NO. 44761-4-II

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

STATE OF WASHINGTON, Appellant

v.

DARIN RICHARD VANCE, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00704-9

REPLY BRIEF OF APPELLANT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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A. ARGUMENTS IN REPLY

The State submits this reply brief to address some of Respondent's statements and arguments in its Amended Response Brief. The State relies and rests upon its Opening Brief for all other issues.

I. THE STATE HAS PROPERLY ASSIGNED ERROR TO THE TRIAL COURT'S FINDINGS

Vance claims the State cannot object to the trial court's findings for the first time on appeal. However, Vance's interpretation of case law on this subject is mistaken. Vance claims that any findings of fact not objected to at the trial court level become verities on appeal, citing to *Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992) and *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn.App. 702, 308 P.3d 644 (2013) for support in that proposition. However, Vance clearly misunderstood the meaning of the line of cases which hold that unchallenged findings of fact are verities on appeal. These cases stand for the proposition that when, during the appeal process, an appellant does not assign error, on appeal, to the findings below, then they are verities at the appellate level. In fact, the case Vance cites to, *Canyon Conservancy v. Bosley, supra* discusses each finding of fact individually and refers to another finding as having error assigned to it in the opening brief. *Canyon*

Conservancy, 828 Wn.2d at 809. In Vance's reply he quotes, "'[t]he appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument' or they become verities on appeal." Am. Br. of Resp. p. 16 (citing *Buck Mountain Owner's Ass'n v.* Prestwich, 174 Wn. App. at 714). Clearly this refers to the appellate process, by referring to a party as the 'appellant' and not a plaintiff or defendant. Further, it is clear from a full reading of the cases and others which hold that unchallenged findings are verities on appeal that these cases are referring to those findings to which an appellant has not assigned error and not to those findings which were not objected to at the trial court level. These cases do not hold that an appellant must object at the trial court level to the findings of fact as they are entered. Further, it is clear from the document itself that it was prepared by defense counsel, it was an opposed motion and the State did not agree, and the State did not sign this document agreeing to the findings or their entry. CP 668. Vance has cited no authority which holds that an appellant must object to findings of fact at the trial court level in order for them to be reviewed on appeal. The only authority to which Vance cites holds that an appellant must assign error to any findings which it wishes to have reviewed. The State did exactly this.

The purpose behind the rule that would allow an appellate court to refuse to review a claim of error not raised in the trial court is "to encourage the efficient use of judicial resources, by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *State v. Lindsey*, 117 Wn.App. 233, 247, 311 P.3d 61 (2013) (citing *State v. Robinson,* 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011)). It was clear at the trial court level that the State did not agree to the entry of the Court's findings on this matter. Allowing appellate review of a contested dismissal does not thwart the purpose of encouraging efficient use of judicial resources.

In *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994) the Supreme Court reasoned,

> There is adequate opportunity for review of trial court findings within the ordinary bounds of review. A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal.... This strikes the proper balance between protecting the rights of the defendant, constitutional or otherwise, and according deference to the factual determinations of the actual trier of fact. We hold that in reviewing findings of fact entered following a motion to suppress, we will review only those facts to which error has been assigned.

Hill, 123 Wn.2d at 647 (internal citations omitted).

This reasoning shows that in contested motions at the trial court level in which findings of fact and conclusions of law are entered, it is

unnecessary for a party who later chooses to appeal, to object to each and every finding of fact or conclusion of law. It is clearly sufficient that Vance's motion to strike and later to dismiss with prejudice were contested by the State and opposed. It is clear from the record the State never agreed to the entry of any findings of fact and the State never signed off on or assented to the particular findings. CP 668. Vance's misreading of the case law has led to his erroneous assertion that the State has not preserved this issue for appeal. Vance's argument is without legal support and is without merit.

II. THE STATE PROPERLY PRESERVED ITS ABILITY TO ARGUE APPLICABLE LAW ON THIS ISSUE

Vance claims that the State never responded to the merits of a motion challenging the search warrant that defense asserted it would file at some point in the future and so now has waived any and all claims that that motion would not have been successful. Am. Br. of Resp. p. 34. This argument is completely without legal support. The motion to which Vance refers in his brief was never litigated at the trial court level because the trial court took action on this case based on another issue. The trial court did not hold a hearing on Vance's potential motion to suppress due to an Article I, sec.7 violation by Agent Burney's actions as a federal officer and therefore the State did not have an opportunity to be heard on this

issue. Vance's argument that the State's failure to insist the trial court also consider the merits of a then moot motion[1] is without legal support and is meritless. Further, the State's failure to object to every word spoken by defense counsel at the trial court level does not constitute a concession or agreement to those words. This is especially true when it has been clear from the beginning that this was a contested issue. If this were to become the legal standard, court hearings on simple issues would take weeks as counsel parsed out and argued over the meaning of each and every word spoken by opposing counsel. The issue of whether Agent Burney acted in concert with State agents during his investigation was not relevant to the motion of defense which the trial court heard - his motion to strike portions of the brief attributable to the federal agents. Simply because the State chose to stay on task and focus on the information relevant to the motion actually before the trial court does not mean the State waived any potential arguments on other issues.

Vance fails to cite any authority which supports his argument on this point. The authority to which Vance cites stands for the proposition that a party must object at the trial court level to the admission of evidence

[1] Vance's motions and potential future motions regarding the propriety of a federal agent doing a federal investigation located in another State who then sends materials to a local law enforcement agency became moot when the trial court found a discovery violation and excised all portions of the search warrant affidavit attributable to information from said federal agent.

or ruling on a motion. This was a contested motion. The State did not agree to defense's position. The State clearly has preserved the issues surrounding this motion and order for appeal. There is no support for the contention that the State may not cite to cases or refer this Court to relevant case law unless it also cited to those cases at the trial court level. Vance's argument that the State's failure to argue that defense's motion to suppress would not have been successful at the trial court level is not a waiver of its position and argument. Vance's claim fails.

III. VANCE'S ASSERTIONS THE STATE CANNOT RELY ON CERTAIN CASE LAW IS WHOLLY WITHOUT MERIT

Vance claims the State cannot now claim error of the trial court for failing to consider the factors outlined in *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998), *cert. denied*, 525 U.S. 1157, 119 S. Ct. 1065, 143 L.Ed.2d 69 (1999) because the State did not ask the trial court to review these factors at the trial court level. Am. Br. of Resp. p. 39. Again, Vance fails to cite to any legal authority which would support his contention that the State has waived any argument it has on this subject. Further, it is clear from the record that the State objected to the remedy effectuated by this trial court. It is also clear that the trial court had the appropriate authority before it and should have been aware of its legal duties in deciding this issue. Vance's brief on this matter specifically

referred the trial court to the *Hutchinson* case. CP 506. Vance has cited to no legal authority which prevents this Court from reviewing this issue on the merits. The State followed proper appellate procedure and assigned error to all findings of fact and conclusions of law in the trial court's order that it wished this Court review.

B. CONCLUSION

Vance's attempts to prevent this Court from considering the issues on the merits by arguing the State has not preserved *any* issues for appeal are wholly without any legal support. Vance cites to no cases which stand for the proposition that the procedure at the trial court level prevents appellate review by this Court. Further, Vance's reliance on case law that he purports stands for the proposition that all findings must have been objected or excepted to at the trial court level is misplaced. Case law shows findings are only verities on appeal if not properly designated as erroneous by the appellant in its opening brief. The State followed the proper appellate procedure here. All assignments of error presented by the State are properly before this Court.

Vance further centers his arguments around the issue of defense's inability to interview or depose two federal agents. However, that is not the issue the State raised in its appeal. The issues before this Court are

whether the State had a requirement, under the discovery rules, to provide interviews or pre-trial depositions of potential witnesses, whether the trial court improperly remedied this supposed discovery violation, and whether that remedy was an abuse of the trial court's discretion.

DATED this 5th day of March, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
RACHAEL R. PROBSTFELD,
WSBA #37878
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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