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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 289907

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MAYIRA BALENCIA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KLICKITAT COUNTY
The Honorable E. Thompson Reynolds

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF THE CASE IN REPLY

Ms. Balencia was charged with delivery of a controlled substance and unlawful use of a building for drug purposes. At a stipulated trial the unlawful use of a building for drug purposes was dismissed, but she was found guilty of delivery of a controlled substance. 3/29/2010 RP 5-6, CP 86-88.

On February 8, 2011, the Findings of Fact and Conclusions of Law Re: Stipulated Bench Trial was entered. CP 86-88. On February 7, 2011, an Order Settling Superior Court Record – Stipulated Documents was entered. CP 84-85. With that order, the Diversion Petition and Exhibit List consisting of the police reports used in the stipulated trial became part of the record. CP 60-82 and CP 83.

Ms. Balencia agreed upon entering a diversion program that a stipulated facts trial based on police reports attached to the diversion agreement would be used to determine whether or not she was guilty of the crimes charged. CP 60-64. During the stipulated trial Ms. Balencia argued that the probable cause declaration and officer's investigation narrative did not state that she handed the confidential informant a controlled substance, but that she handed the confidential informant money. 3/29/2010 RP 3, Ex. 1 (Probable Cause Declaration and Investigation Report ["Police Reports"]).

The State references a handwritten officer's note that Ms. Balencia handed the informant a controlled substance. Brief of Respondent, pgs. 2-3, Ex. 1 (Handwritten Officer's Note). During the stipulated trial there was no reference made by the trial court or State to an officer's handwritten note. 3/29/2010 RP 1 – 8. At the time, defense counsel discussed with the trial court whether he had everything the court had in the way of evidence, and specifically listed he had the "...PC Sheet and then the officer's Narrative and then lab reports..." 3/29/2010 RP 2-3. The only reference the State made to notes during the stipulated trial concerned the substance that was found. 3/29/2010 RP 4-5. The handwritten note is not signed and there is no indication as to who wrote the note. Ex. 1 (Handwritten Officer's Note). Neither the trial court's oral ruling, nor written findings and conclusions make any findings based on handwritten officer's notes. 3/29/2010 RP 5-6, CP 87.

B. ARGUMENT IN REPLY

1. INSUFFICIENT EVIDENCE EXISTED TO SUPPORT THE CONVICTION OF DELIVERY OF A CONTROLLED SUBSTANCE.

a. Standard of Review

The State argues that the standard of review for appeals for criminal trials on stipulated records is "substantial evidence." State v. Bartolome, 139 Wn.App. 518, 161 P.3d 471 (2007). The State points out

that the Bartolome court held that the appellate court shall "leave it to the trial court to weigh…conflicting stipulated evidence and to resolve factual disputes." *Id.* at 522. The Bartolome court citing In re Marriage of Rideout, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003), also stated that:

> [T]here are cases that stand for the proposition that appellate courts are in as good a position as trial courts to review written submissions and, thus, *may* generally review de novo decisions of trial courts that were based on affidavits and other documentary evidence.

Bartolome at 521, footnote 2.

The standard of review is *de novo* when a conviction rests upon stipulated facts and exhibits and the court considered no live testimony in concluding guilt. State v. Shepherd, 110 Wn.App. 544, 550, 41 P.3d 1235 (2002). In this case, the stipulated facts trial was based on a diversion agreement in which Ms. Balencia agreed that she could not present any evidence other than what was contained in the police reports. CP 60- 64. The trial court only had the State's police reports to consider. There was no conflicting evidence submitted by Ms. Balencia. Therefore, the appropriate standard of review is *de novo*.

b. Stipulated Bench Trial

The State argues in response that Ms. Balencia is relying on "an obvious typographical error" in the probable cause statement. Brief of

Respondent, pg. 4. In a stipulated trial, the State bears the burden of proof beyond a reasonable doubt. State v. Johnson, 104 Wn.2d 338, 342, 705 P.2d 773 (1985). The stipulated facts must include those essential facts necessary to permit a reasoned and informed analysis by the court. State v. Wheaton 121 Wn.2d 347, 363, 850 P.2d 507 (1993).

To prove delivery of a controlled substance, the State must have evidence of a knowing physical transfer of a controlled substance. See State v. Evans, 80 Wn.App. 806, 814, 911 P.2d 1344 (1996), *review denied* 129 Wn.2d 1032, 922 P.2d 97. The probable cause statement and investigation narrative drafted by the police do not state that a knowing physical transfer of a controlled substance occurred, but that Ms. Balencia handed the confidential informant money. CP 5, Ex. 1 (Police Reports). When Ms. Balencia pointed out at the stipulated trial that the stipulated facts did not show that Ms. Balencia handed the informant a controlled substance, the State did not notify the trial court or Ms. Balencia that the facts in the probable cause declaration and investigation narrative were an obvious typographical error. 3/29/2010 RP 4. The State instead argued that the "Court could … infer from the probable cause as to the drug use that was going on there…" 3/29/2010 RP 4.

The State now offers a handwritten officer's note to show that Ms. Balencia handed drugs to an informant. Respondent's Brief pg. 3, Ex. 1

(Handwritten Officer's Notes). The handwritten officer's note is not signed, nor is there any indication as to who wrote the note. Ex. 1 (Handwritten Officer's Notes). During the stipulated trial, defense counsel discussed with the trial court whether he had everything the trial court had in the way of stipulated evidence, and he specifically listed he had the "...PC Sheet and then the officer's Narrative and then lab reports..." 3/29/2010 RP 2-3. There was no discussion of a handwritten officer's note. The only reference the State made to notes during the stipulated trial concerned the substance that was found. 3/29/2010 RP 4-5. It is unclear from the record what notes he was referring to. 3/29/2010 RP 4.

The handwritten officer's note was not made part of the initial record. The Exhibit List filed on February 7, 2011, lists only Police Reports, without stating the number of pages or a list of specific documents contained in the police reports. CP 83. Likewise, the diversion agreement only references attached police reports and does not provide the number of pages or list specific documents. CP 63. It was not until after the Order Settling the Record was entered that Ms. Balencia was provided with the handwritten officer's note.

The handwritten officer's note should not be considered, because it is not signed and the author is not identified on the document. It cannot be

determined from the record whether the handwritten officer's note was part of the stipulation packet of police reports. Finally, no reference has previously been made to the handwritten officer's note either at the stipulated trial, or in the oral and written findings and conclusions issued by the trial court.

Ms. Balencia agreed to submit to a stipulated trial based on the facts as stated in the police reports, which she relied upon to make a reasoned and informed decision to waive her right to a jury trial. CP 60-64. Because the facts in the stipulated police reports, probable cause statement and investigation narrative, do not contain evidence of a knowing physical transfer of a controlled substance from one person to another, the conviction for delivery of a controlled substance should be reversed and dismissed.

c. Trial Court's Written Findings and Conclusions

The State submits that to convict Ms. Balencia of delivery of a controlled substance, the State had to prove beyond a reasonable doubt that on or about the 29th day of September, 2008, in Klicitat County, Washington, she knowingly transferred a controlled substance from one person to another. Brief of Respondent, pg. 4.

The trial court's written findings of fact and conclusions of law were entered on February 28, 2011, after Ms. Balencia filed her

Appellant's Opening Brief. CP 86-88. Findings and conclusions comprise a record that may be reviewed on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). Each element must be addressed separately, setting out the factual basis for each conclusion of law. *Id.* at 623. The findings must specifically state an element has been met. State v. Alvarez, 128 Wn. 2d 1, 19, 904 P.2d 754 (1995).

The written findings and conclusions issued by the trial court made no jurisdictional findings or conclusions, nor provide a date for the police contact with Ms. Balencia. CP 86 -88. The trial court's decision did not establish that Ms. Balencia had knowledge that the substance may have been a controlled substance. The trial court did not state a factual basis that the substance was methamphetamine, but jumped to that conclusion. CP 87.

The trial court's written decision was in error when it speculated on what the witnesses "apparently would have testified" in order to reach the conclusion that a "delivery" occurred. CP 87. The police reports did not include written statements by the confidential informant to support what the confidential informant might testify to, if called. Ex. 1 ("Police Reports). The trial court's inference that Ms. Balencia gave the informants drugs is not supported by the probable cause statement, or investigation narrative. Ex. 1 ("Police Reports). There was no factual

basis in the written findings of fact that shows what specific stipulated evidence the trial court relied upon in making its conclusion of law.

If the State had to prove beyond a reasonable doubt that on or about the 29th day of September, 2008, in Klicitat County, Washington, Ms. Balencia knowingly transferred a controlled substance from one person to another, and the trial court was supposed to set out the factual basis for each conclusion of law, then the written findings of fact and conclusions of law have not established each element of the crime. CP 86-88.

The written findings and conclusions fail to address material facts on which the State bore the burden of proof. Therefore, the written findings of fact and conclusions of law do not support a finding of guilt for delivery of a controlled substance and the conviction should be reversed and dismissed.

2. THE CASE SHOULD BE REVERSED AND DISMISSED BECAUSE THE TRIAL COURT FAILED TO TIMELY ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time Ms. Balencia's opening brief was filed the trial court had not entered written finding of fact and conclusions of law pursuant to CrR 6.1(d). Ms. Balencia therefore assigned error to the trial court's non-compliance with CrR 6.1(d). On February 28, 2011 the trial court entered

written findings and conclusions of law, which conform to the oral ruling given by the trial court after the stipulated trial. CP 86-88.

The State argues that the late filing of the written findings and conclusions has resolved the issue. However, at the time Ms. Balenica was preparing her appeal, she did not know what the written findings and conclusions would contain. Therefore, Ms. Balencia maintains that the lack of timely entry of findings of fact and conclusions of law hampered her ability to prepare her appeal, because she could not evaluate the factual basis for each conclusion of law. This is critical for an appeal where Ms. Balencia is challenging the sufficiency of the evidence and where the oral ruling does not fully set forth the factual basis for each conclusion of law.

The State argued that as in Cannon, late filing did not delay this appeal. State v. Cannon, 130 Wn.2d 313, 922 P.2d 1293 (1996), Brief of Respondent, pg. 9. The issue is not whether the appeal was delayed, but whether Ms. Balencia had full access to the record in order to adequately prepare her appeal. Findings and conclusions comprise a record that may be reviewed on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). In Head, the Court noted the possibility that reversal may be appropriate where a defendant can show actual prejudice resulting from

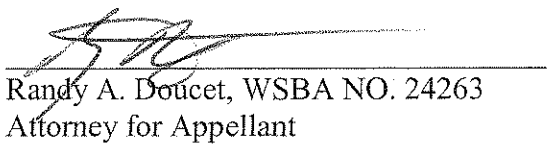
the absence of findings and conclusions or following remand for entry of the same. Head at 624.

Ms. Balencia has had to prepare her appeal with an inadequate record. She did not have the police reports relied on by the trial court in the stipulated trial until after the Appellant's Opening Brief was filed. At issue in this case is whether the evidence relied upon by the trial court was sufficient to convict Ms. Balencia. Yet, the written findings of fact and conclusions of law were not issued until 11 months after the stipulated trial. CP 86. The lack of having the full record to assist in preparing an appeal was prejudicial to Ms. Balencia's right to appeal. Therefore, the conviction should be reversed and dismissed.

C. CONCLUSION

For the reasons set forth above, Ms. Balencia's conviction for delivery of a controlled substance should be reversed and dismissed.

Respectfully submitted this 18th day of April, 2011.



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