

NO. 62728-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JESSE MACIAS,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ISSUE PRESENTED</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| 1. PROCEDURAL FACTS | 1 |
| 2. SUBSTANTIVE FACTS | 2 |
| C. <u>ARGUMENT</u> | 5 |
| THE TRIAL COURT PROPERLY ENTERED FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO JUCR 7.11(D). | 5 |
| D. <u>CONCLUSION</u> | 8 |

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Miranda v. Arizona, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 4

Washington State:

State v. Bennett, 62 Wn. App. 702,
814 P.2d 1171 (1991), review denied,
18 Wn.2d 1017, 827 P.2d 1011 (1992)..... 6

State v. Cowgill, 67 Wn. App. 239,
834 P.2d 677 (1992)..... 7

State v. Head, 136 Wn.2d 619,
964 P.2d 1187 (1998)..... 7

State v. Hillman, 66 Wn. App. 770,
832 P.2d 1369, review denied,
120 Wn.2d 1011 (1992)..... 6

State v. McGary, 37 Wn. App. 856,
683 P.2d 1125, review denied,
102 Wn.2d 1024 (1984)..... 6

State v. Smith, 68 Wn. App. 201,
842 P.2d 494 (1992)..... 6, 7

State v. Taylor, 69 Wn. App. 474,
849 P.2d 692 (1993)..... 6

Rules and Regulations

Washington State:

JuCR 7.11 5

A. ISSUE PRESENTED

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is not an appearance of unfairness and the defense is not prejudiced. Here, the findings of fact and conclusions of law were entered prior to Macias filing his opening brief, but inadvertently filed by the clerk in only the co-respondent's court file. Has Macias failed to establish prejudice from this mere clerical error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Jesse Macias with one count of Possession of a Stolen Vehicle (Count I), one count of Unlawful Possession of a Firearm in the Second Degree (Count II), one count of Malicious Mischief in the Third Degree (Count III), and one count of Making or Having Vehicle Theft Tools (Count IV). CP 103. Following a bench trial before the Honorable LeRoy McCullough, the judge found Macias guilty of counts I, II, and III. CP 9. On both counts I and II Macias was required to serve six months community supervision, 30 days detention with credit for time served, and 24 hours of community service. CP 12-18.

The State drafted the findings of fact and conclusions of law and provided them to defense counsel in early January 2009, Supp. CP 38-39 (Declaration of DPA Stephen A. Herschkowitz at p. 2). Both parties ultimately signed the findings in early February. Id. The delay was due to a dispute over the content of the findings and the scheduled vacation of counsel. Id. The court entered the findings on February 24, 2009. Id. However, the signed findings were inadvertently filed under only co-respondent Gaona's cause number (08-8-04017-0, Supp CP 20-28) despite both Gaona's and Macias' names and cause numbers being listed on the face of the document. Id. The findings that were inadvertently filed in only Gaona's electronic court file have now also been filed in Macias' electronic court file. Id.; Supp CP 29-37 (findings of fact and conclusions of law).

2. SUBSTANTIVE FACTS.

On October 26, 2008, King County Sheriff's Deputy Jeff Hancock was in uniform and on duty in his fully marked police car. 2RP 22.¹ At approximately 2:30 a.m. he was driving northbound

¹ The verbatim report of proceedings contains a total of four volumes that will be referred to as follows: 1RP (11/17/08); 2RP (11/18/08); 3RP (11/21/08); and 4RP (11/24/08 - 11/25/08).

when he saw an older four-door car traveling eastbound on Southwest Roxbury Street in Seattle at what Deputy Hancock estimated to be 45 miles per hour in a 35-mile-per-hour zone. 2RP 23-24. After Deputy Hancock pulled behind the car, he witnessed the car drift into one lane, straddle it, and then change lanes without signaling the lane change. 2RP 24. Deputy Hancock activated the overhead emergency lights on his patrol car and the vehicle eventually stopped. 2RP 27.

As the car came to a stop, Deputy Hancock witnessed the front passenger door open. 2RP 28. Deputy Hancock interpreted this movement to mean that someone was getting ready to “bail out of the car.” 2RP 29. Deputy Hancock parked his patrol car behind the suspect vehicle and gave verbal commands for the passenger to remain inside the car. 2RP 32. The passenger complied and closed the door. 2RP 32.

When Deputy Hancock walked up to the passenger’s side of the car, the window was rolled down and Deputy Hancock recognized the driver, Jesse Macias, from prior contacts. 2RP 33-35. Deputy Hancock also noticed that there was no key in the ignition and that there appeared to be damage to the ignition. 2RP 33, 39. Deputy Hancock then asked Macias to turn the car off, and

Macias did so with a pair of pliers retrieved from his pants pocket.

2RP 39.

Deputy Hancock asked Macias and the other passengers several times if there were any weapons or narcotics inside the car.

2RP 41-43. Although Deputy Hancock received no verbal response, he believed there was a gun in the car based on Macias' avoidance of eye contact and the manner in which he was gripping the steering wheel. 2RP 43-44.

Deputy Hancock drew his gun and ordered all five passengers to show him their hands while he radioed for backup. 2RP 46-47, 73-74. Within five minutes of the call, four to five officers arrived on scene. Id. Once all five occupants of the suspect vehicle exited the car as directed by Deputy Hancock, the occupants were all handcuffed. Id. A subsequent search of the vehicle by King County Sheriff's Deputy Ross Curry revealed a gun underneath the front-passenger seat. 2RP 30, 45-46.

After Macias was handcuffed, but before being transported to the juvenile detention facility, Deputy Hancock borrowed a Miranda² rights card from another deputy and read Macias his

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

rights. 2RP 52-53. Macias then gave an oral statement indicating that he and Gaona stole the vehicle from somewhere along Aurora Avenue North in Seattle and that they both handled the firearm. 2RP 75.

C. ARGUMENT

THE TRIAL COURT PROPERLY ENTERED FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO JuCR 7.11(d).

Macias alleges that the trial court erred by failing to file written findings of fact and conclusions of law supporting his adjudication under JuCR 7.11, and therefore requests that this Court remand his case for entry of written findings and conclusions. However, on February 24, 2009, the trial court properly entered the required written findings of fact and conclusions of law, but inadvertently filed them in only the co-respondent's electronic court file. Supp. CP 38-39 (Declaration of DPA Stephen A. Herschkowitz at p.2). Macias filed his opening brief on May 28, 2009, more than three months after the findings were signed and entered.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is not an appearance of unfairness and the defendant is not prejudiced.

State v. Hillman, 66 Wn. App. 770, 773, 832 P.2d 1369, review denied, 120 Wn.2d 1011 (1992); State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125, review denied, 102 Wn.2d 1024 (1984).

The cases addressing this issue fall into two categories: (1) the "complete absence" of written findings and conclusions, and (2) the "mere delay" in entry of written findings and conclusions during the appellate process. State v. Taylor, 69 Wn. App. 474, 477, 849 P.2d 692 (1993) (citing State v. Bennett, 62 Wn. App. 702, 710-11, 814 P.2d 1171 (1991), review denied, 118 Wn.2d 1017, 827 P.2d 1011 (1992)). In the first category, an appellate court may reverse a conviction and dismiss based on a complete absence of findings and conclusions. State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992) (holding there is a "strong presumption" to dismiss where the required findings are missing).

In the delayed entry category, however, an appellate court will not reverse a disposition unless there is "a showing of prejudice or some form of tailoring of the findings to address the issues raised in the appellant's brief." Taylor, 69 Wn. App. at 477. This Court has explicitly refused to adopt a policy requiring the State to file findings and conclusions within 21 days of the notice of appeal, or else face reversal, because "[n]either the juvenile's interest in

prompt appellate review nor the public's interest in proper enforcement of criminal laws is served by such a policy." State v. Cowgill, 67 Wn. App. 239, 241-42, 834 P.2d 677 (1992).

Here, there is neither a "complete absence" nor "delay" of the findings. Rather, the trial court entered the findings on February 24, 2009. Unfortunately, due to a clerical error, Mr. Macias' findings were not scanned into his electronic court record (ECR). Additionally, that error has since been corrected and the relevant written findings have been filed into Macias' court file. Thus, Macias cannot establish unfairness or prejudice based on the earlier clerical error.

Macias bears the burden of proving that prejudice exists. State v. Head, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1998). The delayed entry of findings and conclusions because of a clerical error does not establish a valid claim of prejudice. Indeed, this Court has refused to infer prejudice from a mere delay in the entry of findings and conclusions. See Head, 136 Wn.2d at 625; cf State v. Smith, 68 Wn. App. at 208 (finding that prejudice existed when the State failed to file findings and conclusions, even after the appellant's opening brief pointed out the deficiency, and waited until oral argument to request remand for entry of findings and

conclusions). Contrary to what occurred in Smith, the State actually submitted its findings in a timely manner, indicating both Macias and Gaona and their respective cause numbers in the caption of the filed document. The clerical error regarding the filing of findings and conclusions has not impacted the resolution of Macias' appeal.

In light of all of the above, Macias cannot demonstrate an appearance of unfairness or prejudice. The trial court's findings of fact and conclusions of law are properly before this Court. Macias' claim of error should be denied.

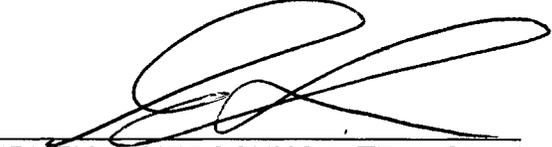
D. CONCLUSION

For the foregoing reasons, this Court should affirm Macias' convictions.

DATED this 22nd day of June, 2009.

Respectfully submitted,

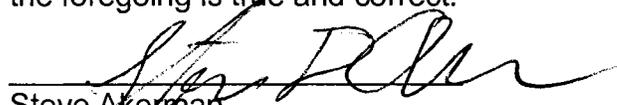
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric J. Nielsen, at Nielsen Broman Koch, the attorney for the appellant, at 1908 E. Madison Street, Seattle, Wa 98122, containing a copy of the Brief of Respondent, in STATE V. JESSE MACIAS., Cause No. 62728-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Steve Akerman
Done in Seattle, Washington

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