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NO. 71154-7-I

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

FILED
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

KONSTANTINE KISLOV,

Appellant.

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

The Honorable Deborra Garrett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court failed to enter written findings of fact and conclusions of law after the suppression hearing as required by CrR 3.5(c).

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. Must this case be remanded for entry of the required findings and conclusions?

C. STATEMENT OF THE CASE

The State charged appellant Konstantine Kislov with felony violation of a court order. CP 2-3. As part of its case the State sought to admit statements Kislov allegedly made to his community corrections officer before the alleged order violation, and also statements he allegedly made during the course of his arrest for the violation. Supp CP __(sub no. 38A, Prosecution's Motions in Limine, filed 10/07/13). Therefore, as required by CrR 3.5,[1] the trial court held a hearing to determine the admissibility of those

[1] CrR 3.5 provides:

> When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. . . ..

statements. RP 32-92.[2]

After taking testimony from Kislov's community corrections officer (Shannon Mills), one of the arresting officers (Joshua Scott) and Kislov, the court concluded most of the alleged statements by Kislov were admissible in the State's case-in-chief, and that others were admissible only if the defense opened the door. RP 88-92. The court also specifically directed the prosecutor to have "a written set of findings and conclusions on this hearing to me within 10 days of the close of this trial." RP 92. To date, no such written findings and conclusions have been filed.

A jury found Kislov guilty as charged and sentence was imposed. CP 21, 31-42. Kislov appeals. CP 22.

D. ARGUMENT

THE TRIAL COURT ERRED BY FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 3.5

The trial court held a CrR 3.5 hearing to determine the admissibility of statements Kislov made to various law enforcement officers. However, the court failed to enter written findings of fact or conclusions of law as required by CrR 3.5(c). This was error and this Court should remand for entry of written findings of fact and conclusions of law.

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[2] There are five volumes of consecutively paginated verbatim report of proceedings collectively reference herein as "RP."

CrR 3.5(c) provides;

> 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 therefor."

This rule plainly requires written findings of fact and conclusions of law. The trial court provided an oral ruling that Kislov's statements were admissible, but no written findings or conclusions were ever entered. The trial court's failure to enter written findings and conclusions violates CrR 3.5(c).

"It must be remembered that a trial judge's oral decision is no more than a verbal expression of his [or her] 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, 566-67, 383 P.2d 900 (1963). Moreover, an oral ruling "has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." Id. at 567.

"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).[3] This is so because the court rules promulgated by our supreme court "provide[] the basis for . . . needed consistency" and a "uniform approach." State v. Head, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). Indeed, "[a]n appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." Id. at 624. However, where a defendant cannot show actual prejudice from the absence of written findings and conclusions, the appropriate remedy is remand for entry of written findings of fact and conclusions of law. Id. at 624.

In this case, the trial court did not enter written findings or conclusions following the CrR 3.5 hearing and provided only an oral ruling. This court must therefore remand this matter to the trial court for entry of the findings and conclusions required by CrR 3.5(c).

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[3] Although Smith involved the suppression of evidence under CrR 3.6, the Smith court "agree[d] that the State's obligation is similar under both CrR 3.5 and CrR 3.6 and that cases applying CrR 3.5 can furnish appropriate guidance." Smith, 68 Wn. App. at 205. Thus, Smith's mandate of written findings under CrR 3.6 should apply with equal force in the CrR 3.5 context.

D. CONCLUSION

This court must remand for the entry of written findings of fact and conclusions of law as CrR 3.5(c) requires.

DATED this 11th day of June 2014.

Respectfully submitted,

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KONSTANTINE KISLOV,	)	
	)	
Appellant.	)	

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 11TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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[X] KONSTANTINE KISLOV
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SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF JUNE 2014.

x Patrick Mayovsky