

NO. 36417-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JON MESKE,

Appellant.

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2008 MAR 18 PM 4:37

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *[Signature]*

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in concluding there were no undisputed facts. CP 18.

2. The trial court erred in finding the check presented by appellant for cashing was "a means of identification or an item that is not describing financing or credit but is personal to, or identifiable with the individual or person." CP 19 (Conclusion of Law 2).¹

3. Appellant has been denied his constitutional right to a timely and meaningful appeal under Wash. Const. art. 1, § 10, by the untimely entry of findings of fact and conclusions of law following a bench trial and by the subsequent tailoring of the findings and conclusions to thwart the issues raised on appeal. CP 19 (Conclusion of Law 2).

Issues Pertaining to Supplemental Assignments of Error

1. Did the trial court err in concluding there were no undisputed facts when the appellant and State disputed whether the check appellant attempted to cash constituted a "means of identification"?

2. Did the trial court err in finding the check appellant attempted to cash was a "means of identification" when the check contained a valid account number and when items that describe "financing

¹ Findings of fact mislabeled as conclusion of law should be treated as a finding of fact on appeal. Ives v. Ramsden, __ Wn. App. __, 174 P.3d 1231, 1244 n.11 (Slip Op. filed January 2, 2008); State v. Baker, 136 Wn. App. 878, 883, 151 P.3d 237 (2007).

and credit" information, such as account numbers, are expressly excluded from the definition of "means of identification"?

3. Is reversal and dismissal with prejudice of appellant's conviction warranted because the findings and conclusions required under CrR 6.1(d) were filed after appellant filed his opening brief and it is apparent they were tailored to meet the issues presented on appeal, thereby denying appellant his right to a timely and meaningful appeal?

B. SUPPLEMENTAL STATEMENT OF THE CASE

On November 30, 2007, appellant Jon Meske filed the opening brief in this appeal. Meske challenged the trial court's failure to file the written findings and conclusion required under CrR 6.1(d) and the sufficiency of the evidence to convict. Brief of Appellant (BOA) at 1.

As to the sufficiency claim, Meske brief argues the evidence was insufficient to convict for second degree identify theft as charged because the State failed to present any evidence he transferred a "means of identification." Resolution of this claim turns on whether an item that contains information that is personal and identifiable with an individual and financial or credit information, such as account numbers, can constitute both "Financial information" and "Means of identification" for purposes of the second degree identity theft statute. Meske argued it could

not because the definition of "Means of identification" specifically excludes items that describe "finances or credit." BOA at 5-9.

On February 4, 2008, the State filed its response brief, which was prepared by the deputy prosecutor from trial, Megan Valentine. Brief of Respondent (BOR) at 6; 1RP; 2RP. The State conceded remand was necessary for entry of CrR 6.1(d) finding and conclusions. BOR at 4.

As to Meske's sufficiency claim, the State seems to assert that an item is still a "means of identification" even if it contains a valid account number, although it provides not supporting authority. BOR at 6.

On February 13, 2008, this Court issued a "Ruling Remanding for Written Findings". The ruling stayed the appeal and direct that the required finding be entered within 30 days. The ruling also provided for the filing of supplemental briefs regarding the findings.

The CrR 6.1(d) findings were filed in superior court on March 3, 2008. CP 16-19. They were presented to the superior court by the same prosecutor who is handling the appeal, Megan Valentine.

C. SUPPLEMENTAL ARGUMENT²

TAILORED FINDINGS HAVE DENIED MESKE HIS RIGHT
TO A SPEEDY AND MEANINGFUL APPEAL.

Meske has the right to appeal without unnecessary delay. Wash. Const. art. 1, § 10; Wash. Const. art. 1, § 22. Meske has been deprived of this right by the tardy filing of written finding and conclusion by the Gray Harbor Superior Court following his bench trial. State v. Head, 136 Wn.2d 619, 626-29, 964 P.2d 1187 (1998) (J. Sanders, dissenting). Moreover, the written findings ultimately filed appear to have been tailored to meet the issue raised by Meske on appeal. This Court should therefore reverse Meske's conviction and dismiss the prosecution.

CrR 6.1(d) requires written findings of fact and conclusions of law be entered after a bench trial. Head, 136 Wn.2d at 621-22, 624. The purpose of this rule is to enable effective appellate review. Id. at 622. Absent written findings of fact and conclusions of law, an appellant cannot properly assign error and the court cannot review whether the findings of fact and conclusions of law are supported by the record. See, e.g., Mairs v. Dep't of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993)

² Meske has not yet had the opportunity to file a reply brief because the State's response brief was not filed until February 4, 2008, and on February 12, 2008, this Court issued a ruling staying the appeal until entry of written findings and conclusions, and allowing only for the filing of a supplemental brief "pertinent to the findings." Meske plans to file a reply brief to the State's response and supplemental briefs, unless otherwise precluded by this Court, or if it appears a reply is unnecessary.

(appellate court only reviews whether findings of fact are supported by substantial evidence and whether the findings of fact support the conclusions of law); State v. Reynolds, 80 Wn. App. 851, 860 n.7, 912 P.2d 494 (1996) (error cannot be predicated on trial court's oral findings).

The court's oral findings are not binding and cannot replace written findings of fact and conclusions of law. Head, 136 Wn.2d at 622. The appellate court should not have to comb through oral rulings to determine if appropriate findings were made, nor should an appellant be forced to interpret oral rulings. Id. at 624. The proper remedy for the failure to enter written findings of fact and conclusions of law under CrR 6.1(d) is remand to the trial court for entry of findings. Id. at 622.

Following remand for the entry of findings, reversal is required if it appears that findings and conclusions subsequently entered have been tailored to meet the issues raised on appeal. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). The tardy written findings filed here appear to have been tailored to meet the issue raised by Meske on appeal.

At trial, Meske did not deny attempting to cash a check bearing the name and account number for ATS Northwest. Rather, Meske argued the State failed to present evidence that he "knowingly use[d] or transfer[red] a means of identification to another person . . . with intent to commit or aid the commission of any crime" because by definition, the check he tried

to cash could not constitute a "means of identification" because it contained financial information in the form of an account number. CP 6 (emphasis added); 1RP 51-56, 59-63. The State conceded the check contained both personal and financial information, but claimed that did exclude it from fitting the definition of "means of identification." 1RP 53-54. The trial court agreed with the State and convicted Meske, concluding that an item could be both a "means of identification" and "financial information." 1RP 56.³ The same issue is the crux of Meske's appeal.

The recently filed written findings and conclusions appear to have been tailored to meet Meske's appellate issue. First, the trial court erroneously concluded there were no disputed facts. CP 18. Although most of the factual matters regarding Meske's alleged offense are not in dispute, there has never been agreement by the parties as to whether the check Meske tried to cash was a "means of identification." This determination has both a legal and factual component because it involves assessing whether the physical features of the check bring it within the legal definition of "means of identification."

³ The trial court is transcribed as stating: "I am going to deny the motion [to dismiss]. I will tell you why. I read the statute -- there is no reason it can be both." 1RP 56 (emphasis added). Based on the context of the preceding and following discussion, however, it is apparent what the court actually said was "there is no reason it can't be both." See 1RP 55-57 (defense counsel argues "The document cannot be both. It's not both." Trial court state defense counsel's interpretation is "much too strict for the intent of the statute[.]").

More importantly, however, the trial court's oral ruling contradicts its written ruling on this issue. The trial court's oral ruling held, wrongly, that an item containing both personal and financial information could be both a "means of identification" and "financial information" for purposes of identity theft. 1RP 56-57; see BOA at 5-9 (discussing why trial court's conclusion is wrong given statutory definitions of relevant terms). The trial court's written ruling, however, states the check Meske tried to cash was only "a means of identification or an item that is not describing finances or credit but is personal to, or identifiable with the individual or other person." CP 19 (Conclusion of Law 2). This finding directly contradicts Meske's argument on appeal and directly conflicts with the trial court's oral ruling, which recognized that the check contained both personal information and financial information. This is tailoring that requires reversal of Meske's conviction and dismissal of the prosecution. Brockob, 159 Wn.2d at 343.

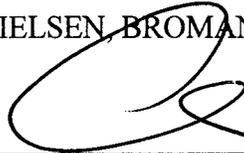
D. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should reverse Meske's conviction and dismiss the charge with prejudice.

DATED this 15th day of March, 2008.

Respectfully submitted,

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