

App. 1

THE SUPREME COURT OF WASHINGTON

ADRIAN JACOBO HERNANDEZ,	)	No. 100392-7
Respondent,	)	ORDER
v.	)	Court of Appeals
CITY OF KENT,	)	No. 81783-3-I
Petitioner.	)	(Filed Mar. 2, 2022)
)	

Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its March 1, 2022, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 2nd day of March, 2022.

For the Court

/s/ González, C.J.

CHIEF JUSTICE

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

ADRIAN JACOBO HERNANDEZ,	)	No. 81783-3-I
Appellant,	)	DIVISION ONE
v.	)	PUBLISHED
CITY OF KENT, a Washington	)	OPINION
Municipal Corporation,	)	(Filed Oct. 25, 2021)
Respondent.)	

HAZELRIGG, J.—Adrian Jacobo Hernandez challenges the forfeiture of his vehicle by the City of Kent pursuant to a criminal investigation. Jacobo Hernandez concedes forfeiture was proper under RCW 69.50.505, but argues that the forfeiture violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. Because an individual’s financial circumstances must be considered prior to a forfeiture determination, and because Jacobo Hernandez was found to be indigent in this and the related criminal proceedings, the forfeiture of his only asset is grossly disproportionate and therefore unconstitutional. We reverse.

FACTS

In June 2018, Adrian Jacobo Hernandez was arrested during a controlled purchase of methamphetamine conducted by the City of Kent Police Department. Jacobo Hernandez had delivered methamphetamine to

App. 3

a residence in his Dodge Charger. While he used his vehicle to deliver the methamphetamine, the record demonstrates it was not purchased with drug money, but rather had been purchased out of salvage and restored by Jacobo Hernandez.

Jacobo Hernandez was charged in the United States District Court for the Western District of Washington and qualified for representation by a federal public defender. He entered a guilty plea to one count of possession with intent to distribute methamphetamine in May 2019. Jacobo Hernandez received multiple sentencing deductions under the Federal Sentencing Guidelines, including a “Minor Role Adjustment” and was ultimately sentenced to 24 months in prison and a mandatory assessment penalty of \$100. No supervised release was ordered. The federal judge declined to impose a fine, finding that Jacobo Hernandez was “financially unable and [was] unlikely to become able to pay a fine.” He has since completed his sentence and was removed from the United States.

In 2018, the City of Kent initiated forfeiture proceedings to seize Jacobo Hernandez’ vehicle. Jacobo Hernandez timely filed a request for a hearing, where he argued the forfeiture violated the Eighth Amendment Excessive Fines Clause because the vehicle (valued at \$3,000 to \$4,000) was the only asset in his estate. He had no bank accounts or savings other than \$50 in his jail account. The hearing examiner found the forfeiture did not violate the Eighth Amendment and forfeited the vehicle to the Kent Police Department.

App. 4

This determination was affirmed by the King County Superior Court. He appeals.

HISTORY OF CIVIL ASSET FORFEITURE IN WASHINGTON

In 1971, Washington enacted RCW 69.50.505, permitting civil asset forfeiture. LAWS OF 1971, 1st Ex. Sess., ch. 308 § 69.50.505. The statute permitted forfeiture of property which was used or intended to be used in the manufacture, distribution, or acquisition of controlled substances. Id. The law enforcement agency who seized the property was permitted to retain the entirety of the property for official use, sell it and retain the proceeds, or forward it for disposition. Id. There were no reporting requirements. In 1982, the statute was amended, including requiring 50 percent of the proceeds from sold forfeitures to be deposited into the general fund of the state, county, and/or city of the law enforcement agency. LAWS OF 1982, ch. 171, § 1. In 1984, this was again changed to give 50 percent of sold forfeiture proceeds to the general fund and 50 percent to the state treasurer to be deposited in the public safety and education account. LAWS OF 1984, ch. 258, § 333.

In 1988, the statute was further amended and the legislature made explicit findings that the goal of civil asset forfeiture was to compensate law enforcement for the costs of investigating drug crimes and deter drug offenses by reducing profits from drug trafficking. LAWS OF 1988, ch. 282 § 2. The legislature also

App. 5

increased the amount of proceeds law enforcement could retain, allocating 75 percent of proceeds to the general fund of the state, county, and/or city, but requiring the money to be “used exclusively for the expansion or improvement of law enforcement services.” Id. Twenty-five percent of proceeds were retained by the state treasurer to be deposited in the public safety and education account (unless the proceeds were less than \$5,000). Id. Still, there were no reporting requirements. In 1992, the legislature permitted law enforcement to keep 100 percent of proceeds. LAWS OF 1992, ch. 211 § 2. Twenty years after the statute was created, the legislature added a requirement that law enforcement keep a record of the property and the amount of money, to be compiled and filed with the state treasurer quarterly. Id. The modern version of the statute allows law enforcement to keep 90 percent of the proceeds, remitting 10 percent to the state general fund. RCW 69.50.505. The recording requirement remains. Id.

During consideration of amendments to the statute in 2001, several stakeholders testified that they had concerns about underlying injustices in the statute. See HOUSE COMM. ON JUDICIARY, HB REP. on Substitute H.B. 1995, 57th Leg., Reg. Sess. (Wash. 1993). These stakeholders testified that “[t]he seizing agencies have a direct conflict of interest,” and that “[t]here is no incentive to reign [sic] in police misconduct.” Id. at 5. The stakeholders also identified disproportionate impacts, testifying that “[t]he vast majority of cases are small time cases, not big drug dealers.” Id.

App. 6

This testimony reflects many issues raised by legal scholars. The “Research Working Group of the Task Force on Race and the Criminal Justice System” reports numerous concerns about civil asset forfeiture.¹ The task force stated the law “creates a conflict between a law enforcement agency’s economic self-interest and traditional law enforcement objectives” because law enforcement relies on forfeiture to fund their operations.² “Legitimate goals of crime prevention are compromised when salaries, equipment, and departmental budgets depend on how many assets are seized during drug investigations.”³ Another concern reflected by the Research Working Group, and by Jacobo Hernandez, is that even indigent claimants do not have a right to appointed counsel during the proceedings. At oral argument before this court, defense counsel⁴ noted that Jacobo Hernandez would only have been able to pay counsel \$7.50 an hour before his legal costs outweighed the value of the property seized.⁵

¹ Research Working Grp., Task Force on Race and the Criminal Justice Sys., Preliminary Report on Race and Wash. Criminal Justice Sys., 47 GONZAGA L. R. 251 (2012).

² Id. at 281.

³ Id. at 281–82.

⁴ Counsel for Jacobo Hernandez indicated at oral argument that he sought express permission from his supervisor at the federal public defenders to assist his client with these corollary proceedings. As such, Jacobo Hernandez was represented by his Federal Public Defender at the initial forfeiture hearing, the appeal to King County Superior Court and on appeal to this court.

⁵ Under RCW 69.50.505(6), a claimant who substantially prevails in a challenge to forfeiture is entitled to reasonable attorney fees. The record demonstrates that the hearing examiner

App. 7

Civil asset forfeiture is a million-dollar industry in Washington. The Institute for Justice found that Washington State accumulated nearly \$145 million in civil asset forfeitures between 2001 and 2018.⁶ Last year the state accumulated \$11.9 million, \$11.6 million of which came from drug offense forfeitures.⁷ These figures do not include proceeds the state received from federal forfeitures.

With this legislative and procedural history in mind, we turn to Jacobo Hernandez’ constitutional challenge.

in this case was well aware of this provision and, in fact, seemed to base his decision in part on the fact that Jacobo Hernandez would be entitled to attorney fees if he prevailed, which he characterized as a “ludicrous” result.

Entitlement to attorney fees for a prevailing party is a common, reasonable result in our egal system, particularly when there is no right to appointed counsel in the proceedings. A result authorized by the legislature, which makes our justice system more accessible to individuals of all socioeconomic classes, can hardly be described as “ludicrous.” However, in light of the fact that Jacobo Hernandez did not seek fees on appeal, we need not consider such an award here.

⁶ Policing for Profit: Washington, INSTITUTE FOR JUSTICE, <https://ij.org/report/policing-for-profit-3/?state=WA> (last visited Oct. 13, 2021).

⁷ Eric Scigliano, The Strange, Failed Fight to Rein in Civil Forfeiture in Washington, CROSSCUT (July 13, 2021), <https://crosscut.com/news/2021/07/strange-failed-fight-rein-civil-forfeiture-washington>.

ANALYSIS

I. Mootness

As a general rule, this court does not decide moot cases where the court can no longer provide effective relief. Westerman v. Cary, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994). “However, a recognized exception permits an appellate court, at its discretion, to ‘retain and decide an appeal which has otherwise become moot when it can be said that matters of continuing and substantial public interest are involved.’” Id. (quoting Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). There are several factors to consider in determining whether an appeal involves matters of continuing and substantial public interest: (1) public or private nature of the issue; (2) whether a determination is desirable to give guidance to public officers; (3) whether the issue is likely to recur; (4) level of adverseness and quality of advocacy; and (5) the likelihood that the issue will escape review due to short-lived facts. Id. at 286–87.

Less than 24 hours before oral argument, Jacobo Hernandez submitted an unopposed motion to dismiss his appeal, stating that the parties had reached a monetary settlement. We denied the motion. After oral argument, the parties confirmed they were continuing to move forward with their prior settlement agreement, despite the court’s denial of the motion to dismiss, and expected the agreement to be finalized within a few weeks. Because the parties have reached a settlement, this court cannot provide effective relief. See Id. at 287.

App. 9

However, review is justified because the issues involved in this appeal are matters of “continuing and substantial public interest.” Id. at 286.

First, the issue is public in nature. The appeal comes from a municipal proceeding initiated by the City of Kent pursuant to statutory authority allowing localities to forfeit vehicles which are used to facilitate the delivery of controlled substances. See RCW 69.50.505.

Second, an authoritative determination is desirable to give guidance to public officers, particularly hearing examiners who are responsible for deciding whether a forfeiture violates the Constitution. While this appeal was pending, the Washington State Supreme Court issued its opinion in City of Seattle v. Long, ___ Wn.2d ___, 493 P.3d 94 (2021). Long revised the test for the Excessive Fines Clause, expressly requiring courts to consider the defendant’s ability to pay when conducting an excessive fine analysis. Id. at 107. This case presents an issue of first impression in interpreting Long’s impact, including analyzing its applicability to civil asset forfeiture and determining whether an individual’s financial circumstances can outweigh the other proportionality factors. The answers to these questions will provide much needed guidance to public officials applying constitutional principles to individual cases.

Third, the issue is likely to recur, as any individual who uses a vehicle to facilitate the sale, delivery, or receipt of controlled substances (or materials used in

manufacturing, compounding, processing, or delivering controlled substances) is subject to civil asset forfeiture. Fourth, prior to settlement, there was a genuine level of adversity and quality of advocacy in briefing.

Finally, it is likely that the issue will escape review due to short-lived facts. If the owner does not notify the law enforcement agency of their claim of ownership within 45 days (90 for real property), the item is deemed forfeited. RCW 69.50.505(4). Additionally, there is no right to appointed counsel in challenging a seizure.⁸ As noted by Jacobo Hernandez at oral argument, individuals challenging a forfeiture risk losing more in attorney fees than their property may be worth.

All five factors weigh in favor of reviewing Jacobo Hernandez' case because it presents substantial and continuing issues of public interest. As such, we turn to the merits of his claim.

II. Whether Forfeiture of Jacobo Hernandez' Vehicle Violates the Eighth Amendment of the United States Constitution

A. Applicability of Long v. City of Seattle

The Washington State Supreme Court in Long considered vehicle impoundment charges under the Excessive Fines Clause. 493 P.3d at 99. In its analysis,

⁸ See Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System, supra note 1.

the court relied on several U.S. Supreme Court cases analyzing civil asset forfeiture. Id. at 107 (citing Austin v. United States, 509 U.S. 602, 609–10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993); United States v. Bajakajian, 524 U.S. 321, 327–28, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998); Timbs v. Indiana, 139 S. Ct. 682, 686, 203 L. Ed. 2d 11 (2019)). The court concluded that “courts considering whether a fine is constitutionally excessive should also consider a person’s ability to pay.” Long, 493 P.3d at 114. It also stated that for Excessive Fines protection to apply, there must be a sanction that is a “fine” and it must be “excessive.” Id. at 109. The U.S. Supreme Court held that forfeitures were punishments, stating that forfeiture under the federal statutes is “‘payment to a sovereign as punishment for some offense.’” Austin, 509 U.S. at 622 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)). Again in Timbs, the U.S. Supreme Court characterized the Excessive Fines Clause to limit “the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’” 139 S. Ct. at 687 (quoting Bajakajian, 524 U.S. at 327–28).

These definitions by the U.S. Supreme Court make clear that civil asset forfeitures are identical for purposes of an Excessive Fines analysis. Therefore, Long applies to civil asset forfeitures and controls our review in this case.

B. Instrumentality and Proportionality

Article 1, Section 14 of the Washington Constitution states “[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.” The Eighth Amendment of the United States Constitution states “[e]xcessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.” Long held that the state and federal provisions were coextensive for the purposes of excessive fines, absent an analysis under State v. Gunwall providing otherwise. 493 P.3d at 107 (citing 106 Wn.2d 54, 720 P.2d 808 (1986)). In 2019, the U.S. Supreme Court held that the Excessive Fines Clause applied to the states through the Fourteenth Amendment. Timbs, 139 S. Ct. at 698. Because the Eighth Amendment applies to the states, and the federal Excessive Fines Clause is coextensive to the Washington state clause, we mirror the analysis in Long and consider Jacobo Hernandez’ claim under the federal constitution.

“The purpose of the Eighth Amendment [of the United States Constitution] was to limit the government’s power to punish.” Austin, 509 U.S. at 609. To trigger its protections, “a sanction must be a ‘fine’ and it must be ‘excessive.’” Long, 493 P.3d at 109. The United States Supreme Court held that civil asset forfeiture that constitutes “payment to a sovereign as punishment” is subject to the Excessive Fines Clause. Austin, 509 U.S. at 622. The City of Kent does not argue the Excessive Fines Clause is inapplicable, only that this forfeiture does not violate the Clause.

While Austin held that civil asset forfeiture was subject to the Excessive Fines Clause, the Court declined to give a test for determining excessiveness. 509 U.S. at 622; see also Tellevik v. Real Prop. Known as 6717 100th St. S.W. Located in Pierce County, 83 Wn. App. 366, 372–73, 921 P.2d 1088 (1996). In analyzing how to determine excessiveness, Division II of this court considered several federal circuit tests, ultimately deciding to examine instrumentality and proportionality. Tellevik, 83 Wn. App. at 374. For instrumentality, the non-exhaustive factors include: (1) the role the property played in the crime; (2) the role and culpability of the property’s owner; (3) whether the offending property can be readily separated from innocent property; and (4) whether the use of the property was planned or fortuitous. Id. at 374–75. For proportionality, the similarly non-exhaustive factors consist of: (1) the nature and value of the property; (2) the effect of forfeiture on the owner and innocent third parties; (3) the extent of the owner’s involvement in the crime; (4) whether the owner’s involvement was intentional, reckless, or negligent; (5) the gravity of the type of crime, as indicated by the maximum sentence; (6) the duration and extent of the criminal enterprise, including the street value of illegal substances; and (7) the effect of the crime on the community, including costs of prosecution. Id. In Long, the Washington State Supreme Court used the following factors in considering proportionality: 1) the nature and extent of the crime; 2) whether the violation was related to other illegal activities; 3) the other penalties

that may be imposed; 4) extent of the harm caused; and 5) a person's ability to pay the fine. 493 P.3d at 114.

1. Instrumentality

First, the property at issue here had a central role in the crime. Jacobo Hernandez admitted he used his vehicle to deliver methamphetamine, hiding the drugs in his gas tank. Second, the property owner had a central role in the crime and was culpable. Again, Jacobo Hernandez owned the vehicle and pleaded guilty to possession with intent to distribute methamphetamine. The parties argued in their briefs and below about whether Jacobo Hernandez played a significant role in the crime. Jacobo Hernandez avers that he was a “mere courier” for a larger drug dealer, and the record reflects that he received a sentencing adjustment for playing a comparatively minor role.⁹ Additionally, he notes that the maximum sentence for his charge was not less than 10 years and up to life in prison, the United States recommended a sentence of no more than 63 months, and the federal judge departed significantly from both of these possible terms of confinement, instead sentencing Jacobo Hernandez to only 24 months in prison without supervised release. The City of Kent argues that Jacobo Hernandez’ adjustment

⁹ A minor role adjustment is given under the Federal Sentencing Guidelines for a defendant “who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.” It entitles the defendant to a 2-level decrease. U.S. SENTENCING GUIDELINES MANUAL § 3B1.2(b); cmt. n.1 (U.S. SENTENCING COMM’N 2018).

was only because his culpability was lower than that of his co-defendant, who had been dealing methamphetamine for years and organized the entire drug-dealing scheme. The City argues that because Jacobo Hernandez alone used his vehicle to deliver drugs, he had a central role and significant culpability. While Jacobo Hernandez is correct that he was a drug courier and the sentencing judge clearly saw his overall culpability as low, demonstrated by his comparatively short sentence, he was convicted of possession of methamphetamine with the intent to distribute. Jacobo Hernandez was central to that crime, and his culpability is evidenced by his guilty plea and conviction. Third, the “guilty property” cannot be separated from the innocent property. The vehicle was used to store, transport, and then deliver methamphetamine. Finally, the vehicle’s use was planned and/or fortuitous. Jacobo Hernandez admitted to hiding methamphetamine in his gas tank, driving it to the “customer’s” home, where it would be sold. He met the co-defendant as a customer of his lawful business, agreed to deliver drugs, and was promised payment for the delivery. He also acknowledged making three such deliveries total, though he was never charged for any previous deliveries.

The instrumentality factors weigh toward forfeiture; the vehicle was clearly an instrument of Jacobo Hernandez’ crime. However, the forfeiture must still be proportional to the crime in order to be valid under the Excessive Fines Clause.

2. Proportionality

A court must also consider proportionality factors. See Tellevik, 83 Wn. App. at 375–76 (holding the trial court erred in failing to analyze proportionality factors).

First, the nature and extent of Jacobo Hernandez’ crime was a drug delivery involving a significant amount of methamphetamine—he admitted to knowingly possessing approximately eight pounds of methamphetamine with the intent to distribute it. Second, the crime was related to other illegal activities, and Jacobo Hernandez admitted to making two other deliveries. Third, the other penalties that may be imposed for the crime are a mandatory minimum term of 10 years in prison, a fine of up to ten million dollars, a mandatory minimum of five years on supervised release, and a mandatory special assessment of \$100. Fourth, the administrative hearing officer noted that the “legislature enacted this statute, in-part, as a deterrent to drug trafficking due to the impact that it has on our society.” The final factor under Long is a person’s ability to pay.¹⁰

Here, Jacobo Hernandez declared that the vehicle is his only asset in his estate. He has no bank accounts, savings, or financial assets other than \$50 in his jail

¹⁰ Jacobo Hernandez argues that considering whether a forfeiture would deprive an individual of their livelihood should be a separate consideration from a proportionality analysis. However, Long is clear that review of an individual’s financial circumstances is wrapped within the proportionality analysis. 493 P.3d at 114.

account. The City did not dispute this declaration below or in its briefing on appeal to this court.¹¹ At sentencing, the federal judge waived all fines, finding Jacobo Hernandez was financially unable, and unlikely to become able, to pay a fine. This final factor of considering his financial condition weighs in favor of finding excessiveness.

Jacobo Hernandez argues that under the proportionality analysis, the Excessive Fines Clause prohibits forfeiting the entirety of an owner's estate, and must not deprive an owner of his livelihood. Below, both the administrative hearing officer and the superior court stated that, even if they were to consider the financial circumstances of Jacobo Hernandez, they could not focus on only one factor.¹² Our Supreme Court's guidance in Long suggests otherwise. Long sets out and meticulously examines the history of the Eighth Amendment and the Magna Carta, which forbid "penalties 'so large as to deprive [a person] of his livelihood.'" 493 P.3d at 111 (alteration in original)

¹¹ The City argues that the forfeiture will not deprive Jacobo Hernandez of his livelihood because the vehicle is not necessary for his ability to earn money, citing the Merriam-Webster thesaurus in support. The Merriam-Webster's Online Dictionary defines livelihood as "means of support or sustenance." (emphasis added) <https://www.merriam-webster.com/dictionary/livelihood> (last visited Oct 13, 2021).

¹² The court stated that it "cannot focus on just one factor" and the hearing examiner noted, "[W]hile it is unfortunate that the Claimant has put himself in the position that he is financially impoverished, the forfeiture of the vehicle neither 'shocking to the conscience' nor constitutionally an excessive, cruel, or unusual punishment in light of his illegal participation in the delivery."

(quoting Browning-Ferris, 492 U.S. at 271). While Long explicitly requires courts to consider an individual's ability to pay, the extensive history upon which the court relies suggests an individual's ability to pay can outweigh all other factors. Id. at 111–12.

Long also drew from the Colorado Supreme Court, which held “the ‘concept of “proportionality” itself’ supported considering ability to pay,” and “[a] fine that would bankrupt one person would be a substantially more burdensome fine than one that did not.” Id. at 113 (quoting Dep’t of Labor & Emp’t v. Dami Hosp., LLC, 2019 CO 47M, ¶ 30–31, 442 P.3d 94 (2019)). The Washington State Supreme Court requires courts to consider an individual's financial circumstances, but the history the court uses to come to that conclusion suggests that an individual's financial circumstances can make a forfeiture grossly disproportionate, even when all other factors support a finding otherwise.

We agree with Jacobo Hernandez' argument that “[f]or the forfeiture of an entirety of a person's estate to be proportional . . . it would have to be far more heinous than Mr. Jacobo[] Hernandez's role as a courier on this one (or even three) occasions.” This is particularly persuasive because Jacobo Hernandez was found to be indigent, both by the federal judge presiding over his criminal matters and by the superior court, which granted an order allowing him to proceed with his appeal at public expense. Even given all the other proportionality factors weighing against Jacobo Hernandez, it seems illogical that the Constitution would allow the State to deprive him of his only asset, a \$3,000 vehicle,

when he has been found to be indigent.¹³ As our Supreme Court noted in Long, “[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear.” 493 P.3d at 115 (emphasis added) (quoting Timbs, 139 S. Ct. at 688). In his federal matter and again in his civil asset forfeiture case, Jacobo Hernandez was found to be indigent. The City does not challenge this evidence. Jacobo Hernandez’ estate clearly will not bear the forfeiture of his only asset, worth only a few thousand dollars, considering his indigency.¹⁴

3. Closer Scrutiny Because the State Stands to Benefit

Additionally, Washington’s Supreme Court “has recognized that punitive fines should not be sought or imposed as a source of revenue.” Id. at 113 (quoting State v. Grocery Mfrs. Ass’n, 195 Wn.2d 442, 476, 461 P.3d 334 (2020)) (noting that much of the funding for the criminal justice system comes from fines). “Courts

¹³ The administrative hearing officer below held that Jacobo Hernandez would not be deprived of his livelihood because he had “skills that he can rely upon to earn a living.” This is inconsistent with Long, which held that the fine deprived Long of his livelihood despite the fact that like Jacobo Hernandez, Long was a skilled tradesman with knowledge and experience upon which he could rely to make money. 493 P.3d at 114–15. Additionally, it seems nonsensical that the State may deprive a person of all their assets, so long as they have some skill or ability to work.

¹⁴ An individual’s financial circumstances may not always outweigh the other proportionality factors. However, the facts here are sufficient to support a finding of gross disproportionality.

scrutinize ‘governmental action more closely when the State stands to benefit.’” *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)). In the context of civil asset forfeiture, there is a significant financial benefit for the State in seizing assets—“Washington State allows local law enforcement agencies to retain 90% of the net proceeds from drug-related assets seized.”¹⁵ We scrutinize the constitutionality of civil asset forfeitures more closely because individual law enforcement agencies, and the state government in general, stand to benefit millions of dollars each year from forfeiture.¹⁶

II. Procedure on Remand

At oral argument before this court, the City urged the panel to remand to the superior court if we found that Long controls. It argued the record below is insufficient to conduct the proportionality test, and asserted that this court cannot know the true extent of Jacobo Hernandez’ finances based only on his declaration. While it is true that our court does not find facts, the City is mistaken as to the record before us and our standard of review. See Quinn v. Cherry Lane Auto

¹⁵ “Because a drug arrest automatically renders much of a defendant’s property seizable, section 69.50.505 of the Revised Code of Washington has a disparate impact on defendants of color.” See Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington’s Criminal Justice System, supra note 1.

¹⁶ See Policing for Profit: Washington, supra note 6; see also Eric Scigliano, The Strange, Failed Fight to Rein in Civil Forfeiture in Washington, supra note 7.

App. 21

Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (appellate courts do not find facts).

The record on appeal contains findings by both the superior court on review and the administrative hearing examiner indicating the vehicle is Jacobo Hernandez' only asset. Additionally, Jacobo Hernandez submitted a finding by the federal judge in his criminal case concluding that he was indigent and would likely never become able to pay a fine, which was the basis for waiving that sentencing requirement. For purposes of the appeal, the superior court found he was indigent and waived fees. Unchallenged findings of fact are "verities on appeal." State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).¹⁷

The City did not cross-appeal or otherwise challenge any of these findings below or in its briefing before us. The City's speculative assertions at oral argument, based on mere conjecture or facts not in the record before us, are not sufficient to challenge the evidence properly submitted by Jacobo Hernandez.¹⁸ Accordingly, we have sufficient facts in the record to conduct the proportionality test. We conclude that the

¹⁷ At oral argument, the City contended that these findings were mixed questions of law and fact. The City misunderstands the law and Jacobo Hernandez' assignments of error. We need not reach this argument.

¹⁸ Jacobo Hernandez also assigned error to the superior court's finding of fact that he "played a significant role" in the underlying crime. He asserts in briefing that this is actually a mixed question of law and fact subject to de novo review by this court. In light of our conclusion as to his primary challenge, we need not reach this assignment of error.

App. 22

forfeiture of Jacobo Hernandez' vehicle was grossly disproportionate in violation of the Eighth Amendment.

Reversed.

/s/ [Illegible]

WE CONCUR:

/s/ Smith, J. /s/ Appelwick, J.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR
THE COUNTY OF KING

ADRIAN JACOBO-
HERNANDEZ,

Petitioner,

vs.

CITY OF KENT,
a Washington Municipal
Corporation,

Respondent,

No. 19-2-26343-1-KNT
FINDINGS OF FACT
AND CONCLUSIONS
OF LAW

(Filed Aug. 7, 2020)

THIS MATTER having come on for oral argument before the undersigned judge of the above-entitled Court on July 24, 2020, and the Court having reviewed the administrative record and considered the written and oral argument of the parties, hereby renders the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. The Petitioner, Mr. Adrian Jacobo-Hernandez, on the date of June 22, 2018, utilized his car, a Dodge Charger, to transport and deliver an unlawful controlled substance, to wit, (8) pounds of methamphetamine, from California to Washington.
2. Mr. Jacobo-Hernandez was arrested and charged in the United States District Court for the Western District of Washington, where

he entered a plea of guilty to Possession with Intent to Distribute Methamphetamine.

3. The maximum penalty for that offense was a term of imprisonment of not less than 10 years and up to life; a fine up to ten million dollars (\$10,000,000); a mandatory minimum term of supervised release of five (5) years, and a mandatory special assessment of one hundred (\$100) dollars.
4. Mr. Jacobo-Hernandez played a significant role in transporting and delivering the Methamphetamine. However, he was less culpable than his co-defendant, Mr. Madrigal-Lemons, a long-time methamphetamine supplier.
5. The Federal Court sentenced Mr. Jacobo-Hernandez to 24 months of confinement, substantially below the maximum penalty. The Government had sought 63 months in custody. All fines were waived. The only financial penalty imposed was a \$100 mandatory assessment.
6. The City of Kent sought to forfeit the car pursuant to RCW 69.50.505(1)(d), and proceedings were held before a Hearing Examiner.
7. Mr. Jacobo-Hernandez did not dispute that the car was forfeitable under the statute, but asserted that forfeiture violated the Excessive Fines Clause of the United States Constitution.
8. The car is Mr. Jacobo-Hernandez's only asset. It's valued at approximately \$3,000 to \$4,000.

9. The street value of the methamphetamine recovered at the time of Mr. Jacobo-Hernandez's arrest was between \$25,000 - \$30,000.
10. The Hearing Examiner considered the constitutional factors of instrumentality, proportionality, and excessive punishment under state and federal law, and the 8th amendment to the United States Constitution. The Hearing Examiner ruled that the City of Kent prevailed, and ordered the car forfeited.
11. Mr. Jacobo-Hernandez, through counsel, asked this Court to grant relief by finding that the seizure of his car is in violation of his constitutional protection under the Eighth Amendment against excessive fines, and that the hearing examiner erroneously interpreted or applied the asset forfeiture statute because of a misunderstanding of the constitutional principles involved.

2. CONCLUSIONS OF LAW

1. Judicial review of administrative orders, such as the order of forfeiture here at issue, is governed by RCW 34.05.570 of the Administrative Procedure Act. This Court reviews those arguments under a de novo standard. *Linville v. Dep't of Ret. Sys.*, 11 Wash.App.2d 316, 320, 452 P.3d 1269, 1272 (Wash. Ct. App. 2019), review denied, 195 Wash. 2d 1013, 460 P.3d 181 (2020).
2. RCW 69.50.505(1)(d) provides statutory authority for forfeiture of "All conveyances, including aircraft, vehicles or vessels, which are used, or

intended for use, in a manner to facilitate the sale, delivery of receipt of property described . . . (All controlled substances).”

3. To perform an excessive fines analysis, Washington courts must examine two factors to determine whether a specific forfeiture is so excessive as to violate the Constitution: (1) instrumentality, or the relationship of the property to the offense; and (2) proportionality, or the extent of the criminal activity compared to the severity of the effects of the forfeiture on the claimant. *Tellevik v. Real Prop. Known as 6717 100th St. S. W. Located in Pierce Cty.*, 83 Wash. App. 366, 373, 921 P.2d 1088 (1996).
4. Instrumentality factors include, but are not limited to, the role the property played in the crime; the role and culpability of the property’s owner; whether the offending property can readily be separated from innocent property; and whether the use of the property was planned or fortuitous. *Id* at 374-375.
 - a. The Dodge Charger owned by Mr. Jacobo-Hernandez was used by Mr. Jacobo-Hernandez to transport and deliver the eight (8) pounds of methamphetamine, from California to Washington.
 - b. Mr. Jacobo-Hernandez cannot be readily separated from the innocent property, as is evident by his role in driving the car to Washington.
 - c. Mr. Jacobo-Hernandez, by his own admission, had previously made this trip, for a similar delivery.

- d. For the above-mentioned reasons, the car was instrumental in the commission of the crime and the seizure was proper under the statute.
- 5. Proportionality factors include, but are not limited to, the nature and value of the property; the effect of forfeiture on the owner and innocent third parties; the extent of the owner's involvement in the crime; whether the owner's involvement was intentional, reckless or negligent; the gravity of the type of crime, as indicated by the maximum sentence; the duration and extent of the criminal enterprise, including in a drug case the street value of the illegal substances; and the effect of the crime on the community, including costs of prosecution. *Id* at 374-375.
- 6. Mr. Jacobo-Hernandez focuses on the second factor, which is the effect of forfeiture on the owner and innocent parties. However, the Court cannot focus on just one factor, but must consider each factor, in tandem.
 - a. The car is worth \$3,000 to \$4,000, and Mr. Jacobo-Hernandez only asset.
 - b. Mr. Jacobo-Hernandez was delivered the methamphetamine from California to Washington on at least three occasions, so his involvement was significant.
 - c. Mr. Jacobo-Hernandez involvement was intentional.
 - d. In determining the gravity of the crime, the court looks at the maximum sentence he could have received. The statutory penalty applicable to the charge is as follows:

mandatory minimum term of 10 years, a fine of up to ten million dollars (\$10,000,000.00), a mandatory minimum term of supervised release of five (5) years, and a mandatory special assessment of one hundred (\$100) dollars. Mr. Jacobo-Hernandez received a significant reduction in sentence. However, he was still required to serve 24 months in confinement and pay the \$100 mandatory fee.

- e. The duration and extent of the criminal enterprise, including the street value of the controlled substances for purposes of the asset forfeiture:
 - i. The street value of the methamphetamine that was recovered at the time of Mr. Jacobo-Hernandez's arrest was between \$25,000 - \$30,000. Additionally, Mr. Jacobo-Hernandez does not dispute that he has made similar trips on a least two other occasions.
 - ii. The financial value of the property is relatively minor compared to the street value of the illegal substance.
- f. The effect of the crime on the community, including the prosecution cost: The legislature enacted this statute, in-part, as a deterrent to drug trafficking due to the impact that it has on our society.
- g. The effect on the owner: Mr. Jacobo-Hernandez has placed a great emphasis on the second factor, arguing that forfeiture of

his car will deprive him of his livelihood, and will not allow him to preserve a minimum core of economic substance. The Court does not find this argument persuasive because there is no evidence that this car will deprive him of his livelihood. And, more importantly, the Court cannot focus on only one of the seven *Tellevik* factors.

7. The Court does not find the seizure of the \$3,000 car grossly disproportionate, in light of all the proportionality factors; including the value of the narcotics at the time of the arrest.
8. The Court concludes that the Hearing Examiner's findings are not in violation of constitutional provisions, nor did the Hearing Examiner erroneously interpret or apply the law.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Hearing Examiner's ruling is affirmed.

Dated this 6th day of August, 2020.

/s/ [Illegible]
Honorable Mafé Rajul
King County Superior Court

**BEFORE THE HEARING EXAMINER
KENT DEPARTMENT OF PUBLIC SAFETY**

City of Kent, a Washington
Municipal Corporation,

Plaintiff

v.

2008 Dodge Charger; VIN
#2B3KA43RX8H199624

ADRIAN JACOBO-
HERNANDEZ

Claimant.

No. 18-9624F

FINDINGS OF FACT/
CONCLUSIONS OF
LAW/FORFEITURE
DECISION

(Filed Sep. 23, 2019)

THIS MATTER came on for hearing pursuant to RCW 69.50.505 on the request of claimant, ADRIAN JACOBO-HERNANDEZ, after the filing of a request by his attorney, John R. Carpenter, Federal Public Defender, within the prescribed statutory period set forth under the state drug forfeiture statutes. Such a hearing was scheduled and held on the date of August 7, 2019. The City and all its witnesses were present for the hearing. The claimant was not present as he was serving time on his Federal sentence. Mr. Carpenter represented the claimant at the hearing and conceded that the above property was used as a vehicle used to transport and deliver an unlawful controlled substance, to wit, methamphetamine, which resulted in his guilty plea in Federal Court to the charge of Possession with Intent to Distribute Methamphetamine in the spring of this year (See Claimant's submission

Exhibit 5). With the claimant's concession that the City has met the statutory burden of proof to forfeit the foregoing property under RCW 69.50.505 et seq., Mr. Carpenter asserted that forfeiting the property in this instance would violate the U.S. Constitution's 8th amendment against cruel and unusual punishment, and would be clearly an excessive fine under the recent U.S. Supreme Court's decision in Timbs v. Indiana, -- US --, 139 S.Ct 682 (2019). The City agrees that an excessive fine analysis is required in this action, but argues that a forfeiture of the subject of this proceeding in light of the facts is neither excessive nor cruel and unusual punishment. Both parties made oral arguments supporting their positions and a variety of briefing and other submissions were provided in writing to this Hearing Examiner. The only issue is whether the above forfeiture is legally appropriate in light of the claimants' asserted economic condition despite the claimants' concession that the automobile was used in violation of Washington law. Having reviewed all documents and applicable case-law, the following findings of fact and conclusions of law are rendered.

1. FINDINGS OF FACT

1. The Claimant, ADRIAN JACOBO-HERNANDEZ, on the date of June 22, 2018, utilized the above vehicle to illegally transport 3.6 kilograms of methamphetamine to a location in Sumner, Washington. (Conceded by the Claimant)

2. The vehicle was properly seized and notice as given by the City of Kent of the intent to seek forfeiture of said vehicle in 2018. (Conceded by the Claimant)
3. The Claimant plead guilty to Possession with Intent to Distribute Methamphetamine in Federal Court on March 1, 2019, such charge arising out from his June 22, 2018 arrest. (Claimant's Exhibit 5)
4. The maximum penalty for that offense was a term of imprisonment of not less than 10 years and up to life; a fine up to ten million dollars (\$10,000,000.00) ; a mandatory minimum term of supervised release of five (5) years, and a mandatory special assessment of one hundred (\$100) dollars. (Exhibit 5).
5. The Federal plea agreement contained the language, "The Defendant further understands a consequence of pleading guilty may include forfeiture of certain property either as part of the sentence imposed by the Court, or as a result of civil judicial or administrative process. (Claimant's Exhibit 5)
6. The Defendant was sentenced to a period of imprisonment substantially less than the maximum penalty (24 months) and the Federal Judge found that he was unable and likely to become unable to pay a fine and such was waived. (Claimant's Exhibit 6)
7. The Declaration of the Claimant indicates that he has no other significant assets other than the vehicle that is the subject of this

proceeding. He estimates the value of the vehicle to be about \$3000. (Claimant's Exhibit 1).

8. The filings of the Claimant indicate that upon completion of the federal sentence, he will be deported to Mexico. (Defense oral argument; Claimant's Declaration)
9. The vehicle was clearly used to transport illegal controlled substances, methamphetamine, the transportation of such indicating an intentional action by the claimant (Claimant's filings)
10. The vehicle has been modified to allow the hiding of the drugs to avoid detection by the authorities, which indicates planning to avoid detection and an intentional action by the claimant (City's briefing and argument)
11. The only person that the forfeiture will significantly affect is the Claimant.
12. The financial value of the property is relatively minor compared to the street value of the illegal substance. (Claimant's Declaration; City's Argument)
13. While the Claimant's role in the drug scheme was as the driver (the person who illegally transported the substance into the state) such action was taken intentionally without and indication of coercion or other undue influence but based upon financial distress asserted by the Claimant (Defendant's Brief)

14. The possible statutory maximum sentence was very high, although the Claimant was determined to be a minor participant in the overall operation. (Claimant's filings; Attorney's argument)
15. The Claimant was to be compensated financially this illegal delivery knowing that his actions were against the law. (Defendant's Brief)
16. The particular substance transported, methamphetamine, is highly addictive drug and significantly affects users in many negative ways including how their brains cognitively operate and their ability to recover from such use. The amount of drug that was delivered could have been very damaging to the community if this particular delivery was not interdicted. (Judicial Notice)
17. In the Timbs decision, the U.S. Supreme court remanded a forfeiture case back to Indiana for the determination of whether such forfeiture was excessive after clarifying that Federal Constitutional law did apply to state forfeiture proceedings. The Timbs forfeiture was of a high value vehicle that was independently purchased with non-drug tainted money that was utilized in a low value drug transaction. The case was remanded to determine the appropriateness of the forfeiture of such in light of the application of the Eighth Amendment and case decisions against excessive fines. The result of the Indiana court decision has not been rendered.

18. The current case involves an extremely low value vehicle involved in the hidden transportation of a high value amount (street value) of methamphetamine.

19. Any Conclusion that should be a Finding is hereby adopted as a Finding. Based on the foregoing Findings of Fact, the Hearing Examiner makes the following:

2. CONCLUSIONS OF LAW

- A. This Hearing Examiner appointed by the City of Kent Police has jurisdiction over forfeiture actions filed by the City of Kent.
- B. RCW 69.50.505(1)(d) provides statutory authority for forfeiture of “All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, in any manner to facilitate the sale, delivery, or receipt of property described . . . (All controlled substances).”
- C. The Claimant has conceded that the car was used in violation of the Washington forfeiture statute.
- D. Without any clear guidance by state and federal courts limiting the value of tangible asset forfeitures, or monetary equivalent of such, or setting a floor for such in the State of Washington, this Hearing Examiner is left to examine the totality of the facts presented in light of the actions and circumstance presented in the current situation. In this civil drug forfeiture proceeding and decision, this Hearing

Examiner has considered the recent Timbs case (cite set forth above) and the factors set forth in Tellevik v. Real Property, 83 Wash. App. 366, 921 P.2d 1088 (1996). This Hearing examiner has also considered the Constitutional factors of instrumentality, proportionality, and excessive punishment under state and federal law and the 8th amendment to the U.S. Constitution.

- E. Mr. Carpenter argues that on the Federal level, money judgment forfeitures, even if the defendant cannot pay the entire amount does not mean that the individual is deprived of his livelihood, as future assets can be seized to satisfy a judgment. (Defendant's Brief Page 10). But he subsequently asserts as the car is the Claimant's sole asset (essentially equating the vehicle as a monetary means to a "fresh start") that the forfeiture of such would be clearly excessive and deprive the Claimant of his livelihood. This Examiner finds no support for this position. The Claimant loses what he risked. The claimant's attorney also relied upon an Appellate Brief filed in the Timbs v. Indiana case (cited above), its lengthy analysis of excessive fines dating back to the time of the Magna Carta, and further cites various state and federal decisions to support the position that forfeiture of the seized vehicle is not proportionate to the Claimant's estate and that it would deprive him of his livelihood. This Hearing Examiner does not find that such forfeiture of the instrumentality modified and used to transport illegal narcotics in the present proceeding

deprives the Claimant of his livelihood. The Claimant obviously has skills that he can rely upon to earn a living even if the vehicle is forfeited. The Claimant made an intentional decision to utilize this car in the transportation of illegal narcotics. The fact that the Claimant finds that this vehicle is his only significant asset (per Declaration of Claimant) does not mean that it must be logically returned to him. He made a choice that involved this asset. To return this car would make no logical sense in the Washington legislative scheme to stop illegal drug activities by asset forfeitures. The City request to forfeit the vehicle intentionally used to transport the illegal narcotics is appropriate in the current circumstance. To rule otherwise would allow drug traffickers to hire persons with no other significant resources to transport drugs in low value assets (vehicles, boats, etc.) without any significant risk of loss of such assets. Further, while it is unfortunate that the Claimant has put himself in the position that he is financially impoverished, the forfeiture of the vehicle neither "shocking to the conscience" nor constitutionally an excessive, cruel or unusual punishment in light of his illegal participation in the delivery the significant amount of methamphetamine. As set forth in the findings of fact above, he intentionally modified and used this car in the illegal delivery of methamphetamine. He alone will be impacted by its forfeiture. He had knowledge of the nature of the drugs, the risk that he was taking, and should have known of the extreme nature

of the possible penalties. His maximum federal sentence demonstrates the severe nature of his actions despite the reduction in sentence by the Federal Judge. His plea agreement clearly provides notice that civil forfeiture of assets were a possibility. He was on notice that the vehicle was subject to a forfeiture action by the City of Kent. If the preservation of this asset was of significant importance to the Claimant's future, it could have been negotiated in the Federal Plea proceeding and with the City potentially conceding jurisdiction to the Federal Prosecutor at their request. That did not happen. The loss of this vehicle is a logical outcome of the Claimant's intentional decision to use it to illegally transport and deliver illegal drugs. This Hearing Examiner does not find such a decision to be cruel & unusual nor excessive in light of his action. Further, there is no evidence that the state forfeiture law is required to give the Claimant a "clean start" with the sale of a tangible asset properly seized in violation of state law. Any decision to return the vehicle to the Claimant in this case would allow the Claimant to seek attorney's fees and costs as the prevailing party, a result that would be ludicrous in the present situation.

- F. Based upon the foregoing, the City of Kent has prevailed in this hearing and the following order is entered.

App. 39

3. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the 2008 Dodge Charger and all rights and interests in such property are FORFEITED to the Kent Police Department.

ENTERED this 11th day of September, 2019.

/s/ Timothy Jenkins
Timothy Jenkins
Kent Police Department
Hearing Examiner

TIMOTHY A. JENKINS
Attorney at Law
P.O. Box 4155
Federal Way, WA 98063-4155
