IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 93115-1
	)	
vs.	)	ANSWER TO PETITION FOR REVIEW
	)	
TARAILLE DUJUAN CHESNEY,	)	
	)	
Petitioner.	)	
	)	
	)	

1. IDENTITY OF MOVING PARTY

Petitioner Chesney has filed a petition for review and the State of Washington files this answer.

2. STATEMENT OF RELIEF SOUGHT

The State of Washington respectfully argues that review is not required under RAP 13.4(b)(1) or (3) because there is no conflict in decisions, nor is there a constitutional issue presented. However, the State respectfully notes that that this Court may wish to grant review pursuant to RAP 13.4(b)(4) to clarify the analysis of RAP 7.2 that is contained in State v. Friedlund, 182 Wn.2d 388, 341 P.3d 280 (2015). Litigants and the Court of Appeals should know how to properly interpret that rule.

3. FACTS RELEVANT TO MOTION

Taraille Chesney was charged by information with violation of the Uniform Controlled Substances Act, possession of cocaine. CP 1-5. Trial began in December 2014. The trial court held CrR 3.5 and CrR 3.6 hearings. The court granted the State's motion to admit custodial statements pursuant to CrR 3.5, but it denied Chesney's CrR 3.6 motion to suppress evidence. RP 61-64, 70-75. Chesney waived his right to a jury trial. CP 25. The trial court found Chesney guilty based on stipulated facts. RP 98-99; CP 15-24. At sentencing, the court imposed a residential drug offender sentencing alternative with inpatient treatment. RP 115-116; CP 35-43. Findings of fact and conclusions of law were prepared and filed at sentencing pursuant to CrR 3.5, but the court failed to immediately file findings and conclusions pursuant to CrR 3.6 and CrR 6.1. CP 29-32.

Chesney's opening brief on appeal argued that his conviction should be remanded because the findings were missing; Chesney did not allege (much less argue) that the trial court had erred in denying his CrR 3.6 motion or in finding him guilty as charged. His opening brief did not discuss Friedlund.

Upon receipt of Chesney's appellate brief, the State presented written findings to the trial court based on the trial court's oral rulings and the trial court signed those findings and filed them. *Compare* CP 69-72 and 73-75 *with* RP 70-75. The findings were designated for appellate review pursuant to RAP 9.6 and the State filed its response brief. The State argued that Chesney's convictions should be affirmed because there was no error below, the failure to file written findings earlier had not prejudiced Chesney, and a remand to the trial court would serve no purpose. Brief of Resp. at 2-4.

Chesney argued in his reply brief that remand was required under State v. Friedlund, because a trial court may not—without permission from the appellate court—enter findings after appellate review has begun, and because an appellant is denied his right to appeal if such findings are not prepared. Reply Brief at 1-2. Chesney has not raised any substantive challenge to the trial court's written findings.

The Court of Appeals affirmed the conviction and refused the request for a remand "because [Chesney] shows no prejudice from the trial court's delayed entry of its findings and conclusion." State v. Chesney, No. 73155-6-I, slip op. at 2, (filed 2/29/16). The court noted that the

written findings were consistent with the trial court's oral rulings and there was no allegation or indication that the findings had been tailored to issues on appeal. Chesney, at 3. The court also noted that Friedlund was distinguishable because it dealt with findings supporting an exceptional sentence, and that Chesney was not denied his right to appeal a sentence like Friedlund was.

4. ARGUMENT

A. FRIEDLUND IS NOT CONTROLLING.

Chesney argues that review is appropriate in this case because the Court of Appeals decision conflicts with the criminal rules, the rules of appellate procedure, and with Friedlund. He is mistaken. Friedlund is distinguishable as a matter of fact and law.

Friedlund involved two consolidated cases from Stevens (Friedlund) and Kittatas (Volk) Counties where the sentencing court had imposed exceptional aggravated sentences but had failed to file written findings of fact and conclusions of law as required by statute. As to both petitioners, the trial court *never* filed findings of fact and conclusions of law justifying an exceptional sentence until *after* the Division Three of the Court of Appeals had issued a decision affirming the sentence. The State

argued that "written findings are a mere formality when the trial record satisfies the requirements under RCW 9.94A.585."[1] As to belated efforts to complete the record for this Court's review, the State simply cited RAPs 1.2 and 18.8. It did not cite to or discuss RAP 7.2(e).

In its decision, this Court framed the issue as "whether an on-the-record oral ruling may substitute for written findings when a trial court imposes an exceptional sentence that is outside the standard sentence range for an offense." Friedlund, at 390. This Court rejected the argument that findings were a "mere formality" and held that without written findings as to the basis for an exceptional sentence, a defendant might not be able to meaningfully pursue an appeal. Friedlund, at 393 ("We hold that an oral colloquy, even if on the record, cannot satisfy the SRA's requirements that findings justifying an exceptional sentence must be in writing.").

This case is quite different. Here, the trial court filed the required findings as soon as it realized its oversight. The State did not argue, and

[1] See, e.g. State v. Volk, No. 89926-6, Motion to Supplement the Record (available at http://www.courts.wa.gov/content/Briefs/A08/89926-6%20Motion%20to%20-Supplement%20Record.pdf) and RESPONSE OPPOSING PETITION FOR REVIEW, at 9 (referring to findings as a "mere formality").

the Court of Appeals did not hold, that findings were superfluous. Thus, unlike in Friedlund, Chesney was not deprived of his right to a meaningful appeal; he plainly had the opportunity to challenge the trial court's rulings after the written findings were filed.[2]

Moreover, the briefing in Friedlund shows that both Friedlund and Volk assigned error in their opening briefs to the trial court's exceptional sentence, indicating that they believed the sentence to be excessive and inappropriate. In this case, Chesney did not present any substantive argument that the trial court's suppression ruling or its finding of guilt was deficient.

This case differs from Friedlund in another respect. In Friedlund, this Court noted in passing that findings presented after appellate review had been conducted would "change the decision then being reviewed by the appellate court" because the findings had been expressly incorporated by the judgment and sentence. Friedlund, at 395-96. The judgment and sentence in Chesney's case does not, however, expressly incorporate the CrR 3.6 ruling, nor does it contain a reference to written findings of guilty. Thus, the findings in this case do not change the decision under review in

[2] The State does not suggest that this practice is desirable; it only suggests that remand is not required to remedy the omission.

the manner alluded to in Friedlund.

For these reasons, Friedlund is not controlling, so there is no conflict necessitating review under RAP 13.4(b)(1).

B. THE ANALYSIS OF RAP 7.2 IN FRIEDLUND WAS NEVER BRIEFED AND IS FLAWED; REVIEW MIGHT BE APPROPRIATE TO CLARIFY THE ANALYSIS.

Even though there are distinctions between this case and Friedlund, it will likely be useful to appellate litigants and the Court of Appeals for this Court to grant review and consider more fully whether and how finding of fact and conclusions of law can be entered once an appeal has been initiated. In particular, this Court should more carefully examine the meaning of the phrase "change a decision then being reviewed by the appellate court." RAP 7.2(e). That phrase must be read in the context of the rule as a whole.

The rule is entitled, "Authority of the Trial Court After Review is Accepted." It provides in pertinent part that

> After review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule, unless the appellate court limits or expands that authority as provided in rule 8.3.

RAP 7.2(a). The very first exception to this rule, however, provides that

the trial court has the authority to settle the record. RAP 7.2(b). Formalizing an oral ruling by reducing it to writing as required by statute or by court rule is a classic example of "settling the record." Thus, RAP 7.2(b) allows the trial court to enter written findings of fact and conclusions of law after review has been accepted in the appellate court. This provision of the rule was not addressed in Friedlund, likely because it was not discussed in the briefing.

Subsection (e) of RAP 7.2 *was* discussed in Friedlund, but that subsection concerns a *different* limit on the trial court's ability to act. That portion of the rule concerns post-trial motions. The State did not make a post-trial motion in this case; it simply asked the trial court to settle the record. Thus, RAP 7.2(e) is inapposite. By simply asking the trial court to settle the record, the State was not asking the court to *change* its existing decision in any regard; it was simply asking it to formalize that decision. Subsection (b) of RAP 7.2 becomes largely superfluous if any request for a written decision is equivalent to "changing" the decision. To the extent Friedlund might be interpreted to suggest that merely entering written findings *changes* a trial court decision, the language of the decision should be clarified.

For these reasons, this Court should grant review to correct the possible misimpression created by some of the language in Friedlund.

Submitted this 27th day of September, 2016.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: James M. Whisman, WSBA # 19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 477-9497 FAX (206) 205-0924

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mary T Swift, the attorney for the petitioner, at swiftm@nwattorney.net, containing a copy of the Answer to Petition for Review, in State v. Taraille Dujuan Chesney, Cause No. 93115-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of September, 2016.

U Brame

Name:
Done in Seattle, Washington

CERTIFICATE OF SERVICE BY EMAIL

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From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, September 27, 2016 3:24 PM
To: 'Brame, Wynne'
Cc: Whisman, Jim; swiftm@nwattorney.net; Sloane, John
Subject: RE: Taraille Dujuan Chesney, Supreme Court No. 93115-1

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Subject: Taraille Dujuan Chesney, Supreme Court No. 93115-1

Please accept for filing the attached documents (Answer to Petition for Review) in State of Washington v. Taraille Dujuan Chesney, Supreme Court No. 93115-1.

Thank you.

James M. Whisman
Senior Deputy Prosecuting Attorney
WSBA #19109
206-477-9577
King County Prosecutor's Office
W554 King County Courthouse
Seattle, WA 98104
E-mail: **jim.whiman@kingcounty.gov**
E-mail: **PAOAppellateUnitMail@kingcounty.gov**
WSBA #91002

This e-mail has been sent by Wynne Brame, paralegal (phone: 206-477-9497), at James Whisman's direction.