64028-3

64028-3

NO. 64028-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GEINLY F. DIAZ-DIAZ,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG
King County Prosecuting Attorney

JASON L. SIMMONS
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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## A. ISSUE PRESENTED

Looking at the totality of the facts and circumstances, would a reasonably prudent officer believe that there was sufficient individualized suspicion, and therefore probable cause, to arrest Diaz-Diaz?

## B. STATEMENT OF THE CASE

During January and February 2008, Detective LaFreniere worked with a confidential informant (CI) on three separate occasions where the CI purchased controlled substances from an individual known as "Rafael" (Diaz-Alvarado). 1RP 27-28. Detective LaFreniere had worked with the specific CI for roughly nine years. 1RP 27. On January 13, 2009, Detective LaFreniere provided the CI with pre-recorded buy money, and then dialed the cell phone number for an individual the CI knows as "Rafael." 1RP 28. The CI and Rafael then set up a drug deal. Id. The CI and Detective LaFreniere reported to the meeting place, and Rafael arrived approximately five minutes later. 1RP 29-30. Rafael arrived to the scene in a 1997 green Ford Taurus, license plate WA

673XRX. 1RP 29-30. Rafael was a passenger in the vehicle. Id. During this transaction, the CI purchased 1.0 grams of cocaine from Rafael. 1RP 31.

Detective LaFreniere set up a second controlled buy with the same CI on January 22, 2009. 1RP 31-32. Again, Detective LaFreniere provided the CI with pre-recorded buy money. 1RP 31. The CI then called Rafael and they again agreed to meet up. 1RP 32-33. Like before, Rafael arrived to the agreed upon location as a passenger in a 1997 green Ford Taurus, license plate WA 673XRX. During this transaction, the CI purchased 1.1 grams of cocaine from Rafael. 1RP 32-33.

On February 10, 2009, a third controlled buy was set up between the CI and Rafael. 1RP 33-34. Rafael chose the location of the drug deal and said, "I'll be right there." 1RP 34-35. Rafael arrived in the same green Ford Taurus, license plate WA 673XRX. 1RP 30, 36. The Ford Taurus arrived five to ten minutes after Rafael was contacted by the CI. 1RP 36. Rafael, like in the prior two deals, was a passenger in the car. Id. Rafael got out of the car and sold 1.1 grams of cocaine to the CI, as both Rafael and the CI stood about 10 feet from the green Ford Taurus. 1 RP 36-37. Rafael was then approached by five to seven additional people.

1RP 38. Rafael engaged in a hand-to-hand transaction with each of the addition people. Id. Due to Detective LaFreniere's years of experience watching drug transactions, and as a result of this training and experience, he believed each of the additional hand-to-hand transactions were drug deals. 1RP 38-39. Rafael slowly moved closer to the green Ford Taurus as he engaged in these apparent drugs deal, with the last deal taking place while Rafael stood at the back passenger seat door. 1RP 38-39.

As Rafael stood at the rear passenger door of the Taurus, with the door open, a red Forerunner approached the area. 1RP 39-40. The occupants of the Forerunner then contacted Rafael and the occupants of the Ford Taurus and engaged in an apparent attempt to engage in a drug transaction; however police did not see drugs or money exchanged. 1RP 40-41.

Detective LaFreniere called in the arrest team, who arrested Rafael and two other Hispanic males. 1RP 42. The Defendant, Geinly Diaz-Diaz, was the driver of the Ford Taurus. In a search incident to arrest, officers recovered 3.2 grams of cocaine and $250 from Diaz-Diaz's person.

Prior to trial, Diaz-Diaz moved to dismiss the charges, alleging lack of probable cause to arrest. CP 11-13. Judge

Conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 208; State v. Johnson, 128 Wn.2d 431, 909 P.2d 293 (1996). However, an appellate court may affirm on any basis apparent from the record. State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993); State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990); State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989).

**2. THERE WAS SUFFICIENT INDIVIDUALIZED SUSPICION FOR A REASONABLY PRUDENT OFFICER TO BELIEVE DIAZ-DIAZ WAS AN ACCOMPLICE TO THE CRIME OF VUCSA – DELIVERY.**

Under the Fourth Amendment of the United States Constitution a warrantless arrest must be supported by probable cause. State v. Bonds, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982). Probable cause to arrest exists where the totality of the facts and circumstances known to the officers at the time of arrest would warrant a reasonably cautious person to believe an offense is being committed. State v. Herzog, 73 Wn. App. 34, 53, 867 P.2d 648 (1994). In making this determination, reviewing courts must give consideration to an arresting officer's special expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). Probable cause to arrest requires more than "a bare

suspicion of criminal activity," State v. Terravona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986), but does not require facts that would establish guilt beyond a reasonable doubt. State v. Conner, 58 Wn. App. 90, 98, 791 P.2d 261 (1990). Probable cause is generally an objective standard. It is determined with reference to a reasonable person with the expertise and experience of the officer in question. The expertise of an officer is critical. What constitutes probable cause is viewed from the vantage point of a reasonably prudent and cautious police officer. State v. Remboldt, 64 Wn. App. 510, 827 P.2d 505, review denied, 119 Wn.2d 1005 (1992).

According to RCW 69.50.401(a), it is a crime for any person to deliver a controlled substance that the person knows to be a controlled substance. Deliver or delivery means "the actual or constructive transfer from one person to another of a substance." RCW 69.50.101(f). Cocaine is a controlled substance. RCW 69.50.101(d); 69.50.206(b)(4).

Here, the co-defendant Rafael Diaz-Alvarado was arrested after the third controlled buy in which he sold cocaine to a CI. In each of those transactions, Diaz-Alvarado arrived to the pre-arranged location of the drug deal in a 1997 green Ford Taurus with a WA license plate 673XRX. Each time, Diaz-Alvarado was a

passenger. The person driving the Ford Taurus at the time of the third and final transaction was Diaz-Diaz. It is not known if Diaz-Diaz was the driver for either, or both, of the previous two transactions.

RCW 9A.08.020 specifically states that an individual is an accomplice when "with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it."

Diaz-Alvarado was engaged in what Judge Halpert referred to as a "moving drug bazaar," as "he just drove all day from site to site dealing drugs." 1RP 77. This moving drug bazaar required the assistance of a driver, Diaz-Diaz. By driving the car, Diaz-Diaz aided Diaz- Alvarado in the commission of the crime of VUCSA delivery.

Diaz-Diaz's reliance on State v. Robinson, 73 Wn. App. 851, 872 P.2d 43 (1994) is misplaced. In Robinson, the Court of Appeals analyzed sufficiency of the evidence with regards to a Robbery in the Second Degree conviction, and specifically addressed the issue of when a Robbery in the Second Degree is completed crime. Id. When a robbery becomes a completed crime

is not an issue before the Court in the instant case. In Robinson, the defendant (Robinson) was driving a car with four passengers. Id at 852. Id. At one point, a passenger (Baker) jumped out of the car and soon thereafter Robinson could see Baker struggling with a girl. Id. Baker then used force to steal the girl's purse. Id. When Baker returned to the car, Robinson panicked and drove away. Id. at 852-853. There was no evidence that Robinson knew of Baker's plot prior to the robbery. Id. at 853. Ultimately, Robinson was located by police, and subsequently charged with and convicted of Robbery in the Second Degree. Id.

The court ultimately held that because, "Baker had completed the act of robbery by the time he reentered the car and Robinson saw the purse, Robinson could not have aided and abetted Baker's crime" and therefore could not be an accomplice to the crime. Id. at 857. The court went on to note that Robinson's action appeared to constitute the crime of Rendering Criminal Assistance, suggesting that his actions were still likely criminal. Id. at 858. The court also found that Robinson neither associated himself with Baker's undertaking, nor participated with the desire to bring about the robbery, nor sought to make the crime succeed by any actions of his own. Id. at 857.

The circumstances in the case at bar are far different. Here, it is reasonable for a prudent officer to believe that Diaz-Diaz associated himself with Diaz-Alvarado's undertaking and sought to make the crime succeed by driving Diaz-Alvarado to the scene of the pre-arranged drug deal. Nothing in the record of the 3.6 hearing suggests Diaz-Diaz was tricked or unaware of what was occurring. Indeed, Diaz-Diaz responded to the pre-arranged location of the drug deal merely five to ten minutes after Diaz-Alvarado was contacted by the CI. Furthermore, Diaz-Diaz waited as Diaz-Alvarado conducted several apparent drug deals mere feet from the car, with the last deal literally taking place directly next to the car.

Diaz-Diaz's argument that there was insufficient individualized suspicion under Grande must also fail. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 249 (2008). Grande stood for the proposition that all passengers in a car may not be arrested for marijuana possession based solely on the odor of marijuana because odor itself can not be connected to any specific person, and therefore there must be individualized suspicion connecting each specific suspect to the crime. Id.

Sufficient individualized suspicion existed to arrest Diaz-Diaz because he was the driver of the car that transported Diaz-Alvarado to a pre-arranged location, where multiple illegal narcotics transactions took place. Importantly, this same car was used by Diaz-Alvarado in the prior two controlled drug buys with the CI. Diaz-Diaz was not merely associating with Diaz-Alvarado, a known drug dealer, but he helped Diaz-Alvarado facilitate the drug deal on February 10, 2008. Diaz-Diaz was the driver for the moving drug bazaar. Diaz-Alvarado was able to arrive at the pre-arranged drug deal's location within minutes as a result of the assistance of the driver, Diaz-Diaz. This moving drug-market necessitated a car and, in this case, a driver, Diaz-Diaz. Additionally, all of the transactions observed after the third controlled buy were within the view of the occupants of the car and in close proximity to the car, with the ultimate apparent drug deal taking place immediately next to the car.

Accordingly, a reasonably prudent officer, looking at the totality of the facts and circumstances, could conclude that Diaz-Diaz was an accomplice to the drug deliveries perpetrated by Diaz-Alvarado. Therefore, there was probable cause to arrest Diaz-Diaz and the Appellant's argument must fail.

## D. CONCLUSION

There was probable cause to arrest Diaz-Diaz. The State, therefore, respectfully requests that this Court affirm Appellant's conviction.

DATED this 20 day of April, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
JASON L. SIMMONS, WSBA #39278
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Bruce Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. GEINLY F. DIAZ-DIAZ, Cause No. 64028-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Venita Schwantes
Name

4/20/10
Date

Done in Seattle, Washington

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