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Court of Appeals
Division III
State of Washington
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No. 96069-1

NO. 34496-7-III

In the Court of Appeals of the State of Washington
Division 3

STATE OF WASHINGTON, Respondent

v.

MICHAEL N. PECK, Appellant

APPELLANT'S REPLY BRIEF

Christopher Taylor
Attorney for Appellant
CR Taylor Law, P.S.
203 4th Ave E Ste 407
Olympia, WA 98501
Voice: (360) 352-8004
Fax: (360) 570-1006
Email: taylor@crtaylorlaw.com

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A) ISSUE DISCUSSED IN REPLY

Did the late filing of written findings of fact and conclusions of law following a CrR 3.6 hearing prejudice Mr. Peck?

B) ARGUMENT

The late filing of written findings of fact and conclusions of law following a CrR 3.6 hearing prejudiced Mr. Peck.

After “an evidentiary hearing is conducted” regarding a motion to suppress physical evidence, “the court shall enter written findings of act and conclusions of law.” CrR 3.6(b). “The purpose of requiring written findings and conclusions is to ensure efficient and accurate appellate review.” *State v. Cannon*, 130 Wn.2d 313, 329 (1996).

“A delay in filing findings of fact and conclusions of law” “after [a] CrR 3.6 hearing” “is reversible...if the delay prejudiced a defendant.” *State v. Brockob*, 159 Wn.2d 311, 343 (2006). A defendant may be prejudiced if “[t]he written findings of fact and conclusions of law...contain unanticipated information.” *Id.* at 344. A defendant may also be prejudiced if he is not present at the presentation hearing where the written findings and conclusions do not “merely memorialize the trial court’s oral ruling.” *State v. Pruitt*, 145 Wn. App. 784, 799 (2008).

Here, the trial court conducted CrR 3.6 evidentiary hearing on May 10, 2016. RP 20-136, 159-69. The trial court issued an oral ruling. RP

190-92. More than ten months later, the trial court entered written findings of fact and conclusions of law concerning that hearing. CP 254-58. The written findings and conclusions greatly expanded on the court's oral ruling. At the presentation hearing on March 31, 2017, the trial court specifically noted some of the written findings of fact had not been "address[ed]" in the court's oral ruling. SRP 5-6. Furthermore, neither Mr. Peck nor his appellate counsel was present at that presentation hearing or signed off on the written findings. *See generally* SRP; *see also* CP 254, 258.

Particularly, the trial court's oral ruling simply did not contain anything resembling Findings of Fact 1, 2, 3, 4, 5, 6, 7, 8, 9, 15, 17, 18, 19, 20, or 21. *Compare* RP 190-92 *with* CP 255-57.

Furthermore, the trial court's oral findings differed substantively from the written findings. For example, the trial court orally found "the owner says it's not his...CD case." RP 190-91. This oral finding does not appear in the written findings, presumably because it was not supported by substantial evidence. *See* CP 255-57; RP 20-136, 159-69. The trial court also orally found Mr. Peck and Mr. Tellvik affirmatively stated "[t]here's nothing else in [the vehicle] that's mine." RP 190. This oral finding was substantially modified by the written Findings of Fact 10, 11, and 12,

again presumably because the original finding was not supported by substantial evidence. CP 256; *see also* 2nd Amend. Resp.’s Brief at 2, fn. 1.

Most importantly, the trial court also orally found “[t]here was no reason why the officers in this case thought that the CD bag contained any evidence” and “there’s no evidence that there was any drugs in that CD case.” RP 191. These oral findings concerned whether there was probable cause to search the CD case. *See* RP 191 (“There’s no way the judge is going to sign a search warrant for it.”). These oral findings were omitted from the written findings. *See* CP 255-57. Instead, the written findings indicated the “search was conducted to determine that nothing unsafe or illegal was left in the truck” in order to “protect[] the registered owner, others who may have left items in the vehicle, the tow company, and law enforcement,” and that “[t]here was no showing or indication that the black cd case was opened for the purposes of evidence gathering on the part of law enforcement.” CP 256-57. This last finding—Finding of Fact 22—is not supported by substantial evidence unless both Deputies Green and McKean’s testimony was found to be not credible in part, a finding the trial court did not make orally or in writing. *See* RP 41, 116-17.

The written findings of fact did not simply memorialize the trial court’s oral ruling. Significant additions and departures were made. Even if this does not establish tailoring in the classic sense, it does establish

prejudice for two reasons. First, the written findings contained significant unanticipated information. Second, either Mr. Peck nor his appellate counsel were present at the presentation hearing or signed off on the written findings. Therefore, this Court should reverse Mr. Peck's convictions.

C) CONCLUSION

Because the written findings contained significant unanticipated information, and because neither Mr. Peck nor his appellate counsel were present at the presentation hearing or signed off on the written findings, Mr. Peck was prejudiced by the late filing of written findings of fact and conclusions of law. Therefore, this Court should reverse Mr. Peck's convictions.

DATED this 1st day of December, 2017.

/s/ Christopher Taylor _____
Christopher Taylor
Washington State Bar Association # 38413
CR Taylor Law, P.S.
Attorney for Appellant
203 4th Ave E Ste 407
Olympia, WA 98501
Telephone: (360) 352-8004
Fax: (360) 570-1006
E-mail: taylor@crtaylorlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT'S
REPLY BRIEF was mailed, postage prepaid, on this 1st day of December,
2017 to counsel for Respondent, Carole L. Highland at 205 W 5th Ave Ste
213, Ellensburg, WA 98926, and to the appellant, Michael N. Peck, c/o
Washington State Penitentiary, 1313 N 13th Ave, Walla Walla, WA 99362.

/s/ Christopher Taylor _____
Christopher Taylor

C.R.TAYLOR LAW PS

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Sender Name: Christopher Taylor - Email: taylor@crtaylorlaw.com
Address:
203 4TH AVE E STE 407
OLYMPIA, WA, 98501
Phone: 360-352-8004

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