

FILED
Court of Appeals
Division II
State of Washington
8/8/2018 10:30 AM

NO. 50432-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

MATHEW TYNES,

Appellant.

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

The Honorable Jerry T. Costello, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The parties erred in failing to enter written CrR 3.5 findings of fact and conclusions of law following a CrR 3.5 hearing.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the parties erred in failing to enter written CrR 3.5 findings of fact and conclusions of law following a CrR 3.5 hearing?

C. STATEMENT OF THE CASE

Gig Harbor Police Office Kevin Goss noticed a black Escalade SUV moving fast. RP1¹ 54. He caught it on radar traveling 53 miles per hour in a 25 mile per hour zone. RP1 54. He watched the SUV drive through a stop sign and pull into the oncoming lane to pass other cars causing two oncoming cars to pull over to avoid being hit by the SUV. RP1 54.

The SUV pulled over, and Officer Goss contacted the SUV's driver, 16-year-old Matthew Tynes. RP1 51-53, 102. Tynes admitted being "stupid" in his driving. RP1 35. Tynes also admitted not having a driver's license. RP1 55. Officer Goss smelled intoxicants on Tynes. RP1 56. Tynes

¹ "RP1" refers to the verbatim record for the March 21, 2017 and June 13, 2017, hearings.

"RP2" refers to the verbatim record for the May 30, 2017 hearing. There is no citation to RP2 in Appellant's Brief.

denied drinking but was wobbly and unsteady in getting out of the SUV.

RP1 56.

Officer Goss advised Tynes his *Miranda*² rights including the juvenile portion. RP1 57. Goss arrested Tynes and took him to the police station for a BAC test. RP1 58. Tynes refused the BAC. RP1 58. Tynes provided a legal blood sample after Officer Goss received a search warrant for the blood draw. RP1 60-61. The sample tested at a .19 alcohol concentration. RP1 61.

The state filed an amended information in Pierce County Juvenile Court charging Tynes with taking a motor vehicle without permission in the second degree, driving under the influence of alcohol, reckless driving, and driving with license suspended in the second degree. CP 1-3.

The court heard a CrR 3.5 hearing immediately before taking trial testimony. RP1 29-43. Mr. Tynes did not testify at the hearing. RP1 40.

The court found Tynes statements to Officer Goss admissible. RP1 40-43.

Tynes stipulated in writing to sufficient facts to support all of the charges except the taking a motor vehicle. RP1 23-24; CP 4-6.

²*Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

At trial, Tynes mother, Cheryl Nelson testified her son did not have permission to drive her Escalade. RP1 77. Tynes testified he had her permission. RP1 103, 107. The court found Nelson credible and entered guilty verdicts on all charges. RP1 139-42; CP 7-11.

The court sentenced Tynes to the 15-36 weeks standard range. RP1 144, 170; CP 12-14.

The parties entered written findings of fact and conclusions of law on the verdict. CP 7-11.

Tynes appealed all portions of the judgment and sentence. CP 22.

To date, no CrR 3.5 findings of fact and conclusions law are filed.

D. ARGUMENT

The trial court's failure to follow CrR 3.5(c) warrants remand for entry of written findings of fact and conclusions of law.

The trial court's failure to enter mandatory CrR 3.5 findings of fact and conclusions of law requires remand and their entry.

After a hearing to determine the admissibility of a defendant's statements, the trial court must enter written findings of fact and conclusions of law. CrR 3.5(c). CrR 3.5(c) provides, "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.”

Written findings of facts and conclusions are mandatory. *State v. Cunningham*, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). The trial court and the prevailing party share the responsibility to see the appropriate findings and conclusions are entered. *State v. Vailencourt*, 81 Wn. App. 373, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1(d), which requires entry of written finding of fact and conclusion of law after bench trial).

While there is no juvenile court rule per se comparable to CrR 3.5, under JuCR 1.4(b), the Superior Court Criminal Rules shall apply in juvenile offense proceedings when not inconsistent with other rules and applicable statutes. The trial court and the parties referred to the hearing to determine the admissibility of Tynes statements to Officer Goss as a CrR 3.5 hearing. RP 27, 28, 35, 36, 38, 39, 48, 65, 90.

Here the trial court held a hearing to determine whether to admit Tynes statements to Officer Goss. RP1 29-42. The court concluded the statement was admissible, RP1 29-43, but failed to enter mandatory written finds of fact and conclusions of law.

The purpose of written findings of fact and conclusion is to promote efficient and precise appellate review. *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); *see State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (written finds necessary to simplify and expedite appellate review.). The absence of written findings and conclusions prohibits effective appellate review.

Although the trial court entered oral findings, such findings are not a suitable substitute. A court's oral opinion is not a finding of fact. *State v. Hescok*, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a court's oral opinion is merely an expression of the court's informal opinion when rendered. *Head*, 136 Wn. 2d at 622. An oral opinion is not binding unless formally incorporated in the written findings, conclusions, and judgment. *Id.*, citing *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966).

A trial court's failure to enter written findings and conclusion requires remand for entry of the written findings. *Head*, 136 Wn.2d at 624. Here, because the trial court failed to enter written findings and conclusions, remand is the appropriate remedy.

"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). An oral ruling “has no final or binding effect, unless *formally incorporated into* the findings, conclusions, and judgment.” *Id.* at 567 (emphasis added). 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.*³ The trial court's failure to make written findings is not cured by the provision of an oral ruling on the record. Until a written order is entered, the court's rulings are not considered final. *State v. Collins*, 112 Wn.2d 303, 308, 771 P.2d 350 (1989).

Here, the court did not enter written findings or conclusions following either the CrR 3.5 hearing and provided only an oral ruling. This

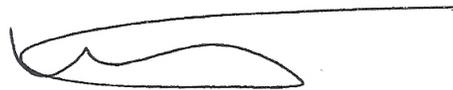
³ But see *State v. Yallup*, ___ Wn. App. ___, 416 P.3d 1250, 1255 (2018). While the initial burden of entering findings was on the court and the prevailing party, appellate counsel should have attempted to resolve this discrepancy either informally with the trial prosecutor or through a motion to compel in the trial court before resorting to the appellate briefing process.

court must therefore remand this matter to the trial court for entry of the findings and conclusions required by CrR 3.5(c).

E. CONCLUSION

The case should be remanded for entry of written findings of fact and conclusion of law on the CrR 3.5 hearing.

Respectfully submitted August 8, 2018.

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 21344
Attorney for Mathew Tynes

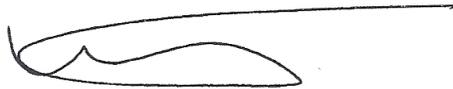
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I filed 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 am maintaining a copy in my file until I next have contact with Mathew Tynes.

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

Signed August 8, 2018, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Mathew Tynes, Appellant

LAW OFFICE OF LISA E TABBUT

August 08, 2018 - 10:30 AM

Transmittal Information

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