

Court of Appeals No. 43585-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

STEVEN C. POWELL,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 11-1-03893-1
The Honorable Ronald E. Culpepper, Presiding Judge

Sheri Arnold, WSBA No. 18760
Attorney for Appellant
P.O. Box 7718
Tacoma, Washington 98417
(253) 683-1124

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I. ASSIGNMENT OF ERROR

The trial court erred in failing to enter the requisite written findings of fact and conclusions of law after denying Mr. Powell's motion to suppress.

II. ISSUE PRESENTED

Should this court remand Mr. Powell's case for entry of written findings of fact and conclusions of law regarding his motion to suppress where such finding are required by court rule but the trial court failed to enter them?

III. STATEMENT OF THE CASE

A. Factual Background

On August 25, 2011, police from various police agencies, including officers from West Valley City, Utah, searched Mr. Steven Powell's residence in connection with a separate investigation. RP 176, 278-279. Det. Ellis Maxwell of the West Valley City police searched Mr. Powell's bedroom. RP 280. Evidence recovered from Mr. Powell's residence was sealed in a trailer and taken back to Utah where it was examined. RP 280-283. Several computer discs were seized. RP 284.

Upon examining one of the discs found in Mr. Powell's bedroom, Utah police discovered images of what appeared to be underage females bathing and using the bathroom. RP 284. Police also recovered a digital camcorder from Mr. Powell's bedroom. RP 285-286. Upon examining the properties of the images on the disc, police discovered that the images

were created by a camcorder of the same model as the camcorder discovered in Mr. Powell's bedroom. RP 285, 287.

After examining the discs, Det. Maxwell brought the disc with the images back to Pierce County and gave it to Pierce County Detective Sanders. RP 284-285. Detective Sanders examined the disc and found a folder titled "WW-1" that contained several subfolders; one titled "taking bath-1," one titled "Taking Bath-2," and one titled "open window in back house." RP 180-181.

These folders contained images of two girls who appeared to be between seven and twelve years of age. CP 9-11. The images were taken from outside the home of the two girls and show the girls unclothed, taking a bath, using the toilet, getting ready to take a bath and getting dressed and undressed. CP 9-11. In many of the photos the photographer focuses on the breast, buttock, and genital areas of the two girls. CP 9-11. The images appeared to be taken at different times since the girls are wearing different clothes and some pictures are taken in the daytime and others are taken at night. CP 9-11.

On September 19, 2011, police went to the residence located directly behind Mr. Powell's residence and observed that Mr. Powell's bedroom window faces a window on the side of the residence. CP 9-11. This side window is similar to the window depicted in the pictures of the

girls. CP 9-11. Police investigated the residence behind Mr. Powell's and determined that the bathroom in the residence was the bathroom depicted in the pictures of the young girls. CP 9-11. The bathroom is in a direct line of sight with Mr. Powell's bedroom. CP 9-11.

Det. Sanders located the family who had been living in the home behind Mr. Powell in the 2006-2008 time period and verified that the mother and two daughters in the family were depicted in the pictures found on the disc in Mr. Powell's bedroom. CP 9-11. The mother confirmed the images were taken at the residence located behind Mr. Powell's house and that she sometimes left the blinds open on the window facing Mr. Powell's home open due to the heat. CP 9-11. The mother of the girls told police she never gave permission to anyone to photograph her or her daughters and that any photographs were taken without their knowledge. CP 9-11.

Det. Sanders identified what he believed were seven separate times when each young girl was filmed in the bathroom. CP 9-11.

Also located on the discs of images were thousands of images of other females, both adult and juvenile, along with images of Mr. Powell urinating and masturbating. CP 9-11. The photographs of the women were mostly in public places, but the photographer focused on the women's buttocks, breasts, and genital areas. CP 9-11.

B. Procedural Background

On September 22, 2011, Mr. Powell was with fourteen counts of voyeurism and one count of possession of depictions of a minor engaged in sexually explicit conduct in the second degree. CP 1-8. All charges included the aggravating factor that Mr. Powell's multiple current offenses and high offender score would result in some of the current offenses going unpunished. CP 1-8. The voyeurism counts had an additional alleged aggravator that the crimes involved an invasion of the victim's privacy. CP 1-8. On September 23, 2011, the charges were amended to correct Mr. Powell's birthday only. CP 12-19.

On March 5, 2012, Mr. Powell moved to suppress the disc containing the photographs. CP 23-34. Mr. Powell argued that the affidavit for the search warrant of his home contained insufficient facts to establish probable cause to search his home and vehicles. CP 23-34. Mr. Powell also argued that the search warrant was overbroad and violated the particularity requirement of the Fourth Amendment and the Washington Constitution. CP 23-34.

On April 23, 2012, a hearing was held regarding Mr. Powell's motion to suppress. RP 4-45, 4-23-12.¹

¹ Not all volumes of the report of proceedings are numbered consecutively. Reference to the report of proceedings will be made by giving the page number followed by the date of the hearing.

On April 24, 2012, the trial court denied Mr. Powell's motion to suppress all evidence found pursuant to the search of his residence. RP 11, 4-24-12.

On May 7, 2012, Mr. Powell moved to dismiss count XV, the possession of a minor engaged in sexually explicit conduct charge. CP 76-81. Mr. Powell argued that the State's evidence was insufficient to establish that any pictures possessed by Mr. Powell depicted a minor engaged in sexually explicit conduct, a necessary element of count XV. CP 76-81. The trial court granted Mr. Powell's motion to dismiss count XV. RP 69, 5-7-12.

Pretrial, Mr. Powell moved to exclude evidence of journal entries from journals found in his bedroom, to exclude the thousands of images found on the disc not relevant to the specific charges against Mr. Powell, and to exclude evidence of the investigation of Josh Powell regarding the murder of Susan Powell. CP 108-122.

Also on May 7, 2012, the State filed its trial memorandum. CP 82-102. In its trial memorandum, the State listed the titles of the folders found on the disc in Mr. Powell's room and gave descriptions of the contents of each folder. CP 82-102.

The trial court held that all journal entries save one were inadmissible. RP 97-113, 5-8-12. The one journal entry the trial court

found to be admissible was an entry by Mr. Powell dated August 17, 2004, that stated, "I enjoy taking video shots of pretty girls in shorts and skirts, beautiful women of every age. I sometimes use these images for self-stimulation, but the images that raise me to orgasmic heights are those of Susan." RP 103-104, 5-8-12. The trial court did rule that the reference to "Susan" had to be redacted from the statement. RP 104, 5-8-12.

On May 9, 2012, a hearing was held to determine the admissibility of various categories of photographs discovered on the disc recovered from Mr. Powell's bedroom. RP 124-164. Mr. Powell did not object to the admission of the photographs of the two alleged victims in this case, only to the rest of the photographs on the disc. RP 128, 5-9-12. The State called Det. Sanders and had him name and describe the folders of pictures the State sought to introduce at Mr. Powell's trial. RP 124-164.

Det. Sanders described several folders and gave the following folder titles and description of the contents of the folders: "girl masturbating 040723" contained still pictures taken from a video pictures of a girl with her hands in her crotch area scratching her leg but that did not contain any nudity; "neighbors" which contained subfolders titled "Alexandra," "Cindy," and "Cindy's Sister" which contained images of a female walking her dog in Mr. Powell's neighborhood, another female walking in Mr. Powell's neighborhood, and pictures taken from inside Mr.

Powell's residence of various females walking through his neighborhood, respectively; "Laura on 166th" which contained various images of a teenage female inside and outside her home; "SMP" which contained numerous sub folders of pictures of Susan Powell; and "Steve Miscellaneous" which contained numerous subfolder that contained pictures of Mr. Powell, nude, masturbating, and urinating. RP 128-144, 5-9-12.

The trial court held that the "girl masturbating" folder was probative and admissible and that Det. Sanders could give the jury a description of the contents of the folder but the State could not introduce the images. RP 150-151, 5-9-12. The trial court held that the "neighbors" folder and all of its sub folders ("Alexandra," "Cindy," "Cindy's sister," and "Laura on 166th") were admissible and that Det. Sanders could testify as to the descriptions of the images. RP 154-155, 5-9-12. The trial court ruled that the "SMP" pictures of Ms. Powell were not admissible. RP 158, 5-9-12. The trial court excluded the pictures of Mr. Powell masturbating to images of Ms. Powell contained in the "Steve Miscellaneous" folder but admitted the rest of the folders and ruled Det. Sanders could offer a general description of the pictures. RP 161-164, 5-9-12.

Mr. Powell's trial began on May 9, 2012. RP 174, 5-9-12.

At trial, the State introduced one photograph to support each count of voyeurism. RP 194-195, 5-9-12. Det. Sanders testified that plaintiff's exhibits 1 through 14 were exact printouts from the CD recovered from Mr. Powell's bedroom and that each picture appeared to be taken at a different time or during a different episode of filming, save for the exhibits relating to charges VIII and X, which were from the same episode of filming. RP 195, 205, 5-9-12. The State then elicited the titles of the folder of the other pictures as well as the descriptions of the contents of those folders from Det. Sanders. RP 212-217, 5-9-12.

On May 14, 2012, Mr. Powell moved to dismiss 12 of the 14 counts of voyeurism after the State rested on the basis that the State had insufficient evidence to support the charges. CP 161-169; RP 323-331, 5-14-12. Mr. Powell argued that the State had insufficient evidence to establish that the photographs were not all taken on the same day. CP 161-169; RP 324-325, 5-14-12. The trial court denied the motion to dismiss. RP 330-331, 5-14-12.

On May 14, 2012, the trial court entered an order dismissing Count XV, the possession of depiction of a minor engaged in sexually explicit conduct charge. CP 169.

On May 16, 2012, the jury found Mr. Powell guilty of all 14 counts of voyeurism. CP 285-298; RP 400-408, 5-16-12.

On June 7, 2012, Mr. Powell moved for dismissal of 12 of the 14 counts of voyeurism on the basis that the convictions violated his right to be free from double jeopardy. CP 310-322. Mr. Powell also moved for any remaining counts to be treated as the same criminal conduct for each victim. CP 310-322.

On June 15, 2012, argument was heard on Mr. Powell's motion to dismiss 12 of the 14 charges. RP 8-39, 6-15-12. The trial court agreed that counts VIII and X appeared to be from the same session and that counts VI and VII also appeared to be from the same filming session. RP 38, 6-15-12. The trial court vacated Mr. Powell's convictions on counts VII and X. RP 38-39, 6-15-12. The court entered findings of fact and conclusions of law and an order dismissing counts VIII and X. CP 369-371.

The trial court sentenced Mr. Powell to an exceptional sentence of 30 months. CP 372-388, 400-402.

Notice of appeal was filed on June 15, 2012. CP 420.

IV. ARGUMENT

Remand of this case is required for the trial court to enter the mandatory written findings of fact and conclusions of law regarding Mr. Powell's motion to suppress.

A trial court is required to enter written findings of fact and conclusions of law followings it ruling in a CrR 3.5 or CrR 3.6 hearing.

CrR 3.5(c); CrR 3.6(b). The purpose of the requirement that trial courts enter written findings and conclusions is to enable appellate courts to review the issues raised on appeal. *State v. McGary*, 37 Wn.App. 856, 861, 683 P.2d 1125 (1984). The remedy for a trial court's failure to enter the required written findings of fact and conclusions of law is to remand for entry of those findings and conclusions. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

Here, Mr. Powell moved pursuant to CrR 3.6 for suppression of all evidence discovered pursuant to the search of his residence. CP 23-34. However, the trial court failed to enter any written findings of fact or conclusions of law regarding Mr. Powell's motion to suppress all evidence discovered pursuant to the search of his home.

This court must remand Mr. Powell's case to the trial court for entry of the requisite findings of fact and conclusions of law in order to permit Mr. Powell to raise any issues on appeal which might pertain to the trial court's denial of Mr. Powell's motion to suppress.

VI. CONCLUSION

For the reasons stated above, this court should remand Mr. Powell's case to the trial court for entry of findings of fact and conclusions of law regarding the trial court's ruling on Mr. Powell's motion to suppress.

DATED this 20th day of February, 2013.

Respectfully submitted,

/s/

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

Certificate of Service:

The undersigned certifies that on February 20, 2013, she delivered by e-mail to the Pierce County Prosecutor's Office, ppatceef@ Pierce.wa.us, and by United States mailed to appellant, appellant, Steven C. Powell, DOC # 357992, Monroe Corrections Center, Twin Rivers Unit, Post Office Box 888, Monroe, Washington 98272 true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, February 20, 2013.

/s/

Norma Kinter

ARNOLD LAW OFFICE

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