

NO. 49708-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM WITKOWSKI,

Appellant.

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

The Honorable Jack Nevin, Judge (CrR 3.6 motion)
The Honorable Gretchen M. Leanderson, Judge (CrR 3.5 and trial)

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. No written findings of fact and conclusions of law on the CrR 3.5 hearing have been entered contrary to the requirement they be entered.

2. No written findings of fact and conclusions of law on the CrR 3.6 hearing have been entered contrary to the requirement they be entered.

3. The judgment and sentence contains a scrivener's error in indicating, wrongly, that Mr. Witkowski was tried on the original information.

4. The judgment and sentence contains a scrivener's error in failing to indicate the court's adoption of the possession with intent to deliver heroin and the possession with intent to deliver methamphetamine as same criminal conduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CrR 3.5(c) requires entry of written findings of fact and conclusions of law at the conclusion of a CrR 3.5 hearing on the admissibility of the statements of an accused. The trial court failed to enter written findings and conclusions after Mr. Witkowski's CrR 3.5 hearing. Should this court remand for entry of written findings and conclusions?

2. CrR 3.6(b) requires entry of written findings of fact and conclusions of law at the conclusion of a CrR 3.6 hearing on the admissibility of evidence against an accused. The court failed to enter written findings and conclusions after Mr. Witkowski's CrR 3.6 hearing. Should this court remand for entry of written findings and conclusions?

3. A judgment and sentence should reflect accurate information. Mr. Witkowski's judgment and sentence incorrectly reports he was tried on the original information rather than, accurately, the amended information. Should this court remand for correction of the judgment and sentence?

4. A judgment and sentence should reflect accurate information. Mr. Witkowski's judgment and sentence fails to indicate the court's adoption of the possession with intent to deliver heroin and the possession with intent to deliver methamphetamine as same criminal conduct. Should this court remand for correction of the judgment and sentence?

C. STATEMENT OF THE CASE

The court heard a CrR 3.6 hearing. RP September 1, 2016¹ at 4-66.

Mr. Witkowski challenged the stop and investigation of his car which lead

¹ The Report of Proceedings ("RP") are referenced by the date on the cover page or the volume number on the cover page. The RP with volume numbers are those prepared for Judge Leanderson.

to the discovery of evidence. CP 3-16; RP September 1, 2016 at 4-5. The court denied Mr. Witkowski's motion. RP September 1, 2016 at 61-66. The State agreed to prepare written findings of fact and conclusions of law to document the court's rulings. RP September 1, 2016, at 66. To date, no written findings and conclusions have been entered.

The trial court heard a CrR 3.5 hearing. RP I 9-35. The court found Mr. Witkowski's statements to law enforcement admissible. RP I 35. The court directed the State to prepare written findings of fact and conclusions of law to document the court's rulings. RP I 35. To date, no written findings and conclusions have been entered.

A jury heard the trial on the three charges in the amended information: unlawful possession of a controlled substance with intent to deliver – methamphetamine (count 1) and heroin (count 2) and unlawful possession of a stolen vehicle (count 3). RP I, II, III; CP 1-2. The jury found Mr. Witkowski guilty on all three charges. CP 25-27.

At sentencing, the State told the court the two intent to deliver charges were same criminal conduct and the offender score was seven. RP III 374; Supp. DCP, Statement of Prior Record and Offender Score. The court agreed with the same criminal conduct analysis by adopting the State's "seven points" calculation. RP III 386; CP 32.

The judgment and sentence incorrectly specifies Mr. Witkowski was tried on the original information. CP 31. The judgment and sentence fails to reflect the court's adoption of the same criminal conduct analysis. CP 31.

D. ARGUMENT

Issue 1. The trial court erred by failing to enter written findings of fact and conclusions of law as required by CrR 3.5 and CrR 3.6.

The trial court held a CrR 3.5 hearing to determine whether Mr. Witkowski's statements were the product of police coercion, and held a CrR 3.6 hearing to determine whether evidence sought to be used against Mr. Witkowski was lawfully obtained by the police. RP September 1, 2016 at 4-66 (CrR 3.6); RP I 9-35 (CrR 3.5). But the court failed to enter post-hearing written findings of fact or conclusions of law as required by CrR 3.5(c) and CrR 3.6(b). This court must remand this matter for the entry of written findings of fact and conclusions of law, as the law requires.

CrR 3.5(c) provides, "Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefor." Similarly, CrR 3.6(b) provides, "If an evidentiary hearing is conducted, at its

conclusion the court shall enter written findings of fact and conclusions of law.”

These rules plainly requires written findings of fact and conclusions of law. After the CrR 3.5 hearing, the trial court gave an oral ruling that Mr. Witkowski’s statements to the arresting officer were admissible, RP I 35, but no written findings or conclusions were ever entered. The trial court’s failure to enter written findings and conclusions violated the clear requirements of CrR 3.5(c).

Similarly, after the CrR 3.6 hearing, the court gave an oral ruling that the evidence discovered during the stop and investigation of the car driven by Mr. Witkowski was admissible. RP September 1, 2016, at 61-66. Yet, no written findings or conclusions were ever entered. The trial court’s failure to enter written findings and conclusions violated the clear requirements of CrR 3.6(b).

“It must be remembered that a trial judge’s oral decision is no more than a verbal expression of his [or her] informal opinion at that time.

It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.” *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). Moreover, an oral ruling “has no

final or binding effect, unless *formally incorporated into* the findings, conclusions, and judgment.” *Id.* at 567 (emphasis added).

“When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy.” *State v. Smith*, 68 Wn. App. 201, 211, 842 P.2d 494 (1992).² This is so because the court rules promulgated by our supreme court “provide[] the basis for . . . needed consistency” and a “uniform approach.” *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998).

Indeed, “[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.” *Id.* at 624. Where a defendant cannot show actual prejudice from the absence of written findings and conclusions, however, the remedy is remand for entry of written findings of fact and conclusions of law. *Id.*

² Although *Smith* involved the suppression of evidence under CrR 3.6, the *Smith* court “agree[d] that the State’s obligation is similar under both CrR 3.5 and CrR 3.6 and that cases applying CrR 3.5 can furnish appropriate guidance.” *Smith*, 68 Wn. App. at 205. Thus, *Smith*’s mandate of written findings under CrR 3.6 should apply with equal force in the CrR 3.5 context.

Here, the court did not enter written findings or conclusions following either the CrR 3.5 hearing or the CrR 3.6 hearing and provided only an oral ruling. This court must therefore remand this matter to the trial court for entry of the findings and conclusions required by CrR 3.5(c) and CrR 3.6(b).

Issue 2. Scrivener's errors in the judgment and sentence are correctible error.

CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its initiative or on the motion of any party. Scrivener's errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). A scrivener's error is one that, when amended, would correctly convey the intention of the trial court, as expressed in the record at trial. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011); see also *Presidential Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). The amended judgment and sentence should either correct the language to reflect the trial court's intentions or add the language that the trial court inadvertently omitted. *State v. Snapp*, 119 Wn. App. 614, 627, 82 P.3d 252 (2004). The remedy for

a scrivener's error in a judgment and sentence is to remand to the trial court for correction. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016); CrR 7.8(a).

a. Mischaracterization of the charging document

Here the judgment and sentence incorrectly records that Mr. Witkowski was tried on the "original information." CP 31. In truth, Mr. Witkowski was tried on the amended information. CP 1-2. The original information charged Mr. Witkowski only with two counts of delivery of controlled substances. Supplemental Designation of Clerk's Papers, Information. The amended information added the third count of unlawful possession of a stolen vehicle. CP 1-2.

b. Failure to identify offenses as same criminal conduct

At sentencing, the State agreed Mr. Witkowski's two unlawful possession of a controlled substance convictions were same criminal conduct for scoring and sentencing purposes. RCW 9.94A.589(1)(a) provides,

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

After all, the offenses occurred on the same date and time, with the same criminal intent, and had the same victim, the state. RCW 9.94A.589. The difference between the two offenses was only the substance possessed (heroin and methamphetamine). *See State v. Garza-Villarreal*, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993) (separate counts for possession with intent to deliver cocaine and heroin same criminal conduct for sentencing purposes).

Based on the same criminal conduct analysis, Mr. Witkowski had an offender score of seven. RP III 374; Supplemental DCP, Statement of Prior Record and Offender Score. The trial court agreed with the State's analysis and sentenced Mr. Witkowski with an offender score of seven. CP 32. Yet, the judgment and sentence does not reflect the adoption of the same criminal conduct analysis. The court left the following box unchecked and did not fill in its finding that counts 1 and 2 were same criminal conduct:

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

CP 31.

The case should be remanded to the trial court to correct the errors. *Makekau*, 194 Wn. App. at 421.

E. CONCLUSION

Mr. Witkowski's case should be remanded to the trial court for the entry of CrR 3.5 and CrR 3.6 findings and conclusions and for correction of the two scrivener's errors.

Respectfully submitted June 30, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for William Witkowski

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Brief of Appellant to (1) Pierce County Prosecutor's Office, at pcpatcecf@co.pierce.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to William Witkowski/#2016221027 c/o Pierce County Jail, 910 Tacoma Ave S., Tacoma, WA 98402.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed June 30, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for William Witkowski, Appellant

LAW OFFICE OF LISA E TABBUT

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