

FILED

Jan 13, 2014

Court of Appeals

Division III

State of Washington

No. 31580-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOSE MENDEZ, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred by failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.

2. The State's evidence was insufficient to support the convictions beyond a reasonable doubt.

3. The court erred by imposing an exceptional sentence.

Issues Pertaining to Assignments of Error

A. Did the court err by failing to enter the required written findings of fact and conclusions of law after the CrR 3.5 hearing?
(Assignment of Error A).

B. Was the evidence insufficient to support the convictions when the State failed to prove identity beyond a reasonable doubt?
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C. Did the court err by imposing an exceptional sentence?
(Assignment of Error C).

II. STATEMENT OF THE CASE

Jose Mendez was charged in count one with attempting to elude a pursuing police vehicle, in count two with possession of cocaine, in count three with possession of heroin, in count four with

first degree driving while license revoked, and in count five with felony DUI. (CP 23). After a CrR 3.5 hearing, certain statements by Mr. Mendez to law enforcement were found admissible. (2/19/13 RP 79-131). But no written findings of fact or conclusions of law were entered.

For purposes of this appeal, the facts elicited by the State during trial were reflected in the probable cause narrative of Union Gap Police Sgt. Monte McNearney:

[On 10/10/12} Sgt. McNearney was on duty in the city of Union Gap and was in full departmental uniform in a Union Gap police car with emergency lights and siren. Sgt. McNearney was wbound on Walla Walla approaching 5th Ave. when Washington license ADY 7519 pulled out in front of him and made a left turn. This vehicle was stopped at a stop sign. . . Sgt. McNearney had to brake heavily to avoid a Collision. Sgt. McNearney stopped the vehicle in the 2200 block of S. 4th Ave.

Sgt. McNearney had activated the emergency lighting on his patrol car. He approached the driver side of the vehicle and could see a Hispanic male wearing a reddish colored shirt was driving. The driver suddenly put the vehicle into gear and accelerated away, spinning its tires. Sgt. McNearney advised SunComm dispatch of the pursuit and activated his siren. The vehicle went to Valley Mall Blvd. and turned wbound, failing to stop at a posted stop sign. It then turned nbound onto S. 5th Ave. and continued through the posted stop signs at Walla Walla and Whitman without stopping. The Vehicle was traveling at approx. 50 mph in a posted

25 mph residential zone. The driver then turned ebound onto Whatcom St. to S. 3rd Ave. An unidentified vehicle turned wbound onto Whatcom from S. 3rd Ave. and had to pull off the roadway to avoid being hit. The driver braked heavily and lost control and struck a power pole on the southwest corner of 3rd and Whatcom. . . The driver then continued through the posted stop sign and nbound onto 3rd Ave. Sgt. McNearney continued after the vehicle with his lights and siren activated. The vehicle continued nbound and through a red light at Washington Ave. traveling at approximately 30 mph. There were vehicles both east and west on Washington. These vehicles had to brake heavily to avoid a collision. The vehicle continued nbound to Mead Ave. at approximately 60 mph and slowed somewhat but continued through another red light at approximately 30 mph. The suspect vehicle had to swerve to the left to avoid a collision. The vehicle then approached Nob Hill and slowed down and then turned wbound onto Prasch almost striking cars parked along the roadway. The vehicle continued wbound on Prasch running three stop signs while traveling at approx. 35 mph. When the vehicle reached S. 10th Ave. it turned nbound failing to stop at a posted stop sign. It struck a sbound car driven by Dirk Spencer and continued nbound. It did not stop to check on Spencer's condition or exchange information. The vehicle continued nbound across Nob Hill and went through a red light at approx 25 mph. It then made a quick left turn onto Stewart. When Sgt. McNearney turned behind the vehicle he saw it had stopped in the road and saw the driver running from the driver door. The driver ran around the front of the vehicle and nbound into a yard in the 1000 block of Stewart. Sgt. McNearney began chasing the subject on foot and took him into custody a short distance away. When Sgt. McNearney was taking the subject into custody he was actively trying to get away from Sgt. McNearney and turned

toward him in a fighting stance to fight him. On the ground just outside the driver door was a bag of white powder that tested positive for cocaine. In a bush where the driver had been tried to hide Sgt. McNearney found a bag that tested positive for heroin. Just inside the door to the vehicle was a bag of green vegetable matter that was recognized to be marijuana. The driver was identified as Jose Mendez. . . A check of DOL showed him to be DWLS 1st degree. . . A criminal history check showed four prior DUI convictions within the last 10 years. (CP 2-3; see also 2/20/13 RP 276-321).

Mr. Mendez stipulated an order of revocation of his driver's license was in effect on October 10, 2012, and he had four or more prior convictions for DUI within 10 years. (CP 71-74). There were no exceptions taken to the court's instructions. (2/22/13 RP 532).

The only defense asserted at trial was that Mr. Mendez was not the driver. (2/22/13 RP 554, 558, 562-73). The jury found him guilty as charged and also returned a special verdict that he endangered others while attempting to elude. (CP 111-16).

Mr. Mendez had an offender score of 16 for both (1) the attempting to elude with a standard range of 22-29 months and (2) the felony DUI with a standard range of 60 months. (CP 128). He had an offender score of 11 for each of the possession convictions

with a standard range of 12+ to 24 months. (*Id.*). The gross misdemeanor of first degree driving while license revoked carried confinement of 0-364 days. (*Id.*).

The court imposed a sentence of 29 months for the attempting to elude plus a 12-month enhancement for endangering others, 24 months on each of the possession convictions to run concurrently, 180 days for first degree driving while license revoked, and 60 months for felony DUI. The court further imposed an exceptional sentence by running the 41-month sentence for attempting to elude, the 24-month concurrent sentence for the possession convictions, the 60-month sentence for felony DUI, and 6 months for the gross misdemeanor of first degree driving while license revoked consecutively for total confinement of 131 months. (CP 129). This appeal follows.

III. ARGUMENT

A. The court erred by failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.

The court allowed certain statements and disallowed others upon holding a pretrial CrR 3.5 hearing. (2/19/13 RP 79-131). The rule requires entry of written findings and conclusions, but none

were entered. Remand for entry of those findings and conclusions is appropriate. *State v. Landsiedel*, 165 Wn. App. 886, 269 P.3d 347, review denied, 174 Wn.2d 1103 (2012).

B. The evidence was insufficient to support a finding of guilt because the State failed to prove identity beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). So viewed, the State's evidence still fell short of showing by the requisite quantum of proof that Mr. Mendez was the person driving the car and committed the crimes. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

The sole defense offered at trial was that Mr. Mendez was not driving the car. From the beginning, he maintained he was not the driver. (2/21/13 RP 496-97). Although credibility is for the jury to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In the circumstances here, the identity of

the driver was indeed based on guess, speculation, or conjecture. The State's evidence was simply insufficient to prove the driver's identity beyond a reasonable doubt. The convictions must be reversed.

C. The court erred by imposing an exceptional sentence.

The court ran the sentences consecutively to each other, except for the two 24-month possession sentences that ran concurrently but consecutively to the other sentences, for total confinement of 131 months. (CP 129). In imposing an exceptional sentence, the court found:

2.6 Exceptional Sentence: The Court finds substantial and compelling reasons exist which justify an exceptional sentence. Pursuant to RCW 9.94A.535(2)(c), the Court finds that an exceptional sentence by running Counts 1, 2 + 3 and/or 5 consecutively based on the following aggravating circumstance(s):

The defendant committed multiple current offenses and his high offender score results in some of the current offenses going unpunished. (CP 128).

An offender score over 9 does not, in and of itself, justify an exceptional sentence. *State v. Stephens*, 116 Wn.2d 238, 246, 803 P.2d 319 (1991); *State v. Alvarado*, 164 Wn.2d 556, 192 P.3d 395 (2008). Although there were current offenses here, the jury already

found by special verdict the endangerment enhancement on the attempting to elude that added 12 months to the sentence. The nature and circumstances of the other offenses, however, are not extraordinary and do not justify the imposition of an exceptional sentence. Except for the high offender score, which is not alone reason enough, there are no substantial and compelling reasons supporting the exceptional sentence. *Id.* Mr. Mendez should be resentenced within the standard range with the sentences running concurrently.

IV. CONCLUSION

Based on the foregoing, Mr. Mendez respectfully urges this Court to reverse his convictions and dismiss the charges. Alternatively, he asks that his exceptional sentence be reversed and the case remanded for resentencing within the standard range.

DATED this 13th day of January, 2014.

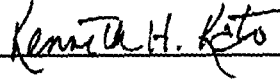
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 13, 2014, I served a copy of the brief of appellant by first class mail, postage prepaid, on Jose Mendez, # 936781, PO Box 769, Connell, WA 99326; and by email, as agreed by counsel, on tamara.hanlon@co.yakima.wa.us.

A handwritten signature in cursive script, reading "Kenneth H. Kato", is written over a horizontal line.