

NO. 35411-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

ROGER LEWIS,

Appellant.

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

The Honorable Linda G. Thompkins, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to enter written findings of fact and conclusions of law after a bench trial, in violation of CrR 6.1(d).

2. The trial court erred in failing to enter written findings of fact and conclusions of law after admitting appellant's statements to police, in violation of CrR 3.5(c).

Issues Pertaining to Assignments of Error

1. CrR 6.1(d) requires entry of written findings of fact and conclusions of law after a bench trial. Is remand required for entry of written findings and conclusions?

2. CrR 3.5(c) requires entry of written findings of fact and conclusions of law after a hearing to admit appellant's custodial statements to police. Is remand required for entry of written findings and conclusions?

B. STATEMENT OF THE CASE

The Spokane County prosecutor charged appellant Roger Lewis with one count of attempting to elude a pursuing police vehicle. The State further alleged that during the incident Lewis also threatened his passenger,

Rochelle Sprinkle, with physical injury or harm. CP 6. Lewis waived his right to a jury trial. CP 19; RP¹ 6-9.

The trial court determined that Lewis's statements to police at the time of his arrest were admissible during the State's case-in-chief. RP 34-35. No written findings of fact and conclusions of law were entered.

The trial court found Lewis guilty as charged. CP 62-76; RP 148-51. No written findings of fact and conclusions of law were entered. The trial court imposed a drug offender sentencing alternative (DOSA), sentencing Lewis to 18.75 months imprisonment and 18.75 months of community custody. CP 62-76; RP 182.

Lewis timely appeals. 77-94.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE BENCH TRIAL

CrR 6.1(d)² requires the trial court to enter written findings of fact and conclusions of law after a bench trial. State v. Head, 136 Wn.2d 619,

¹ This brief refers to the verbatim reports as follows: RP – April 17 and 19, 2017; May 19, 2017; and June 14, 2017.

² CrR 6.1(d) provides: "In a case tried without 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."

621-22, 964 P.2d 1187 (1998). The case must be remanded to the trial court for entry of written findings and conclusions.

Written findings are essential to permit meaningful and accurate appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); State v. Mewes, 84 Wn. App. 620, 621-22, 929 P.2d 505 (1997). Equally important, written findings "allow the appealing defendant to know precisely what is required in order to prevail on appeal." State v. Smith, 68 Wn. App. 201, 209, 842 P.2d 494 (1992).

"A court's oral opinion is not a finding of fact." State v. Hescock, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Rather, an oral opinion is no more than a verbal expression of the court's informal opinion at the time rendered and "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." Head, 136 Wn.2d at 622 (quoting State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)).

The court's factual findings must separately address each count and adequately identify the factual basis relied upon to support each element of each count. Head, 136 Wn.2d at 623. "An 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. Remand for

entry of written findings of fact and conclusions of law as required by CrR 6.1(d) is the ordinary remedy for an initial failure to make written findings. Id. at 623.

Findings and conclusions may be submitted and entered while an appeal is pending if there is no appearance of unfairness and the defendant is not prejudiced. State v. Hillman, 66 Wn. App. 770, 773-74, 832 P.2d 1369 (1992). Without written findings of fact and conclusions of law, it is not possible to accurately assess what appellate issues may exist. Lewis reserves the right to challenge any written findings and conclusions entered after the filing of this brief. Further, an amended brief may be filed in response to such findings and conclusions.

2. REMAND IS REQUIRED FOR ENTRY OF WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 3.5 (c).

The trial court must enter written findings of facts and conclusions of law after a hearing to determine the admissibility of a defendant's statements. CrR 3.5(c); State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003).³ The trial court and the prevailing party share the

³ CrR 3.5(c) provides:

(c) 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;

responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1 (d), which requires entry of written findings of fact and conclusions of law after bench trial).

Here, the trial court held a hearing to determine whether to admit Lewis's statements to police. The court concluded the statements were admissible, but failed to enter the required written findings and conclusions.

The purpose of written findings and conclusions is to promote efficient and precise appellate review. Cannon, 130 Wn.2d at 329; see Head, 136 Wn.2d at 622 (written findings necessary to simplify and expedite appellate review). The absence of written findings and conclusions frustrates such review.

Although the trial court entered oral findings,⁴ such are not a suitable substitute for written ones; a court's oral opinion is not a finding of fact. Hescock, 98 Wn. App. at 605-06. Rather, a court's oral findings merely express the court's informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally

and (4) conclusion as to whether the statement is admissible and the reasons therefor.

⁴ RP 34-35.

incorporated into the written findings, conclusions and judgment. Head, 136 Wn.2d at 622 (citing Mallory, 69 Wn.2d at 533).

A trial court's failure to enter written findings and conclusions requires remand for entry of them. Head, 136 Wn.2d at 624. Here, because the trial court failed to enter written findings and conclusions, remand is the appropriate remedy.

3. APPEAL COSTS SHOULD NOT BE IMPOSED⁵

The trial court found Lewis was entitled to seek review at public expense, and therefore appointed appellate counsel. CP 95-101. If Lewis does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief), rev. denied, 185 Wn.2d 1034, 377 P.3d 733 (2016). RCW 10.73.160(1) states the "court of

⁵ RAP 14.2 now provides, with regard to appellate costs:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The trial court found Lewis indigent for purposes of the appeal. CP 100-01. That finding remains in effect.

appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State’s request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Lewis's ability to pay must be determined before discretionary appellate costs are imposed.

The existing record establishes that any award of appellate costs would be unwarranted in this case. Even after his eventual release from prison, Lewis will still face the combined disadvantages of his present indigency and felony conviction. Even assuming that Lewis is eventually able to surmount these disadvantages, and obtain gainful employment, it would almost certainly take years. During those years of struggle, Lewis's debt to the State of Washington, the price of his constitutional right to appeal his conviction, would be accruing interest at the civil rate of 12 percent.

Without a basis to determine that Lewis has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

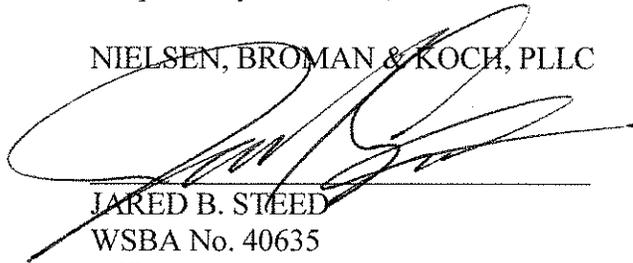
D. CONCLUSION

For the reasons set forth, Lewis requests remand for entry of written findings and conclusions. This Court should also exercise its discretion and deny appellate costs.

DATED this 24th day of October, 2017

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is fluid and cursive.

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