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JAN 30 2012

King County Prosecutor  
Appellate Unit

NO. 67217-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DEBORAH A. VALENTINE,

Appellant.

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

The Honorable Joan DuBuque, Judge

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BRIEF OF APPELLANT

ANDREW P. ZINNER  
Attorney for Appellant

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STATE OF WASHINGTON  
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A. ASSIGNMENT OF ERROR

The trial court failed to enter written findings of fact and conclusions of law after the hearing under CrR 3.5.

Issue Pertaining to Assignment of Error

CrR 3.5(c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant's statement. No findings or conclusions were filed in this case. Should this case be remanded for entry of the required findings and conclusions?

B. STATEMENT OF THE CASE

Columbia City boutique owner Karla Esquivel-Riel was chatting with a customer, Anna Lisa Loop, when she heard a "clinking" noise from the back of the store where Deborah A. Valentine was shopping. 2RP 4, 13-17. The sound caused Esquivel-Riel to think Valentine may have put a store item into the large bag slung over her shoulder. 2RP 17-18. Esquivel-Riel approached Valentine and explained it was store policy for her to keep large bags behind the counter while customers shopped. Esquivel-Riel took the bag. When she set it on a chair behind the counter, the bag flopped open, revealing two store items inside. 2RP 17-23.

Esquivel-Riel announced to Loop that Valentine had been shoplifting, and asked her to call the police and lock the door to the store.

2RP 26. Valentine came to the counter and asked for her bag. When Esquivel-Riel told her she could have the bag after the police came, Valentine reached for it. She and Esquivel-Riel grabbed the bag at the same time and struggled over it. 2RP 27-30. Esquivel-Riel eventually got sole control of the bag. In an effort to get her bag back, Valentine kicked, hit, and pulled the hair of Esquivel-Riel. 2RP 30-34; 3RP 16-21, 27-29.

Unsuccessful, Valentine offered to pay for the items in the bag. Esquivel-Riel declined the offer because by then she had been "beaten a little bit" and believed it was better to have police handle the situation. 2RP 34. Valentine then left the store without her bag. 2RP 35, 3RP 24-25, 47.

Loop, meanwhile, was giving the 911 operator a blow-by-blow account of events as she observed them. 3RP 25-29. Police officers arrived just after Valentine left the store. 3RP 29. As Officer Matthew Hurst drove up, he saw a group of people pointing toward the corner in the direction of Valentine's departure. 2RP 88-89. What followed was the subject of a pretrial hearing under CrR 3.5(a).

Hurst was the sole witness at the hearing. He said he turned the corner, saw Valentine, got out of his police car, and told her to "[c]ome over here and talk to me real quick." 1RP 29-32, 39. When she did, Hurst

directed Valentine to sit down on the front bumper of the car. 1RP 39, 43.

At that point Valentine was not free to leave. 1RP 35-36, 43, 50.

After asking Valentine for identification, Hurst asked, "What's going on today?" 1RP 40. Valentine explained she was trying to shop in the boutique when an employee came up and told her she was tired of having black people come into the store and stealing things. Annoyed at this comment, Valentine decided at that point that she was going to steal something. She put items in her bag, but later offered to pay for them. Her offer was refused and she was told to leave. 1RP 34-35, 40. At no point had Hurst advised Valentine of her Miranda<sup>1</sup> rights.

By then another officer had arrived. He watched Valentine while Hurst spoke with Esquivel-Riel and Loop. 1RP 36-37, 40-41, 44, 46-47. After doing so, Hurst directed the other officer to arrest Valentine. 1RP 36, 46-47.

Valentine urged the court to exclude her statements to Hurst because they resulted from custodial interrogation that was not preceded by Miranda warnings. 1RP 70-73, 81-83. The court rejected this argument and admitted the statements, finding Valentine was briefly

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

detained when she answered Hurst's questions, but was not in custody for purposes of Miranda. 1RP 85. The court did not enter written findings of fact and conclusions of law.

A King County jury heard the above evidence, as well as Loop's 911 conversation and Valentine's statements to Hurst. 2RP 92-96 (Valentine's statements); 3RP 26-28 (911 recording). The jury found Valentine not guilty of attempted third degree theft, not guilty of third degree assault, and guilty of the lesser offense of fourth degree assault. CP 19-21, 58. The trial court imposed a 12-month suspended sentence, with credit for time served. CP 62.

C. ARGUMENT

THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 3.5(c).

Valentine's statements to police were admitted after a hearing required by CrR 3.5 to establish whether the statements were the product of police coercion. The court, however, failed to enter written findings or conclusions as required by CrR 3.5(c). That rule provides in part:

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) conclusion as to whether the statement is admissible and the reasons therefore.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required. The court below rendered an oral decision following the hearing, but no written findings or conclusions have been entered as of this date. The oral decision is "no more than a verbal expression of [the court's] 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, 567, 383 P.2d 900 (1963). Consequently, the court's decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State v. Hescocock, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

"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). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205 ("[T]he State's obligation is similar under both CrR 3.5 and CrR 3.6"). But where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the

written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is appropriate. Id.

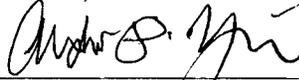
D. CONCLUSION

For the stated reasons, this court should remand the cause for entry of written findings of fact and conclusions of law as required by CrR 3.5(c).

DATED this 30 day of January, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
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v.	)	COA NO. 67217-7-1
	)	
DEBORAH VALENTINE,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF JANUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DEBORAH VALENTINE  
307 23<sup>RD</sup> AVENEUE EAST  
SEATTLE, WA 98122

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JANUARY 2012.

x Patrick Mayovsky

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