

No. 47478-6-II

Pierce County #14-1-00499-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

HARVEY S. JOHNSON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Gary E. Johnson, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The sentencing court erred in ordering forfeiture without statutory authority and in violation of RCW 9.92.110. This Court's decision in State v. Roberts, 185 Wn. App. 94, 339 P.3d 995 (2014), controls.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

RCW 9.92.110 eliminated the doctrine of "forfeiture by conviction," under which the government had the authority to seize and forfeit items based solely upon conviction of a crime. Further, a sentencing court has no inherent authority to order forfeiture.

In Roberts, this Court specifically rejected a general order of forfeiture entered as a condition of sentencing. Did the sentencing court err and act outside its statutory authority in this case in ordering forfeiture?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Harvey S. Johnson was charged by second amended information filed in Pierce County superior court with five counts of third-degree assault, one of which was charged with a "sexual motivation" aggravating factor. CP 91-93; RCW 9A.36.031(1)(f); RCW 9.94A.030; RCW 9.94A.533; RCW 9.94A.835. On February 26, 2015, the Honorable Judge Garold Johnson accepted Johnson's pleas. CP 95-106.¹

Sentencing was held before Judge Johnson on April 9, 2015, and an agreed-upon exceptional sentence. CP 143-57. Johnson appealed. CP 158. On December 17, 2015, findings and conclusions in support of the exceptional sentence were filed and some corrections made to the

¹The verbatim report of proceedings consists of separately paginated volumes containing the proceedings of June 30, August 1 and 22, October 31 and September 19, 2014, the proceedings of February 12, 2015, the chronologically paginated proceedings of February 18, 19, 23, 24 and 26 and March 27, 2015, and the sentencing of April 9, 2015.

judgment and sentence. This pleading follows. See CP 158.

2. Facts relevant to issue in appeal

On the judgment and sentence, a handwritten notation provided, “forfeit contraband.” CP 148. A preprinted portion of the judgment and sentence was amended so that it was changed from “All property is hereby forfeited” to “All contraband is hereby forfeited.” CP 148.

D. ARGUMENT

THE TRIAL COURT ACTED WITHOUT STATUTORY
AUTHORITY IN ORDERING FORFEITURE AS A CONDITION
OF SENTENCE

This Court should strike the order of forfeiture, because a sentencing court has no inherent authority to order forfeiture, there was no statute supporting the order and the order was in violation of RCW 9.92.110, which abolished the doctrine of allowing forfeiture based on a defendant’s conviction of any crime.

In general, a sentencing court’s authority to impose conditions of a sentence is limited by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Under the Sentencing Reform Act, the Legislature alone has the authority to establish the scope of legal punishment. Id. As a result, a sentencing court has only the authority granted by the Legislature by statute. See State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999).

“Forfeitures are not favored.” City of Walla Walla v. \$401.333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). In addition, the authority to order forfeiture is wholly statutory. See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d

913 (1998); see also, Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 387 (1997), review denied, 134 Wn.2d 1016 (1998).

As a result, a trial court has no authority to order forfeiture unless there is a specific statute authorizing that order. State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992). Importantly, this is true even when a defendant is accused of a crime. As this Court has noted, there is no “inherent authority to order the forfeiture of property used in the commission of a crime.” Alaway, 64 Wn. App. at 800-801. It is only with statutory authority and after following the procedures in the authorizing statute that the government may take property by way of forfeiture. Id.; see Espinoza, 87 Wn. App. at 866.

Here, the sentencing court authorized government forfeiture of contraband but did not cite any legal authority for such an exertion of power.

Roberts, supra, is on point. In Roberts, also a case from Pierce County and this Court, the sentencing court wrote on the judgment and sentence, “[f]orfeit any items seized by law enforcement,” as a condition of sentencing. 185 Wn. App. at 96. This Court rejected the prosecution’s efforts to argue that there was any authority for such an order of forfeiture simply based on the conviction, instead holding that there was no statutory or inherent authority authorizing government forfeiture of items as a condition of sentencing. 185 Wn. App. at 95-96.

Further, the Court rejected the idea that a defendant must somehow make a motion for the return of property or meet some other burden in

order to challenge the unlawful condition of sentencing authorizing immediate forfeiture of property. 185 Wn. App. at 96.

As this Court has specifically held, a defendant is not automatically divested of his property interests in even items used to create contraband, simply by means of conviction. Alaway, 64 Wn. App. at 799. Instead, “the State cannot confiscate” a citizen’s property “merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures.” Id.

And the Legislature has carefully crafted such procedures and has included protections against governmental abuse of the awesome authority of taking away the property of a citizen. See, e.g., RCW 10.105.010 (law enforcement may seize certain items to forfeit but must serve notice and offer a hearing, etc.); RCW 69.50.505 (controlled substance forfeitures requiring notice, an opportunity to heard, a right of removal, a civil proceeding etc.); Smith v. Mount, 45 Wn. App. 623, 726 P.2d 474, review denied, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Further, many forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, **in separate civil proceedings**, that property should be forfeited as a result of its relation to a crime. See RCW 9A.83.030 (money laundering; attorney general or county prosecutor file a separate civil

action in order to initiate those proceedings, etc.); RCW 9.46.231 (gambling laws: 15 days notice, etc.). And CrR 2.3(e) governs property seized with a warrant supported by probable cause and issued by a judge which requires serving the person when the item is seized with a written inventory and information on how to get their property back if they believe their property was improperly seized under the warrant. But that rule is limited to items deemed “(1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears to be committed[.]”

None of these statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant in this fashion. Nor do the statutes authorize such a forfeiture without any of the process which is constitutionally due before the government may seize the property of a man or at least the process the Legislature required before such forfeitures may occur. See, e.g., Alaway, 64 Wn. App. at 798 (rejecting the idea that the sentencing court had “inherent power to order how property used in criminal activity should be disposed of”).

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction. And indeed, to the extent that the trial court assumed it had authority to order the forfeiture based upon the criminal conviction, that assumption runs directly afoul of RCW 9.92.110, which specifically abolished the doctrine of forfeiture by

conviction. That statute provides, in relevant part, “[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein.” Thus, under the statute, the mere fact that the defendant was convicted of a crime is not sufficient on its own to support an order of forfeiture. This Court should follow Roberts and so hold.

E. CONCLUSION

This Court should strike the condition of sentence requiring forfeiture of contraband under Roberts, as there was no authority for the sentencing court to enter the order.

DATED this 4th day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant’s Opening Brief to opposing counsel via this court’s portal upload at Pierce County Prosecutor’s Office, pcpatccff@co.pierce.wa.us, and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Harold Johnson, DOC 934587, Coyote Ridge CC, P.O. Box 769, Connell, WA. 99326.

DATED this 4th day of March, 2016.

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