

28865-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER P. SMITH, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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Attorney for Appellant

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A. ASSIGNMENT OF ERROR

1. The court erred in denying the defendant's motion for the return of seized assets.

B. ISSUE

1. Did the State provide sufficient proof of service to satisfy the mandatory requirements of the drug asset forfeiture statute RCW 69.50.505?

C. STATEMENT OF THE CASE

Christopher Smith was arrested in 2007 for possession of a controlled substance with intent to deliver. (CP 1, 17) Officers seized \$4940 in cash from Mr. Smith at the time of his arrest. (CP 21) In March 2009, at the request of the prosecutor, the court entered an order dismissing the charge. (CP 5-6) Mr. Smith filed a motion for return of his seized property in September 2009. (CP 8-11)

The State answered that the cash had been lawfully seized and forfeited pursuant to RCW 69.50.505. (CP 18) The State alleged that the police department had issued a notice of seizure, with which Mr. Smith was personally served on June 7, 2007. (CP 17-18) It is undisputed that Mr. Smith did not file a claim for the seized cash.

In support of its allegations, the State attached to its responsive pleading facsimile copies of a notice of seizure dated June 7, 2007, with Mr. Smith's name printed at the top and a check mark next to the words "in person," signed by an unidentified officer on behalf of the police chief, and a certified memorandum dated February 3, 2010, stating that Mr. Smith and a codefendant "were presented seizure notices on 060707" and \$2740 of Mr. Smith's money was forfeited after 45 days. (CP 20-21) Additional memoranda, dated November 29, 2007, purporting to explain a claimed discrepancy between the amount listed on the notice of seizure and amounts actually seized, were also attached. (CP 22-23)

At the hearing on his motion, Mr. Smith argued that the State had failed to provide proof of the personal service required by the forfeiture statute. (RP 3-4) The State argued that the evidence submitted with the responsive pleading constituted sufficient proof of service. (RP 5) Mr. Smith pointed out that the proof of service did not comply with the rules of civil procedure. (RP 7)

Finding that Officer Maker's certified statement that Mr. Smith was presented a seizure notice satisfied the requirement for proof of timely personal service, the court denied his motion. (RP 9, CP 25-26)

D. ARGUMENT

1. THE FORFEITURE WAS INVALID BECAUSE LAW ENFORCEMENT FAILED TO PROVE COMPLIANCE WITH STATUTORY REQUIREMENTS.

“Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.” *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226, 59 S. Ct. 861, 83 L. Ed. 1249 (1939).

Forfeiture of drug-related property is governed by RCW 69.50.505. A court’s authority to order a forfeiture of property derives solely from this statute. *Bruett v. Real Property Known as 18328 11th Ave. N.E.*, 93 Wn. App. 290, 296, 968 P.2d 913 (1998); *Espinoza v. City of Everett*, 87 Wn. App. 857, 865, 943 P.2d 387 (1997), *review denied*, 134 Wn.2d 1016 (1998). The statute thus provides the “exclusive mechanism” for forfeiting property allegedly used in drug trafficking. *Bruett*, 93 Wn. App. at 296. The government is stopped from proceeding in a forfeiture action if it fails to follow statutory procedures. *State v. Alaway*, 64 Wn. App. 796, 799-800, 828 P.2d 591, *review denied*, 119 Wn.2d 1016 (1992); see *Espinoza*, 87 Wn. App. at 866 (dictum).

The statute requires the law enforcement agency to serve notice of the seizure on the owner of the property in compliance with the rules of

civil procedure. RCW 69.50.505(3). CR 5(b)(1) authorizes personal service: “Service . . . upon a party shall be made by delivering a copy to him”

“CR 5 does not provide the requirements for proof of service by personal delivery. However, Washington case law indicates that proof of service by personal delivery requires that there be some evidence of the time, place, and manner of service.” *See Terry v. City of Tacoma*, 109 Wn. App. 448, 455-56, 36 P.3d 553 (2001). Proof of service under CR 5(b)(1) is adequately shown when the proof of service indicates the time, place, and manner of service. *Sunderland v. Allstate Indem. Co.*, 100 Wn. App. 324, 329, 995 P.2d 614 (2000).

In *Sunderland*, proof of service was sufficient by a combination of two documents: a signed certificate indicating the time and manner of delivery and a “received” stamp showing the date and the law firm on the document served. *Id.*; *cf. Terry v. City of Tacoma, supra*

Here, the “proof of service” consists of a checkmark next to the words “in person” on the notice of seizure, which is not certified and is signed by an unidentified officer, and the certified memorandum of an officer, prepared more than two years later, with no indication that the officer has personal knowledge of the relevant fact, or of the person or persons who may have provided that information. The officer who signed

the certified statement is the property officer; there is no evidence he is or ever was involved in serving notice on private individuals. (CP 20)

In any event, neither of these documents purports to indicate the “time, place, and manner of service.” 109 Wn. App. at 456.

The seizure and forfeiture statute, RCW 69.50.505, vests in law enforcement agencies the power to seize and retain the property of private citizens. The only protection against abuse of this power is strict enforcement of the protections incorporated in the statute, including the requirement of proper service of notice on persons whose property has been seized. The evidence in this case suggests that the law enforcement agency in question had a singularly cavalier approach to its responsibilities under the statute. The absence of adequate proof of service on Mr. Smith requires reversal of the trial court’s ruling.

E. CONCLUSION

The State failed to comply with the statute; Mr. Smith is entitled to have his property returned.

Dated this 7th day of September, 2010.

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