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NO. 67170-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,

v.

HARRY OLEBAR,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE MARY YU

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. The sentencing court denied a motion to return property to Olebar, when he admitted that the property did not belong to him, and when part of the property had previously been forfeited pursuant to statute. Should this Court decide that the trial court's order is not reviewable because it did not affect a substantial right of Olebar's?

2. Assuming this Court decides to address the merits of the appeal, did the trial court properly deny a motion to return property of which Olebar was not the owner, and a portion of which had previously been forfeited pursuant to statute?

**B. STATEMENT OF THE CASE**

On December 1, 2009, Harry Olebar was arrested for driving under the influence, after his car ran off gas on State Route 520, blocking the left lane of the westbound bridge high-rise. CP 40-41. Olebar was so intoxicated that he could not maintain his balance long enough to perform field sobriety tests. CP 41. Olebar had over \$7,400 in cash, phencyclidine (PCP), a cell phone and an address book on his person. Id. The address book contained a business card of "Douglas Sheldon," with a phone number,

address, and "\$2,500" written on the back of the card. CP 42. In the vehicle, a sheet of paper was discovered between the driver's seat and the center console with Sheldon's name and an amount of money written on it. Id. Other names, phone numbers and amounts of money were written on the paper. Id. Also discovered in the car were over 50 grams of cocaine, and another cellular telephone. Id. Olebar was uncooperative and did not provide a breath sample. Id.

In January 2011, Olebar was charged in King County Superior Court with possession of phencyclidine; he later pled guilty to a reduced charge. CP 1, 39. Olebar was sentenced on February 17, 2011. CP 3-4.

On March 14, 2011, Olebar moved the sentencing court to "return/release any and all property/evidence." CP 45-48. Citing RCW 10.105.010, he alleged that his property could not be forfeited because he had not been convicted of a felony. CP 47. He did not state with any particularity the property he sought to be returned; he referred only to "property" taken during his arrest. CP 46. It would appear from his argument that Olebar understood at the time he filed his motion that the money at issue had been forfeited.

The State responded with an affidavit averring that the signing deputy prosecuting attorney had spoken to the Assistant Attorney General who had personally handled the forfeiture proceeding regarding the \$7,400<sup>1</sup> taken from Olebar's person at the time of his arrest. CP 23. Ruth Ammons, the Assistant Attorney General, informed the deputy prosecutor that within 15 days of Olebar's arrest, notice had been sent to the address he provided to the police when arrested. CP 24. Notice had also been mailed to Olebar's last known address on record with the state Department of Licensing. Id. Olebar never made a claim for the money pursuant to RCW 69.50. Id. The money was forfeited to the State Patrol pursuant to RCW 69.50.505 on or before February 26, 2010. Id.

The court denied Olebar's motion on March 30, 2011. CP 28. Also on March 30, 2011, Olebar drafted a "reply" to the State's response. It was apparently received by the sentencing court on April 4, 2011, after the court had denied Olebar's motion. CP 51-57. However, Olebar filed a motion to reconsider on April 12, 2011. CP 29-32. Thus, the court had reviewed Olebar's response when it denied his motion for reconsideration on May 4, 2011. CP 34.

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<sup>1</sup> The police indicated that they seized \$7,470.00 from Olebar. CP 42.

**C. ARGUMENT**

1. THE SENTENCING COURT'S DENIAL OF OLEBAR'S MOTION TO RETURN PROPERTY IS NOT REVIEWABLE BECAUSE IT DID NOT AFFECT HIS SUBSTANTIAL RIGHTS.

Olebar asks this Court to review the denial of his motion to return property. But Olebar asked the sentencing court to return property that he admitted did not belong to him, and part of which had previously been forfeited pursuant to RCW 69.50.505. As such, the court's order could not have affected Olebar's substantial rights. Therefore, this Court should dismiss Olebar's appeal, as the order he seeks review of is not appealable.

Olebar cites RAP 2.2(a)(13) in support of his argument for review of the sentencing court's order:

(a) **Generally.** Unless otherwise prohibited by statute or court rule . . . a party may appeal from only the following superior court decisions:

(13) *Final Order After Judgment.* Any final order made after judgment that affects a substantial right.

RAP 2.2(a)(13). The State does not dispute that an order denying a motion to return property can, in some circumstances, constitute a final order that affects a substantial right. But on these facts, the court's refusal to return property that Olebar admitted he did not own, and at least a portion of which had already been forfeited

pursuant to statute, does not fall within this category of appealable decisions.

RCW 69.50.505 is the exclusive mechanism by which the State can forfeit the proceeds from the sale of controlled substances, or property that is used to facilitate the violation of drug laws. State v. Alaway, 64 Wn. App. 796, 801, 828 P.2d 591 (1992). It also outlines the exclusive manner for a claimant to seek return of the property. RCW 69.50.505(5). Ignoring RCW 69.50.505 altogether, Olebar filed a motion to return the property under his criminal cause number. CP 46-48. In response to Olebar's motion, the State pointed out by affidavit that the money had been forfeited over a year earlier, pursuant to the provisions of RCW 69.50.505.<sup>2</sup> CP 23-24.

Olebar's motion was not a simple motion to return property in the possession of the police or the court. To the extent Olebar sought return of property forfeited pursuant to default order entered under RCW 69.50.505(4), his motion was a collateral challenge to the civil forfeiture, occurring pursuant to an administrative process,

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<sup>2</sup> The State's response addressed only the money, most likely because Olebar's motion was vague on exactly what it was he was asking the court to return; he referred only to "property." CP 46-47.

that was completed over a year before Olebar brought his motion in the criminal case.<sup>3</sup> CP 24, 45. The sentencing court had no jurisdiction or authority to "return" property that had already been forfeited, i.e., that was unreturnable.

Olebar's assertion that the State is confusing the question of appealability with the potential merits of the appeal ignores the fact that Olebar could not bring a CrR 2.3(e) motion to recover property forfeited under RCW 69.50.505. CrR 2.3(e) broadly covers motions to recover property in general, while RCW 69.50.505 narrowly outlines a claimant's ability to recover proceeds from the sale of controlled substances that are subject to forfeiture by the State.

Pursuant to RCW 69.50.505, Olebar's ability to recover the forfeited money is limited to filing a civil claim for relief; he cannot file a CrR 2.3(e) motion in his criminal case, demand a full evidentiary hearing on the validity of the past civil forfeiture proceeding, and subsequently argue he has the right to appeal the denial of such motion. If Olebar believes that the money was improperly forfeited, his remedy is to file a civil claim for relief. See State ex. rel Schillberg v. Everett District Justice Court, 90 Wn.2d

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<sup>3</sup> See e.g. RCW 69.50.505(4) (procedure for entry of a default order of forfeiture); RCW 35.05.440 (procedure for appealing such an order).

794, 798, 585 P.2d 1177 (1978) (motion and hearing for return of property under court rule is not a proceeding in which the court determines ownership of the property; if disputed, defendant must resort to civil remedy). Since Olebar could not regain possession of the property through a hearing in the criminal case, the court's order denying his motion could not in any way "affect a substantial right" as required under RAP 2.2(a)(13). The order is not appealable.

Moreover, to the extent that Olebar complains of the court's refusal to return the cell phone and address book, he has already denied that those items belonged to him.<sup>4</sup> CP 56 ("Harry Olebar shows prove [sic] that Maxine Demmert is correct and true owner of property taken on 12/01/2009"); CP 57 ("Harry Olebar requests that the property be returned to the actual owner Maxine Demmert"). Olebar cannot claim that the property does not belong to him and simultaneously argue that the court's denial of his motion to return the property affected a substantial right of his. This Court should dismiss this appeal.

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<sup>4</sup> As pointed out above, Olebar's "reply" to the State's response was received by the court prior to the denial of his motion for reconsideration. CP 34, 52.

2. EVEN ASSUMING THAT THE COURT'S DENIAL OF OLEBAR'S MOTION TO RETURN PROPERTY IS APPEALABLE, THE COURT PROPERLY DENIED THE MOTION.

Olebar has not shown that the court erred by denying his motion to return property. With respect to the currency, it had been forfeited, and Olebar had no right to its return. With respect to the cell phone and the address book (as well as the currency), Olebar admitted that all of the property belonged to someone else. Because the trial court properly denies a motion for return of property if the defendant is not the rightful owner, or if the property is subject to forfeiture, it did not err when it denied Olebar's motion.

a. The Court Properly Denied Olebar's Motion For The Return Of The Property As He Was Not The Rightful Owner.

A court may deny a motion to return property when "the defendant is not the rightful owner." Alaway, 64 Wn. App. at 798. Here, Olebar continually represented to the court that the property seized at his arrest belonged to someone else, namely Maxine Demmert. CP 56 ("Harry Olebar shows prove [sic] that Maxine Demmert is correct and true owner of property taken on 12/01/2009"); CP 57 ("Harry Olebar requests that the property be

returned to the actual owner Maxine Demmert"); CP 54 ("The cell phones in Harry Olebars possession [sic] is registered to Maxine through T-Mobile"); CP 54 ("If the seizing police contacted Maxine concerning her phones . . . then Maxine surely would have made claim to the cell phones and money"); CP 31 (The car belonging to Jerome Whitmoore was returned to him. So all other property should be returned to correct owners. Maxine Demmert").

Although the trial court did not elaborate on its reasoning when it denied Olebar's motion for reconsideration, because Olebar admitted that someone else was the true owner of the property in his "reply" to the State's response, the court properly denied his motion to return property that did not belong to him.

b. The Court Properly Denied Olebar's Motion For The Return Of The Currency Because It Had Previously Been Forfeited.

A court may deny a motion to return property if "the property is subject to forfeiture pursuant to statute." Alaway, 64 Wn. App. at 798. RCW 69.50.505 provides the exclusive mechanism for forfeiting property associated with the delivery of controlled substances. Alaway, 64 Wn. App. at 801. A person must claim his right to the property within 45 days of the forfeiture notice by the

State, or he forfeits his claim to the property. RCW 69.50.405(3); Key Bank of Puget Sound v. City of Everett, 67 Wn. App. 914, 841 P.2d 800 (1992), review denied, 121 Wn.2d 1025 (1993).

Olebar appears to concede that if the currency was forfeited, he is not entitled to its return. Brf. of Appellant at 12. But he places an erroneous limitation on his concession by arguing that he has the right to litigate the validity of the forfeiture in an evidentiary hearing in the criminal case. Id. Although he cites to Alaway in support of this claim, Alaway does not stand for that proposition. In Alaway, no forfeiture proceedings pursuant to RCW 69.50.505 were initiated; the State simply responded to the defendant's CrR 2.3(e) motion with the argument that the property should not be returned because the State *could have* forfeited it. 64 Wn. App. at 798-801. Finding that the State was required to actually utilize RCW 69.50.505 should it desire to forfeit the defendant's property, the appellate court reversed. Id. at 801.

Here, the State complied with RCW 69.50.505. CP 23-24. Olebar is not entitled to litigate the validity of the forfeiture proceedings in a CrR 2.3(e) motion for the return of his property. Having failed to timely assert ownership of the money under

RCW 69.50.505(3), he has forfeited his claim to it. Under Alaway, the court properly denied his motion for return of the currency.

Olebar asserts that the affidavit of the deputy prosecutor contained inadmissible hearsay, and that the court could not rely on it. He is wrong. In addition to covering motions for the return of illegally seized evidence, CrR 2.3(e) governs motions for the return of lawfully seized property no longer needed for evidence. Alaway, 64 Wn. App. at 798. A defendant may bring a CrR 2.3(e) motion at any time, even after he has pled guilty. State v. Card, 48 Wn. App. 781, 786, 741 P.2d 65 (1987). However, if such a motion is brought after charges are filed, "it shall be treated as a motion to suppress." CrR 2.3(e); Card, 48 Wn. App. at 786. Hearsay is admissible at suppression motions, as the court is not bound by the rules of evidence as to questions of admissibility. ER 104(a). Moreover, the Sixth Amendment right to confrontation does not apply to a suppression motion, and the court can consider hearsay without running afoul of the constitution. State v. State v. Fortun-Cebada, 158 Wn. App. 158, 172-73, 241 P.3d 800 (2010). There is no reason to apply a more restrictive approach to a post-sentencing hearing to return property.

Moreover, our Supreme Court has upheld a motion denying the return of property when the evidence before the trial court consisted of affidavits containing apparent hearsay. In Schillberg v. Everett Dist. Justice Ct., the State presented an affidavit of one of the arresting officers outlining hearsay evidence that the claimant of the property was observed stealing merchandise from a store. 90 Wn.2d at 796. The claimant also presented an affidavit, from his attorney, which stated in general terms that the claimant had advised the attorney that he was legitimately in possession of the merchandise. Id. The court determined that the State had made a substantial showing that at least part of the merchandise was stolen and declined to return it to the claimant. Id. at 801. Although the court was interpreting the court rule relating to juvenile court proceedings, JCrR 2.10(e), the wording of the rule is identical to CrR 2.3(e).

In short, Olebar has not shown that the court erred by considering the affidavit of the deputy prosecutor when it contained hearsay. The court properly declined to return currency to Olebar that had previously been forfeited pursuant to RCW 69.50.505.

**D. CONCLUSION**

For the above reasons, this Court should dismiss Olebar's appeal because the order he seeks review of did not affect his substantial rights, and is thus not appealable. Should this Court decide to address the merits of the appeal, it should find that the sentencing court properly denied Olebar's motion for the return of property.

DATED this 27 day of December, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. HARRY OLEBAR, Cause No. 67170-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

12/27/11  
Date