

FILED
Court of Appeals
Division II
State of Washington
10/1/2019 4:28 PM

NO. 52851-7-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEROME WARD MOODY,

Appellant.

RESPONDENT'S BRIEF

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HALL OF JUSTICE
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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err suspending the entirety of the sentences on both misdemeanor convictions.
2. Any error by the court in not entering written findings of fact and conclusions of law after the 3.5 hearing was harmless.
3. The omission of the sentencing hearing date in Section 1.1 of the judgment and sentence does not require remand for correction because it is not a scrivener's error.

II. STATEMENT OF FACTS

On September 21, 2018, Jerome Moody was found guilty in a jury trial of one count Violation of the Uniform Controlled Substances Act - Possession of a Controlled Substance (methamphetamine), one count of tampering with physical evidence, and one count of resisting arrest. RP2 227. Prior to the trial, the court held a 3.5 hearing to determine the admissibility of Moody's statements. RP1 37-62. The court held that Moody's statements prior to arrest were admissible because they were not during custody and not the product or the result of an interrogation or a comment designed to elicit an incriminating response. RP1 57. The court held that Moody's statements after arrest in the patrol car were admissible because they were attenuated and spontaneous with the exception of two statements made in response to Moody being shown the narcotics by the

officer. RP1 60-61. The statements that were inadmissible were statements to the effect of “these were planted on me” and “it’s not mine.” RP1 61-62.

Sentencing was held on October 15, 2018 where the court imposed 12 months and a day on Count I (referred to as “No. 980”), the minimum sentence for Moody’s range. RP2 246. Moody additionally had a concurrent charge (referred to as “No. 1011”) where he plead guilty to Theft in the Second degree where his minimum sentence for his range was 17 months. RP2 242-247. The court ran those two crimes concurrently. RP2 246-247. The court held “[o]n Cause No. 980, I’m actually going to impose – it’s not going to be 17, it’s going to be 12 months and a day” with the understanding that it will not change the 17 month minimum on No. 1011. *Id.* Counts II and III of No. 980 “will have suspended time.” *Id.* The court did not impose any probation, but imposed 12 months of community custody. *Id.* The court imposed 17 months on No. 1011 concurrent with No. 980 and 364 with 364 suspended on Count II of No. 1011. *Id.* The judgment and sentence was signed and entered on October 15, 2018. RP2 248.

III. ARGUMENT

A. The trial court did not err suspending the entirety of the sentences on both misdemeanor convictions.

The Sentencing Reform Act (“SRA”) outlines the trial court’s authority in regard to sentencing on felony cases. *State v. Furman*, 122 Wn2d 440, 456, 858 P.2d 1092 (1993); *In re Post-Sentence Review of Combs*, 176 Wn. App. 112, 117, 308 P.3d 763 (2013). 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). Appellant is correct in that Tampering with physical evidence is a gross misdemeanor with a maximum 364 day sentence under RCW 9A.72.150(1)(A) and RCW 9A.20.021(2) and Resisting arrest is a misdemeanor with a maximum 90 day sentence under RCW 9A.76.040 and RCW 9A.20.021(3).

Appellant’s request for relief is that the case be remanded to strike the “suspended” language because the sentence suspends no jail time. However, in the judgment and sentence, the court imposed “[t]hat the defendant serve 364 days in the Cowlitz County Jail with 364 days suspended so long as the defendant complies with the terms of his/her

probation as ordered below” on Count II. CP 5. Additionally, the court imposed “[t]hat the defendant serve 90 days in the Cowlitz County Jail with 90 days suspended so long as the defendant complies with the terms of his/her probation as ordered below” on Count II. CP 6. Directly below that section is the section where the court orders probation and that box is left unchecked and is additionally crossed out. CP 6. In its ruling, the court did not order probation. RP2 246. Therefore, the court imposed 0 days on Count II and 0 days on Count III. And because the court did not impose probation, the condition of “so long as the defendant complies with the terms of his/her probation as ordered below” does not apply to Moody. The court’s sentence is clear that Moody was only ordered to serve 366 days on Count I and does not require any further clarification of Moody’s obligations to serve his sentence in No. 980 and No. 1011.

B. Any error in the court’s failure to enter written findings and conclusions after the 3.5 hearing was harmless, as the oral findings were sufficient to allow for appellate review.

Criminal Rule 3.5 requires a trial court to enter written findings of fact and conclusions of law after a hearing regarding the admissibility of a defendant’s statements. The failure to do so constitutes error, but “the error is harmless if the court’s oral findings are sufficient to allow appellate review.” *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998), *citations omitted*. Furthermore, the absence of written findings is

not grounds for reversal unless there is prejudice to the defendant. *State v. Haynes*, 16 Wn. App. 778, 788, 559 P.2d 583(1977). When there are adequate oral findings, there is no prejudice. *Id.* Here, the trial court made adequate oral findings and conclusions, and the defendant was not prejudiced.

The trial court made the following oral findings and conclusions on the record. First, Officer Brown responded to a call for service regarding a suspicious person at United Methodist Church and Moody made spontaneous statements that were made prior to an arrest having occurred. RP1 56. Prior to arriving at the scene, the officer heard a lighter and then asked to see the pipe to which Moody replied that he was smoking marijuana. RP1 57. This was accompanied by a “barrage of statements” including profanities and agitated statements by Moody in regard to being snuck up on. *Id.* Based on training and experience, the officer believed Moody took a pipe consistent with one that would be used for smoking methamphetamine out of his sweatshirt pocket and throwing it to the ground. *Id.* At that point, there was an arrest and a struggle ensued. *Id.* The court held that the statements prior to the arrest were not subject to custody and not the product or result of an interrogation or comment designed to elicit an incriminating response. *Id.*

There were a number of statements made post-arrest where Moody was in custody. *Id.* Therefore, the court questioned whether they were subject to interrogation. *Id.* The officer, after arresting Moody, searched him incident to arrest and located a small bag of white crystalline substance, pulled it out of the pack of cigarettes, and showed it to Moody. RP1 53. The court re-called the officer after both parties asked him questions to clarify one point: “When you pulled it out, was it in such a way that you were trying to show him what you had found or was it something that you just pulled out and were looking at yourself?” *Id.* The officer responded, “I was showing him.” *Id.* Moody made additional statements after his arrest and in the patrol vehicle including threats, jumping out of a tree to attack an officer, and statements made during an attempted head butt in the jail.

In its determination, the court analyzed whether all or some of the responses that came after the action of showing the methamphetamine to Moody would be suppressed or whether they were attenuated and spontaneous. RP1 60. The court held that the statements not directly pertaining to the contraband that was shown to the defendant were irrespective of that action and would have been made regardless, thereby making them spontaneous statements. *Id.* The statements made in immediate response to Moody being shown the narcotics are clearly

suppressed. RP1 60-61. The court required further clarification on exactly what those statements were, and after conferring with both parties, the statements to be suppressed included, “these were planted on me” and “it’s not mine.” RP1 61. The court ensured to specify which statements were to be admissible and which statements were to be suppressed. The oral findings and conclusions in this case were sufficient for appellate review; therefore, reversal is not warranted.

C. The omission of the sentencing hearing date in Section 1.1 of the judgment and sentence does not require remand for correction because it is not a scrivener’s error.

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). While there is an omission of the sentencing date in Section 1.1, an amendment would not change the intention of the trial court. On Page 11 of the Judgment and Sentence, it states, “Done in Open Court and in the presence of the defendant this date” with “10-15-18” written in the blank. This same page has been signed by all parties, the judge, and Moody. Additionally, on the fingerprint page (page 13) of the judgment and sentence, it states, “I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document” and it was signed by the Clerk of the Court, Deputy Clerk on “10/15/18” written next to the signature. The

intention of the trial court was very clearly and correctly expressed in multiple places on the judgment and sentence despite the omission of the date in Section 1.1. Therefore, there is no need for an amended judgment and sentence.

IV. CONCLUSION

For the reasons stated above, the State respectfully requests this Court to deny Moody's request to strike the "suspended" language, deny Moody's request to remand this matter to the trial court for entry of the findings and conclusions of the 3.5 hearing, and deny Moody's request to remand this matter to the trial court to amend the judgment and sentence.

Respectfully submitted this 23rd day of September, 2019.

By:


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Deputy Prosecuting Attorney
Representing Respondent

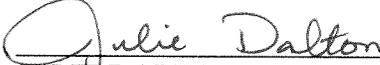
CERTIFICATE OF SERVICE

Julie Dalton certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington, on the 1st day of October, 2019.



JULIE DALTON

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

October 01, 2019 - 4:28 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52851-7
Appellate Court Case Title: State of Washington, Respondent v. Jerome Ward Moody, Appellant
Superior Court Case Number: 18-1-00980-1

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