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NO. 65427-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

KURT BENSHOOF,

Appellant.

REC'D
APR 19 2011
King County Prosecutor
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT'S ORDER DENYING BENSHOOF'S MOTION FOR RETURN OF PROPERTY IS RIPE FOR REVIEW AND SHOULD BE REVERSED.

The trial court erred in denying Benshoof's motion for return of property where the sheriff's office failed to follow the statutory due process requirements for seizing property involved in drug manufacturing. The State contends the trial court properly denied Benshoof's motion and, in any event the decision is not appealable because it does not constitute a final order. Brief of Respondent at 14. The State is wrong.

Post trial, Benshoof filed a motion for return of the property seized from him in conjunction with the criminal prosecution. CP 72-81. Benshoof argued the State's failure to provide adequate notice of intent to seek forfeiture following seizure required return of his property. CP 73-74. The trial court denied Benshoof's motion and ordered that the property was subject to the forfeiture process. CP 118-19.

In arguing Benshoof claim is not properly before this Court, the State overlooks the fact that Benshoof followed the same procedure for return of his property as set forth in State v. Alaway, 64 Wn. App. 796, 797-98, 828 P.2d 591 (1992). In Alaway, the State moved for an order forfeiting property to the sheriff following the trial and sentencing. Alaway, 64 Wn. App. at 797. Alaway objected and moved for return of

all his property. Alaway, 64 Wn. App. at 797. The trial court heard both motions; the State conceded that statutory forfeiture procedures had not been followed. Alaway, 64 Wn. App. at 797. The court erroneously ruled in the State's favor. Alaway, 64 Wn. App. at 801.

On appeal, this Court noted CrR 2.3(e) governs motions for return of illegally seized property. Alaway, 64 Wn. App. at 798. This Court concluded the trial court should have granted Alaway's motion for return of property because the State had not complied with the due process requirements in the forfeiture statute. Alaway, 64 Wn. App. at 801. Alaway does not state that defendants must pursue the return of property in a separate forfeiture proceedings or that denial of a defendant's motion for return of property is not a final judgment. Rather, the Alaway court states that a motion for the return of "illegally seized property" is governed by CrR 2.3(e), which provides:

Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. If the motion is granted the property shall be returned. If a motion for return of property is made or comes on for hearing after an indictment or information is filed in the court in which the motion is pending, it shall be treated as a motion to suppress.

Following Alaway and CrR 2.3(e), Benshoof properly filed his motion for return of property in the trial court. The trial court had

authority and jurisdiction to grant Benshoof's motion at that time because the State failed to serve notice of seizure on Benshoof within 15 days of physically seizing his property. The State claim this determination can be made only by the court handling the separate forfeiture action is wrong. The trial court's erroneous denial of Benshoof's motion is a final order that is ripe for appellate review.

B. CONCLUSION

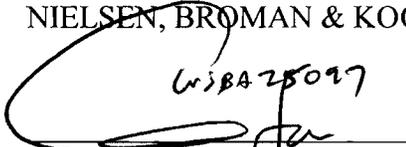
The State may not seize property without observing certain modest due process requirements. Because the State failed to give notice within 15 days of seizing Benshoof's property, Benshoof is entitled to have his property returned.

DATED this ^{9th} day of April 2011.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF APRIL, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KURT BENSHOOF
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SEATTLE, WA 98103

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF APRIL, 2011.

x *Patrick Mayovsky*