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Court of Appeals
Division II
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NO. 52851-7-II

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

STATE OF WASHINGTON,

Respondent
v.

JEROME MOODY,

Appellant.

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

The Honorable Anne M. Cruser, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in suspending the sentences on both misdemeanor convictions.

2. The trial court failed to enter written CrR 3.5 findings of fact and conclusions of law contrary to the requirement they be entered.

3. A scrivener's error on the judgment and sentence which omits the sentencing hearing date requires remand for correction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court lacked authority to impose suspended sentences on Mr. Moody's gross misdemeanor and misdemeanor sentences when the court ordered Moody serve the maximum 364 days and 90 days on each concurrent with Moody's 366-day felony sentence?

2. Whether, after hearing a pre-trial CrR 3.5 hearing, the trial court erred by failing to enter written CrR 3.5 findings of fact and conclusions of law contrary to CrR 3.5(c)'s requirement that they be entered?

3. Whether Mr. Moody's case should be remanded to correct the trial court's oversight in failing to provide the sentencing hearing date as required on section 1.1 of the judgment and sentence?

C. STATEMENT OF THE CASE

Jeremy Moody smoked a joint on the way home from an outing at the river. RP2[1] 147-48. He stopped in an alcove at the Kelso United Methodist Church to finish the joint. RP1 38; RP2 148. Because someone called the police about a suspicious person in the neighborhood, Kelso Police Officer Jeffrey Brown responded to investigate. RP1 63-65. Officer Brown startled Mr. Moody by suddenly appearing in the alcove. RP2 148.

Mr. Moody told Officer Brown he was just smoking marijuana and that was not illegal. RP1 69; RP2 148. Kelso Police Officer Andrew Drakos joined Mr. Moody and Officer Brown in the alcove. RP1 126-27. Officer Brown did not smell marijuana and told Mr. Moody to show him his pipe. RP1 69, 71. Mr. Moody told Officer Brown he had a joint, not a pipe. RP1 148. Both officers saw Mr. Moody make a throwing motion with his hands. RP1 71, 130. Officer Brown heard a familiar popping noise he believed to be a methamphetamine pipe breaking. RP1 71-72.

Per Officer Brown, burning methamphetamine has a mild scent. RP1 94-95. He did not smell burning methamphetamine while engaging with Mr. Moody. RP1 95.

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[1] There are two volumes of verbatim report of proceedings (RP) referred to as "RP1" and "RP2."

Officer Brown moved to take Mr. Moody into custody for tampering with evidence for disposing of the suspected methamphetamine pipe. RP1 72. Mr. Moody grabbed his walking stick and started to leave. RP1 73. Officer Brown tried to grab Mr. Moody's arm, but Moody pulled his arm away. RP1 74. Mr. Moody also did not immediately comply with being handcuffed. RP1 74. To gain Mr. Moody's compliance, Officer Drakos kneed Moody in the thigh several times, and both officers pushed Moody against a retaining wall. RP1 74, 128-29.

Officer Brown searched Mr. Moody incident to his arrest for tampering with evidence and resisting arrest. RP1 75. Officer Brown found a pack of Marlboro cigarettes in Mr. Moody's "kangaroo pouch." RP1 71, 76; RP2 154. Officer Brown found a piece of paper between the pack's cellophane wrapper and the pack's exterior. RP1 76. Inside the paper was a small piece of crystalline material which later tested positive for methamphetamine. RP1 76, 113; RP2 121.

The state charged Mr. Moody with possession of methamphetamine, tampering with physical evidence, and resisting arrest. CP 1-3.

Mr. Moody testified he shared his cigarettes with other people. RP2 154-55. He handed the pack to people and they removed individual

cigarettes. RP2 154-55. He had no idea who put the methamphetamine in his cigarette pack. RP2 155. “Down at the river, there’s all kind of people down there smoking all kinds of funny stuff. I don’t know what they were smoking, I just know about myself.” RP2 155.

At Mr. Moody’s request, the court instructed the jury on unwitting possession as a defense to the possession of methamphetamine charge. RP2 178, 183, 193-94.

The jury returned guilty verdicts on each count. CP 4-6; RP2 227.

The court sentenced Mr. Moody to 12 months plus one day for the possession of methamphetamine, plus an additional 12 months of community custody. RP2 246; CP 13, 15. The court imposed 364 days on the tampering with evidence, and 90 days on the resisting arrest to be served concurrent with the felony possession of methamphetamine. CP 13-14; RP2 242-46. The court also ordered all of the time on both misdemeanors suspended so long as Mr. Moody abided by conditions of probation. CP 13-14. Mr. Moody did not object to the sentencing. RP2 242-46.

In entering sentencing paperwork, the court did not fill in the sentencing date in section 1.1 of the judgment and sentence. CP 7.

Prior to Mr. Moody's jury trial, the court held a CrR 3.5 hearing and found most of Moody's statements admissible. RP1 37-62. The court has not entered any written findings of fact or conclusions of law to support its oral ruling.

Mr. Moody appeals his judgment and sentence. CP 22.

D. ARGUMENT

Issue 1: The trial court lacked authority to suspend any portion of the gross misdemeanor and the misdemeanor sentences on Counts II and III because the maximum terms were served concurrently with Mr. Moody's 366-day felony sentence.

The trial court lacked authority to suspend any portion of the misdemeanor sentences on Counts II and III because the court sentenced Mr. Moody to serve the misdemeanors concurrent with Moody's 366-day felony sentence. CP 13-14. As such, all the time on the "suspended sentences" are being served concurrent with the felony sentence. Once his felony sentence is served, Mr. Moody will have served the maximum allowable sentence on both misdemeanors. There is no sentence left to suspend. Mr. Moody's case should be remanded to clarify he has no continuing legal obligations on the two misdemeanor sentences once his felony sentence is served.

Whether a sentencing court imposed an unauthorized sentence is a question of law reviewed de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Alleged sentencing errors are reviewed based on the principles that (1) a sentence in excess of statutory authority is subject to collateral attack and (2) a defendant cannot agree to punishment in excess of statutory authority. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873–74, 50 P.3d 618 (2002). Mr. Moody did not object to the sentences, but illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) *superseded by statute on other grounds*, Laws of 2008, ch. 231, § 4, *as recognized in State v. Cobos*, 182 Wn.2d 12, 15–16, 338 P.3d 283 (2014).

A court can grant probation by "suspend[ing] the imposition or the execution of the sentence." RCW 9.95.210(1). But if a court imposes a maximum sentence of confinement and suspends none of it, the court lacks the authority to impose probation. *State v. Gailus*, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), *overruled on other grounds by State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009).

Tampering with physical evidence is a gross misdemeanor with a maximum 364-day sentence. RCW 9A.72.150(1)(a); RCW 9A.20.021(2).

Resisting arrest is a simple misdemeanor with a maximum 90-day sentence. RCW 9A.76.040; RCW 9A.20.021(3).

Here the court imposed maximum 364-day and 90-day sentences, respectively, on the tampering with physical evidence and the resisting arrest. CP 13-14. The court "suspended" the sentences. CP 13-14. But the court also ordered, "That [these] sentences[s] shall run concurrent with the sentence imposed in Count I." CP 13. Mr. Moody is serving a 366-day sentence on Count 1, the possession of methamphetamine conviction. CP 7, 13. As noted, the court ordered Counts II and III served concurrent to Count 1. CP 13. As the sentences on Counts II and III are served concurrently with the felony 366-day sentence, the 364-day and the 90-day misdemeanor sentences are subsumed by the felony sentence. Thus, as Mr. Moody is serving the maximum misdemeanor sentences in conjunction with the felony sentence, there is no time left on the misdemeanor sentences to suspend.

Because the sentence suspends no jail time, the case should be remanded to strike the "suspended" language and vacate any obligation Mr. Moody may have to the court based on the improper "suspended" sentences. *Gailus*, 136 Wn. App at 201.

Issue 2: Failure to enter written CrR 3.5 findings of fact and conclusions of law necessitates remand.

The trial court held a CrR 3.5 hearing to determine whether statements attributed to Mr. Moody could be admitted in the State's case in chief. RP1 38-62. But the court failed to enter post-hearing written findings of fact or conclusions of law as required by CrR 3.5(c). 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."

The rule 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. Moody's statements to the arresting officer were admissible, but no written findings or conclusions were ever entered. RP 62. The trial court's failure to enter written findings and conclusions violated the clear requirements of CrR 3.5(c).

"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.

"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). 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." *Head*, 136 Wn.2d 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*.

Here, the court did not enter written findings or conclusions following the CrR 3.5 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).

Issue 3: Omitting the sentencing date from the judgment and sentence is a scrivener's error and requires correction.

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). 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. 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).

Section 1.1 of the judgment and sentence currently reads:

> The court conducted a sentencing hearing this date _____; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

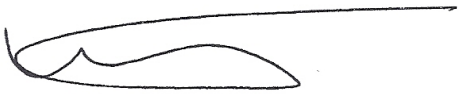
The judgment and sentence form anticipates the sentencing date will be written in the provided blank space. On remand, the court should correct the inadvertently omitted sentencing date at section 1.1 of an

amended judgment and sentence. *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).

E. CONCLUSION

On remand, Mr. Moody's purportedly suspended misdemeanor sentences should be clarified to vacate any perceived obligation Mr. Moody may have to the court. The trial court should enter written CrR 3.5 findings of fact and conclusions of law. Finally, the scrivener's error omitting the sentencing date should be corrected by including the date on an amended judgment and sentence.

Respectfully submitted June 25, 2019.



LISA E. TABBUT/WSBA 21344
Attorney for Jerome Moody

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Cowlitz County Prosecutor's Office, at appeals@co.cowlitz.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Jerome Moody,DOC#273570, Monroe Correctional Complex-SOU, PO Box 514, Monroe, WA 98272.

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

Signed June 25, 2019, in Winthrop, Washington.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Jerome Moody, Appellant

LAW OFFICE OF LISA E TABBUT

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