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Court of Appeals
Division II
State of Washington
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NO. 49584-8-II

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

STATE OF WASHINGTON, Appellant

v.

MARK THOMAS HENSLEY, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01021-2

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The State submits this brief reply to Hensley's response brief. The State relies upon all arguments previously made in its initial brief.

ARGUMENT

I. This Court can review a trial court's oral findings.

Hensley argues this Court may not consider a court's oral findings in deciding this matter and that only a trial court's written order may be appealed. Br. of Respondent, p. 7. However, this assertion is not supported by case law.

Our courts have held that a trial court's failure to enter written findings, while potentially erroneous, does not preclude appellate review if the oral findings are sufficient to allow appellate review. *State v. Thompson*, 73 Wn.App. 122, 130, 867 P.2d 691 (1994) (citing to *State v. Riley*, 69 Wn.App. 349, 352-53, 848 P.2d 1288 (1993) and *State v. Clark*, 46 Wn.App. 856, 859, 732 P.2d 1029, *rev. denied*, 108 Wn.2d 1014 (1987)). *See also*, *State v. Grogan*, 147 Wn.App. 511, 195 P.3d 1017, *rev. granted, cause remanded*, 168 Wn.2d 1039, 234 P.3d 169, *on remand*, 158 Wn.App. 272, 246 P.3d 196 (2008) (holding a trial court's failure to enter findings required is harmless error if the court's oral findings are sufficient to permit appellate review); *State v. Miller*, 92 Wn.App. 693, 703, 964

P.2d 1196 (1998) (holding a trial court's failure to comply with CrR 3.5(c) is harmless error if the court's oral findings are sufficient to allow appellate review); *State v. Phillip Arthur Smith*, 67 Wn.App. 81, 834 P.2d 26, reviewed and affirmed on other grounds, 123 Wn.2d 51, 864 P.2d 1371, (1992) (holding a trial court's failure to enter written findings following the denial of a motion to suppress was harmless error where the court's oral findings were sufficient to permit appellate review). No known case law dictates a party to an action may not appeal a suppression ruling or a dismissal because the trial court failed to enter written findings. When the oral ruling of the trial court is sufficient to allow an appellate court to determine its basis for its ruling, then the lack of written findings does not preclude appellate review.

II. The trial court's dismissal of the charges was erroneous.

Hensley argues that the trial court's decision was not "so 'manifestly unreasonable' or based on such 'untenable grounds' that no reasonable person (or judge) would have ordered the same." Br. of Respondent, p. 11. Hensley goes on to argue that the facts of the *Brady* violation were such to shake confidence in the fairness of the trial. *Id.* However, Hensley's account of the facts is not entirely accurate. Hensley argues that "[d]efense counsel was given, for the first time and without apparent justification, a massive Internal Affairs file from the very police

department charging defendant with harassment; and this disclosure came *after* the first day of trial for that harassment.” *Id.* This argument implies the prosecutor provided Hensley’s attorney with a “massive” amount of documents either on or after the first day of trial. However, this is absolutely not true. The State had previously complied with its discovery obligations and provided defense with all evidence, including documents, in its possession.

There was no discussion of a “massive” internal affairs file being provided to defense by the State; instead, the record shows the defense came into possession of some documents obtained directly from the Ridgefield Police Department, one of which was interesting to the defense. RP 351-58. Further, it was clear from the record below that this one document, a letter from Lt. Rhine, did not itself contain any exculpatory evidence or “*Brady* material.” Hensley, both at the trial court below and now on appeal, misapprehends the *Brady* analysis. The requirement that the State provide known exculpatory or impeachment evidence in its possession is limited to information held by the state, and necessarily *excludes* information that could have been discovered, and actually was in this case, by the defense. *State v. Mullen*, 171 Wn.2d 881, 896, 259 P.3d 158 (2011). Furthermore, the issue of a *Brady* violation is based on the actual evidence, and not theoretical, potential, future investigations that

may or may not occur after learning about the evidence. The information in the City of Ridgefield's possession, a letter from Lt. Rhine indicating he had spoken with the defendant's therapist who indicated the defendant was dangerous, is not, itself, exculpatory or impeachment evidence. In fact, this evidence is *inculpatory* given the charge of Harassment.

Another important crux of a *Brady* violation is actual suppression by the State. The State cannot be found to have suppressed evidence available to and actually discovered by a defendant. When a defendant has enough information to ascertain the supposed *Brady* material on his own, the government has not suppressed the evidence. *U.S. v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991). When a defendant can discover the evidence, and would have with an exercise of reasonable diligence, there is no *Brady* violation. *State v. Lord*, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007); *see also Mullen*, 171 Wn.2d at 894. Hensley also had access on three occasions to Lt. Rhine, the author of the letter, for pretrial interviews, and did indeed speak with him about the event detailed in the letter nearly 10 months prior to trial. The defendant was "aware of the essential facts enabling him to take advantage of any exculpatory evidence...." *Raley v. Ylst*, 470 F.3d 792, 804 (9th cir. 2006) (quoting *U.S. v. Brown*, 582 F.2d 197, 200 (2d Cir. 1978)).

Further, as argued in the State's initial brief, the evidence was not material in this case. Because the 'elements' of a *Brady* violation were not present, the trial court erred in finding that the State committed a "*Brady* violation" and in dismissing the case pursuant to CrR 8.3(b) for government misconduct or mismanagement, when that misconduct or mismanagement was based on a finding of a *Brady* violation.

III. The State preserved this issue for appeal.

Hensley argues in his response brief that the State never objected to the lack of notice during the motion hearing and simply stood by and let the motion be heard. Br. of Respondent, p. 16. Hensley clearly missed the part in the verbatim record of proceedings, and in the State's initial brief, wherein the State outlined how it had asked the trial court to allow a recess prior to hearing Hensley's motion to allow the State adequate time to respond to the defense's allegations and motion to dismiss. RP 365. The trial court denied the State the opportunity to respond to a motion in a diligent and appropriate way by refusing to allow the State time to research the law on the issue, to conduct any factual investigation, to talk with Lt. Rhine, to call Mr. Bender to confirm whether what counsel says Mr. Bender said is true, etc. This denial of the State's request to have time to respond to the matter was a refusal by the trial court to conduct a hearing in accordance with CrR 8.3(b) which requires "notice and

hearing” on the matter. The State was precluded from giving any well-researched, thought-out, and knowledgeable response to the defendant’s allegations because of the trial court’s refusal to allow the State any period of time to look into the matter. The State did not, as Hensley suggests in his response brief, stand by and simply let the motion proceed without objection. The State clearly did not agree with the defendant’s motion to dismiss, the State clearly wanted time, the notice and opportunity to be heard guaranteed by CrR 8.3, and the ability to investigate the issue that was sprung upon them mid-trial. The State never acquiesced to the defendant’s motion nor agreed with the trial court’s handling of the issue. By responding as best it could when after the trial court denied the State’s request for actual time to research and investigate the State did not waive its right to appeal the trial court’s decision or improper handling of the motion hearing. Hensley’s argument the State failed to preserve this issue for appeal is meritless.

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CONCLUSION

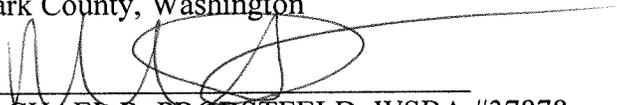
For the reasons discussed above and in the State's initial brief, the trial court erred in dismissing the criminal charges against Hensley and its order should be reversed and the criminal charges reinstated.

DATED this 9 day of November, 2017.

Respectfully submitted:

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