32113-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LUIS A. AVILA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF ASOTIN COUNTY

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 8754
Spokane, WA 99203
(509) 838-8585

INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

COURT RULES

OTHER AUTHORITIES

A. ARGUMENT

Findings of fact entered following a suppression hearing "must be supported by substantial evidence." *State v. Vasquez*, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002).

"The purpose of findings of fact is to enable an appellate court to determine the basis on which the case was decided in the trial court and to review the questions raised on appeal." *In re Welfare of Woods*, 20 Wn. App. 515, 516-17, 581 P.2d 587 (1978). Written findings serve to show how the trial court resolved disputed evidence and facts. *Id.*

When the trial court enters required findings of fact and conclusions of law, "appellate review is limited to determining whether substantial evidence supports the findings and, if so, whether they support the trial court's conclusions of law and judgment." *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 78, 180 P.3d 874 (2008) (citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 111 Wn. App. 209, 214, 43 P.3d 1277 (2002), *aff'd*, 149 Wn.2d 873, 73 P.3d 369 (2003)); see *State v. Call*, 75 Wn. App. 866, 869, 880 P.2d 571 (1994).

"It is improper for an appellate court to ferret out a material or ultimate finding of fact from the evidence presented. Such a practice would place the appellate court in the initial decision making process instead of keeping it to the function of review." *In re Welfare of Woods*,

20 Wn. App. 515, 516-17, 581 P.2d 587 (1978) (quoting *Wold v. Wold*, 7 Wn. App. 872, 876, 503 P.2d 118 (1972)).

The problem with the written findings in the present case is that they relate numerous alleged facts for which no evidentiary support was provided at the suppression hearing. There is nothing in the record establishing that defense counsel stipulated to the factual assertions contained in the proposed findings.[1] In the absence of an express stipulation, the findings entered following the suppression hearing here can only be understood to demonstrate that the case may have been decided on the basis of factual findings that are not supported by substantial evidence.

This possibility is reinforced by the trial court's comments explaining the significance of defense counsel's proposed findings in the court's decision: "[T]he Defense Proposed Findings, including 'uncontested facts' proffered by the defense and the prosecution, were relied upon by the court in reaching its final Findings on 3.5 hearing." (CP 112) Absent a stipulation, no authority authorizes the trial court to rely on facts for which no evidentiary support was offered simply because

[1] It would be reasonable to assume that since the prosecutor was the prevailing party, defense counsel's version of the proposed findings was merely intended to provide helpful edits for the State's proposed findings. (CP 114) Defense counsel expressly states that he "signed off on the proposed order" because "it incorporated the changes as ordered by the judge at the presentment hearing." (CP 115)

counsel failed to contest those facts. The sufficiency of the evidence to support the court's findings must be decided, in the first instance, by the trial court.

More significantly, the court "acknowledges that the layout of the Asotin County Courthouse, as well as the set-up of the 'interview room' where the questioning of Mr. Avila took place, are well known to the Court and both the Prosecutor and Defense Counsel." (CP 112)

The rules of evidence prohibit the courts from noticing facts, including those of which they have personal knowledge, unless those facts are generally known or can be accurately determined. *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (citations omitted). ER 201(b) provides:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Facts that are undisputed because they are supported by evidence presented in a different hearing may not be judicially noticed to support the court's conclusions, even when a judge has been present at a prior proceeding:

> The notion of judicial notice should not be confused with a judge's personal knowledge about facts at issue. A judge may not dispense with the requirement of formal proof

> simply because he or she already 'knows' that something is true. The facts known by the judge may or may not rise to the level of indisputability required by Rule 201. If they do not, it is error to take judicial notice of them.

5A Karl B. Tegland, Washington Practice: Evidence, § 201.3 (5th ed. 2007) .

A court may take judicial notice of the existence of court records in another case, but may not take notice of the testimony presented:

> ER 201 sometimes permits a court to take judicial notice of court records. The reason is that the existence of such records (as opposed to the truth of the contents of the allegations contained therein) is "not subject to reasonable dispute[.]" This reason does not extend to a judge's memory of oral testimony from a prior case, the accuracy and contents of which *are* subject to reasonable dispute. Accordingly, the judge who would offer his or her own memory of oral testimony given at a different trial must testify as a witness, and he or she is not permitted to do that in a proceeding over which he or she is then presiding.

Vandercook v. Reece, 120 Wn. App. 647, 651-652, 86 P.3d 206 (2004) (footnotes omitted).

This court should be concerned when it becomes apparent that in reaching a legal conclusion the trial court has taken judicial notice of, and relied upon, facts which do not appear in the record of the suppression hearing, based on the court's personal knowledge and counsels' representations contained in proposed findings, which merely purport to reflect trial court's determination of the factual issues.

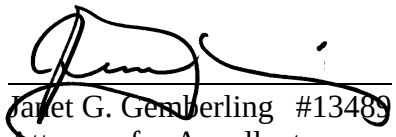
The written findings entered by the trial court on remand are insufficient to enable this court to determine the basis on which the case was decided in the trial court and to review the questions raised on appeal. *In re Welfare of Woods*, 20 Wn. App. 515, 516-17, 581 P.2d 587 (1978). To the extent these findings serve to show how the trial court resolved evidence and facts, they demonstrate a failure to follow procedures that comport with established rules of evidence. *Id.*

B. CONCLUSION

Mr. Avila's conviction should not be affirmed on the basis of alleged facts that have been presented with disregard for the rule of law.

Dated this 13th day of January, 2016.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No.32113-4-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
LUIS A. AVILA,	)	
	)	
Appellant.	)	

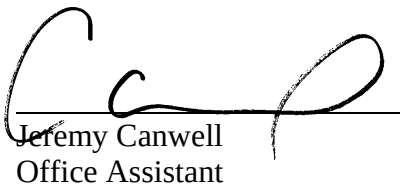
I certify under penalty of perjury under the laws of the State of Washington that on January 13, 2016, I served a copy of the Appellant's Supplemental Reply Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Benjamin Nichols
lwebber@co.asotin.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on January 13, 2016, I mailed a copy of the Appellant's Supplemental Reply Brief in this matter to:

Luis A. Avila
#369547
Washington Correction Center
PO Box 900
Shelton, WA 98584

Signed at Missoula, Montana on January 13, 2017.



Jeremy Canwell
Office Assistant