

**FILED**

OCT 18 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

NO. 289907

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

MAYIRA BALENCIA,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KLICKITAT COUNTY  
The Honorable E. Thompson Reynolds

---

APPELLANT'S OPENING BRIEF

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Appellant’s Opening Brief

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it based its determination of guilt for delivery of a controlled substance on insufficient evidence.
2. The trial court erred by failing to enter written findings of fact and conclusions of law as required by CrR 6.1(d).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State submitted police reports in a stipulated trial that do not state that the defendant knowingly delivered controlled substances to a confidential informant. The trial court found the defendant guilty based on what the confidential informants might have testified regarding the element of delivery. Did the trial court base the decision to convict defendant of delivery of a controlled substance on insufficient evidence to prove delivery occurred, thereby requiring reversal and dismissal of the conviction?
2. The trial court did not issue written findings of fact and conclusions of law following the stipulated trial. Trial courts are to set out in writing the factual basis for each conclusion of law. In this case the defendant challenges the sufficiency of the factual findings and the trial court's conclusions. Does

failure to comply with CrR 6.1(d) require reversal and dismissal of the conviction?

C. STATEMENT OF THE CASE

1. Procedural History

On February 19, 2009, the Klickitat County prosecutor charged appellant Mayira Balencia with delivery of a controlled substance; that in the County of Klickitat, State of Washington, on or about 09-29-08, she did knowingly deliver a controlled substance, methamphetamine, contrary to RCW 69.50.401(1). CP 1. She was also charged with unlawful use of a building for drug purposes in violation of RCW 69.53.010. CP 2.

Ms. Balencia petitioned to enter drug court and was accepted after having been assessed as a “good candidate for treatment.” 5/8/2009 RP 3. The court advised Ms. Balencia that by entering drug court she was “giving up some constitutional rights”, which included the “right to a trial within ninety (90) days” and a “right to a jury trial.” 5/8/2009 RP 3. She was further advised that if the “matter did have to go to trial” she was “agreeing that the police reports can be used as evidence against you without any objection.” 5/8/2009 RP 3.

## 2. Drug Court

Ms. Balencia had a “bumpy start” in drug court. 7/10/2009 RP 2. However, by July she was “doing quite well in intensive ...outpatient treatment” and was reported to have been clean and sober since May 20, 2009. 7/10/2009 RP 3. By September she was enrolled in college. 9/09/2009 RP 2. In October, she was considered a “star”, taking parenting classes and going to school. 10/07/2009 RP 2. She continued to be “the star of the program” in November. 11/6/2009 RP 2. In December, it was reported she missed a month of treatment due to the illness of her child and herself, yet she continued to provide clean UA’s and made scheduled appointments. 12/11/2009 RP 2-3. By February 2010, Ms. Balencia had relapsed and was given a last chance, which required checking into inpatient treatment. 2/05/2010 RP 7. In March, she was before the Drug Court because she missed her inpatient bed date after she fell asleep in the bus station and missed her bus. 03/05/2010 RP 2. On March 15, 2010, Ms. Balencia was removed from the drug court program. 3/15/2010 RP 3.

## 3. Stipulated Trial

Ms. Balencia’s case was set “for a nonjury trial just on the police reports.” 3/15/2010 RP 4. The stipulated trial took place on March 29, 2010. The State rested on the stipulated police reports. 3/29/2010 RP 2. The police reports were not made part of the record. With respect to the

delivery of a controlled substance charge, defense counsel pointed out that the probable cause sheet and officer's narrative say, "Nothing about she handed the CI uh any suspected methamphetamine." 3/29/2010 RP 3. "She handed him back the money according to the probable cause statement and that is backed up again in the officers uh narrative where they say uh the same thing uh middle of the page on page 1 uh CI 1967 said Balencia left with her child and the buy money." 3/29/2010 RP 3. "When Balencia came into the apartment she handed CI 1967 the money. Nothing about the dope." 3/29/2010 RP 4.

The State responded, "As for the violation in Count 1 in the stipulation packet as well as the probable cause statement other than the fact that the Court could also I believe easily, easily infer from the probable cause as to the drug use that was going on there..." 3/29/2010 RP 4.

Defense counsel's final statement before the ruling was, "I recognize that true we stipulated to the reports but the reports themselves still have to have sufficient evidence to find her guilty of both crimes and they don't." 3/29/2010 RP 5.

In an oral ruling, the court found Ms. Balencia guilty of delivery of a controlled substance and dismissed the charge of unlawful use of a building for drug purposes. The entire oral ruling follows:

Okay as far as Count 1 uh according to the police reports there's the confidential informants contacted Ms. Balencia uh and with the idea of buying some methamphetamine. Ms. Balencia left the apartment with her child. She came back later um the confident informants then uh apparently gave her money and when the confidential informants came back they were searched and they had methamphetamine. Confidential informants apparently would have testified had they been called that they had received the um methamphetamine from Ms. Balencia. I'm satisfied beyond a reasonable doubt that Ms. Balencia did uh deliver uh controlled substance methamphetamine. I find that beyond a reasonable doubt.

As far as Count 2 I will dismiss Count 2. I don't believe there sufficient evidence to show that she was operating a drug house um so I am going to dismiss Count 2 so we do have a conviction on Count 1. States recommendation on sentencing?

3/29/2010 RP 5-6.

Ms. Balencia was sentenced to a year and a day of incarceration.

4/19/2010 RP 4. Ms. Balencia filed a Notice of Appeal on April 19, 2010.

CP 56.

#### D. ARGUMENT

1. INSUFFICIENT EVIDENCE EXISTED TO SUPPORT THE CONVICTION OF DELIVERY OF A CONTROLLED SUBSTANCE BECAUSE THERE WAS NO EVIDENCE THAT DRUGS WERE TRANSFERRED TO ANOTHER PERSON.

a. Standard of Review

When a conviction rests upon stipulated facts and exhibits and the court considered no live testimony in concluding guilt, review is de novo.

State v. Shepherd, 110 Wash.App. 544, 550, 41 P.3d 1235 (2002).

Appellate review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law. Willener v. Sweeting, 107 Wash.2d 388, 393 730 P.2d 45 (1986). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

b. Stipulated Bench Trial

In a stipulated trial, the State still bears the burden of proof beyond a reasonable doubt. State v. Johnson, 104 Wash.2d 338, 342, 705 P.2d 773 (1985). Ms. Balencia was convicted of delivery of a controlled substance after a stipulated bench trial based on police reports. The crime of delivery requires the knowing, physical transfer of a controlled substance. State v. Evans, 80 Wash.App. 806, 814, 911 P.2d 1344 (1996). Guilt is established by proof that the defendant delivered a controlled substance and that the defendant knew that the substance delivered was a controlled substance. Id. at FN 17. "Delivery" means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship. RCW 69.50.101(f).

c. Stipulated Facts

It is fundamental that stipulated facts must include those essential facts necessary to permit a reasoned and informed analysis by the court. If parties stipulate to facts at trial, those facts must be sufficient for a sound legal decision. Further, the stipulated facts must be sufficient for appellate review of issues arising from the decision on the stipulated facts. State v. Wheaton 121 Wash.2d 347, 363, 850 P.2d 507 (1993).

The facts in the probable cause sheet do not state that a transfer of drugs occurred between Ms. Balencia and the CI, only that she handed the CI the money. CP 5. The police reports were not made part of the record. The police reports and the probable cause sheet state the same facts regarding the statement that Ms. Balencia “handed him [CI] back the money.” 3/29/2010 RP 4. The probable cause statement reads:

CI 1969 said Balencia left with her child and the buy money. CI 1969 said Balencia came back with the dope in a reddish burgundy car. When Balencia came into the apartment she handed CI 1967 the money.

CP 5.

The stipulated facts must include those essential facts necessary to permit a reasoned and informed analysis by the court. Wheaton at 363. When Ms. Balencia pointed out at the stipulated trial that the police reports did not have sufficient facts to convict her of the delivery charge,

the State did not argue that the facts in the police reports were incorrect, but that the “Court could ... infer from the probable cause as to the drug use that was going on there...” 3/29/2010 RP 4. To prove delivery, there must be a transfer of the controlled substance; drug use is a different charge. The stipulated facts do not address whether Ms. Balencia had knowledge of any illegal substance, nor do the stipulated facts address whether she was alone in the apartment or whether there were others in the apartment who could have delivered drugs to the informants. The stipulated facts state that she handed the informant the money, not drugs. CP 5.

All of the essential facts necessary to make a reasoned and informed analysis by the Court should have been in the stipulated facts. The State drafted the facts. The probable cause statement was drafted by a detective and reviewed by a deputy prosecuting attorney. CP 4. The State did not include witness statements with the police reports, but had the opportunity to do so prior to Ms. Balencia agreeing to the stipulation. Ms. Balencia based her decision to waive her rights to a jury trial and agreed to a stipulated trial based the facts in the police reports, which should have been sufficiently accurate and complete to give Ms. Balencia the opportunity to make a reasoned and informed decision.

d. Trial Court's Oral Decision

“[B]y the stipulation, [the defendant merely] agrees that what the State presents is what the witnesses would say.” State v. Mierz, 27 Wash.2d 460, 469, 901 P.2d 286 (1995). The trial court's oral decision was in error when it speculated on what the witnesses “apparently would have testified” in order to reach the conclusion that a “delivery” occurred. 3/29/2010 RP 5-6.

The problem in this case is that the State did not present any witness statements to support what the confidential informant witnesses might testify to if they were called. There is no factual support in the oral decision as to what the informants might have said had they testified. The stipulated facts submitted by the State were insufficient within the four corners of the stipulated police reports to find that Ms. Balencia knowingly delivered a controlled substance.

When the sufficiency of evidence is challenged in a criminal case, all reasonable inferences from the evidence are drawn in favor of the State and are interpreted most strongly against the defendant. State v. Partin, 88 Wash.2d 899, 906-07, 567 P.2d 1136 (1977). An “inference” is a conclusion reached by considering other facts and deducing a logical consequence from them. Black's Law Dictionary, Ninth Edition, pg. 847.

The court's inference that Ms. Balencia gave the informants drugs is not supported by other facts on which the court could deduce a logical conclusion. The court found that, "She came back later um the confident informants then uh apparently gave her money and when the confidential informants came back they were searched and they had methamphetamine." 3/29/2010 RP 5-6. The stipulated facts do not indicate whether anyone else was in the apartment, or if Ms. Balencia was alone. The court's conclusion did not foreclose the possibility that someone else was in the apartment who may have given drugs to the informants. According to the stipulated probable cause statement Ms. Balencia handed CI 1967 the buy money. CP 5.

There were reasonable alternative conclusions that could be drawn from the stipulated facts, thereby casting doubt on what was alleged to have transpired. There was insufficient evidence to support a finding of guilt for delivery of a controlled substance and the conviction should be reversed and dismissed.

2. THE CASE SHOULD BE REVERSED AND DISMISSED  
BECAUSE THE TRIAL COURT FAILED TO ENTER  
WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF  
LAW AS REQUIRED BY CrR 6.1(d)

In a bench trial, the trial court is required to enter written findings of fact and conclusions of law pursuant to CrR 6.1(d). Findings and conclusions comprise a record that may be reviewed on appeal. State v. Head, 136 Wash.2d 619, 622, 964 P.2d 1187 (1998). Each element must be addressed separately, setting out the factual basis for each conclusion of law. Id. at 623. The findings must specifically state an element has been met. State v. Alvarez, 128 Wash. 2d 1, 19, 904 P.2d 754 (1995). In this case, there were no written findings of fact and conclusions of law as required by CrR 6.1(d).

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.

CrR 6.1 (d)

In Head, the Court noted the possibility that reversal may be appropriate where a defendant can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. Head at 624. If a case is remanded, no additional evidence may

be taken; the findings and conclusions are to be based on the evidence already taken. Id. at 625.

Ms. Balencia's has been prejudiced by the lack of written findings and conclusions of law and reversal is required. Ms. Balencia is currently incarcerated and remand will cause unnecessary delay in reaching a decision in this case. Ms. Balencia stipulated to the facts in the police reports and nothing more. The trial court's oral decision was based upon speculation as to what witnesses might have testified to. There was no evidence in the police reports that Ms. Balencia knowingly delivered a controlled substance.

The lack of findings of fact and conclusions of law hampered Ms. Balencia's ability to evaluate the factual basis for each conclusion of law. This is especially critical in this case where the oral ruling does not provide a factual basis for each conclusion of law. The trial court did not make jurisdictional findings regarding where the incident occurred, the date of the incident, or how much of the controlled substance was involved. The trial court's oral decision did not establish that Ms. Balencia had knowledge that the substance may have been a controlled substance. The trial court did not provide a factual basis that the substance was in fact methamphetamine, but jumped to that conclusion.

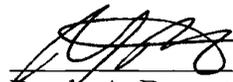
3/29/2010 RP 5-6. Finally, the trial court did not address whether Ms. Balencia was alone in the apartment, or whether there were others.

This Court has before it all of the stipulated facts that can be considered in reaching a decision. A remand will not cure the record or allow for supplementation of the facts. This case should be reversed and dismissed.

E. CONCLUSION

For the reasons set forth above, Ms. Balencia respectfully asks this Court to reverse her conviction and dismiss the case.

Respectfully submitted this 14<sup>th</sup> day of October, 2010.

  
\_\_\_\_\_  
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