

FILED
April 7, 2016
Court of Appeals
Division III
State of Washington

NO. 33888-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

LEOPOLDO CUEVAS CARDENAS,

Appellant.

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

The Honorable Blaine G. Gibson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing restitution.
2. The trial court failed to enter written findings of fact and conclusions of law as required by CrR 3.5(c).
3. The judgment and sentence contains a scrivener's error on the maximum penalty for attempted burglary in the second degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Cardenas disputed the state's proposed restitution amount. The trial court correctly refused to order the proposed restitution without a hearing but imposed \$1 restitution as a "place holder." Was the imposition of "place holder" restitution in error?

2. A trial court must enter written findings of fact and conclusions of law after the suppression hearing as required by CrR 3.5(c). The trial court has not entered CrR 3.5 findings and conclusions. Is the trial court's failure to do so in error?

3. Mr. Cardenas is entitled to a judgment and sentence without scrivener's errors. His judgment and sentence misstates the maximum penalty for attempted burglary in the second degree. Should his case be remanded to correct the judgment and sentence?

C. STATEMENT OF THE CASE

1. Procedural Facts

The Yakima County Prosecutor charged Leopoldo Cardenas with attempted burglary in the second degree. CP 1. The court heard a CrR 3.5 hearing prior to trial and held Mr. Cardenas's statements to a police officer admissible. RP¹ 48-69. To date, the court has not entered written findings of fact and conclusions of law to support its oral ruling.

A jury found Mr. Cardenas guilty. RP 210-11; CP 2.

2. Trial Evidence

Lorraine's Espresso is located just outside of Wapato. RP 103-04. It is a family run business. RP 104. The owner, Robert Castillo, arrived early on August 24, 2015, to open the business. RP 104. He saw that it appeared as if someone had attempted to force entry into the business via a security door. RP 104. His wife called the police. RP 104.

The business has a video security system. RP 106. Before the police arrived, Mr. Castillo reviewed video recorded the last few hours. RP 108. He saw a man walk up to the business and use a stick to knock out one of the overhead fluorescent lights. RP 108. The man tried to cover his face with something like a bandanna but it kept falling off. RP 108, 112. He did not recognize the man in the video. RP 113. The man then

¹ There are two volumes of verbatim report of proceedings for this appeal. The pages from one volume to the next are consecutively numbered and are herein cited to as "RP."

used a hand-held object to try and pry open the door. RP 108-09, 129. The door remained secure and the man did not gain entry to the espresso shop. RP 115, 119-20.

Mr. Castillo showed portions of the video to Yakima County Sheriff's Deputy Justin Swale when he came to investigate. RP 106, 124. After looking at the video, Deputy Swale drove around looking for someone who looked like the man in the video. RP 124. About twenty minutes later, he noticed Mr. Cardenas standing in a parking lot talking to another person. RP 124, 126. Thinking that Mr. Cardenas looked like the person, he stopped his car and got out to talk to Mr. Cardenas. RP 125. He told Mr. Cardenas he was investigating a burglary and, per Deputy Swale, Mr. Cardenas spontaneously said, "I only walked by the coffee place." RP 126-27. Deputy Swale arrested Mr. Cardenas for the attempted burglary. RP 127.

At trial, the state played portions of the security video for the jury. RP 111. The jury was also shown pictures of Mr. Cardenas as he appeared when contacted by Deputy Swale. RP 130-132.

Mr. Cardenas did not testify and presented no defense witnesses. RP 163.

3. Sentencing

The state provided the court with certified copies of Mr. Cardenas's convictions as well as information from the Department of Corrections. RP 235, 248. Defense counsel agreed that Mr. Cardenas's offender score was at least nine points making his standard range 38.25 to 51 months. RP 236, 238, 244. Mr. Cardenas, in his allocution, told the court some of his convictions were fraudulently entered and illegal. RP 237, 241.

The court imposed a 51 month sentence. RP 253; CP 4-5. It struck all court costs except for the \$100 DNA fee and \$1 was imposed as a restitution "placeholder" after Mr. Cardenas objected to the state's proposed restitution of \$260 for damage to the business's light and door. RP 253-259; CP 6.

Mr. Cardenas appeals all portions of his judgment and sentence. CP 11.

D. ARGUMENT

1. **The trial court lacked authority to impose restitution over Mr. Cardenas's objection without first holding a restitution hearing.**

A trial court's authority to impose restitution is entirely statutory. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); *State v. Cosgaya-Alvarez*, 172 Wn. App. 785, 790, 291 P.3d 939 (2013).

Restitution shall be ordered whenever an offender is convicted of an offense which results in injury to any person or damage to or loss of property. RCW 9.94A.753(5); *State v. Griffith*, 164 Wn.2d 960, 965-966, 195 P.3d 506 (2008). When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days. RCW 9.94A.753(1).

Mr. Cardenas objected at sentencing to the \$260 restitution proposed by the state. The court agreed that because of the objection, it had to order a restitution hearing to determine the amount of restitution. RP 257, 259. But rather than setting a hearing date, the court entered \$1 restitution on the judgment and sentence as a “placeholder.” RP 259; CP 6.

Restitution is a matter within the trial court's discretion, and its ruling will be disturbed on appeal only if there is an abuse of discretion. *State v. Young*, 63 Wn. App. 324, 333, 818 P.2d 1375 (1991). A trial court abuses its discretion when its action is manifestly unreasonable or the sentencing court exercised its discretion on untenable grounds or for untenable reasons. *State v. Woods*, 90 Wn. App. 904, 905, 953 P.2d 834 (1998).

Here the trial court abused its discretion. The restitution statute does not contemplate “place holder” restitution. RCW 9.94A.753. As Mr. Cardenas objected to the imposition of any amount of restitution without a

hearing, the court's imposition of even \$1 was an abuse of discretion and is in error. It should be stricken from the judgment and sentence.

2. The trial court erred in failing to enter written findings of fact and conclusions of law per CrR 3.5.

The trial court held a CrR 3.5 hearing to determine whether Mr. Cardenas's statement was the product of police coercion. RP 48-69. However, the court failed to enter written findings of fact and conclusions of law as required by CrR 3.5(c). Even if this court concludes Mr. Cardenas's statement was admissible, this court must remand the 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 therefore." This rule plainly requires written findings of fact and conclusions of law. The trial court provided an oral ruling that Mr. Cardenas's statement to Deputy Swale was admissible, but no written findings or conclusions have ever been entered. RP 66-69. The trial court's failure to enter written findings and conclusions violate 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). An oral ruling “has no final or binding effect, unless *formally incorporated into* the findings, conclusions, and judgment.” *Id.* at 567 (emphasis added).

“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 a “consistent, uniform approach.” *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). “[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. However, where a defendant cannot show actual prejudice from the absence of written findings and conclusions, the remedy is remand for entry of written findings of fact and conclusions of law. *Id.* at 624.

Here, the trial court has not entered written findings or conclusions following the CrR 3.5 hearing. This court must therefore remand this

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

3. The trial court should correct the judgment and sentence to reflect the correct maximum penalty for attempted burglary in the second degree.

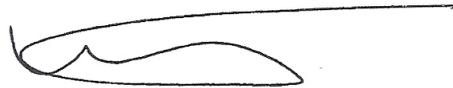
Mr. Cardenas's judgment and sentence contains a scrivener's error that requires correction. Section 2.5 incorrectly notes the maximum term for attempted burglary in the second degree is 10 years. CP 4. The offense, as an inchoate crime, is a class C felony with a maximum term of 5 years. RCW 9A.52.030(2); RCW 9A.28.020(3)(c).

This court should remand Mr. Cardenas's case to correct the judgment and sentence. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010)(remand appropriate to correct scrivener's error in judgment and sentence erroneously stating defendant stipulated to an exceptional sentence); *State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999)(remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence).

E. CONCLUSION

Mr. Cardenas's case should be remanded to strike the \$1 restitution, for entry of written CrR 3.5 findings of fact and conclusions of law, and to correct the maximum sentence scrivener's error.

Respectfully submitted April 6, 2016.



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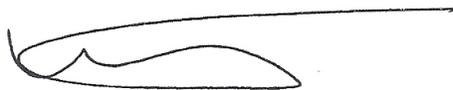
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Yakima County Prosecutor's Office, at appeals@co.yakima.wa.us; (2) the Court of Appeals, Division III; and mailed to (3) Leopoldo Cuevas Cardenas/DOC#919072, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

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

Signed April 6, 2016, in Winthrop, Washington.

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 No. 21344
Attorney for Leopoldo Cuevas Cardenas, Appellant