

No. 35761-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY HOSHALL,

Appellant.

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

The Honorable Richard Strophy , Judge  
Cause No. 06-1-01837-4

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred by failing to reverse and dismiss Hoshall's convictions because written findings of fact and conclusions of law were not entered following the bench trial.

2. Whether Hoshall gave valid consent to the search of his person.

3. Whether Hoshall's trial attorney failed to properly argue the motion to suppress and thereby provided ineffective assistance of counsel.

4. Whether the trial court erred in finding that Hoshall's offender score was one based solely upon the prosecutor's representation.

B. STATEMENT OF THE CASE

The State accepts the appellant's statement of the case, while noting that although Hoshall's attorney and the deputy prosecuting attorney agreed to a reading of the record to preserve the suppression issue for appeal, [01/02/07 RP 35] the court apparently did not consider the record beyond the testimony taken at the CrR 3.6 hearing and the lab reports regarding the suspect substances.

[01/02/07 RP 37-39]

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### C. ARGUMENT

1. The trial court did not err in failing to reverse and dismiss Hoshall's convictions for lack of written findings of fact and conclusions of law following the bench trial.

The trial court did not err for failing to reverse and dismiss for the lack of written findings of fact and conclusions of law because it is apparent from the record that Hoshall did not raise the issue before the trial court. The court cannot be expected to grant a defendant relief for which he has not asked. Had the issue been raised below, the remedy would have been to enter the findings and conclusions, not to dismiss. Hoshall's real argument, however, is that the appellate court should reverse and dismiss, because he is precluded from properly assigning error and this court cannot conduct an appropriate review. Neither is the case.

A brief review of the trial record [01/02/07 RP 1-39] shows that there was a CrR 3.6 hearing held on January 2, 2007. Judge Strophy denied the motion to suppress following an explanation of his reasons for doing so [01/02/07 RP 26-35]. At the end of that portion of the hearing, there was discussion regarding whether there would be a CrR 3.5 hearing to decide whether statements made by the defendant were admissible, and it was determined that

no issue existed, so no hearing was necessary. [01/02/07 RP 27-29]

When Judge Strophy concluded his remarks explaining his decision to deny the motion to suppress evidence, which has been reduced to written findings and conclusions [CP 37-39], defense counsel advised the judge the defendant wished to preserve the suppression issue for appeal and that he also wished to waive a jury and have Judge Strophy decide the issue of guilt or innocence at that time. [01/02/07 RP, 35-36] There followed a colloquy with the defendant to ensure he understood that he was giving up his right to a jury trial and that the court would make a decision based upon the facts he had just heard at the suppression hearing. Mr. Hoshall consented. [01/02/07 RP 36-37] Thereupon the State offered into evidence two lab reports verifying the nature of the illegal substances which the defendant was charged with possessing, without objection from defense counsel, and the court found the defendant guilty of both counts. [01/02/07 RP 37-39]

While no additional findings and conclusions were prepared or filed, it is obvious that they would add nothing to the findings and conclusions made following the suppression hearing. They could only contain the findings that the two substances were indeed

marijuana and psilocybin, and the conclusion that the defendant was guilty beyond a reasonable doubt. The Judgment and Sentence [CP 27-35] memorializes that conclusion, and by implication the findings. It is clear from the discussions following the CrR 3.6 hearing that the issues to be preserved for appeal were the suppression issues, and it is difficult to imagine that Hoshall intended to appeal the judge's findings that the substances possessed were psilocybin and marijuana, given that he made no objection to the admission of the lab reports.

The Judgment and Sentence was entered on January 8, 2007, and Findings and Conclusions from the CrR 3.6 hearing were not filed until February 20, 2007. State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998), cited by the appellant, does note that reversal may be the appropriate result where the defendant can show "actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. . . . We will not infer prejudice, however, from delay in entry of written findings of fact and conclusions of law." *Id.*, at 624-25. See also, State v. Gaddy, 114 Wn. App. 702, 705, 60 P.3d 116 (2002), *affirmed* 152 Wn.2d 64, 93 P.3d 872 (2004) ("But we will not reverse a conviction for tardy entry of findings unless the defendant can establish either

that she was prejudiced by the delay or that the findings and conclusions were tailored to meet the issues presented in the appellate brief.”); State v. Pray, 96 Wn. App. 25, 30-31, 980 P.2d 240 (1999) (“The purpose of entering findings is to enable an appellate court to review the issues raised on appeal. . . . [F]indings and conclusions may be submitted and entered even while an appeal is pending.’ . . . The belated filing of findings, although disfavored, does not constitute error so long as the defendant is not prejudiced thereby and the State does not tailor the findings to meet the issues raised by the appellant in his opening brief.” (Cite omitted.)); State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (“A delayed entry of findings and conclusions does not warrant reversal ‘unless the delay prejudiced the defendant or prevented effective appellate review.’”)

The purpose of written findings and conclusions is to permit the appellate court to make an adequate review. “Lack of written findings of fact on a material issue in which the State bears the burden simply cannot be harmless unless the oral opinion is so clear and comprehensive that written findings would be a mere formality.” State v. Smith, 68 Wn. App. 201, 298, 842 P.2d 494 (1992). “In this case, the fact that written findings and conclusions

were not entered until a later date has no effect whatsoever on our ability to conduct appellate review. While careful adherence to the requirements of CrR 3.6 is always the safest course, the purpose of CrR 3.6 is to have a record made and that purpose has been served here.” State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991). As recently as September 10, 2007, Division I held that “. . .there is no error if the trial court’s findings are sufficient to permit appellate review, and the defendant does not demonstrate any prejudice arising from the belated finding.” (Cite omitted.) State v. Glenn, Court of Appeals No. 57698-4-I, p. 13 (Sept. 10, 2007).

While it is true that “[a]n appellate court should not have to comb an oral ruling to determine whether appropriate ‘findings’ have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction,” Head, supra, at 624, that would not be the case here. A reading of, at most, three pages of trial transcript [01/02/07 RP 37-39] shows that following the suppression hearing the court admitted two exhibits and found the defendant guilty of two charges.

Hoshall has failed to demonstrate that he has suffered any prejudice from the lack of findings and conclusions specifically

relating to the bench trial. In the Head case, the matter was remanded to the trial court for the entry of findings and conclusions. In that case, however, Head had been convicted of eight counts of first degree theft, each with different and complicated facts, and the trial record was inadequate to allow an appellate court to review the trial court's decision.

By contrast, Hoshall was convicted of two counts of possession of drugs, and the findings and conclusions from the CrR 3.6 hearing give this court an ample record to review the decision. While under Head the appropriate action for this court to take is to remand for the entry of written findings and conclusions regarding the bench trial, in fact doing so would not accomplish anything. Everything this court needs to review the trial court's decisions has been reduced to writing and was available to the appellant before his brief, which was filed on July 20, 2007, was written.

2. Timothy Hoshall gave valid consent to the search of the contents of his pockets.

In the trial court Hoshall challenged the search of his person, which was nothing more than a request that he empty his pockets. The court entered findings of fact and conclusions of law regarding the suppression hearing. When a trial court's findings of fact

following a motion to suppress are challenged on appeal, those findings will be upheld if there is substantial evidence to support them. Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. State v. Johnson, 104 Wn. App. 409, 414. 16 P.3d 680 (2001). Issues of law are reviewed de novo. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996).

The trial court found that after being asked if he would mind emptying his pockets to show that he had nothing illegal on his person, Hoshall began to do so without comment. [CP 38, 01/02/07 RP 31] Hoshall argues that the officers were required to tell him that he had the right to refuse consent. That is not the case.

When the subject of the search is not in custody and the question of whether consent is voluntary, knowledge of the right to refuse consent is not a prerequisite of voluntary consent. State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003) (citing Schneckloth, 412 U.S. at 248-49).

State v. Tagas, 121 Wn. App. 872, 876-77, 90 P.3d 1088 (2004). (Coincidentally, in Tagas the written findings of fact and conclusions of law following the CrR 3.6 hearing were not entered until after Tagas had filed her opening brief. The court declined to

reverse on that ground, holding there had been no prejudice from the delay and the findings and conclusions had not been tailored to meet the issues presented in the brief. Tagas, *supra*, at 875-76.)

Whether consent is voluntary is a question of fact and depends upon the totality of the circumstances. State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004).

The State must meet three requirements in order to show a valid consensual search: (1) the consent must be voluntary; (2) the person granting the consent must have authority to consent; and (3) the search must not exceed the scope of the consent. (Cites omitted.)

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Whether consent is voluntary is a question of fact (*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)) and depends upon the totality of the circumstances, including (1) whether *Miranda* warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of his right not to consent. (Cites omitted.) While knowledge of the right to refuse is relevant, it is not a prerequisite to finding voluntary consent, however. (Cites omitted.) In addition, the court may weigh any express or implied claims of police authority to search, previous illegal actions of the police, the defendant's cooperation, and police deception as to identity or purpose. (Cites omitted.)

Reichenbach, *supra*, at 131-132.

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In this case, there is no claim that Hoshall did not have authority to grant the consent to search his pockets, or that the scope of the search exceeded the scope of the consent. He was asked if he would mind emptying his pockets and that is all that he did. Reichenbach presents an illustrative list of factors a court may consider in deciding whether consent is voluntary, but the bottom line is that the assessment is made on the totality of the circumstances. In Hoshall's case, *Miranda* warnings were not given. Hoshall was not in custody; there was no reason to give them. As Hoshall points out in his opening brief, there is nothing in the evidence regarding his education or intelligence, but he did understand the *Ferrier* warnings and was able to articulate that he wished to limit the scope of the search to exclude his parents' bedroom. He was not advised of his right to refuse, but as both Reichenbach and Tagas point out, that is not necessary.

The totality of the circumstances, which the trial court considered, was that Hoshall was approached by two plainclothes police officers at his home. His mother was with him. The officers explained about the anonymous tip they had received and both Hoshall and his mother were given a chance to explain. They were both shown the *Ferrier* warning form; the officer read it to them as

well as allowed them to read it themselves. Both were asked for permission to search, and both agreed. Hoshall limited the search to exclude his parents' bedroom, and the police honored that limitation. Neither officer searched without the presence of either Hoshall or his mother. [01/02/07 RP 7-12] Deputy Rudloff did not order Hoshall to empty his pockets. He said, "Do you mind emptying your pockets out for me so that I can assure that you don't have any other illegal drugs or drug paraphernalia on your person?" [01/02/07 RP 13] The deputy did not trick Hoshall in any way, or try to hide the ball. Hoshall was on his home turf, and he knew from the search of the house that he could refuse a search or limit its scope. There is no reason to think he would suddenly feel compelled to submit to a search; he already knew he could at the very least ask questions and they would be answered. Yet he did not say anything that either officer could recall, merely began taking items out of his pockets and putting them on the pickup. [01/02/07 RP 13] He may well have concluded that since the police had already found the marijuana the jig was up and he might as well come clean. However, the officers did not do or say anything to coerce him into showing them what was in his pockets.

The trial court does appear to have concluded that the search of Hoshall's pockets was an extension of the search of the home. That is an issue that this court does not have to address in order to decide this matter. If it was, the *Ferrier* advisements were sufficient to inform Hoshall of his rights. If it was not, Hoshall's consent was voluntary under the totality of the circumstances test. "[A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court." Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). (See also State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997) ("We may affirm the trial court on any ground supported by the record."))

3. Hoshall's trial attorney provided effective assistance of counsel.

While Hoshall now claims his attorney argued the wrong theory of the case, it is apparent from a review of the record that the attorney did argue that the *Ferrier* search had ended before the search of Hoshall's pockets. [01/02/07 RP 25] In any event, since that distinction is not dispositive, it would not matter if he hadn't.

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4. Based upon this court's opinion in *State v. Mendoza*, it was error for the trial court to find that Hoshall had an offender score of one.

This court has recently decided *State v. Mendoza*, 139 Wn. App. 693, 162 P.2d 439 (2007), in which it held that a defendant's silence regarding the State's calculation of his offender score is insufficient to constitute waiver of the issue. Since there is nothing in the record to indicate that Hoshall affirmatively acknowledged that it was correct, the State concedes that the case must be remanded for resentencing. At that hearing, the State will not be held to the existing record and may introduce a certified copy of the judgment and sentence or other documentation to prove the prior conviction. *State v. Mendoza*, *supra*, at 713.

#### D. CONCLUSION

The trial court did not err by failing to reverse and dismiss for lack of written Findings of Fact and Conclusions of Law following the bench trial or by failing to suppress the evidence obtained from the consensual search of Hoshall's pockets. Trial counsel did not provide ineffective assistance. The trial court did err in finding Hoshall's offender score was one based solely on the prosecutor's representation regarding his prior criminal history.

The State respectfully asks this court to affirm the convictions and to remand for a resentencing hearing.

Respectfully submitted this 5<sup>th</sup> of October, 2007.

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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on October 8, 2007.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: 10/8/07  
Signature: A. Reilly