

No. 39381-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL DRAPER

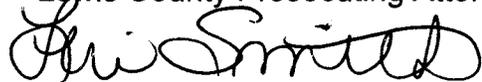
Appellant.

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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PM 2-1-10



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STATEMENT OF THE CASE

Without waiving the right to challenge any facts as stated by Appellant, and except as otherwise cited below, the Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. BECAUSE THE RECORD IS NOT ENTIRELY CLEAR AS TO THE BASIS FOR IMPOSING CONSECUTIVE SENTENCES IN THIS CASE, AND BECAUSE THERE IS NO FINDING LISTED IN THE JUDGMENT AND SENTENCE AS TO THE BASIS FOR AN EXCEPTIONAL SENTENCE, THIS MATTER SHOULD BE REMANDED FOR CLARIFICATION OF THE SENTENCE AND ENTRY OF FINDINGS.

Draper claims the trial court "did not articulate a proper basis for imposing an exceptional sentence." Brief of Appellant 3. The State agrees that the record is confusing regarding the reason for imposing consecutive sentences in this particular case.

Draper was sentenced on the same day for multiple current offenses in multiple cases. And, although the only aggravating sentencing factor discussed at the sentencing hearing on all of Draper's cases was the "free crimes, multiple current offenses, high offender score" factor set out in RCW 9.94A.535(2)(c)—it also appears there may have been some confusion regarding whether it was mandatory to impose the sentences consecutively in this

particular case. See, e.g., transcript of sentencing hearing, pages 5-7 where the prosecutor explains that the felony eluding and the bail jump charge "are two crimes which run consecutive. . . . the bail jump was as a result of him failing to appear for a hearing on the attempt to elude case and so those should run consecutive to one another." But later in the hearing, in response to a question from defense counsel as to clarification of the basis for imposing the consecutive sentences in this case, the prosecutor first responded, "[e]ssentially unpunished criminal history for the current crimes." 5/8/09 RP 22. Upon hearing this, the trial court echoed, "[i]t's unpunished criminal history for the current crime in the overall scheme of things. And it's not--they're consecutive to one another, but they're concurrent to the other time, so there's no--in essence there's no additional time that he's actually going to serve on the 223-8." 5/8/09 RP 22.

It is true that the record of the sentencing hearing shows that the only aggravated sentencing factor discussed at all was the factor set out in RCW 9.94A.535(2)(c). That factor is that a judge may impose an exceptional sentence (without a finding by the jury) where "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current

offenses going unpunished." Id. While Respondent can see that it was this factor that supported the exceptional sentence in this case, the fact of the matter is that the section of the judgment and sentence indicating that an exceptional sentence has been imposed is blank. CP 15.

Because the facts surrounding the imposition of consecutive sentences in this case are rather confusing, and there is no written finding in the judgment and sentence as to the basis for imposing an exceptional sentence, this matter should be remanded for clarification of the sentence, and for entry of findings if the intent was to impose consecutive sentences.

B. DRAPER CONCEDED GUILT ON THE FELONY ELUDE AND BAIL JUMP CHARGES AND THE COURT'S ORAL FINDINGS ADEQUATELY SUPPORT THE CONVICTIONS, SO ANY ERROR IN FAILING TO ENTER WRITTEN FINDINGS IS HARMLESS.

Draper next claims that the trial court erred in failing to enter written findings of fact following the bench trial. Brief of Appellant 8-10. The State concedes that written findings were not entered as to the basis for the guilty verdicts. However, this error should be deemed harmless for the reasons set out below.

CrR 6.1(d) requires entry of written findings of fact and conclusions of law articulating the facts and the law relied upon by

a court when acting as the trier of fact. But the failure to do so here should be found harmless. The Supreme Court has recognized that the failure to enter written findings and conclusions is subject to harmless error analysis and does not automatically require remand. State v. Banks, 149 Wn.2d 38, 43-44, 65 P.3d 1198 (2003). In Banks, the Supreme Court reviewed a trial court's failure to enter findings and conclusions on the knowledge element of the crime of unlawful possession of a firearm. Banks, 149 Wn.2d at 43. The court determined that this error was subject to the harmless error analysis recognized in Neder v. United States, 527 U.S. 1, 7 119 S.Ct. 1827 (1999). That test is whether "there is a reasonable probability that the outcome of the trial would have been different had the error not occurred.... A reasonable probability exists when confidence in the outcome of the trial is undermined." Banks, 149 Wn.2d at 44 (quoting State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

In other circumstances, this court has found that the failure to enter findings of fact is harmless. In State v. Fry, 15 Wn.App. 499, 550 P.2d 697 (1976), the defendant argued that he was denied due process due to the absence of any written findings of fact entered after a revocation hearing. This court denied the

defendant's claim based upon the *existence of a sufficient oral opinion and record in the case*. Fry, 15 Wn.App. at 501-02. This court quoted State v Myers, 86 Wn.2d 419, 429:

...the absence of specific written findings did not hinder appellant in making his appeal since the oral opinion provided a record sufficient for review... A remand for the purpose of entering formal written findings would serve no useful purpose...

Similarly, this court has held that the failure to enter written findings of fact and conclusions of law following a CrR 3.5 hearing is harmless if the oral opinion and the record are sufficiently comprehensive and clear to allow appellate review. State v. Miller, 92 Wn.App. 693, 703-04, 964 P.2d 1196 (1998), review denied, 137 Wn.2d 1023, 980 P.2d 1282 (1999).

In the present case, first of all, Draper conceded guilt at the close of the evidence as to the the felony eluding and bail jump charges. RP 106. Draper fails to acknowledge this critical fact in his argument on the lack of written findings after the bench trial. Brief of Appellant 8,9. Secondly, the record of the bench trial shows that the trial court entered specific, detailed oral findings to support both convictions. RP 109-111(eluding); RP 111-112(bail jump)(Draper was acquitted on the drug charge). In essence, the evidence presented and the trial court's comprehensive oral ruling

is essentially a detailed verbal finding of fact and conclusion of law. Id. In view of those detailed oral findings, remanding this case to memorializing those findings in writing would add nothing to the efficacy of Mr. Draper's appeal, or this court's ability to review the trial court's verdict. Where the record is sufficient to facilitate review on issues raised on appeal, a court will address those issues in the absence of written findings and conclusions. State v. Otis, 151 Wn.App. 572, 577, 213 P.3d 613 (2009); State v. Mitchell, 149 Wn.App. 716, 721 n. 1, 205 P.3d 920 (2009). Because of the trial court's detailed oral findings, this record is "sufficient to facilitate review," and Draper has not shown that the absence of written findings has compromised this court's ability to provide meaningful appellate review. Id. Nor does Draper explain how remand for entry of findings on remand would be anything more than a formality.

Considering the adequacy of the trial court's oral ruling and the record, this court should find the trial court's failure to enter written findings harmless. In the alternative, this court should remand for entry of findings. The Supreme Court in State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187, 1190 (1998), held that remand is an option when a trial court's oral findings are sufficiently

comprehensive and complete to make drafting written findings a simple task. That is true here. Accordingly, remand for entry of written findings and conclusions is the appropriate remedy if this court finds that the failure to enter findings at the conclusion of the bench trial is not harmless error.

CONCLUSION

If this court agrees that the record is not clear as to the imposition of, and the basis for, the consecutive sentences, then this case should be remanded for clarification of the sentence and entry of findings, if needed. Because Draper conceded guilt on the two convictions herein, and because the trial court's detailed oral findings adequately support the convictions, the failure to enter written findings after the bench trial should be found harmless. In the alternative, this court should remand with instructions to enter written findings as to the verdicts of guilty.

RESPECTFULLY SUBMITTED THIS 30th day of January,
2010.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:

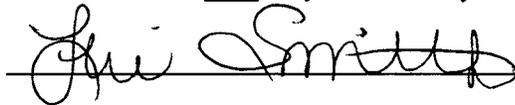
LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a copy of this response brief to which this declaration is affixed was served upon the Appellant by placing said document in the United States mail, postage prepaid, addressed to Appellant's attorney as follows:

Casey Grannis
Neilsen Broman & Koch
1908 E. Madison St.
Seattle, WA 98122

DATED THIS 30 day of January, 2010.

A handwritten signature in cursive script, appearing to read "Julie Smith", written over a horizontal line.