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

ALFREDO AHUMADA, CHRISTINA LOPEZ, JP MORGAN BANK, JOEL CHAVEZ, WELLS FARGO BANK, and DIANA RIVERA, Appellants, v. KENNEWICK POLICE DEPARTMENT, Respondent.	)	No. 32369-2-III UNPUBLISHED OPINION

SIDDOWAY, C.J. — Parties who claim an interest in currency and other property seized by the Kennewick Police Department as probable proceeds of drug transactions appeal the dismissal of their petition for judicial review of a default order entered against them by a city hearing examiner. Although a Benton County Superior Court commissioner initially concluded that they had been wrongly denied a hearing, he was ultimately persuaded that they had lost their right to seek judicial review by failing to exhaust their administrative remedies.

On these unusual facts, presenting violations by city agents of the forfeited parties' rights under applicable statutes, an exception to the requirement to exhaust administrative remedies applies. Because the forfeited parties were deprived of a fair opportunity to

exhaust the administrative process as a result of the actions of the city's agents, we reverse the order dismissing their appeal and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

On June 20, 2012, the Kennewick Police Department seized $65,875 in currency, a 2004 Cadillac Escalade, a 2006 Lincoln Mark LT pickup truck, and a 2005 Nissan pickup truck based on probable cause to believe that the property was proceeds of an illegal drug transaction. The city of Kennewick served four individuals and two secured lenders with notice of its intent to forfeit their interests in the property. The city's notice explained that forfeiture could be contested by submitting a written request for a hearing to the police department within 45 days.

Attorney Robert Thompson prepared a letter to the police department dated August 2 that stated in part:

> Please be advised that this office will represent all claimants on the potential forfeiture actions arising from Mr. Alfredo Ahumada Ozuna's [sic] arrest on or about June 20, 2012 in Kennewick, WA.
>
> This includes Joel Chavez (KPS No. 12-18645), Alfredo Ahumada Ozuna [sic], Christina Lopez and Mr. Ahumada's mother, Diana Rivera, and any and all other potential claimants.
>
> Please forward any and all correspondence and or pleadings to this office.

Clerk's Papers (CP) at 30. Mr. Thompson hand delivered his letter to the police department the same day and claims to have explained to the three individuals with

whom he left the letter that he was requesting a hearing. One of Mr. Thompson's clients, Mr. Chavez, had separately written the police department in July to contest forfeiture of the Escalade.

On August 17, the chief of police sent a letter to Mr. Chavez informing him that a forfeiture hearing regarding only the Escalade had been scheduled for September 27. Attorney Thompson was one of three individuals copied on the letter.

A hearing took place on September 27 as scheduled. It was characterized as a hearing in "Kennewick Police Department [ ] versus Joel Chavez." CP at 36. Present at the hearing were the hearing officer, the city's attorney, Kelly Walsh, Mr. Chavez, and attorney Kevin Holt, who stated that he was "standing in on behalf of Bob Thompson," who had asked that he "come in and represent Joel Chavez today." CP at 36, 42. At the outset of proceedings, the city's attorney explained to the hearing officer that the city's position was that the hearing was only on the claim Mr. Chavez had personally filed, since Mr. Thompson's letter had been insufficient to assert a claim on behalf of his clients.

The city's attorney asked the hearing officer to make a ruling that Mr. Chavez was the only claimant and that the interests of all other parties served with notice had been forfeited by default. Mr. Holt suggested that the hearing officer instead rule that the hearing concerned only Mr. Chavez and that the hearing officer "reserve" on the issue of the other parties' interests until Mr. Thompson could be heard. The hearing officer

declined the suggestion to hear from Mr. Thompson and orally granted the city's motion for default against Mr. Ahumada, Ms. Lopez, Ms. Rivera, and JP Morgan Bank.

A default order of forfeiture was entered against Mr. Thompson's clients other than Mr. Chavez on October 4. It recited as grounds that (1) "the document submitted by attorney Robert Thompson on August 2, 2012, was merely a Notice of Appearance and not an adequate claim to the property on behalf of any claimant," and (2) "the Notice of Hearing including time, place, and date of the initial hearing held on September 27, 2012 was mailed to Mr. Chavez and to his attorney, Robert Thompson, on the 17th day of August, 2012" and "neither Robert Thompson, nor any other claimant [other than Mr. Chavez] appeared at the hearing." CP at 62.

Mr. Thompson received notice of the default order by electronic mail on October 8 and by hard copy the next day. On October 30, he filed a notice of appeal in the Benton County Superior Court claiming violations of the Uniform Controlled Substances Act (UCSA), chapter 69.50 RCW,[1] and his clients' due process rights under the federal and state constitutions. In a motion to vacate the default filed in May 2013, he cited *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way*, 150 Wn. App. 387, 396, 208 P.3d 1189 (2009), which held that because the UCSA does

[1] His notice actually cited chapter 69.05 RCW, an obvious transposition.

not prescribe any form of notice, a timely notice of appearance by a lawyer that identifies his clients as "claimants" is sufficient to entitle the clients to a hearing.

Pointing out that neither he nor his clients against whom the order of default was entered received notice of the hearing or of the city's intent to move for default, Mr. Thompson asked that the superior court "reverse the order of default and send the matter back . . . for [an] administrative hearing on forfeiture." CP at 98. The city continued to defend the order of default based on its two grounds of (1) an insufficient claim and (2) failure to attend the September 17 hearing.

A hearing was conducted on the forfeited claimants' motion to vacate on July 11, 2013, at which a superior court commissioner determined that the city had not provided proper notice to Mr. Thompson's forfeited clients. But it did not resolve a newly raised issue: whether the forfeited claimants failed to exhaust their administrative remedies. The commissioner heard supplemental argument on that issue on August 15, 2013. The city argued that the forfeited claimants failed to exhaust their administrative remedies by failing to file a motion to vacate the default judgment with the hearing officer as permitted by RCW 34.05.440(3).

The court commissioner was persuaded that the forfeited claimants failed to exhaust their administrative remedies. But in its oral ruling, it expressed its understanding that if it ruled to that effect, then the city should agree to vacate the default and offer a rescheduled hearing—the remedy the city contended should have been

pursued by Mr. Thompson. If the city refused to offer a hearing, the commissioner expressed his view that the forfeited claimants could then pursue an administrative appeal because they would be able to show that exhaustion of administrative remedies was futile.

The day following the hearing, however, the commissioner wrote a clarifying letter to the attorneys explaining that, on reflection,

> once the Court determines that the Appellant failed to exhaust administrative remedies without excuse, the Court has no further jurisdiction to order any other relief except dismissal of the Appeal. The court does not have the power to order any other administrative action. I apologize for the confusion this may cause.

CP at 156.

On March 5, 2014, the court entered an order dismissing the appeal. Among findings of fact made by its order were the following:

> 4. On August 2, 2012, the Kennewick Police Department received notice that Robert Thompson would represent "Joel Chavez, Alfredo Ahumada Ozuna, Christina Lopez, Diana Rivera, and any and all other potential claimants" to the "potential forfeiture actions[,]"

and

> 6. Notice of the September 27, 2012 hearing was not sent to the Appellants or to Mr. Thompson on their specific behalf.

CP at 172-73.

The forfeited claimants appeal the order dismissing the appeal. The city does not cross appeal any of the superior court's findings.

ANALYSIS

The Statutory Forfeiture Procedure

The Uniform Controlled Substances Act provides for the seizure and forfeiture by law enforcement agencies of many types of property used or intended for use in connection with violations of its provisions. RCW 69.50.505(1). Notice of seizure and intent to forfeit is required to be served on parties whose interests the agency wants to forfeit. RCW 69.50.505(5) provides that if a person notifies a seizing law enforcement agency in writing of the person's claim of ownership or right to possession of seized property within 45 days of service of notice by the agency, then "the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right." The statute does not require the claimant to request a hearing. *See* RCW 69.50.505(5).

A claimant may remove a forfeiture proceeding to court within 45 days after notifying the agency of his or her claim; if the proceeding is not removed, the hearing will be conducted by the seizing agency. In that event, the hearing before the seizing agency and any appeal therefrom proceeds under title 34 RCW, and more specifically under chapter 34.05 RCW, Washington's Administrative Procedure Act (APA).

The hearing officer's default order forfeiting most of Mr. Thompson's clients' interests was served upon Mr. Thompson "by placing for pick-up and hand delivery by Pronto Process and Messenger Service on the 9th day of October, 2012 and also by electronic mail with return receipt requested on the 8th day of October, 2012." CP at 63.

RCW 34.05.440(3) provides that "[w]ithin seven days after service of a default order under subsection (2) of this section, or such longer period as provided by agency rule, the party against whom it was entered may file a written motion requesting that the order be vacated, and stating the grounds relied upon." The seven day period would have expired in mid-October 2012.

Procedural Missteps in this Forfeiture Process

It cannot be seriously contended by the city that Mr. Thompson's August 2 letter was insufficient to entitle his clients to a forfeiture hearing in light of *Poplar Way*. Here is the *Poplar Way* court's description of the contents of the notices of appearance entered by lawyers for claimants in that case:

> [W]e first consider the one served by Yatin's attorney. In the caption of the notice, there is the following identification: "YATIN JAIN and ASHIMA JAIN, husband and wife, **Claimant(s)**." The body of the notice contains the following: "PLEASE TAKE NOTICE that THE MACDONALD LAW OFFICE is appearing on behalf of the **Claimant(s)**." Finally, the signature block for counsel has the following wording below it: "Attorney for **Claimant(s)**."
>
> Vijay's attorney also served on counsel for the task force a notice of appearance and request for discovery. The notice was identical to the notice of appearance above, with the exception that it stated, "VIJAY JAIN and MRS. VIJAY JAIN, husband and wife" followed by the word "**Claimant(s)**" in the caption. The notice also indicated that **claimants** were represented by David G. Arganian.

Poplar Way, 150 Wn. App. at 396 (footnotes omitted). The court concluded that the information stated in the notices of appearance "is sufficient to alert [the agency seeking

to forfeit assets] that both Yatin and Vijay contested the seizure and forfeiture and that a hearing is required . . . . There is no other reasonable interpretation of these documents." *Id.* at 396-97.

The same can be said of Mr. Thompson's notice of appearance. It states that his office "will represent all **claimants** on the potential forfeiture actions arising from Mr. Alfredo Ahumada Ozuna's [sic] arrest . . . . This includes Joel Chavez[ ], Alfredo Ahumada Ozuna, Christina Lopez and Mr. Ahumada's mother, Diana Rivera, and any and all other **potential claimants.**" CP at 30 (emphasis added). As in *Poplar Way*, there is no reasonable interpretation of the document other than as an appearance for clients asserting a claim of ownership or right to possession, which is all that RCW 69.50.505(5) requires.

Having provided the police department with notice of the claims, the forfeited claimants were entitled to a hearing. Under RCW 34.05.434(1), they were entitled to not less than seven days advance written notice of the time and place of the hearing. The city does not assign error to the commissioner's finding that notice of the September 27, 2012 hearing "was not sent to the Appellants or to Mr. Thompson on their specific behalf," which, as to the city, is a verity on appeal. CP at 173 (finding 6); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002) (unchallenged findings are verities on appeal). Even without that unchallenged finding, the city could not seriously contend that the notice was effective as to anyone but Mr. Chavez. The notice dealt only with the

Escalade, not any other assets, and city attorney Kelly Walsh was explicit during the hearing that it was addressing only Mr. Chavez's interest, it being the city's position that all of Mr. Thompson's other clients were in default and had not been entitled to a hearing.

Not only did the forfeited parties not get notice of any hearing, but the city made its motion for a default order ex parte, knowing that at a minimum Mr. Thompson had filed a notice of appearance. Mr. Holt properly protested that the forfeited parties' claims should not be defaulted without giving their lawyer, Mr. Thompson, an opportunity to be heard. But city attorney Walsh persisted in requesting and the hearing officer granted an ex parte decision, oblivious to the fact that its ruling was contrary to the controlling authority provided by *Poplar Way.*

Exhaustion of Administrative Remedies

As the city points out, the superior court commissioner ultimately found these procedural irregularities irrelevant. Despite clearly being troubled by the lack of notice to Mr. Thompson, the commissioner dismissed the appeal on the basis of the forfeited parties' failure to pursue a motion to vacate the default.

RCW 34.05.534 provides generally that "[a] person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged." Ordinarily, the exhaustion requirement

> (1) prevents premature interruption of the administrative process; (2) allows the agency to develop the factual background on which to base a decision; (3) allows the exercise of agency expertise; (4) provides a more efficient process and allows the agency to correct its own mistake; and (5) insures that individuals are not encouraged to ignore administrative procedures by resort to the courts.

Citizens for Clean Air v. City of Spokane, 114 Wn.2d 20, 30, 785 P.2d 447 (1990).

The APA's exhaustion requirement is subject to several statutory exceptions; the court may relieve a petitioner of the requirement to exhaust administrative remedies upon a showing that they would be "patently inadequate," "futile," or that the "grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies." RCW 34.05.534(3).

The statutory exhaustion requirement is also subject to nonstatutory exceptions, including a nonstatutory exception for "one [who] has not enjoyed a fair opportunity to exhaust the administrative process." *Gardner v. Pierce County Bd. Of Comm'rs*, 27 Wn. App. 241, 243-44, 617 P.2d 743 (1980).

We review de novo a trial court's dismissal for failure to exhaust administrative remedies. *Cost Mgmt. Servs. v. City of Lakewood*, 178 Wn.2d 635, 641, 310 P.3d 804 (2013).

The forfeited claimants make a number of arguments that we reject. We are unpersuaded by their argument that they were not required to exhaust their administrative

remedies because the police department's actions in the forfeiture proceeding were unconstitutional; the constitutional issues they raise are ones that the hearing officer would have been capable of deciding had they been raised in a motion to vacate the default. We are unpersuaded by their argument that seeking to vacate the default would have been futile; they can only speculate that the hearing officer would have rejected their arguments out of hand. We agree with the superior court commissioner that the fact that *moving to vacate a default* is permissive does not alter the fact *that exhausting administrative remedies* is mandatory. We are not persuaded that the jurisdiction that the superior court would have had over forfeiture in the event of a timely removal to superior court excused the forfeited parties from complying with the APA.

But we are persuaded that this is a case in which the nonstatutory exception provided by *Gardner*—which was relied on by the forfeited parties in the superior court and reflects the due process concerns at the heart of their appeal—does apply.

Gardner announced a very narrow exception. In that case, a property owner was concerned about a preliminary plat being proposed for an area near his home that was denied by the county planning commission but then appealed by the developers to the county commissioners. When the appeal was heard on May 8, 1978, a negative declaration of environmental significance that had been issued three months earlier came to light and was relied on by the commissioners, who approved the plat. The property owner appealed the commissioners' action to the superior court, relying on an argument

that the negative declaration was clearly erroneous. The county responded that the property owner had failed to timely appeal the negative declaration; by county ordinance, it had to be appealed no later than 10 days before the meeting at which final action would be taken on the plat.

The court observed that there was nothing in the record to indicate that the property owner was aware of the negative declaration before the May 8 meeting. It held that "[t]o require petitioner to file an appeal 10 days before the hearing under these circumstances would be unreasonable and violative of due process." *Gardner*, 27 Wn. App. at 243 (citing *Prosser v. Butz*, 389 F. Supp. 1002 (N.D. Iowa 1974)). "Where one has not enjoyed a fair opportunity to exhaust the administrative process . . . exhaustion of administrative remedies will not be required." *Id.* at 243-44.

The *Gardner* exception was further examined in *Ward v. Board of Skagit County Commissioners*, 86 Wn. App. 266, 936 P.2d 42 (1997). It was invoked by parties who had been denied a variance and special use permit by a hearing examiner, received a notice advising them of the 14 days permitted for appeal, and—as the result of a calendaring error by their lawyer—missed the appeal deadline by a day.

The court in *Ward* characterized the *Gardner* exception as "a recognized exception to the exhaustion requirement," *id.* at 272, but held that it was not available on the Wards' facts:

> In contrast to *Gardner*, no action on the part of Skagit County, except for the Board's adherence to the deadlines in the ordinance, contributed to the Wards being denied review by the Board. Thus, the Wards were not denied a fair opportunity to exhaust their administrative remedies by any governmental body.

Id. at 273.

Here, a fair opportunity for the forfeited claimants to exhaust the administrative process would have afforded them (1) notice of a hearing and a hearing, (2) an opportunity for their attorney of record to be heard on the motion for default, and (3) a right to move to vacate any improperly entered default order. What they were afforded was instead only the seven-day right to move to vacate the default order. While the seven-day requirement for such a motion would have been a reasonable procedure and not violative of due process standing alone, the entire process, viewed as a whole, was unreasonable and denied due process. *Cf. Espinoza v. City of Everett*, 87 Wn. App. 857, 869, 943 P.2d 387 (1997) (a due process right to a timely and full adversarial hearing following seizure applies to any property, real or personal).

The facts of this case fall within the *Gardner/Ward* criteria: the forfeited parties were deprived of a fair opportunity to exhaust the administrative process as a result of actions of the city's agents. Because that exception to the exhaustion requirement applied, the superior court erred in dismissing the forfeited parties' appeal.

We reverse and remand for proceedings consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, C.J.

WE CONCUR:

Brown, J.

Korsmo, J.