75026-7

~~No. 92385-0~~

SUPREME COURT

OF THE STATE OF WASHINGTON

URQUHART, KING COUNTY SHERIFF,

Plaintiff/Respondent

vs.

$6,510.00 U.S. CURRENCY,

In Rem Defendant

and

RICHARD MENDALL,

Claimant/Appellant

CORRECTED

APPEAL of KING COUNTY ~~SUPERIOR~~ COURT No. 15-2-00716-5

APPELLANT'S BRIEF

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I. BRIEF INTRODUCTION TO THE CASE

This case is an appeal of a denial of a Petition for Review of an Administrative Order. The Hearing Examiner (hereinafter the Examiner) for the King County Sheriff (hereinafter the Sheriff) ordered $6,510.00 seized from Appellant/Claimant Mr. Mendall forfeited under RCW 69.50.505, our State's drug forfeiture statute. The King County Superior Court affirmed. Mr. Mendall appeals.

Mr. Mendall was not afforded his rightful due process. The Sheriff failed to provide a full adversarial hearing within 90 days as directed by statute, as construed by our Supreme Court. Mr. Mendall's full adversarial hearing date was delayed twice. The administrative record must provide substantial evidence of good cause to delay a full adversarial hearing under the drug forfeiture statute. In Mr. Mendall's case, the record provides no evidence at all, only after-the-fact conclusions.

The first delay was a 67-day continuance to "the first week of December" based on Counsel for the Sheriff's 37-day unavailability. Mr. Mendall motioned for dismissal asserting a violation of his rightful due process. Only upon affirming the delay did the Examiner disclose the reason for the additional 30 days of delay was to accommodate her previously unmentioned vacation.

Regarding the second delay, the full adversarial hearing was never

scheduled as ordered: for "the first week of December" at all. Instead, it was scheduled for the second week of December over the objection of Mr. Mendall and without substantial evidence that the delay rested on good cause. Again, Mr. Mendall motioned for dismissal asserting a violation of his rightful due process. Again, only upon affirming the delay did the Examiner disclose the reason for the delay was to accommodate her undisclosed "unavailability," Of note, the Examiner has never disclosed the reason for this second "unavailability."

When affirming the delays, the Examiner ignored this Supreme Court's plain language directing agencies to provide "a full adversarial hearing within 90 days if [a timely claimant] contest[s] the seizure."[1] The Examiner instead followed a Division-I a case[2] that this writer believes should be overruled: a case that fails to follow not only this Supreme Court's precedent[3] as well as its own from just a year previous[4].

Due to these violations of Mr. Mendall's right to a full adversarial hearing within 90 days without any evidence in the record to show good cause, Mr. Mendall seeks a reversal of the Order of Forfeiture, the return of his property, and attorney fees for defending his property interests.

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[1] *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 86, 838 P.2d 111 (1992), modified 845 Wn.2d 1325 (1993) (hereinafter *Tellevik I*).
[2] *One Black Chevrolet Corvette,* 91 Wn. App. 320, 963 P.2d 187 (1997).
[3] *Id; Tellevik v. 31641 W. Rutherford St.*, 125 Wn.2d 364, 370-374, 884 P.2d 1319 (1994)(hereinafter *Tellevik II*).
[4] *Hutmacher v. Board of Nursing,* 81 Wn. App. 768, 772, 915 P.2d 1178 (1996).

II. ASSIGNMENTS OF ERROR

a. The Examiner erred by entering that portion of Finding of Fact 1 that states the date a claim was received begins a "90-day time period for commencing an adjudicative proceeding." (AR 102-103).

b. The Examiner erred by entering that portion of Finding of Fact 5 that states: "The Hearing Examiner was unavailable due to a long prescheduled vacation for the latter part of October and all of November." (AR 102-103).

c. The Examiner erred by entering Finding of Fact 6: "The Hearing Examiner returned from vacation, she had an unanticipated unavailability and Mendall's hearing needed to be scheduled for December 9, 2014, a brief continuance of two days." (AR 102-103).

d. The Examiner erred by entering Conclusion of Law 1: "The Tellevik cases cited by Mendall do not create a statute of limitations for administrative hearings for personal property forfeitures under RCW 65.50.505 and the Court of Appeals has not followed that interpretation of Tellevik for such forfeitures." (AR 102-103).

e. The Examiner erred by entering that portion of Conclusion of Law 2 that states: "In re Forfeiture of One 1988 Black Chevrolet Corvette, 91 Wn. App. 320, 963 P.2d 187 (1997) is aligned with the law on this point, and analogizes delays in administrative hearings to delays in criminal trials, holding that commencement takes place when claimant is notified of the date that the hearing will be conducted." (AR 102-103).

f. The Examiner erred by entering those portions of Conclusion of Law 3 that state: "...the issue is whether the claimant can show actual prejudice to his claim or his ability to put on his case.... The Hearing Examiner's unavailability was [] unavoidable and unforeseeable and was reasonable under the circumstances. Both continuances were for good cause." (AR 102-103).

g. The Examiner erred by entering that portion of Conclusion of Law 4 that states: "The four-part test in Black Corvette is the applicable analysis for whether due process rights have been violated." (AR 102-103).

h. The Examiner erred by entering that portion of Conclusion of Law 6 which states: "I find that the continuances of Mendall's hearing were for good cause." (AR 102-103).

i. The Examiner erred by entering Conclusion of Law 7: "Claimant's motion to dismiss for violation of due process is DENIED." (AR 102-103).

j. The Examiner erred by entering Discussion and Conclusions of Law 2: "All notices by the King County Sheriff's Office (KCSO) were timely given and received." (AR 106-107).

k. The Examiner erred by entering Discussion and Conclusions of Law 10 which states: "The claimant's money is properly forfeited under RCW 69.50.505." (AR 106-107).

l. The Court erred by entering that portion of Holding 1 that states: "RCW 34.05.419(1)(b) requires the agency to schedule a hearing (an adjudicative proceeding) [under RCW 69.50.505] within 90 days from a claimant's notice that he is contesting the seizure and forfeiture. KCSO complied with RCW 69.50.505 and RCW 34.05.419(1)(b) when it scheduled Mendall's hearing for September 30, 2014. The holding in Hutmacher v. Bd. of Nursing, 81 Wn. App. 768, 915 P.2d 1178 (1996) does not involve RCW 69.50.505 and therefore is inapplicable." (CP 59-61).

m. The Court erred by entering that portion of Holding 2 that states: "The hearing examiner had previously notified the parties via email that her first available date in December was the 2nd. The hearing examiner is not required to explain her availability *sua sponte* [without being asked]. The record before the Court is sufficient to find that Mendall's hearing was continued for KCSO's attorney's family medical emergency, followed by the hearing examiner's vacation, both of which are good cause. The record does not support a conclusion that the hearing examiner abused her discretion in granting KCSO's motion to continue the hearing to early December." (CP 59-61).

n. The Court erred by entering that portion of Holding 3 that states: "Finding 6 (CP 41) indicates that the hearing examiner had an

unanticipated unavailability when she returned from vacation that required scheduling Mendall's hearing on December 9, rather than during the first week of December. Nothing in the record suggests that the hearing examiner abused her discretion by [allowing the hearing to be delayed]. (CP 59-61).

o. The Court erred by entering that portion of Holding 4 that states: "The hearing examiner appropriately relied on In re Forfeiture of One 1988 Black Chevrolet Corvette, 91 Wn. App. 320, 323, 963 P.2d 187 (1997). Under Black Corvette and a well-settled body of state and federal case law analyzing due process deprivation based on delay in both civil forfeiture and time for trial under the Sixth Amendment, Mendall is required to show that he was prejudiced by the continuance." (CP 59-61).

III. STATEMENT OF THE ISSUES

a. The Examiner lacked good cause for ordering a continuance to "the first week of December" because Sheriff's Counsel was unavailable only through October and no reason for further delay was offered or argued. Pg 18

b. Affirming the continuance to "the first week of December" due on her own undisclosed vacation was an abuse of discretion because there are no facts in evidence on which to find "good cause" for any delay beyond the end of October. Pg 20

c. Concluding her own still undisclosed "unavailability" permitted the Sheriff to unilaterally disregard the Continuance Order was an abuse of discretion because there were no facts in evidence on which to find "good cause" for yet another delay. Pg 21

d. The Examiner and Superior Court applied case-law that fails to follow our State Supreme Court's previous ruling that due process requires a drug forfeiture claimant be provided a full adversarial hearing within 90 days of his claim absent good cause for a delay, and thus should be overruled. Pg 23

IV. STATEMENT OF THEFACTS OF THE CASE

On May 31, 2014, the Sheriff commenced this present drug forfeiture adjudicative proceeding when it seized $6,510.00 in cash from Richard Mendall's vehicle after firearms and a personal use quantity of suspected cocaine were observed in plain view during a traffic stop. (AR 050). The Department timely mailed to Mr. Mendall notice that this forfeiture action had commenced and his property would be forfeited by default unless a claim was filed within forty-five days. (AR 050). On July 7, 2014, the Sheriff's Department received Mr. Mendall's timely claim asserting his property interest in the seized items. (AR 051-052).

Mr. Mendall's full adversarial hearing was initially scheduled to be held September 30, 2014 – 85 days after the Sheriff received his claim. The Sheriff provided Mr. Mendall just 6 days notice of such, a violation of the Model Code of Administrative Procedure (hereinafter Model Code), WAC 10-08-040 (and causing Mr. Mendall to waive his right to demand more notice in order to preserve his right to a full adversarial hearing within 90 days of making his claim). (AR 056, 057).

Mr. Mendall's Counsel, Ms. Morelli, called the Sheriff to confirm the full adversarial hearing as soon as receiving notice, as instructed by the Sheriff within the Order. (AR 34-35, 057). Mr. Mendall's Counsel then emailed the Examiner and Sheriff's Counsel, Ms. Jacobsen-Watts, with

notice of Claimant's intended pre-hearing motions, per the Model Code and as instructed on the Order, providing as much notice as possible given the short timeframe provided. (AR 34-35, 057). Sherriff's Counsel complained that Mr. Mendall's request for motions to be heard on the currently scheduled full adversarial hearing date was "not enough time" for her own briefing on those motions. (AR 059).

Mr. Mendall's Counsel immediately objected to any delay of the full adversarial hearing, noting it was the Sheriff who chose the short timeframe. (AR 063). The Sheriff's Counsel denied knowing anything about the hearing as scheduled, explaining she was out of the office due to a family emergency (AR 058). As a courtesy, the Examiner provided potential alternative dates based on her own calendar in case the full adversarial hearing was to be rescheduled. (AR 060).

The next day, the Sheriff's Counsel formally motioned for a continuance of the full adversarial hearing date, explaining she would likely be unavailable through October (36 days from the date of her Motion; 117 days from receipt of Mr. Mendall's claim) while attending to her father who was presently hospitalized, incapacitated, about to have surgery, and likely about to be diagnosed with cancer, as she was his attorney-in-fact. (AR 062). The Sheriff's Counsel pledged to discuss potential settlement options with Claimant's Counsel in the meantime

should her request be granted. (AR 062).

Claimant objected to rescheduling based on his right to a full adversarial hearing within 90 days of making his claim. (AR 064).

The Examiner ordered a continuance "to the first week of December" (all of October and all of November; 147 days from receipt of Mr. Mendall's claim). (AR 065). The Examiner noted her decision was partially based on Sheriff's Counsel's assurance that she would engage in settlement discussions with Claimant's Counsel. (AR 065).

The Sheriff ignored the Continuance Order. The full adversarial hearing was never scheduled for the first week of December. And Sheriff's Counsel never fulfilled her pledge to engage in settlement discussions: a pledge on which the continuance was partially based. (Entirety of CP corresponds). Sheriff's Counsel was "back in the office" within the month of October, as anticipated. (AR 67).

A full 51 days after the full adversarial hearing was Ordered continued, Mr. Mendall's Counsel received an email from the Sheriff asking Claimant's Counsel to agree to hold the full adversarial hearing during the second week of December because the Examiner was no longer available. (AR 69-70). Mr. Mendall's Counsel responded with Claimant's objection to any further delay. (AR 69). Mr. Mendall's objection was ignored.

Mr. Mendall's Counsel later received a second Scheduling Order indicating the full adversarial hearing had been rescheduled for December 9, 2014 (the second week of December). (AR 34).

Mr. Mendall motioned for dismissal of this action based on the failure of the Sheriff to provide a timely full adversarial hearing. (AR 39-49).

The day of the hearing, the Examiner heard and denied the motion, finding that the initial continuance of the full adversarial hearing through October and November was granted in part because she, the Examiner, had gone on a previously undisclosed vacation. (AR 101-102).

The Examiner also found that the full adversarial hearing was lawfully scheduled for the second week of December, rather than the first week as ordered, because she, the Examiner, had some other unnamed unavailability. (AR 101-102). The Examiner then concluded that her own earlier vacation and unnamed unavailability were "unavoidable and unforeseeable." (AR 102). The Examiner held that due to these "unforeseeable events," there was "good cause" to delay Mr. Mendall's full adversarial hearing through October, and through November, and through the first week of December. (AR 102).

Mr. Mendall was never told why the Examiner was "unavailable" the first week of December.

The property was ordered forfeited to the Sheriff. (AR 107). Mr. Mendall timely filed his Petition for Review. (CP 1-5). King County Superior Court affirmed the Examiner. (CP 59-61). Mr. Mendall timely filed this appeal.

V. STANDARD OF REVIEW

A full adversarial hearing in a drug forfeiture adjudicative proceeding may be continued for "good cause". WAC 10-08-090; *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 91, 838 P.2d 111(1992), modified 845 P.2d 1325 (1993) (hereinafter "*Tellevik I*"). The decision to grant or deny a continuance of a commenced forfeiture action is reviewed for an abuse of discretion. *Tellevik I, 120 Wn.2d at 90-91; City of Des Moines v. $81,231*, 87 Wn.App. 689, 698, 943 P.2d 670 (1997), quoting *City of Bellevue v. Vigil*, 66 Wn.App. 891, 892, 833 P.2d 445 (1992). The granting of a continuance is an abuse of discretion when "manifestly unreasonable, or resting on untenable grounds, or for untenable reasons." *City of Des Moines*, 87 Wn.App at 698.

VI. LAW

ON THE ISSUE OF COMMENCMENT

The plain language of RCW 69.50.505(3) is clear: "Proceedings for the forfeiture shall be deemed commenced by the seizure." *Id.* Thus, RCW 34.05.419, on which the Sheriff relied on below, does not apply. In 1996, Division I of the Court of Appeals decided *Hutmacher v. Board of Nursing,* 81 Wn.App. 786, 915 P.2d 1178 (1996). *Hutmacher* explains when RCW 34.05.419 applies to an administrative adjudicative proceeding, and more importantly for Mr. Mendall's case, when it does not apply. As explained in that case, and as is clear by the plain language of the drug forfeiture statute, "proceedings for forfeiture shall be deemed commenced upon seizure," thus RCW 34.05.419 is irrelevant to drug forfeiture cases.

ON THE ISSUE OF DUE PROCESS

The Due Process Clauses of the United States and Washington Constitutions require notice and an opportunity to be heard prior to government deprivation of an individual's life, liberty, or property interest. *Tellevik I,* 120 Wn.2d at 82-83; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950). The nature of the interest and the severity of the deprivation dictate the amount and type of process due. *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S.

Ct. 893 (1976).

Washington State's legislature has codified the due process requirement when a government agency seizes property for forfeiture based on alleged violations of the uniform controlled substances act within RCW 69.505(3-5)[5], as construed by our State Supreme Court. *Tellevik I*, 120 Wn.2d at 77-87; *Tellevik II,* 125 Wn.2d at 370-374.

RCW 69.50.505(3-5) reads in relevant part:

> (3) ...[P]proceedings for the forfeiture shall be deemed commenced by the seizure. The law enforcement agency ... shall cause notice to be served within fifteen days 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 ... 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.... ;
>
> (5) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right ... 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....

RCW 69.50.505 (truncated and bolded by Claimant's Counsel for case-

[5] When the *Tellevik* cases were decided in the early 1990's, the subsections of RCW 69.50.505 were listed alphabetically, (a-q). The statute has been amended several times between now and then, including a 2004 amendment to list the subsections numerically rather than alphebetically. Former subsections (c-e) are now (3-5). The statutory language pertinent to this present case has not changed.

specific clarity).

Our courts must construe statutes to preserve constitutionality when possible. *High Tide Seafoods v. State*, 106 Wn.2d 695, 698, 725 P.2d 411 (1986). Our Supreme Court preserved the constitutionality of the generic phase "reasonable opportunity to be heard" in RCW 69.50.505(5) by holding that individuals claiming a property interest in property seized under the statute have a due process right to "a full adversarial hearing within 90 days if they contest the seizure." *Tellevik I*, 120 Wn.2d at 86, 87. Two years later our Supreme Court affirmed and reiterated this 90-day requirement again in *Tellevik II*, explaining that "[c]ontrary to the State's assertion, the 90-day hearing requirement articulated in *Tellevik I* is not dicta, but is, instead, central to its holding." *Tellevik II*, 125 Wn.2d at 372, 374.

"A fundamental rule of statutory construction is that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into the statute." *Espinoza v. City of Everett*, 87 Wn.App. 857, 869, 943 P.2d 387 (1997), citing *In re Vandervlugt*, 120 Wn.2d 427, 436, 842 P.2d 950 (1992). The phrase "a reasonable opportunity to be heard" contained within RCW 69.50.505(5) operates as if it were originally written "a full adversarial hearing within 90 days." *Tellevik II*, 125 Wn.2d at 372, 374.

When drug forfeiture adjudicative proceedings are administrative in nature, Washington State's Administrative Procedure Act, 39.05 RCW (APA) and Model Code of Administrative Procedure 10-08 WAC (Model Code) provide additional procedural instruction. All agencies that do not adopt their own administrative rules, such as the Sheriff in this case, are directed by statute to adopt the Model Code. RCW 34.05.220.

A timely Claimant in a drug forfeiture adjudicative proceeding has a due process right to a full adversarial hearing within 90 days absent "good cause." WAC 10-08-090; *Tellevik I,* 120 Wn.2d at 90-91. "The State does not have the power to ignore the statutory limitations on a [drug forfeiture adjudicative proceeding] hearing date." *Tellevik II*, 125 Wn.2d at 373. Even in administrative matters, there is a process that must be followed before any hearing can be delayed. WAC 10-8-090. That process includes some sort of notice to the opposing party, as well as facts in evidence supporting a finding of "good cause" for any delay *Id.*

The decision to grant or deny a continuance of a commenced forfeiture action is reviewed for an abuse of discretion. *Tellevik I, 120 Wn.2d at 90-91; City of Des Moines v. $81,231*, 87 Wn.App. 689, 698, 943 P.2d 670 (1997), quoting *City of Bellevue v. Vigil*, 66 Wn.App. 891, 892, 833 P.2d 445 (1992). The granting of a continuance is an abuse of discretion when "manifestly unreasonable, or resting on untenable

grounds, or for untenable reasons." *City of Des Moines*, 87 Wn.App at 698.

Our State Supreme Court ruled in *Tellevik II* that federal case law regarding alleged due process violations of the federal drug forfeiture statute are irrelevant when deciding whether a violation of the 90-day time limitation of RCW 69.505(5) occurred. *Tellevik II at 374. Tellevik II* explained:

> Unlike *Good*[6] [a federal case analyzing the federal drug forfeiture statute, citation omitted], the 90-day requirement is not merely an "internal timing requirement." Here, as discussed above, the time limitation requirement was read into the statute in order to preserve its constitutionality. *Tellevik II at 374.*

Thus, in Washington State, Washington State law is applied, and is the Standard of Review in Mr. Mendall's Case:

A full adversarial hearing in a drug forfeiture adjudicative proceeding may be continued for "good cause". WAC 10-08-090; *Tellevik I*, 120 Wn.2d 68. The decision to grant or deny a continuance of a commenced forfeiture action is reviewed for an abuse of discretion. *Tellevik I, 120 Wn.2d at 90-91; City of Des Moines*, 87 Wn.App. at 698, quoting *City of Bellevue*, 66 Wn.App. at 892. The granting of a continuance is an abuse of discretion when "manifestly unreasonable, or resting on untenable grounds, or for untenable reasons." *Id.*

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[6] *United States v. James Daniel Good Real Property,* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

VII. ARGUMENT AND ANALYSIS

Claimant agrees it was appropriate for Sheriff's Counsel, Ms. Jacobsen-Watts, to be with her father during his medical emergency. No argument is made to the contrary.

a. **The Examiner lacked good cause for ordering a continuance to "the first week of December" because Sheriff's Counsel was unavailable only through October and no reason for further delay was offered or argued.**

Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. RCW 34.05.461(4).

There are no facts in evidence to find "good cause" for a continuance of 67 days. Ms. Jacobsen-Watt's absence of 37 days was the only reason offered for a delay.

The granting of a continuance is an abuse of discretion when "manifestly unreasonable, or resting on untenable grounds, or for untenable reasons." *City of Des Moines*, 87 Wn.App at 698. In this case, the additional 30 days of delay isn't resting on any legal grounds at all.

A timely Claimant in a drug forfeiture adjudicative proceeding has a due process right to a full adversarial hearing within 90 days absent "good cause." It is anticipated that the Sheriff will argue that the Examiner's vacation rises to the level of "good cause." But at the time of

the Examiner's Order, no evidence was presented for the record about any such vacation and the Sheriff's argument for delay involved only Ms. Jacobsen-Watt's 37 day absence. Significantly, when the Examiner disclosed her schedule, no motion was pending and at no time did she mention her vacation or "unavoidable" absences.

"Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." RCW 34.05.461(4). The granting of a continuance is an abuse of discretion when "manifestly unreasonable, or resting on untenable grounds, or for untenable reasons." *City of Des Moines*, 87 Wn.App at 698. If the Examiner intended to delay Mr. Mendall's full adversarial hearing based on her own unavailability, Mr. Mendall needed to be informed of this *before* her decision, not after. Because the Examiner's vacation was not disclosed until after the continuance was granted, it was not a finding of fact "based exclusively on the evidence of record" as required by the plain language of RCW 34.05.461(4).

A finding based on no evidence at all is certainly "manifestly unreasonable, or resting on untenable grounds, or for untenable reasons." *City of Des Moines*, 87 Wn.App at 698.

Further, Mr. Mendall had no opportunity to question the reasonableness of the Examiner's unavailability and whether the

unavailability was actually "unavoidable." Perhaps a *pro tem* or other Examiner was available during her absence. We do not know because Mr. Mendall had no opportunity to raise these questions. Mr. Mendall had no information regarding any vacation – that fact did not present itself until after the continuance was ordered and then after the continuance was later affirmed.

Preventing a party from making relevant inquiries and valid arguments for or against a judicial decision is manifestly unreasonable. A finding here is based on no evidence at all. It is thus "manifestly unreasonable, or resting on untenable grounds, or for untenable reasons." *City of Des Moines*, 87 Wn.App at 698. The continuance of 67 days was an abuse of discretion.

b. Affirming the continuance to 'the first week of December" due to her own undisclosed vacation was an abuse of discretion because there are no facts in evidence on which to find "good cause" for any delay beyond the end of October.

As argued above, the administrative record is devoid of a "good cause" for the last 30 days of the 67 day continuance. The Examiner's decision to affirm her previous decision to continue the full adversarial hearing for 67 days was an abuse of discretion for all the reasons argued above, and by reference Mr. Mendall incorporates them here. The record was devoid of any mention of a vacation until two months after the

continuance was ordered. The vacation was finally disclosed when affirming the continuance based on that undisclosed vacation.

Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. RCW 34.05.461(4). "Finding" that her vacation was "unforeseen and unavoidable" is an abuse of discretion when there were no facts in evidence on which she could make such a finding.

c. Concluding her own still undisclosed "unavailability" permitted the Sheriff to unilaterally disregard the Continuance Order was an abuse of discretion because there were no facts in evidence on which to find "good cause" for yet another delay.

Scheduling the full adversarial hearing for the second week of December, rather than the first week, was in direct violation of the Examiner's Continuance order. The Order was clear: schedule the full adversarial hearing for the "first week of December." The record is clear at the time of the Order that the Examiner's calendar was open for the full adversarial hearing to be scheduled as ordered. The Examiner abused her discretion.

"The State does not have the power to ignore the statutory limitations on a [drug forfeiture adjudicative proceeding] hearing date." *Tellevik II*, 125 Wn.2d at 373. Even in administrative matters there is a process that must be followed before any hearing can be delayed. WAC 10-8-090.

That process includes some sort of notice to the opposing party, as well as facts in evidence supporting a finding of "good cause." *Id.*

The Examiner held that there was good cause for this additional delay because she herself was "unavailable" and that unavailability was "unforeseen and unavoidable." But there are no facts in evidence to support any such finding. Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. RCW 34.05.461(4).

It's reasonable to consider that in Mr. Mendall's case, the Examiner' reason for being "unavailable" is because 51 days passed before the hearing was actually rescheduled, and thus the previous openings in the Examiner's schedule during the first week of December simply filled up over the normal course of her job. Such a scheduling conflict is both foreseeable and avoidable, and thus cannot be a "good cause" to delay the full administrative hearing again. Simply scheduling the hearing for the first week of December way back at the time of the original continuance would have prevented such a problem.

"The State does not have the power to ignore the statutory limitations on a [drug forfeiture adjudicative proceeding] full administrative hearing date." *Tellevik II*, 125 Wn.2d at 373. Even in administrative matters there is a process that must be followed before any

hearing can be delayed. WAC 10-08-090. That process includes some sort of notice to the opposing party, as well as facts in evidence supporting a finding of "good cause." *Id.*

The Examiner abused her discretion. Her findings and conclusions regarding the second delay are not resting on facts in evidence. The decision is wholly unreasonable. Her ruling on this issue must be reversed and the case dismissed.

d. <u>The Examiner and Superior Court applied case-law that fails to follow our State Supreme Court's previous ruling that due process requires a drug forfeiture claimant be provided a full adversarial hearing within 90 days of his claim absent good ause for a delay, and thus should be overruled.</u>

The Examiner in Mr. Mendall's case relied on *One 1988 Black Chevrolet Corvette*, 91 Wn.App. 320, 963 P.2d 187 (1997) and *Escamilla v. Tri-City Drug Task Force,* 100 Wn.App. 742, 900 P.2d 625 (2000), which also relied on *One 1988 Black Chevrolet Corvette*. This was error. *Black Chevrolet Corvette* applied the wrong law to the facts and this writer suggests it should be overruled, as should *Escamilla*.

The crux of the problem is the confusion of issues from whether or not a Claimant received a "full adversarial hearing within 90 days" of making his claim, to focusing instead on "commencement." The issue is confused more because the *Black Corvette* and subsequent courts ignored RCW 69.50.505's plain language that forfeiture proceedings "commence"

at time of the property seizure.

Commencement is not the issue.

The plain language of RCW 69.50.505(3) is clear: "Proceedings for the forfeiture shall be deemed commenced by the seizure." *Id.* Thus, RCW 34.05.419, on which the Sheriff relied on below, does not apply. In 1996, Division I of the Court of Appeals decided *Hutmacher v. Board of Nursing,* 81 Wn.App. 786, 915 P.2d 1178 (1996). *Hutmacher* explains when RCW 34.05.419 applies to an administrative adjudicative proceeding, and more importantly for Mr. Mendall's case, when it does not apply. As explained in that case, and as is clear by the plain language of the drug forfeiture statute, "proceedings for forfeiture shall be deemed commenced upon seizure," thus RCW 34.05.419 is irrelevant to drug forfeiture cases.

The issue is whether the various delays to Mr. Mendall's full adversarial hearing were for good cause.

In this brief, *One Black Corvette* is compared and contrasted RCW 69.50.505 and certain sections of 34.05 RCW (Administrative Procedure Act) to explain the error of analysis made in that case and thus by the Examiner in Mr. Mendall's matter. That case failed to follow the *Tellevik* cases. It's analysis is incorrect and should be overruled.

In *One Black Corvette*, the Snohomish County Sheriff seized the *in*

rem defendant property and the same day notified Joel Rae that it intended to forfeit the vehicle under the drug forfeiture statute. *Id. at 323.* 78 days after Rae filed his timely claim a pre-hearing conference was scheduled to be held 33 days after that, ie: 111 days after filing his claim. *Id.* 36 days after that, 147 days after his claim, a full adversarial hearing was held and the vehicle ordered forfeited. *Id.*

The *Black Corvette* Court ignored the plain language of RCW 69.50.505(3) that states drug forfeiture adjudicative proceedings commence at the time of seizure, only mentioned the *Tellevik* cases in a dismissive footnote, and then applied a balancing test used for deciding alleged due process violations in federal forfeiture actions. *Id. at 324.*

The Court concluded that the scheduling of the pre-hearing conference that occurred on day 78 from claim filing was enough to satisfy the requirement of *Tellevik I and Tellevik II* that a claimant be afforded to a "full adversarial hearing" within 90 days after seizure. Then, finding Claimant could not show "prejudice," concluded was no error by holding the full adversarial hearing more than 90 days after making a claim.

Our State Supreme Court ruled in *Tellevik II* that federal case law regarding alleged due process violations of the federal drug forfeiture statute are irrelevant when deciding whether a violation of the 90 day time limitation

of RCW 69.505(5) occurred. *Tellevik II at 374.* *Tellevik II* explained the difference:

> Unlike *Good* [a federal case analyzing the federal drug forfeiture statute, citation omitted], the 90-day requirement is not merely an "internal timing requirement." Here, as discussed above, the time limitation requirement was read into the statute in order to preserve its constitutionality.

Tellevik II at 374.

Thus, the federal drug forfeiture statute and any case law analyzing whether a claimant received due process under it is irrelevant and cannot apply to the Washington State drug forfeiture statute. *One 1988 Black Chevrolet Corvette* was decided incorrectly because it ignored the *Tellevik* cases and instead applied the very analysis our State Supreme Court previously ruled did not apply.

Citation to sections 413 and 419 of the APA does not save this error. RCW 69.50.505(3) states unambiguously, "proceedings for the forfeiture shall be deemed commenced by the seizure." *Id.* Under RCW 34.05.413, the APA also provides direction on how and when actions are commenced. These statutes do not conflict, the Examiner relies on case law that misunderstands their interplay.

RCW 34.05.413 states in its entirety:

> (1) Within the scope of its authority, an agency *may commence* an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

(2) When required by law or constitutional right, and upon the timely application of any person, an agency *shall commence* an adjudicative proceeding.

(3) An agency may provide forms for and, by rule, may provide procedures for filing an application for an adjudicative proceeding. An agency may require by rule that an application be in writing and that it be filed at a specific address, in a specified manner, and within specified time limits. The agency shall allow at least twenty days to apply for an adjudicative proceeding from the time notice is given of the opportunity to file such an application.

(4) If an agency is required to hold an adjudicative proceeding, an application for an agency to enter an order includes an application for the agency to conduct appropriate adjudicative proceedings, whether or not the applicant expressly requests those proceedings.

(5) 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 (emphasis added by Claimant's Counsel for clarity).

It is important to remember the issue discussed in the *Tellevik* cases is not about *commencement* of drug forfeiture adjudicative proceedings – it is about the deadline for the *completion* of drug forfeiture adjudicative proceedings. Whether or not the action commenced never at issue, and for good reason.

"Proceedings for the forfeiture shall be deemed commenced by the

seizure." RCW 69.50.505(3).

An agency "may" commence an administrative action at any time, in accordance with RCW 34.05.413(1). In all drug forfeiture adjudicative proceedings, an agency chooses to commence the action by choosing to seize the property. In drug forfeiture adjudicative proceedings, RCW 34.05.413(2) does not come into play because it is not the claimant's claim that triggers the requirement of commencement – it is the seizure itself.

"Proceedings for the forfeiture shall be deemed commenced by the seizure." RCW 69.50.505(3).

Subsection five of the above statute is in accord as well. When a Claimant's property is seized and they are informed the property will be deemed forfeited if they do not act, they have been informed that some stage of the commenced forfeiture action will be conducted. Forfeiture via default is a potential stage of the previously commenced forfeiture action. The default cannot take place without first the property being seized, thus commencing the proceeding. Nor can default take place without the agency first notifying prospective claimants of the next stage of the commenced forfeiture action if they do not act – default.

RCW 69.50.505(3-5) and RCW 34.05.413 are in harmony. Drug

forfeiture adjudicative proceedings commence upon seizure of property. RCW 34.05.419 does not save the Examiner's erroneous decision because it is inapplicable.

RCW 34.05.419 begins, "[a]fter receipt of an application for an adjudicative proceeding, other than a declaratory order, an agency shall proceed as follows:..." I do not type the remainder of the section because it does not apply to Mr. Mendall's case. Drug forfeiture adjudicative proceeding claimants do not apply for "adjudicative proceedings." Drug forfeiture adjudicative proceeding claimants "notif[y] the seizing law enforcement agency in writing of the person's claim." RCW 69.50.505(2). There is no need to apply for an adjudicative proceeding because the agency previously "commenced" the forfeiture action – an adjudicative proceeding – by seizing the property. RCW 69.50.505(3).

The Examiner, relying on the erroneous analysis in *One 1988 Black Chevrolet Corvette* and *Escamilla,* confuses the terms "adjudicative proceeding" with the phrase "full adversarial hearing" coined in the *Tellevik* cases.

> RCW 34.05.010(1) defines "adjudicative proceeding:"
>
> "Adjudicative proceeding" means a proceeding before an agency in which an opportunity for hearing before that

> agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW 66.08.150, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

Id.

Drug forfeiture adjudicative proceedings commence upon the agency's seizure of property for forfeiture. RCW 69.05.505(3). The drug forfeiture statute provides for an "opportunity" to be heard. RCW 69.50.505(3). No Claimant need take an agency up on the opportunity. The adjudicative proceeding commences regardless of whether or not a claim for property is made. The drug forfeiture statute requires an agency to inform known potential claimants that the next stage of the adjudicative proceeding will be default forfeiture if no claim is made. This notice satisfies both the drug forfeiture statute and the APA.

If a claim is timely made, the *Tellevik* cases require a "full adversarial hearing within 90 days." *Tellevik I,* 12 Wn.2nd. at 86. A "full adversarial hearing" is a stage of an "adjudicative proceeding."

The nature of the interest and the severity of the deprivation dictate the amount and type of process due. *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). In *Tellevik I*, the court coined the

phrase "full adversarial hearing" to define what type of due process is required in drug forfeiture adjudicative proceedings. A "full adversarial hearing" is much more due process than the *ex parte* hearing discussed in that case. And it is less than a full trial by a jury of the Claimant's peers. By the plain language of the words our Supreme Court chose, we can define what a "full adversarial hearing" must contain:

- Full: A complete discussion and analysis of all issues relevant to whether or not property should be forfeited;
- Adversarial: Opposing parties, usually represented by Counsel, presenting typically conflicting evidence and testimony in support of or against a forfeiture;
- Hearing: A neutral magistrate makes a final decision after presentation of all evidence and full argument by opposing parties on all issues.

Thus, a "full adversarial hearing" is quite a bit of due process.

By comparison, when no claim is made a drug forfeiture adjudicative proceeding may be completed at the default stage, without any evidence or answering of whether or not the property is even forfeitable.

Tellevik I and *II* is the law of our State Supreme Court. "The State does not have the power to ignore the statutory limitations on a [drug forfeiture adjudicative proceeding] hearing date." *Tellevik II*, 125 Wn.2d at 373. A delay of a timely claimant's "full adversarial hearing" violates

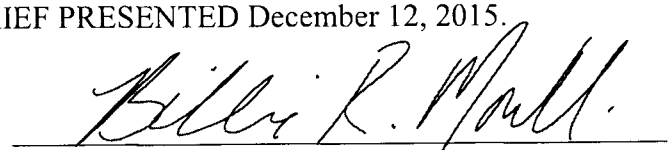
due process unless there is a "good cause" entered into evidence to support the delay. In Mr. Mendall's case, the Examiner's post-disclosure of her vacation and her still undisclosed later "unavailability" were not in evidence and cannot be the basis for any finding of a "good cause" for a delay of any sort. The Examiner abused her discretion and Mr. Mendall's property must be returned.

VIII. CONCLUSION AND REQUEST FOR RELIEF

For the above reasons, Mr. Mendall respectfully requests the reversal of the Orders of the Examiner regarding the continuance and re-scheduling of the full administrative hearing date, an Order directing the Sheriff to return Mr. Mendall's property immediately, and the dismissal of this forfeiture action.

Mr. Mendall further requests an award of his costs and attorney fees. Mr. Mendall asks for time to submit an accounting, and for a judgment against Plaintiff for those fees and costs reasonably incurred.

CORRECT BRIEF PRESENTED December 12, 2015.

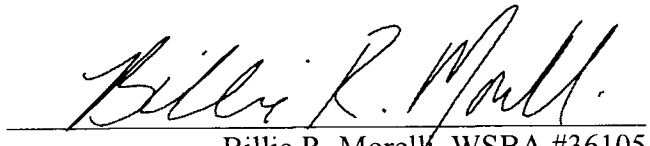


Billie R. Morelli, WSBA No. 36105
Counsel for Claimant Richard Mendall

CERTIFICATE OF SERVICE

I, Billie R. Morelli, declare that on or about December 12, 2015, I emailed a digital PDF copy of this document to Jacobsen-Watts at Heidi.Jacobsen-Watts@kingcounty.gov. Ms. Jacobsen-Watts and I have mutually agreed to accept email service in this matter.

DECLARED December 12, 2015, in Concrete, Washington



Billie R. Morelli, WSBA #36105

OFFICE RECEPTIONIST, CLERK

To: billie@lawyerforthelittleguy.com; Jacobsen-Watts, Heidi
Subject: RE: For Filing in 92385-0: CORRECTED Appellant's Brief on the Merits

Received on 12-14-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Billie R. Morelli [mailto:billie@lawyerforthelittleguy.com]
Sent: Saturday, December 12, 2015 4:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Jacobsen-Watts, Heidi <Heidi.Jacobsen-Watts@kingcounty.gov>
Subject: For Filing in 92385-0: CORRECTED Appellant's Brief on the Merits

Clerk and Ms. Jacobson-Watts:
The citations to the record were incorrect in Appellant's Brief filed 12/04/2015. Attached please find Mr. Mendall's CORRECTED Appellant's brief. The only changes are to the citations to the record. Everything else is the same. I called the court last week and was told that I just needed to re-submit with a short letter of explanation. Please accept this email as that letter. The Corrected brief is attached for filing.

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