

63828-9

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NO. 63828-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

R.S. (DOB 6/17/94),

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Carol A. Schapira, Judge

REPLY TO STATE'S RESPONSE

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/ petitioner/plaintiff containing a copy of the document to which this declaration is attached.

King County IT - via email & Hand delivery
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

[Signature] 11/17/09
Name Done in Seattle, WA Date

A. ASSIGNMENTS OF ERROR IN REPLY¹

1. This Court should decline to consider the late-filed findings that were presented without notice to appellate counsel.

2. The court erred in finding “this incident occurred while the respondent’s father was out of the country and left the respondent and his brother at home alone.” CP ___ (FOF 6).

3. The court erred in entering finding 10 and in relying on uncharged offenses to support the disposition.

4. The court erred in entering conclusions of law 2, 3, 4, 5, 6, and 7.

Issues Pertaining to Assignments of Error

1. Should this court decline to consider the late-filed written findings and conclusions?

2. Does the record fail to support the quoted finding?

3. Are the state’s arguments unsupported by the law or the record?

¹ R.S.’s appellate counsel is familiar with the general rule that error cannot be assigned in a reply brief. But as noted infra, the state proposed written findings and conclusions after R.S. filed his opening brief. The state gave appellate counsel no notice of the proposed findings. There was no prior opportunity to assign error before this reply. To the extent the late findings may even be considered, R.S. assigns error to them in an abundance of caution.

4. Where the disposition court orally and in writing improperly relied on uncharged offenses and did not state it would impose a manifest injustice disposition solely on proper factors, and where the state concedes the court's findings are "intertwined" with its reliance on uncharged offenses, is it impossible to fairly affirm this disposition?

B. STATEMENT OF THE CASE IN REPLY

On October 9, 1995, this Court decided State v. Corbin, 79 Wn. App. 446, 903 P.2d 999 (1995). On July 14, 2008, this Court decided State v. Pruitt, 145 Wn. App. 784, 187 P.3d 326 (2008). Both cases required the prosecution to provide notice to appellate counsel when presenting late findings and conclusions. Corbin, 79 Wn. App. at 451 ("If appellate counsel has been appointed, the State should² also give that attorney notice of the presentation and provide him or her with copies of the proposed findings and conclusions so that appellate counsel can choose whether or not to participate"); Pruitt, 145 Wn. App. at 791 (unmistakably condemning the state's counsel for failing to notify appellate counsel of the

² Under RAP 1.2(b), "should" denotes an act that counsel "is under an obligation to perform."

presentation of findings in the trial court, even assuming the state had notified the proper trial counsel).³

The state's trial and appellate attorneys have both been practicing law since October 2007.⁴ R.S. filed his opening brief on September 30, 2009. Trial counsel for the state presented written findings to the trial court on October 23, 2009. Appellate counsel for the state signed the state's response on October 29, 2009. The state's response relies at least in part on the court's written findings. Response, at 6, 12. Neither of the state's attorneys – trial or appellate – provided notice to R.S.'s appellate counsel of the preparation and presentation of written findings.⁵

³ Both cases merely confirm the obvious. Notice is a fundamental component of due process and professional courtesy. Corbin and Pruitt are more valuable in providing a window into how much this Court appreciates counsel who ignore the obvious.

⁴ This information appears on the Washington Bar Association's website, www.wsba.org.

⁵ The state appears to have notified trial counsel, whose signature appears on the findings. As an officer of the court, undersigned counsel states he received no notice of the presentation. The state likely will concede this fact at oral argument.

C. ARGUMENT IN REPLY

1. THE WRITTEN FINDINGS SHOULD NOT BE CONSIDERED.

The state's written findings were proposed after the notice of appeal was filed. The state has not asked this Court for permission to formally enter them. The findings are not properly before this Court. RAP 7.2 (a trial court has limited authority to act after this Court accepts review); see e.g., City of Seattle v. Holifield, 150 Wn. App. 213, 223-25, 208 P.3d 24 (2009) (discussing RAP 7.2(e)); Pruitt, 145 Wn. App. at 793-94.

The state may contend the trial court retained jurisdiction to enter late findings under RAP 7.2(j). That rule does not apply, however, as it is limited to findings entered "pursuant to JuCR 7.11(d)." RAP 7.2(j). As the state's response points out, this case involves a manifest injustice disposition and is governed by JuCR 7.12(e), not JuCR 7.11(d). Response, at 6.

Perhaps the state may formally move this Court to forgive the late entry of findings, even though they were presented without notice to appellate counsel.⁶ Given the clarity of Corbin and Pruitt,

⁶ Then again, perhaps the state will not. The state's brief claims written findings were not necessary because the oral ruling "is sufficiently clear." Response, at 6. As argued in the opening brief,

such a plea should fall on deaf ears. This Court is well aware the issue of late findings is persistent and has substantial systemic costs in wasted time for appellant's counsel and this Court. See e.g., Pruitt, 145 Wn. App. at 792-801 (discussing the myriad issues raised by the state's failure); State v. Smith, 68 Wn.App. 201, 208-09, 842 P.2d 494 (1992). Should the state seek such relief, and should this Court be inclined to seriously consider the state's request, R.S. respectfully asks this Court to first call for a response.

2. FINDING 6 IS NOT SUPPORTED BY THE RECORD.

If this court nonetheless considers the written findings and conclusions, at least one is not supported by the record. Finding number 6 states in part: "The father was unaware of the stolen items police found in the house at the time of this incident, which shows his lack of parental control. This incident occurred while the respondent's father was out of the country and left the respondent and his brother at home alone." CP __ (FOF 6).

The record instead shows this incident occurred October 14, 2008. CP 1, 15. The predisposition report, which was the only

the oral ruling is sufficiently clear in one respect – it specifically reveals the trial court's heavy and improper reliance on uncharged offenses. The oral ruling is adequate only to permit reversal, not affirmance. BOA at 17-20.

source of the alleged factual information about R.S.'s father, states he was out of the country from "March 2009 – April 2009." Report, at 5. The finding therefore lacks evidentiary support. The court erred in relying on it to find "lack of parental control."

3. THE COURT DID NOT STATE IT WOULD IMPOSE THE MANIFEST INJUSTICE DISPOSITION BASED SOLELY ON A VALID AGGRAVATING FACTOR.

The opening brief argues the court erred (1) in relying on uncharged offenses and R.S.'s positive adjustment to detention, and (2) in failing to consider or acknowledge statutory mitigating circumstances. BOA at 10-16. Because the court did not orally say it would impose the disposition based solely on a proper aggravating circumstance, and because this Court cannot make that finding with any confidence for the first time on appeal, reversal and remand is required. BOA at 17-20.

The state's response makes a splendid effort to characterize the trial court's oral ruling as a three-part hierarchy – but the state's hierarchy is one the trial court expressly refused to construct. Response at 3-4. The state now claims the trial court's "primary" reliance was on "lack of parental control," with "[s]econdary reliance" placed on the alleged fact that R.S. had "previously shown an inability to comply with conditions imposed by parole and

probation officers in the community[.]” Response, at 3. Only then does the state candidly admit the court expressly relied on uncharged offenses to support its finding of lack of parental control and a “high risk to reoffend.” To complete the hierarchy, the state characterizes this as “[t]acit, tertiary reliance[.]” Response, at 4.

While the state’s carefully constructed hierarchy reveals creative appellate advocacy, it does not fairly characterize the trial court’s oral ruling.⁷ Here’s why.

The court first stated it was “unusual” for the court to depart from an agreed recommendation, but it had “a number of concerns.” RP 24. “[A]n important mitigating [sic] factor – not to say this is the most important – is the lack of family control and the lack of positive behavior in the community.” RP 24-25 (emphasis added). The court then continued to discuss R.S.’s prior offenses and the family dynamic it described as showing a lack of effective parental or parole supervision. RP 25.

Given the court’s express refusal to identify this as the most important factor, the state’s current effort to characterize it as “primary” is as transparent as it is meritless.

⁷ A copy of the court’s oral ruling is attached as appendix A.

The court next spent a paragraph discussing its reliance on uncharged offenses. It first noted that “both [sic] of these charges are serious[.]” RP 25. But R.S. was charged with only one offense, because the state had dismissed the other. CP 12, 19. This further evidences the court’s improper reliance on uncharged offenses.

Building on this mistake, the court next said “both” current offenses “are a very pale version of the array of things that have happened. Mr. [S]’s home was filled with stolen property, including firearms which of course he’s forbidden to have so the standard range substantially understates what is a fair amount of time, whether it would be in detention or at JRA.” RP 25.

As shown in the opening brief, this was clear error in light of State v. Melton, 63 Wn. App. 63, 72, 817 P.2d 413, rev. denied, 118 Wn.2d 1016 (1992). BOA at 10-11.

Contrary to Melton and the law stated in the opening brief, the disposition court expressly relied on uncharged offenses to support the disposition. Despite its otherwise creative advocacy, the state concedes the court relied on uncharged offenses in entering both of the findings the state now characterizes as a “lack of parental control” finding and a “high risk to reoffend” finding. Response, at 4 (for both alleged findings “the court relied upon the

fact that stolen property from far more than this one burglary was found in a search of R.B.S.'s living space"); at 10 (citing the uncharged acts to show "lack of parental control"), at 10 (conceding the court's findings are "inseparably intertwined"). The state's concession should end the analysis, because the state admits it cannot show the trial court would have entered the disposition without improperly relying on uncharged offenses. R.S. nonetheless briefly replies to the state's other legal assertions.

The state first mischaracterizes Melton as a "real facts" case. Response at 7. The "real facts" doctrine is a creature of adult sentencing under the Sentencing Reform Act, not juvenile dispositions under the Juvenile Justice Act. See Fine and Ende, 13B Wash. Pract. Criminal Law, § 3806 & n.2 (2009) (citing former RCW 9.94A.370(2)). Melton is based on settled principles of due process and the presumption of innocence. BOA at 10-11. The state does not otherwise analyze Melton, effectively conceding its applicability.⁸

Citing State v. Tierney, the state next suggests the court could rely on "real facts" to justify an "exceptional sentence" if the

⁸ See e.g., In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it.").

facts “are closely related to the charged offense.” Response, at 7 (citing State v. Tierney, 74 Wn. App. 346, 352, 872 P.2d 1145 (1994), 74 Wn. App. 346, 352, 872 P.2d 1145 (1994), cert. denied, 513 U.S. 1172 (1995)). The state does not mention Tierney has not been cited by a Washington appellate court since 2003. This likely is because it is no longer worth the paper it is printed on after Blakely and its progeny⁹ effectively overruled it. The state also does not mention Tierney was never cited to support a manifest injustice disposition – even before Blakely.

Even so, the state must stretch this record to support its novel reliance on Tierney. It claims “[h]ad there been a trial on this matter, it certainly would have come out in testimony that it was another agency’s search warrant that turned up the stolen Nintendo from the Perkins home.” Response, at 8. This claim not only conflicts with general rules precluding an appellate court from speculating about evidence not presented to the trial court, it also overlooks the likelihood that such other bad acts evidence, even if proved by proper foundation, would have been excluded at trial under ER 404(b). The state’s reliance on Tierney is meritless.

⁹ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007).

The state also claims the court's "tertiary" aggravating factor was R.S.'s alleged "high risk to reoffend." Response, at 4 (citing RP 27); Response at 10. For at least three reasons, this is another example of creative appellate advocacy lacking record support.

First, these oral remarks were delivered after the court had given its reasons for the disposition. RP 24-28 (attached as appendix A). Whether more properly characterized as a "pep talk" to encourage R.S.¹⁰ or a "lecture on the divergent paths from which he had to choose,"¹¹ the remarks were not findings. RP 27-28.

Second, the oral remarks do not include the words "high," "risk," "reoffense," or "reoffend." RP 27. In other cases where an appellate court has affirmed the finding, the trial court first actually made the finding. The words and concept are neither novel nor difficult. An appellate court should not have to hunt for them between the lines, nor should an appellate court create such findings in the first instance. Cf. State v. S.H., 75 Wn. App. 1, 7, 877 P.2d 205 (1994) (trial court's findings stated "[t]he respondent is a high risk to reoffend").

¹⁰ BOA at 7.

¹¹ Response at 10.

Assuming arguendo the court made a camouflaged “high risk” finding, the state still concedes the improper uncharged offense rationale infects that finding. Even under the state’s theory, the alleged basement full of stolen property from uncharged offenses was “inseparably intertwined with” the “high risk” and “lack of parental control” findings. Response, at 10.

Given the state’s concession the court’s findings were “intertwined,” and given the court’s unquestioned improper reliance on uncharged offenses, the state simply cannot show the trial court would have imposed the same disposition absent its reliance on the improper factor. Even the late-entered written findings and conclusions do not so find. Reversal is required. BOA at 17-18.

D. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should reverse the disposition and remand for a new disposition hearing.

Respectfully submitted this 17th day of November, 2009.

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APPENDIX A

No. 63828-9-I

1 no guarantee that parole is going to be able to do anything
2 later rather than now, and if he gets back into the
3 community sooner I think there may be more of an opportunity
4 for him to turn his behavior around. I mean, I understand
5 what she's saying, but I don't think that the year gets him
6 any further in terms of reconnecting into the community, so.

7 And in terms of the remainder of the
8 recommendation of the PSP I join with the State's
9 time-served recommendation. So I could turn it over to my
10 client if he has anything to say.

11 THE COURT: Thank you.

12 And again good morning, Mr. Sek. Anything
13 that you wanted to discuss about either of these two cases?

14 THE RESPONDENT: Not really.

15 THE COURT: I assume nothing further from
16 you, Ms. Scudder?

17 MS. SCUDDER: Excuse me, your Honor, I'm
18 sorry?

19 THE COURT: Nothing further from you?

20 MS. SCUDDER: No, your Honor.

21 THE COURT: Thank you.

22 The court will impose a manifest injustice.
23 Obviously, it's unusual and probably even more unusual for
24 me. The court has a number of concerns. Certainly, an
25 important mitigating factor -- not to say this is the most

1 important -- is the lack of family control and the lack of
2 positive behavior in the community. That is, Mr. Sek has
3 not been able to, despite help, get into or stay in a school
4 program. The court obviously understands that every family
5 dynamic is different but there clearly is no current family
6 control that responds appropriately to Ms. Sek's need nor is
7 there likely to be any in the immediate future, given what
8 has happened over the last couple of years. We're not
9 judging Mr. Sek by the fact that he has prior offenses, but
10 having prior offenses should mean extra efforts, more
11 efforts. Certainly, supervision has been attempted and not
12 been able to accomplish that. Parole has attempted and not
13 been able to that. I'm sure the father has made efforts,
14 but again he's been unsuccessful.

15 The court has to also take into account that
16 while both of these charges are serious they are a very pale
17 version of the array of things that have happened. Mr.
18 Sek's home was filled with stolen property, including
19 firearms which of course he's forbidden to have so the
20 standard range substantially understates what is a fair
21 amount of time, whether it would be in detention or at JRA.

22 We know that Mr. Sek has been to JRA before.
23 He seemed to respond in a satisfactory way while he was
24 there. Committed one of these offenses within a month of
25 his release. I assume he was on parole even though he had

1 done all of his time, and he committed the other offense
2 while he was on conditions pending the outcome of the
3 residential burglary.

4 Mr. Sek is about to be a father or perhaps he
5 is already a father, is not in any way up to date in terms
6 of his schooling, his preparation to return to the community
7 and be involved in positive activities like school and other
8 things which is appropriate for someone who is his age.

9 The court will follows Ms. DePhelps'
10 recommendation. I think these numbers are magic. I will on
11 the -- I guess I should do the later case first so that --
12 or does it matter?

13 MS. DEPHELPS: It does matter.

14 MS. SCUDDER: Yeah, it does matter.

15 THE COURT: On the residential burglary, I
16 will impose 48 to 52 weeks. On the other matter, I'm just
17 going to impose the 10 days, the possession of a stolen
18 vehicle. I'm just going to impose the 10 days and of course
19 he'll get credit for that. I think that means he has 72
20 days' credit on the other matter, on the residential
21 burglary?

22 MS. DEPHELPS: That's correct, your Honor.

23 THE COURT: 72 days altogether. Obviously,
24 I'm not factoring in good time and this entire
25 recommendation means that certainly Mr. Sek can benefit if

1 run or locked down. I know what I'd like for you, but it's
2 up to you to decide what you want for you, whether you want
3 to get yourself an education and be capable of a lot of
4 things, be a good dad, a good friend and a good citizen.

5 If you don't want those things, I can you
6 know how to do the negative. I'm hoping that you're
7 interested in acquiring those positive skills, I truly am.
8 So I don't want to pretend that this is an easy decision and
9 it's certainly not easy for you, but it will mean months
10 where you are able to focus on positive things and not have
11 people distracting you with things that ultimately have not
12 brought you a lot of happiness, safety or freedom.

13 Of course, I have to impose the victim's
14 penalty assessment on each of these. Is there any
15 restitution information that we know?

16 MS. SCUDDER: Your Honor, at this time we
17 don't have complete information so we just ask that it be
18 left open for 180 days and the State can set a restitution
19 hearing.

20 MR. MCDONALD: Presence will be waived.

21 THE COURT: Thank you. I don't know what you
22 want to have run first. Does it say in here what they'll be
23 consecutive to?

24 MS. DEPHELPS: No, and I -- I guess it will
25 depend on where is the most restitution, so --