

NO. 40369-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

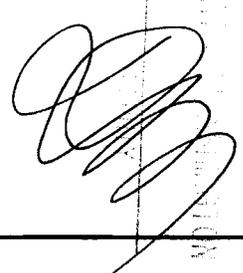
Respondent,

v.

TORRIE LYONS,

Appellant.

FILED
COURT REPORTERS
10 JUN 29 PM 2:41
BY
STATE OF WASHINGTON



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

BRIEF OF APPELLANT

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A. INTRODUCTION.

Two days prior to a scheduled pretrial hearing on a second degree assault charge, Torrie Lyons's father died in Yuma, Arizona. Because she was tending to his affairs, she missed the hearing. When she returned to court seven days later the court quashed the warrant. Twenty days later she was again in Yuma involved in a probate action of her father's estate and missed a second hearing in Lewis County. Again, upon her return to Washington the court quashed the warrant and allowed her to remain out of custody. The State amended the information to included a charge of bail jumping.

On the eve of trial, the State filed a second amended information dropping the assault charge and adding a second count of bail jumping. In fact, prior to trial the State offered to dismiss the assault in exchange for a guilty plea to bail jumping. The trial court concluded that Ms. Lyons's father's death was not an "unavoidable circumstance" and convicted her as charged for failing to appear for a case which the State believed lacked the merit to prosecute.

B. ASSIGNMENTS OF ERROR.

1. The trial court deprived Ms. Lyons of due process by convicting her in the absence of sufficient evidence.

2. The trial court erred in failing to enter findings of fact and conclusions of law as required by CrR 6.1.

3. The court's order that Ms. Lyons pay the costs of incarceration violates RCW 9.4A.760.

4. Finding 2.5 in the Judgment and Sentence is unsupported by substantial evidence in the record.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Due process includes the right to have the State prove each element of a crime. RCW 9A.76.170 establishes that it is a defense to bail jumping that the person's failure to appear at a subsequent hearing was the result of uncontrollable circumstances. Ms. Lyons established her failures to appear at two hearings were due to her father's death, and that she appeared in court shortly after. Was there sufficient evidence to convict Ms. Lyons of bail jumping?

2. CrR 6.1 requires a trial court file written findings of fact and conclusions of law following a bench trial. Does the trial court's failure to file written findings as required by the rule require reversal of Ms. Lyons's convictions?

3. The Due Process and Equal Protection Clauses of the Fourteenth Amendment prevent the imposition of costs on a

defendant following a criminal trial where the defendant lacks the present and/or future ability to pay those costs. Despite evidence that she was presently unemployed, indigent, involved in bankruptcy proceedings, and lacked any assets, the trial court found Ms. Lyons had both the present and future ability to pay more than \$3100 in court costs. Does the imposition of court costs deprive Ms. Lyons her rights to equal protection and due process?

4. RCW 9.94A.760(2) limits the imposition of the costs of confinement in a county jail to the actual daily cost, not to exceed \$100 per day. Ms. Lyons has served four days in the Lewis County Jail in this matter. Does the court's imposition of a \$1000 jail fee violate the plain terms of RCW 9.94A.760(2)?

5. The trial court imposed costs for a host of items such as a court-appointed counsel and a sheriff's fee, The State did not present any evidence from which the court could find any of these costs, or amounts, were actually incurred. In the absence of proof of the actual costs incurred, did the trial court err in imposing these costs?

D. STATEMENT OF THE CASE.

Ms. Lyons was initially charged with second degree assault with a firearm allegation. CP 1-3. The weakness of the State's

evidence in that case caused the State to dismiss the charge. CP 11-13; 1/28/10 RP 2-3.

Before the State dismissed the charge, however, and two days prior to a scheduled court hearing, Ms. Lyons's father passed away in Yuma, Arizona. Ex 13; 2/4/10 RP 39. In response to his death and to assist in the settling of her father's affairs, Ms. Lyons travelled first to Port Angeles and then to Yuma. 2/4/10 RP 40. In doing so, Ms. Lyons was unable to appear at an October 1, 2010, pretrial hearing regarding the assault charge prior to its dismissal for lack of prosecutorial merit. 2/4/10 RP 39. On October 8, 2010, Ms. Lyons appeared in court and the court quashed the previously issued warrant. 2/4/10 RP 18.

Several weeks later, Ms. Lyons was required to return to Yuma to file a demand for notice in the probate action regarding her father's estate. Ex. 14; 10/4/10 RP43-44. In doing so, Ms. Lyons missed the rescheduled hearing in the assault case. 10/4/10 RP 18.

In the period preceding Ms. Lyons's trial in this case, the State offered to dismiss the assault charge in exchange for a guilty plea to a single bail jumping charge. 1/29/10 RP 16. When Ms. Lyons refused the offer, the State filed the amended information,

dropping the assault charge and charging two counts of bail jumping. CP 11-13.

Ms. Lyons waived her right to a jury trial. 2/3/10 RP 2-4.

The trial court, in an oral ruling, found her guilty as charged, 2/4/10 RP 63, but did not enter written findings of fact.

E. ARGUMENT.

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MS. LYONS COMMITTED THE OFFENSE OF BAIL JUMPING.

a. The State was required to prove the elements of the offense beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State did not prove Ms. Lyons committed bail

jumping. RCW 9A.76.170 provides:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

Ms. Lyons met her burden of establishing the statutory defense, and consequentially there was insufficient evidence to support a conviction of bail jumping.

RCW 9A.76.010(4) provides a non exclusive definition of a “uncontrollable circumstances” as

an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

Plainly the death of an immediate family member fits within this definition of an uncontrollable circumstance, as the death is a natural event over which the defendant had no control.

Nonetheless, the trial court concluded “a death in the family under the circumstances as they are described here does not rise to the uncontrollable circumstance that is anticipated in this defense.”

2/4/10 RP 64. The trial court’s statement reflects its misunderstanding that only the examples set forth in the statute can rise to the level of an uncontrollable circumstance. But, by use of the phrase “such as,” it is clear RCW 9A.76.010(4) is not an exclusive list. Instead, the statute describes acts of nature or another person over which the defendant had no control. The death of an immediate family member meets that definition.

The trial court next concluded Ms. Lyons did not reappear in court as soon as the circumstance ceased to exist. But the record shows Ms. Lyons quashed the warrant 7 days after the hearing she missed. The record establishes she had to travel first to Port Angeles and then to Yuma, Arizona in response to her father’s death. The record establishes the relevant circumstance, the need to settle her father’s affairs, continued beyond even that date, as she had to again return to Yuma to appear in the probate action.

Thus, she appeared even before the relevant circumstance ceased to exist.

Ms. Lyons's failures to appear at two initial hearings in a case which the State believed lacked merit to prosecute, were necessitated by unavoidable circumstances. Ms. Lyons established the statutory defense and could not be convicted of bail jumping.

c. The Court must dismiss Ms. Lyons's convictions.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because she established the statutory defense, the State failed to prove Ms. Lyons was guilty of bail jumping and this Court must reverse her convictions.

2. THE LACK OF WRITTEN FINDINGS OF FACT PRECLUDE EFFECTIVE REVIEW OF THE PRE-TRIAL SUPPRESSION HEARINGS.

a. The trial court must enter written findings setting forth the facts necessary to material issues and ultimate conclusions. Court rules as well as due process principles require the trial court to explain the factual basis of its decision. State v. Dahl, 139 Wn.2d 678, 689, 990 P.2d 396 (1999); CrR 6.1. It is the trial court's role to resolve factual disputes, make credibility determinations, and issue findings of fact and conclusions of law. State v. Hill, 123 Wn.2d 641, 646-47, 870 P.2d 313 (1994); State v. Barnes, 96 Wn.App. 217, 222, 978 P.2d 1131 (1999). The purpose of the court's findings is to resolve material factual issues so the appellate court has a clear record of the basis for the trial court's decision on review. Dahl, 139 Wn.2d at 689; State v. Smith, 68 Wn.App. 201, 208, 842 P.2d 494 (1992); Bowman v. Webster, 42 Wn.2d 129, 134, 253 P.2d 934 (1953). When the trial court fails to fully articulate the grounds for its determinations, its decision is not amenable to judicial review. Dahl, 139 Wn.2d at 689; Bowman, 42 Wn.2d at 135.

CrR 6.1(d) provides,

In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

(Emphasis added.).

The written findings are considered the trial court's definitive statement on the issues before it, although the appellate court may refer to an oral ruling when it clarifies the basis of the trial court's decision. Dahl, 139 Wn.2d at 689; Bowman, 42 Wn.2d at 135. When facts are not included in the written findings, the reviewing court presumes the omission means missing facts were not adequately proven. State v. Armenta, 134 Wn.2d 1, 14, 904 P.2d 754 (1997).

The purpose of written findings is not merely to assist, but to enable an appellate court's review of questions presented on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); State v. Alvarez, 128 Wn.2d 1, 16, 904 P.2d 754 (1995). A trial court's oral ruling is "no more than [an] oral expression[] of the court's informal opinion at the time rendered." Id. The oral opinion has no binding effect unless expressly incorporated into a final written judgment. Id. at 622. As the Supreme Court noted in Head,

An appellate court should not have to comb an oral ruling to determine whether the 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.

The failure of the prosecution to submit and the court to enter written findings of fact and conclusions of law is “a serious lapse in appellate procedure.” State v. Naranjo, 83 Wn.App. 300, 302, 921 P.2d 588 (1996). Additionally, it is “inherently prejudicial” for this Court to sanction “the practice of allowing findings to be entered on remand, after the appellant has framed the issues in his or her brief.” Id.; see State v. Witherspoon, 60 Wn.App. 569, 572, 805 P.2d 248 (1991).

b. The failure to enter written findings requires reversal. The trial court neglected to formalize its findings and conclusions into writing as required. Thus, Ms. Lyons is unable to challenge the court’s findings with specificity and must speculate as to the court’s reasoning and guess at the facts relied upon by the court.

While the lack of written findings may at times be cured by remand, or by reference to oral rulings, in the case at bar no findings can cure the lack of evidence presented by the

prosecution. Head, 136 Wn.2d at 20-21; State v. Souza, 60 Wn.App. 534, 541, 805 P.2d 237 (1991). Remand is only an appropriate remedy where there is sufficient evidence to support the missing findings. Souza, 60 Wn.App. at 541. As this Court said in Smith,

Lack of written findings of fact on a material issue on which the State bears the burden simply cannot be harmless unless the oral opinion is so clear and comprehensive that written findings would be a mere formality. The trial court's opinion falls far short of that standard. Accordingly, the conviction cannot stand on the present record.

(Footnotes omitted.) Smith, 68 Wn.App. at 208. The oral findings here are not "clear and comprehensive" and thus, remand for findings is not appropriate. Instead the trial court's oral ruling is somewhat conclusory. Thus, the conviction should be reversed. Smith, 68 Wn.App. at 210.

3. THE COURT'S FINDINGS IN THE JUDGMENT AND SENTENCE SUPPORTING THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829

P.2d 166 (1992). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to her poverty

a. There is insufficient evidence to support the trial court's finding that Ms. Lyons had the present or future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay; “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution “direct[a court] to consider ability to pay.” Id. at 915-16.

Here, the court made an express and formal finding that Ms. Lyon had the ability to pay. CP 21 (Finding 2.5). But, whether the finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). Here, there is no evidence in the record to support a finding that Ms. Lyons had the ability to pay the \$3163 in costs imposed.

The court did not inquire into Ms. Lyons's present financial ability. In fact, the only thing before the court that touched upon her present ability was Ms. Lyons's declaration in support of a motion for an order of indigency that provided she has equity in a car of \$1,800, is in foreclosure and bankruptcy proceedings, is unemployed, and has monthly living expenses of \$450. Supp. CP , Sub 73 (Motion and Declaration for Order of Indigency); 2/17/10 RP 9. Plainly that information does not establish Ms. Lyons's ability to pay the costs imposed, and in fact establishes she lacks the ability to pay the costs.

The trial court's finding that Ms. Lyons had the ability to pay legal financial obligations is unsupported by the record and should be stricken. Moreover, because the record does not support a finding that Ms. Lyons has the present or future ability to pay costs, legal financial obligations may not be imposed. Fuller, 417 U.S. at 47-48; Curry, 118 Wn.2d at 915-16.

b. The record does not support the costs imposed.
Even if this Court finds there is sufficient evidence to support the trial court's finding that Ms. Lyons has the ability to pay the costs imposed, there is no evidence to support the amounts imposed.

The judgment and sentence requires Ms. Lyons to pay \$1,000 for the "Lewis County Jail Fee Reimbursement" and cites to RCW 9.94A.760(2). That statute provides

If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration the court may require the offender to pay the actual cost of incarceration per day of incarceration, if incarcerated in a county jail. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration.

RCW 9.94A.760(2). The judgment and sentence indicates Ms. Lyons spent four days in jail prior to sentencing. CP 22. Following sentencing, the court permitted Ms. Lyons to either secure bail or report to begin her term of confinement on March 12, 2010. Supp. CP __, Sub No. 71 (Order Setting Conditions of Release). Ms. Lyons filed the required bond and thus has not served an additional term of confinement. Supp. CP __, Sub No. 82 (Bail Bond)

There was no evidence before the court to establish the actual cost of incarceration for either the four days served or the time remaining to be served. Certainly the court could not impose \$1000 in costs for the four days served as that exceeds the \$100 per day limit in RCW 9.94A.760(2). In the absence of any

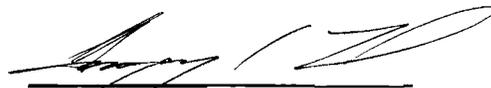
evidence to establish the actual cost of incarceration the court must strike the jail fee in it entirety.

Similarly there is no evidence in the record that the actual cost of appointed counsel in this case was \$1,200. The same is true of the \$163 "Sheriff service fee". Each of these amounts were preprinted on the Judgment and Sentence as if they are imposed as a matter of routine rather than based on the amounts actually incurred. See CP 23. Because there is no evidence in the record to establish the actual costs, the trial court erred in imposing the jail fee, the cost of counsel, the filing fee, and the sheriff service fee.

F. CONCLUSION.

For the reasons above, this Court must reverse Ms. Lyon's convictions of bail jumping and strike the costs imposed in the judgment.

Respectfully submitted this 28th day of July 2010.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 40369-2-II
v.)	
)	
TORRIE LYONS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JULY, 2010.

X _____ *grnd*


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