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OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

In Re:

**THE CITY OF TACOMA through its
POLICE DEPARTMENT,**

Respondent,

v.

**One 2005 Porsche Cayenne; LICENSE
#CLR3060, VIN# WP1AB29P75LA60260,**

RICHARD LEE,

Petitioner/Claimant.

**FILE NO. HEX.TPD.2024-004
(TPD NO. 24-02200586)**

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER OF RESTITUTION**

THIS MATTER came on for hearing on April 2, 2024,¹ before JEFF H. CAPELL, Hearing Examiner, for the City of Tacoma, Washington. Keith Echterling, Deputy City Attorney, appeared at hearing for the City of Tacoma (the “City”) and its seizing agency/department, the Tacoma Police Department (“TPD”). Tacoma Police Officers Kevin Hanley and Wyatt Gustason were present as City witnesses. Claimant Richard Lee (“Claimant” or “Lee”) appeared *pro se* and gave testimony on his own behalf.

At the hearing, testimony was taken and exhibits were admitted and reviewed. Based upon the evidence admitted, the Hearing Examiner makes the following:

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¹ This hearing was conducted over Zoom at no cost to any participant with video, internet audio, and telephonic access.

**FINDINGS OF FACT,
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1 **FINDINGS OF FACT**

2 1. The events giving rise to the forfeiture at issue here took place between
3 January 17, 2024 and January 22, 2024, starting when the Washington State Patrol reported
4 information to TPD that led to TPD officers, including Hanley and Gustason, being dispatched
5 to Lee’s location in a Tacoma alleyway on January 22, 2024. Both Officers Hanley and
6 Gustason are currently assigned to the Special Investigation Unit of TPD (SIU) that focuses on
7 drug investigations and enforcement. *Hanley Testimony, Gustason Testimony, Lee Testimony;*
8 *Declaration for Determination of Probable Cause, Cause No. 24-1-00217-2*, dated January 23,
9 2024 (the “PC Declaration”).²

10 2. The aforementioned TPD officers were not dispatched to arrest Lee for any
11 offense under RCW 69.50,³ the Uniform Controlled Substances Act (“UCSA”), but rather were
12 dispatched to arrest Lee on probable cause for felony assault and related charges. *Hanley*
13 *Testimony, Gustason Testimony, PC Declaration.*

14 3. Both officers Hanley and Gustason participated in arresting Lee for the charges
15 just referenced. Criminal proceedings are now pending in Pierce County Superior Court (a) for
16 two counts of First-Degree Assault,⁴ (b) for one count of Drive-by Shooting,⁵ and (c) for one
17 count of Carrying a Firearm-No Permit.⁶ Hearing testimony and the PC Declaration indicate
18

19 ² Neither party to the hearing offered the PC Declaration as an exhibit, but facts recounted therein were referred to
20 during the hearing. The Examiner was aware of the PC Declaration from having checked Pierce County LINX for
21 pending criminal charges against Lee related to this civil forfeiture appeal. The Examiner makes such checks in
order to fully advise civil forfeiture appellants of the potential implications of testifying in a civil forfeiture
hearing while related criminal charges are still pending.

³ “RCW” is the commonly used abbreviation for the Revised Code of Washington. “TMC” also used herein is the
abbreviation for the Tacoma Municipal Code.

⁴ RCW 9A.36.011(1)(a).

⁵ RCW 9A.36.045(1).

⁶ RCW 9.41.050(2)(4).

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1 that “And [sic] additional charge might be filed related to the drugs.” No such additional
2 charge was pending at the time of the hearing. *Id.*⁷

3 4. In the arrest operation, Hanley, was assigned to an armored vehicle. He testified
4 that he saw Lee walking toward the 2005 Porsche Cayenne that was seized (the “Porsche”). He
5 exited the armored vehicle. Hanley offered hearsay testimony from another officer not
6 testifying at the hearing that Lee had opened the door to the Porsche. For purposes of the
7 hearing, Hanley speculated from this hearsay, that Lee was trying to “escape from the
8 situation.” *Hanley Testimony.*⁸

9 5. Hanley used what he called the “draw and direct technique” with his department
10 issued rifle, trained his weapon on Lee, and ordered him to show his hands.⁹ Another TPD
11 officer also had a weapon trained on Lee at this same time. Hanley testified that Lee then
12 jumped down and threw a handgun under the Porsche. Later in his testimony in response to a
13 question from the City’s counsel, Hanley indicated that he did not see Lee throw the gun under
14 the car, but rather that he only heard that this had happened over the radio.¹⁰ Hanley ultimately
15 handcuffed Lee and took him into custody. He testified that this took place next to the Porsche.
16 *Hanley Testimony.*

17 6. In conducting a search incident-to-arrest of Lee’s person, a bag of blue pills was
18 discovered in his right jacket pocket. Hanley testified that his training and experience led him
19

20 ⁷ See, https://linxonline.co.pierce.wa.us/linxweb/Case/CriminalCase.cfm?cause_num=24-1-00217-2.

21 ⁸ It is unclear to the Examiner how Hanley could have seen Lee approaching the Porsche, but not seen for himself whether Lee had opened the door.

⁹ Officer Hanley actually said “show my hands” in his testimony, but it appears he meant for Lee to show his hands.

¹⁰ Again, this is confusing to the Examiner how Officer Hanley would have had Lee in his sights, as it were, but not directly seen Lee ditch the pistol.

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1 to believe that the pills were fentanyl. Hanley found a “sum of money” in Lee’s pants pocket.
2 Hanley testified that he did not count the money and that it was not seized. In the process of
3 arresting and searching Lee, Hanley testified that Lee said he “was just trying to make a
4 living.” Hanley concluded that this statement meant Lee was selling the pills.

5 7. The pills were small and blue. Hanley testified that they “usually” are imprinted
6 with the number 30, although he did not say that the pills found on Lee necessarily had that
7 imprint. The pills only appear photographically in Exhibit R-5 of the record, and it is not
8 possible to tell whether the pills have any imprint on them from this photo. *Hanley Testimony;*
9 *Ex. R-5.*

10 8. Officer Gustason was the “lead case agent” for the operation that arrested Lee. He
11 was contacted by Washington State Patrol (WSP) who advised Gustason that probable cause
12 existed for Lee’s arrest. Gustason first saw Lee when he was on the ground in the process of
13 being arrested.¹¹ Gustason provided “area cover” during Lee’s arrest due to a nearby apartment
14 door being open. Gustason testified that he was aware of “about 92 grams” of fentanyl pills and
15 “about 12 grams of meth” being taken off Lee’s person during the arrest. *Gustason Testimony.*

16 9. Gustason testified that pills such as those found on Lee are commonly imprinted
17 to look like prescription oxycodone. He also testified that the packaging and the amount,
18 estimated somewhere around 1,000 pills, commonly called a “boat,” were more consistent with
19 dealing than with personal use. He also testified that the amount found on Lee is consistent
20 with a dealer having just made a purchase from a higher-up distributor with the intention of
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¹¹ Like Hanley, Gustason testified regarding Lee having a gun, but also like Hanley, his testimony of that was not first-hand.

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1 splitting it up for smaller, subsequent, street-level sales. A boat of fentanyl can have a street
2 value of around \$1,800. *Gustason Testimony; Ex. R-5.*

3 10. Gustason testified that the pills were field tested with what he thought was a Nic-
4 Kit 33 and a positive result returned. Gustason “believed” that the meth was also tested with
5 Nic-Kit U and produced a positive result.¹² Gustason thought about 12 grams of
6 methamphetamine were taken from Lee’s person. He indicated that a 12-gram amount was
7 “not a crazy amount” but was still more than a common user amount. *Gustason Testimony.*

8 11. Gustason later obtained a search warrant for the Porsche and searched it. The
9 search found a single, empty dime bag, and some razor blades. Dime bags are used to package
10 drugs for individual sale, and are purchased in the bags. Razor blades are often used to cut up
11 drugs of various types both for sale and consumption. There was no testable residue on the
12 razor blades. Gustason thought there was drug residue on the floor of the vehicle, but it was
13 insufficient in quantity to test.¹³ No evidence was presented of any type of residue being found
14 on the dime bag. *Gustason Testimony.*

15 12. The location at which Lee was arrested was a one-way alley. Lee admitted that he
16 was on the way to the Porsche, but that the arresting officers intercepted him before he got to
17 the car and that he was not able to attempt getting into the Porsche. Lee testified that he would
18 not have been able to leave in the Porsche in any event because police vehicles, including the
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21 ¹² This testimony appears to be hearsay. Gustason’s testimony indicated that he did not do the testing of either the
fentanyl or the methamphetamine.

¹³ The razor blades were found in the Porsche’s center console. Gustason pointed to a white substance on the floor
as what he thought might be drug residue, but that was untestable. It appears that there was no connection between
the white substance on the floor and the razor blades until they were juxtaposed for the photo that is Exhibit R-7.

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1 one shown in Exhibit R-5, were blocking exit from the alley in both directions. *Lee Testimony;*
2 *Ex. R-5.*

3 13. Lee testified that the razor blades found in the Porsche are refills that he uses in a
4 boxcutter at his work. Lee presented four W-2 tax statements (*Exhibits C-1, C-2, C-6 and C-7*)
5 showing work and income from four different employers for 2023. Lee did not expressly
6 identify at which employer he uses the boxcutter, although his testimony regarding his
7 employment at Terra Staffing seemed to indicate a warehouse-like environment. He testified
8 that the razors were new and in cardboard sheaths until the searching officers removed the
9 sheaths. The cardboard sheaths are shown in Exhibit R-7 under two of the blades.

10 14. Lee testified that the single dime bag in his car was for marijuana and that he does
11 smoke marijuana. *Lee Testimony.*

12 15. Lee testified that the “sum of money” referred to by Officer Hanley was between
13 two and three hundred dollars and was not the proceeds of transactions in controlled
14 substances, but rather from his lawful employment. The money was apparently not seized with
15 the intention to forfeit in any event. Lee testified that he is always employed. *Lee Testimony,*
16 *Hanley Testimony; Ex. C-6.*

17 16. Any Conclusion of Law more properly deemed to be a Finding of Fact is hereby
18 adopted as such.

19 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

20 **CONCLUSIONS OF LAW**

21 1. This matter was brought pursuant to the provisions of the Revised Code of

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1 Washington (RCW) Chapter 69.50, the Uniform Controlled Substances Act (UCSA), and
2 RCW 34.05, the Administrative Procedures Act (the “APA”), before the duly appointed
3 Hearing Examiner of the City of Tacoma, serving as the designee of the Chief Law
4 Enforcement Officer of the City.

5 2. The Hearing Examiner has jurisdiction over this matter pursuant to RCW
6 69.50.505 and RCW Chapter 34.05.

7 3. The seizing law enforcement agency has the burden of proof in forfeiture
8 proceedings under the UCSA (RCW 69.50) to establish, by a preponderance of the evidence,
9 that the property seized is subject to forfeiture under the provisions of the statute. *RCW*
10 *69.50.505(5)*. Preponderance of the evidence means that the trier of fact is convinced that it is
11 more probable than not that the fact at issue is true.¹⁴ The seizing agency “[m]ay meet its
12 burden through direct or circumstantial evidence.”¹⁵ The preponderance of the evidence
13 standard is at the low end of the spectrum for burden-of-proof evidentiary standards in the U.S.
14 legal system.¹⁶

15 4. The law requires that decisions from adjudicative tribunals rest upon evidence.¹⁷
16 Evidence is used to establish facts. “Proof of the fact[s] to be established may be by direct or
17 circumstantial evidence.”¹⁸ The hearing examiner weighs the evidence and makes credibility
18 determinations where evidence conflicts.¹⁹

19 _____
20 ¹⁴ *Spivey v. City of Bellevue*, 187 Wn.2d 716, 733, 389 P.3d 504, 512 (2017); *State v. Paul*, 64 Wn. App. 801, 807,
828 P.2d 594 (1992).

¹⁵ *Sam v. Okanogan County Sheriff's Office*, 136 Wn. App. 220, 229, 148 P.3d 1086 (2006).

21 ¹⁶ *In re Custody of C.C.M.*, 149 Wn. App. 184, 202-203, 202 P.3d 971, 980 (2009); *Mansour v. King County*, 131
Wn. App. 255, 266, 128 P.3d 1241, 1246-1247 (2006).

¹⁷ *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 356-357, 493 P.2d 1018, 1022-1023 (1972).

¹⁸ *Lamphiear*, 6 Wn. App. at 356, *citing* *Arnold v. Sanstol*, 43 Wn.2d 94, 260 P.2d 327 (1953); *see also* *GLEPCO, LLC v. Reinstra*, 175 Wn. App. 545, 563, 307 P.3d 744, 752-753 (2013).

¹⁹ *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 614-615, 398 P.3d 1078 (2017).

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1 5. Some of what appeared to be key evidence for the City was hearsay.²⁰ HEXRP
2 1.11, titled “Evidence,” together with RCW 34.05.452 (a section of the APA), titled “Rules of
3 evidence—Cross-examination,” apply to the handling of evidence in forfeiture hearings. These
4 two sections essentially mirror each other, and regarding hearsay, they state that: “Evidence,
5 including hearsay evidence, may be admissible if in the judgment of the Examiner it is the kind
6 of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of
7 their affairs.” The Examiner also looks to the Washington Rules of Evidence as guidelines²¹ in
8 making determinations on the admissibility, weight, and credibility of evidence.²² The weight
9 given to evidence also depends on the evidence’s actual relevance to the issues presented.

10 6. The Examiner has no problem with the officers’ credibility as it regards the
11 hearsay evidence proffered, but rather, as will be set forth below, that evidence does not weigh
12 heavily in the balance of determining the actual issue at hand here: whether TPD’s seizure of
13 the Porsche was authorized by RCW 69.50.505.

14 7. Speculation and conjecture are not evidence.²³ Our State Supreme Court has
15 stated this evidentiary proposition as follows:

16 In order to prove a fact by circumstances there should be positive proof of the
17 facts from which the inference or conclusion is to be drawn. The circumstances

18 ²⁰ Evidence rule 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at
19 the trial or hearing, offered in evidence to prove the truth of the matter asserted.” For example, neither officer who
20 testified at the hearing witnessed Lee throw the gun under the Porsche. They only heard of this from other officers
making their testimony regarding the gun hearsay. The same appears to be true for the test results of the pills and
the methamphetamine. Gustason did not testify that he conducted the tests and witnessed the results, only that he
knew what the results were. He would have been informed of these from another person who did not testify at the
hearing.

21 ²¹ RCW 34.05.452(2).

²² *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 613~614, 398 P.3d 1078 (2017) (*hearing examiners determine
what weight to give evidence presented*).

²³ *Clements v. Blue Cross of Wash. & Alaska*, 37 Wn. App. 544, 550, 682 P.2d 942, 946 (1984) (*When critical
element of the case was founded on speculation and conjecture, the court concluded that such testimony did not
constitute substantial evidence.*)

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1 themselves must be shown and not left the rest in conjecture...Presumptions may
2 not be pyramided upon presumptions, nor inference upon inference... The law
3 demands that verdicts rest upon testimony, and not upon conjecture and
speculation. *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d
144, 163-64, 106 P.2d 314, 323 (1940).²⁴

4 8. In this matter, TPD stated that it is relying on RCW 69.50.505(1)(d) as the
5 statutory authority for seeking forfeiture of the Porsche. RCW 69.50.505(1)(d) provides, in
6 relevant part the following:

7 (1) The following are subject to seizure and forfeiture and no property right exists
8 in them:...

9 (d) All conveyances, including aircraft, **vehicles**, or vessels, which
10 are used, **or intended for use**, in any manner to facilitate the sale,
delivery, or receipt of property described in (a) or (b) of this
subsection,... [Emphasis added.]

11 The City's legal counsel argued specifically that the City had shown by a preponderance that
12 the Porsche "was...*intended for use*, in any manner to facilitate the sale..." Given the City's
13 position, the City's evidence should answer the question of how the Porsche was used or
14 intended to be used to facilitate USCA violations by a preponderance.

15 9. In *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 398 P.3d 1078 (2017), the State
16 Supreme Court stated the proposition of proof for a civil forfeiture such as this as follows:

17 *The Uniform Controlled Substances Act, chapter 69.50 RCW*, provides for
18 forfeiture of property that is connected to an intended or completed controlled
19 substances violation...[t]he City's burden [][is] not merely to show that [][a
20 claimant's] property was connected to *some* illegal or untoward activity. It was
required to prove, by a preponderance of the evidence, that [][the claimant's] car
and money were specifically connected to drug manufacturing, transactions, or
distribution.²⁵

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²⁴ Internal cites omitted.

²⁵ At pages 608 and 616 of the Court's decision.

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1 Under the holding in *Sunnyside*, the City must prove by a preponderance that Lee’s Porsche
2 was “[s]pecifically connected to drug...transactions, or distribution.” *Id.*

3 10. Here, the TPD officers were essentially testifying as experts on the Tacoma illicit
4 drug trade based on their experience and training. “The opinion of an expert must be based on
5 facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not
6 evidence which will take a case to the jury.”²⁶ In a hearing such as this, the Hearing Examiner
7 is both the trier of fact (like a jury) and law (judge).

8 11. The facts TPD proved by a preponderance are essentially (a) that Lee had a gun,
9 (b) that Lee had illegal drugs on his person (while opining that the quantities were more
10 consistent with dealing than with personal use), (c) that Lee had a sum of cash also on his
11 person, and (d) that Lee had a single, empty dime bag and some razor blades in the Porsche.
12 Lee was also in relatively close proximity to the Porsche when he had drugs taken from his
13 person. *See Findings of Fact 5 through 12.*²⁷

14 12. In response, Lee showed by a preponderance that he has lawful employment as a
15 source for the money found on his person, that he uses razor blades lawfully in that
16 employment in a box cutter, and that the single dime bag had been for his own use (i.e., a
17 purpose other than for him to package and sell drugs). *See FoF 13 through 15.*

18 13. In *Sunnyside*, the State Supreme Court found the seizure of claimant Gonzalez’s
19 car and \$5,940 in U.S. currency unlawful when the seizure was based on the following
20 evidence found by the *Sunnyside* hearing examiner:
21

²⁶ *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952, 956 (1990), internal cites omitted. *See also Smith v. Dep’t of Corr.*, 189 Wn. App. 839, 851 n.9, 359 P.3d 867, 873 (2015).

²⁷ Finding(s) of Fact are abbreviated hereafter as “FoF.”

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- 1 1. There were 2 cell phones found under the control of the claimant,
Mr. Gonzalez, at the time he was stopped by officers;
- 2 2. Cocaine was found in the vehicle;
- 3 3. There was a large amount of cash in the vehicle, to wit \$5,940.00;
- 4 4. Officers testified that the cash was “coated” by enough cocaine so that the drug
dog also alerted to the cash;
- 5 5. The vehicle, a 2001 BMW, was not in the name of the claimant at the time of
the incident, however he had driven it from California just prior to being
stopped; [and]
- 6 6. The fact that the Claimant, Mr. Gonzalez, states he received money from an
injury and from unemployment does not seem to explain all of the cash that
was present.

7
8 The Court stated that “Gonzalez was clearly guilty of possession, but there was no evidence
9 that his drug-related activities ever had or ever would include drug manufacturing,
10 transactions, or distribution” that involved his car.²⁸

11 14. Here too, the case for possession is strong, although no charges have been brought
12 against Lee for any USCA violation as yet. RCW 69.50.505 “[g]enerally does not contemplate
13 forfeiture where the only violation is mere possession of a controlled substance; the violation
14 usually must involve drug manufacturing or transactions.”²⁹ The case for transactions /
15 distribution would appear to be based mostly on the quantities of drugs found on Lee’s person
16 (not in the car), and that he was carrying a handgun. The single, empty dime bag and the razors
17 may have some very slight weight there, but seem to be of only marginal import.

18 15. All that notwithstanding, other than Lee’s admission that he was heading toward
19 the Porsche, there is no substantial evidence upon which to conclude that the Porsche was
20 “used, or intended for use, in any manner to facilitate the sale, delivery, or receipt of” illegal

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²⁸ 188 Wn.2d at 616. By the time of the Court’s decision in *Sunnyside*, Gonzalez had “[p]lead guilty in superior court to one charge of possession of a controlled substance for the cocaine that was discovered in the car.” 188 Wn.2d at 604.

²⁹ *Sunnyside*, 188 Wn.2d at 608.

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1 drugs. In *Sunnyside*, Gonzalez was driving his BMW with cocaine in the car when the car was
2 seized. That notwithstanding, the Court found that there was no substantial evidence of the car
3 being used for transactions/distribution. Here, although the fentanyl and methamphetamine
4 were in quantities more consistent with distribution than personal use, there is no evidence of
5 the drugs being in the Porsche. Just as in *Sunnyside*, there is also no evidence that the Porsche
6 was “[s]pecifically connected to drug...distribution”³⁰ even if Lee were to have entered the
7 Porsche. He may have been getting into the Porsche to go to work or go grocery shopping. He
8 may also have been getting into the Porsche to go sell fentanyl, but there is no evidence that
9 such was the case beyond having the drugs on his person. Concluding that if he had entered the
10 Porsche, he must have been driving somewhere to sell drugs, is “[i]ndulging in a presumption
11 in order to support a conjecture.”³¹

12 16. Such conjecture is not evidence and is not enough to establish by a preponderance
13 that the Porsche was used, or intended for use, in any manner to facilitate the sale, delivery, or
14 receipt of illegal drugs. An intention on Lee’s part to use the Porsche to facilitate the sale,
15 delivery, or receipt of illegal drugs cannot come from the mere presence of the Porsche.

16 17. Likewise, there is no evidence of Lee’s having received the “boat” of fentanyl or
17 the meth using the Porsche to facilitate. He may have; but we simply do not know. If we do not
18 know, the fact that we do not know cannot be the basis for forfeiting his personal property,
19 whatever assumptions or conjectures otherwise may be. The evidence does not show by a
20 preponderance that Lee intended to use the Porsche to facilitate unlawful transactions in
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³⁰ 188 Wn.2d at 616.

³¹ *Prentice Packing & Storage Co.*, 5 Wn.2d at 163~164.

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1 controlled substances. There is no “specific connection” in the evidence between the Porsche
2 and any use or intended use for “drug manufacturing, transactions, or distribution.”³² The
3 Porsche was just there when Lee was arrested with drugs on his person. *Sunnyside* is
4 controlling here. The Porsche must be returned.

5 18. Any Finding of Fact more properly deemed or considered a Conclusion of Law is
6 hereby adopted as such.

7 Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing
8 Examiner enters the following:

9 **ORDER OF RESTITUTION**

- 10 1. The City of Tacoma, Washington, is not entitled to forfeiture of the
11 subject 2005 Porsche Cayenne, License #CLR3060, VIN#
12 WP1AB29P75LA60260; seized by officers of the Tacoma Police
13 Department on January 24, 2024, and any claim of right, title or ownership
14 or right to possession by the City of Tacoma, is hereby denied pursuant to
15 the provisions of RCW 69.50, the Uniform Controlled Substances Act,
16 and controlling case law.
- 17 2. Based upon the evidence presented, the subject 2005 Porsche Cayenne, License
18 #CLR3060, VIN# WP1AB29P75LA60260; referred herein shall be returned to
19 Claimant Richard Lee.

20 **SO ORDERED** this 12th day of April, 2024.

21 

JEFF H. CAPELL, Hearing Examiner

³² *Sunnyside*, 188 Wn.2d at 616.

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NOTICE

A petition for reconsideration of this Order may be filed, pursuant to Section 34.05.470 RCW. Further, this Order may be appealed in accordance with Part V of Chapter 34.05 RCW, Administrative Procedures Act.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER OF RESTITUTION**

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