

FILED
Court of Appeals
Division II
State of Washington
1/2/2018 4:09 PM
No. 50691-2-II

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

STATE OF WASHINGTON, Respondent

v.

JOHN C. MILAM, Appellant

APPEAL FROM THE SUPERIOR COURT
OF GRAYS HARBOR COUNTY
THE HONORABLE JUDGE THOMAS A. COPLAND

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred when it failed to enter written findings of fact and conclusions of law required under CrR 6.1(d).
- B. The State failed to present sufficient evidence to establish that the defendant was the same individual named in the out of state conviction.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. CrR 6.1(d) requires entry of written findings of fact and conclusions of law after a bench trial. Where the trial court fails to comply with the rule, should this Court remand for entry of written findings and conclusions?
- B. Did the State fail to present sufficient evidence to establish that the defendant was the same individual named in the out of state conviction documents?

II. STATEMENT OF FACTS

Grays Harbor prosecutors charged John Milam with failure to register as a sex offender, in violation of RCW 9A.44.130. CP 1-2. Mr. Milam waived his right to a jury trial, and the matter proceeded to a bench trial. CP 19.

On August 4, 2016, John and Toni Barber rented a home in Hoquiam. (5/2/17 RP 8). In January 2017, a Hoquiam patrol officer conducted a welfare check on Ms. Barber. He made contact with her, and she appeared fine, so he left. (5/2/17 RP 14).

About a week later a local grocery store called police regarding a welfare check on Toni Barber's husband, John. (5/2/17 RP 18;24). He told officers he had been shopping with his wife and now could not find her. (5/2/17 RP 19). One officer described Mr. Barber as "a doddering old man that was maybe a little bit confused." (5/2/17 RP 28). Thinking she might be at her home and concerned about his mental state, officers took him to the residence. Officers found Ms. Barber at a different location, and ended the welfare check. (5/2/17 RP 20-21).

On February 1, 2017, officers again went to the Barber home for a welfare check on Ms. Barber, based on a report of concern by her sister. (5/2/17 RP 29-30). She told officers that Mr. Barber was an Oregon registered sex offender and his name was John Milam. (5/2/17 RP 30).

Officer Salstrom conducted a google search and testified he found John Milam was a listed sex offender in Multnomah County,

Oregon¹. (5/2/17 RP 31). Relying on the word of a Multnomah County Sheriff's Office records specialist, "who seemed familiar with the defendant" and who told Salstrom that Milam was "registered to be living at a residence in Troutdale, Oregon" Mr. Milam was arrested on February 2, 2017. CP 3.

On April 18, 2017, the prosecutor noted on the pretrial memorandum that a certified copy of the Oregon Judgment and Sentence of the underlying sex offense was scheduled to arrive that day, but had not been received yet. CP 20-21.

Subsequently, the Grays Harbor County Sheriff's Office obtained an email packet containing a copy of (1) a 1989 sentence and probation order, (2) waiver of jury trial, (3) order regarding trial evidence, and (4) "a secret indictment" from the Oregon State Patrol. (5/2/17 RP 40; Exh. 1).

At trial, defense counsel objected to the introduction of the "secret indictment" on the basis of hearsay. Counsel agreed the emailed copy was "authenticated" under the rules of evidence, but

¹ According to the online State of Oregon Sex Offender Inquiry System, the website only lists sex offenders designated a level 3 offender, a predatory sex offender, or a sexually violent dangerous offender. www.sexoffenders.oregon.gov. John Milam is *not* listed as a sex offender on that website and does not appear in any Oregon County sex offender registry.

that it constituted hearsay as it was a sworn accusation by an Oregon prosecutor being introduced for the truth of the matter of the accusation. (See Exh. 1 p.6); (5/2/17 RP 46). The court overruled the objection. (5/2/17 RP 46).

Defense counsel also argued the State had not produced any evidence to establish that the defendant was the John Milam named in the Oregon documents. (5/2/17 RP 57). The documents contained no identifying information such as date of birth, a photograph, or fingerprints. (5/2/17 RP 57).

The court found Mr. Milam guilty, but as of the filing of appellant's opening brief, has not entered written findings of fact and conclusions of law. (5/2/17 RP 58). In its sentencing memorandum and at the hearing, the State asserted that Mr. Milam had multiple failures to register violations in the State of Oregon. CP 41; (5/8/17 RP 5). However, the State presented no evidence to corroborate its assertion and admitted there was no record that he had ever been found guilty of a failure to register. CP 41. Mr. Milam makes this timely appeal. CP 26.

III. ARGUMENT

A. Failure to File Findings of Fact and Conclusions of Law

Following A Bench Trial Requires Remand.

In a case tried to a jury, the court *shall* enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court *shall* enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

CrR 6.1(d). (emphasis added). The trial court and the prevailing party share the responsibility to see that written findings and conclusions are entered at the conclusion of a bench trial.

State v. Portomene, 79 Wn.App. 863, 865, 905 P.2d 1234 (1995).

Until the court's opinion has been formally incorporated in written findings, conclusions, and judgment, it has "no formal or binding effect." *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)(quoting *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)). Without the written findings and conclusions, an appellant cannot properly assign error, and the appellate Court cannot review whether the findings of fact and conclusions of law are supported by the record. *State v. Reynolds*, 80 Wn.App. 851, 860 n.7, 912 P.2d 494 (1996). The purpose of the rule is to enable effective appellate review. *Head*, 136 Wn.2d at 621-22.

The current state of the record, in this case, prohibits effective appellate review: no written findings of fact and conclusions of law have been entered. The court's oral opinion is not a finding of fact, but rather, simply an expression of its informal opinion. *State v. Hesock*, 98 Wn.App. 600, 605-06, 989 P2d 1251 (1999); *Head*, 136 Wn.2d at 622. The proper remedy is a remand to the trial court for entry of written findings. *Head*, 136 Wn.2d at 622.

Assuming they are ultimately entered, a reversal will be required if the delay prejudices Mr. Milam. *Id.* at 624. Where prejudice can be shown, the proper remedy for failure to comply with CrR 6.1(d) is reversal. *Id.* Mr. Milam is entitled to the opportunity to offer further argument depending on the content of the written findings and conclusions.

B. The State Did Not Prove Mr. Milam Was Required To Register Because It Failed To Link Mr. Milam To The Prior Requisite Conviction.

The State did not lay an adequate foundation linking Mr. Milam to the individual named in the court documents contained in exhibit 1. *State v. Harkness*, 1 Wn.2d 530, 544, 96 P.2d 460 (1939). This conviction must be reversed and dismissed. *Id.*

In *Harkness*, the Washington Supreme Court held that "identity of names alone is *not* sufficient proof of the identity of a

person to warrant the court in submitting to the [fact finder] a prior judgment of conviction. It must be shown by *independent evidence* that the person whose former conviction is proved is the defendant in the present action.” *Harkness*, 1 Wn.2d at 544. (emphasis added). The Court reasoned that identity of a name may be *some* evidence of the identity of persons, but, standing alone it was insufficient. It adopted the following rule:

The record of a former conviction is not sufficient alone to show that defendant in the present prosecution was formerly convicted. It must be shown by evidence *independent* of the record of the former conviction that the person whose former conviction is proved is the defendant in the present prosecution. *The State has the burden of producing evidence to prove such identity*. Underhill's Criminal Evidence (4th ed.) 1500, § 829. See, also, 2 Wharton's Criminal Evidence, 11th Ed., § 852.

Harkness, 1 Wn.2d at 543 (emphasis added).

The *Harkness* rule applies here. The State produced court documents from 1989 which bore only the name “John Milam” but no other identifying evidence. The state did not produce a shred of distinguishing independent evidence such as date of birth, fingerprints, or photograph which linked the person named in the court documents with the defendant, Mr. Milam. Mr. Milam’s conviction rests on the assumption that he was the subject of those documents. Absent that assumption there is no basis for finding

that Mr. Milam had a duty to register as a sex offender. The State's failure to lay an adequate foundation necessitates reversal and dismissal with prejudice. *Harkness*, 1 Wn.2d at 544.

IV. CONCLUSION

Based on the preceding facts and authority, Mr. Milam respectfully asks this Court to dismiss his conviction with prejudice based on the State's failure to produce sufficient evidence that he is the individual named in the 1989 Oregon documents. In the alternative, he asks this Court to remand to the trial court with instructions to enter written findings of fact and conclusions of law; and to allow for supplemental briefing once they are filed.

Respectfully submitted this 2nd day of January 2018.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for John Milam, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on January 2, 2018 to:

John Milam
505 Polk Street
Hoquiam, WA

And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Grays Harbor County Prosecuting Attorney (at appeals@co.grays-harbor.wa.us).

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January 02, 2018 - 4:09 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50691-2
Appellate Court Case Title: State of Washington, Respondent v John Milam, Appellant
Superior Court Case Number: 17-1-00113-1

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