the Court of Appeals held, there was nothing nefarious about setting the hearing for December 9; KCSO could not set the hearing for a date that the hearing examiner was unavailable. The grant of a continuance is reviewed for an abuse of discretion and the law regarding continuances is well-settled. A trial court's decision will not be disturbed unless the appellant makes "a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12,

26, 482 P.2d 775 (1971); *see also* State v. Heredia-Juarez, 119 Wn. App. 150, 153, 79 P.3d 987 (2003) (good cause for continuance for prosecutor's vacation); State v. Williams, 104 Wn. App. 516, 523, 17 P.3d 648 (2001), as amended (Apr. 13, 2001) (no abuse of discretion granting continuances due to the prosecutor's unavailability); State v. Torres, 111 Wn. App. 323, 331, 44 P.3d 903 (2002) (noting that scheduled vacations of counsel and investigating officers justify a continuance); State v. Flinn, 154 Wn.2d 193, 200, 110 P.3d 748 (2005) (scheduling conflicts may be considered in granting continuances).

Mendall cannot show that the hearing examiner's decision was manifestly unreasonable or based upon untenable grounds when she continued his hearing until the first week of December and ultimately set it for December 9. He has never challenged the merits of the hearing examiner's decision, nor has he alleged any prejudice caused by the continuance of his hearing.

In sum, in the context of the record and the well-settled case law regarding civil asset forfeiture procedure and basis for continuances, there is simply no novel legal issue presented that requires this Court to expend precious judicial resources on this case. The requirements under RAP 13.4 are not met.

E. CONCLUSION

For the above-stated reasons, the King County Sheriff respectfully asks that the petition for review be denied.

DATED this 17th day of April, 2017.

Respectfully submitted,

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