

NO. 42546-7-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

NICK TAYLOR ARQUETTE,

Appellant.

BRIEF OF RESPONDENT

**MIKE NGUYEN
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Deputy Prosecutor
for Respondent**

**Hall of Justice
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I. ISSUES

1. SHOULD A CASE BE REMANDED BACK TO THE TRIAL COURT FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 6.1(d) WHEN THE TRIAL COURT COMPLETELY FAILED TO ENTER ITS FINDINGS AND CONCLUSIONS FOLLOWING A BENCH TRIAL?
2. SHOULD THE ISSUE OF SUFFICIENCY OF THE EVIDENCE BE ADDRESSED ON APPEAL WHEN THE TRIAL COURT DID NOT ENTER ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A BENCH TRIAL?
3. SHOULD THE ISSUE OF DOUBLE JEOPARDY BE ADDRESSED ON APPEAL WHEN THE TRIAL COURT DID NOT ENTER ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A BENCH TRIAL?

II. SHORT ANSWERS

1. YES. WHEN THE TRIAL COURT COMPLETELY FAILED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A BENCH TRIAL, THE APPELLATE COURT SHOULD REMAND THE CASE BACK TO THE TRIAL COURT FOR ENTRY OF ITS FINDINGS AND CONCLUSIONS AS REQUIRED BY CrR 6.1(d).
2. NO. THE ISSUE OF SUFFICIENCY OF THE EVIDENCE INVOLVES A FACTUAL ISSUE AND IT SHOULD NOT BE ADDRESSED ON APPEAL UNTIL THE TRIAL COURT ENTERS ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH REGARDS FOLLOWING A BENCH TRIAL.
3. YES. THE ISSUE OF DOUBLE JEOPARDY INVOLVES A LEGAL ISSUE AND CAN BE REVIEWED DE NOVO ON APPEAL WITHOUT THE TRIAL COURT ENTERING ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A BENCH TRIAL.

III. FACTS

In March 2009, Gary McKee bought a 1970 Datsun pickup from an acquaintance named Robert Tribble. CP 52-55. When Mr. Tribble failed to deliver the truck, Gary McKee looked for Mr. Tribble at his residence on 25th Avenue. CP 55-56, 140, 143, and 155. Gary McKee went to Mr. Tribble's residence several times and met his roommate, the appellant, on two or three occasions. Gary McKee did not know the appellant and had several conversations with the appellant about the pickup. CP 37-40 and 42. Gary McKee saw the pickup at the appellant's residence every time he went there, but never took it upon himself to take the pickup. CP 80.

Through the course of his conversations with the appellant, Gary McKee informed the appellant that he had bought the pickup from Mr. Tribble. The appellant informed Gary McKee that he was the owner of the pickup and was willing to give Gary McKee the title to the pickup because Gary McKee paid for the pickup. In exchange for the title, the appellant required that Gary McKee bring Mr. Tribble to him because the appellant wanted to tell Mr. Tribble that he was no longer allowed to reside at their residence. The appellant did not require Gary McKee pay for the pickup and indicated that he would deal with Mr. Tribble about the

pickup. The contact between Gary McKee and the appellant was cordial in nature. CP 57-59 and 76-77.

After a day or two, Gary McKee brought Mr. Tribble to the appellant. The appellant told Mr. Tribble that he was no longer allowed at their residence and proceeded to retrieve, sign, and give the title to Gary McKee. CP 60. Gary McKee obtained the title to the pickup without incident. CP 61-621. The title was for a 1970 Datsun pickup, listed the appellant as the owner, and signed by the appellant releasing all his interests in the pickup. CP 50, 65-66, 78, 108-110, and 142-143.

A couple of days later, Gary McKee returned to the appellant's home to retrieve the pickup. The pickup was not in running condition and Gary McKee brought Doyle Ash to tow the pickup. The pickup was parked in the driveway behind the appellant's other truck. The appellant moved his other truck and allowed Mr. Ash to tow the pickup. Gary McKee retrieved the pickup without incident. CP 62-64, 72, 77-78, and 85-86. The pickup was towed to Larry McKee's residence. CP 67 and 87. Gary McKee possessed the pickup since towing it from the appellant's residence. CP 66 and 80-81.

On March 27, 2009, Officer Alan Buchholz of the Longview Police Department contacted the appellant about his stolen vehicle report. CP 96-100. The appellant reported that his 1970 Datsun pickup was

stolen indicated that Gary was the likely suspect, and signed the Longview Police Department Incident Report. CP 13-14 and 100-107. Officer Buchholz had no other contact with the appellant about the pickup and had Officer Charles Meadows of the Longview Police Department assist him with the investigation. CP 111-112 and 130-131.

On March 29, 2009, Officer Meadows responded to the appellant's call indicating that the pickup was located in the 200 block of Cypress Street. CP 131-132. Officer Meadows located the pickup in a carport for the 269 Cypress Street complex. The pickup was unoccupied, was not covered by a tarp, had its original plates, and was clearly visible from the alleyway. CP 132-136 and 140. The manner in which the pickup was found was not indicative of it being stolen because the pickup had its original plates, was not concealed, was parked in a carport of the complex where the alleged suspect might be located, and was easily identified and located within the alleyway. CP 136 and 140. Officer Meadows informed the appellant that the pickup had been located and asked the appellant to retrieve the pickup. The appellant asked Officer Meadows to leave the pickup unsecured in the carport. CP 137-138.

Shortly after leaving the pickup, Officer Meadows received a call from Larry McKee asking him why he was at his residence looking at the pickup. CP 139-140. Officer Meadows proceeded to contact Larry

McKee at his residence at 269 Cypress Street. CP 140. Larry McKee was upset by the appellant's vehicle theft allegation and showed Officer Meadows the original signed title to the pickup. CP 141-142. Officer Meadows made a copy of the title and noticed a signature that purported to be the appellant's signature releasing the appellant's ownership of the pickup. CP 142-143.

On April 18, 2009, Officer Meadows contacted the appellant at his residence in Cowlitz County, Washington State, about his vehicle theft complaint. CP 144 and 155. The appellant wrote and signed a statement under penalty of perjury stating, "That a person, Gary, came by two or three times. One of the times, I found out why he was coming by. He said that he bought a truck off Rob, and then I told him it was not Rob's to sell, it was my truck. Then he said he had already paid for it, and, in parentheses he says a hundred and forty dollars, and he was going to take the truck. Then I told him if you take the truck, I will report the truck stolen. Then, on Thursday night, after I got off work and came home, he was here to get another truck that was his. On Friday evening when I came home from work my truck was gone, and I filed a police report on my truck." CP 14, 149-151, 155, and 169.

Subsequently, Officer Meadows submitted the appellant's signed Longview Police Department Incident Report to Officer Buchholz on

March 27, 2009, the appellant's signed written statement to Officer Meadows on April 18th, 2009, and the appellant's signed pickup title to the crime laboratory for analysis. CP 13-16, 100-107, 49-151, 153-155, and 169. The crime laboratory determined and the appellant subsequently admitted that he had signed the title to the pickup. CP 9, 13, and 169-170.

On October 7, 2009, the appellant was charged with two counts of perjury in the second degree. CP 169-170. The first count was for the appellant's signed Longview Police Department Incident Report to Officer Buchholz on March 27, 2009, CP 13-14 and 100-107, and the second count was for the appellant's signed written statement under penalty of perjury to Officer Meadows on April 18, 2009. CP 14, 149-151, 155, and 169. The trial court dismissed the first count and the second count was tried to a jury in the Cowlitz County Superior Court on May 5, 2010.

At the jury trial, the appellant testified that Gary McKee came to his residence on a number of occasions looking for Robert Tribble concerning the appellant's 1970 Datsun pickup. The appellant told Mr. McKee that Mr. Tribble was not the owner of the pickup and did not have a right to sell the pickup. The appellant informed Mr. McKee that he was the owner of the pickup and that the pickup was not for sale. CP 20-23. The appellant neither sold the pickup nor gave the title of the pickup to Mr. McKee. CP 23 and 25. On or about March 27, 2009, the appellant

got up for work, discovered the pickup was missing, and reported the pickup being stolen. CP 12-14, 24-26, and 30. The appellant testified that he had signed the title to the pickup and released all interest in the pickup on March 11, 2009, "because there was a gentleman over in Kelso [the appellant] was talkin' to, and [the gentleman] was interested in it, and [the appellant] thought it was a potential sell." CP 16.

The jury found the appellant guilty of perjury in the second degree as charged in count two. The appellant appealed his conviction and this court in an unpublished opinion, State v. Arquette, No. 40776-1-II, 162 Wash.App. 1025 (2011), affirmed the appellant's perjury in the second degree conviction.

On December 10, 2010, the State filed an Information, Cowlitz County Superior Court Cause No. 10-1-01249-1, charging the appellant with one count of perjury in the first degree. The Information alleges that the appellant falsely testified to (1) the appellant not selling his vehicle, and/or (2) the appellant having a replacement title to his vehicle, and/or (3) the appellant's vehicle being stolen at his jury trial in State v. Arquette, 162 Wash.App. 1025 (2011), on May 5, 2010. CP 1-2. Contrary to the appellant's claim in his brief on page 12, the appellant was not previously charged with perjury in the first degree in State v. Arquette, 162 Wash.App. 1025 (2011).

The appellant opted for a bench trial in Cowlitz County Superior Court Cause No. 10-1-01249-1. On August 11, 2011, the Honorable Stephen Warning presided over the appellant's bench trial. 8/11 RP 10. Judge Warning watched videos of all the witnesses' testimonies in State v. Arquette, 162 Wash.App. 1025 (2011), and had transcripts of all their testimonies. Id. The State's evidence consisted of the signed truck title, Gary McKee's possession of the title, and video testimonies and transcripts of the appellant, Gary McKee, Doyle Ash, Officer Charles Meadows, and Officer Alan Buchholz. 8/11 RP 10 and CP 8. The appellant's evidence consisted of video testimonies and transcripts of Christopher Hawkins and Greg Rupert. CP 8. The evidence was stipulated by both parties and was not in dispute. 8/11 RP 11-13 and CP 7-10.

The appellant argued that he was not guilty of perjury in the first degree because there was insufficient evidence for the State to meet its higher burden of proof in perjury cases. 8/11 RP 15-21. "In order to convict the [appellant] of the crime of perjury, there must be either positive testimony of a least two credible witnesses that directly contradict the [appellant's] statement under oath; or, one direct witness, along with independent or direct or circumstantial evidence supporting circumstances

that clearly overcome the oath of the [appellant] and a legal presumption of the [appellant's] innocence.” 8/11 RP 16.

Judge Warning rejected the appellant's insufficiency of the evidence argument and orally found the appellant guilty of perjury in the first degree in light of the higher standard needed to convict the appellant of perjury. 8/11 RP 22-27. However, the trial court did not enter written findings of fact and conclusions of law to reiterate its oral rulings. 8/11 RP 22-38.

Judge Warning orally found that “what appears to be agreed is how this circumstance started. A friend, or obviously former friend of Mr. Arquette's, sold a vehicle that didn't belong to him and pocketed the money, and that was kind of the genesis of this whole thing.” 8/11 RP 24. Furthermore, Judge Warning orally found that it was “clear, without question, is Mr. Arquette signed a title releasing interest in the vehicle, and never provided any kind of a real credible reason for that conduct.” 8/11 RP 23. Judge Warning also orally found that “what is clear is that Mr. Ash went with Mr. McKee to where this truck was located, and somebody there moved another truck to give them access to this one and let them haul it away,” 8/11 RP 24, and that “the title and the truck both ended up in the hands of Mr. McKee.” *Id.* Judge Warning indicated “that is [his] read on the facts that are important here.” 8/11 RP 25.

In finding the appellant guilty of perjury in the first degree, Judge Warning orally indicated that “the issue is that of the corroboration, the extra burden of proof, if you will, that’s required in a perjury case, and whether or not that is present.” 8/11 RP 26. Judge Warning found there was independent or direct or circumstantial evidence supporting circumstances that clearly overcame the appellant’s oath. In particular, Judge Warning noted “that generally surrounds the issue of the title, and I think Mr. Arquette’s subsequent conduct. When contacted by Officer Buchholz, he doesn’t identify witnesses, who he later brings here to court and said the officer was too busy, which I - - Officer Buchholz denied, and I frankly can’t buy. [Appellant] indicated that the title was stolen in a prior, unreported burglary and there was some confusion about just when that burglary was or wasn’t reported, but it’s pretty clear that the title was not stolen in a prior unreported burglary, and his conduct [inaudible] with Officer Meadows when he tells [appellant] he’s located the truck, oh just leave it alone, leave it where it is, and then doesn’t come in to follow up with Officer Meadows when requested.” 8/11 RP 26. At no time did Judge Warning reference or find any facts articulated by appellant or appellant’s witnesses. 8/11 RP 22-27.

On August 17, 2011, Judge Warning imposed an exceptional sentence downward and sentenced appellant to zero days in jail. 8/11 RP

37. The appellant's standard range sentence for perjury in the first degree is twelve to fourteen months in prison. 8/11 RP 28. Appellant now appeals Judge Warning's finding that he was guilty of perjury in the first degree.

IV. ARGUMENTS

1. **WHEN THE TRIAL COURT COMPLETELY FAILED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A BENCH TRIAL, THE APPELLATE COURT SHOULD REMAND THE CASE BACK TO THE TRIAL COURT FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 6.1(d).**

Pursuant to CrR 6.1(d), the trial court is required to enter findings of fact and conclusions of law following a bench trial. The purpose of this requirement is to enable review of the questions raised on appeal. State v. Head, 136 Wash.2d 619, 621-622 (1998). When the trial court completely fails to enter findings and conclusions after a bench trial, the only remedy is remand for entry of the same, as required by CrR 6.1(d). Id. at 624.

The State concedes that there are no written findings of fact and conclusions of law entered with regards to appellant's bench trial. Therefore, appellant's case should be remanded back to the trial court for entry of findings of fact and conclusions of law as required by CrR 6.1(d).

2. THE ISSUE WITH REGARDS TO SUFFICIENCY OF THE EVIDENCE INVOLVES FACTUAL ISSUES THAT CANNOT BE ADDRESSED ON APPEAL UNTIL THE TRIAL COURT ENTERS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

“Because written findings and conclusions facilitate appellate review, reviewing courts will generally refuse to address issues raised on appeal in the absence of such findings and conclusions. See Head, 136 Wash.2d at 624, 964 P.2d 1187. But where the record is sufficient to facilitate review, we may decide issues raised on appeal in the absence of written findings and conclusions” State v. Otis, 151 Wash.App. 572, 577 (2009).

With regards to the second issue of sufficiency of the evidence, appellate review should be postponed until the case is remanded back to the trial court and the trial court enters its written findings of fact and conclusions of law. Until the trial court enters its findings of fact, the second issue of sufficiency of the evidence should not be addressed on appeal as it involves factual issues.

3. THE APPELLANT’S PERJURY IN THE FIRST DEGREE CONVICTION IN HIS SECOND CASE DOES NOT VIOLATE HIS DOUBLE JEOPARDY RIGHT.

With regards to the third issue regarding double jeopardy, the record is sufficient to facilitate appellate review because the application of

double jeopardy principles is a question of law and is reviewed de novo. State v. McPhee, 156 Wash.App. 44, 56 (2010). “For a defendant’s double jeopardy right to be violated, three elements must be presented: (1) jeopardy must have previously attached, (2) jeopardy must have previously terminated, and (3) the defendant is again being put in jeopardy for the same offense.” Id.

Two offenses are not “the same” for double jeopardy purposes if each includes an element not included in the other. State v. Graham, 153 Wn.2d 400, 404 (2005). The perjury in the second degree charge in State v. Arquette, No. 40776-1-II, 162 Wash.App. 1025 (2011), is not the same offense as the perjury in the first degree charge in Cowlitz County Superior Court Cause No. 10-1-01249-1.

In State v. Arquette, No. 40776-1-II, 162 Wash.App. 1025 (2011), the appellant was charged with one count of perjury in the second degree pursuant to RCW 9A.72.030(1). RCW 9A.72.030(1) states “a person is guilty of perjury in the second degree if, in an examination under oath under the terms of a contract of insurance, or with intent to mislead a public servant in the performance of his or her duty, he or she makes a materially false statement, which he or she knows to be false under an oath required or authorized by law.”

The facts underlining the perjury in the second degree charge revolve around the appellant falsely reporting his vehicle being stolen to the Longview Police Department. On March 27, 2009, appellant reported his truck being stolen to the Longview Police Department. Officer Meadows investigated the appellant's vehicle theft report and during the course of his investigation, the appellant signed a false written statement under penalty of perjury to Officer Meadows on April 18, 2009. CP 14, 149-151, 155, and 169.

In Cowlitz County Superior Court Cause No. 10-1-01249-1, the appellant was charged with one count of perjury in the first degree pursuant to RCW 9A.72.020(1). The perjury charge in the later case not only involves a different crime than the first case, but it also it involves a different factual basis. CP 1 and 7-200. RCW 9A.72.020(1) states "a person is guilty of perjury in the first degree if in any official proceedings he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law." The facts underlining the perjury in the first degree charge in the later case revolve around the appellant falsely testifying, under oath, to his vehicle being stolen during his jury trial in the first case on May 5, 2010. CP 1-2.

While the two different perjury charges in the two cases involve the same false statement of the appellant's vehicle being stolen, the two

perjury charges do not violate double jeopardy as they involve different crimes with different legal elements and factual basis. The first case dealt with events on April 18, 2009, and the appellant's false written statement to Office Meadows during Officer Meadow's investigation of the appellant's stolen vehicle report. The second case dealt with events on May 5, 2010, and the appellant's false oral testimonies during his jury trial. Therefore, the appellant's perjury in the first degree conviction in Cowlitz County Superior Court Cause No. 10-1-01249-1, should not be vacated because it does not violate double jeopardy

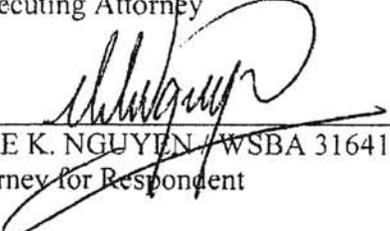
V. CONCLUSION

The appellant's case should be remanded back to the trial court for entry of findings of fact and conclusions of law as required by CrR 6.1(d), and the appellant's perjury in the first degree conviction in Cowlitz County Superior Court Cause No. 10-1-01249-1, should not be vacated because it does not violate double jeopardy.

Respectfully submitted this 16 day of April 2012.

SUSAN I. BAUR
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By:



MIKE K. NGUYEN / WSBA 31641
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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 16, 2012.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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