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JUL 27 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 290841

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ALEJANDRO MAGANA ARREOLA,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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Rules

RAP 10.3(b) 1

I. REQUEST FOR SUPPLEMENTAL BRIEFING

A. SUPPLEMENTAL QUESTION PRESENTED

– WHAT AUTHORITY, IF ANY DID THE OUTSTANDING WARRANT PROVIDE FOR SEARCH OF ARREOLA INCIDENT TO ARREST.

- 1) What authority, if any, did the outstanding warrant provide the police to search Arreola incident to arrest?

B. ANSWER TO SUPPLEMENTAL QUESTION.

- 1) The outstanding warrant gave the officer the legal ability and basis to progress from a Terry pat down to a full search incident to arrest.

II. SUPPLEMENTAL STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in previous briefing and the commissioners ruling therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

The supplemental question asked by this court addresses the ability of the officer in this case to “search incident to arrest” appellant after a valid arrest warrant was discovered during his initial detention and arrest for failure to disburse.

As addressed in the States opening brief this is an instance where a group of identified gang members had congregated for the purpose of taking a group picture of “homies.” The officer who was first on scene

testified that very location had been the scene of a recent drive-by shooting and for the officer to ignore this “very, very uncommon” occurrence would have been inviting disaster. (RP 8-9, 14, 23) This initial contact was non-confrontational. The officer told the group that they must disperse. They refused to follow this lawful order and subjected the community and therefore engaged in conduct that created a substantial risk of injury.

The next contact was at the park. This is the next step along the legal path which led to the discovery of the outstanding warrant for Arreola. It is the position of the State that this gave the officers the legal basis to arrest any and all of the persons who had been ordered to disperse, this included the appellant.

It can also be addressed in the context of a “Terry” stop. The officers had established a reasonable articulable belief that there was a crime which has been committed and in this instance it had been committed in there very presence. The officers therefore had a legal basis to contact these individuals and conduct initial questioning and in this instance because of the knowledge that these were confirmed members of a violent gang, an officer safety pat down.

State v. Mercer, 45 Wn. App. 769, 774-76, 727 P.2d 676 (1986);

Under some circumstances, a person may be detained briefly for questioning, even though probable cause for arrest may be absent; such detention need only be supported by a well founded suspicion of criminal activity based upon specific and articulable facts. The officer's experience will be taken into account in assessing whether a suspicion of wrongdoing was justified under the circumstances. Although the circumstances must be more consistent with criminal than innocent conduct, "reasonableness is measured not by exactitudes, but by probabilities."...

The courts have repeatedly encouraged law enforcement officers to investigate suspicious situations. "Merely because a police officer lacks probable cause to arrest an individual, he need not shrug his shoulders and allow suspected criminal activity to continue or to escape his further scrutiny."

...

The scope of an investigative stop, without probable cause to arrest, must be limited to the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. However, if the results of the initial investigation do not dispel the officer's suspicion of criminal activity, he may further detain the suspect and continue his investigation by doing what is reasonably necessary under the circumstances. (Emphasis mine, citations omitted.)

That occurred and during that process the officers are allowed to question and identify the party whom they are patting down. In this specific case that person was the appellant, Arreola who had a valid outstanding warrant.

The very nature of a warrant changed this matter from the Terry encounter, officer safety setting to one where the officer is required to arrest the person. The warrant was confirmed and thereafter the officer

had the legal ability to search Arreola incident to the arrest. He was going to jail. This type of search is by its very nature far more intrusive. It allows the officers to remove any and all items in the arrested persons effects. It allows the officers to check any and all pockets and the contents thereof. That occurred here and this is when the controlled substances were found.

It would be the position of the State that the analysis set forth in State v. Rothenberger, 73 Wn.2d 596, 598-99, 440 P.2d 184 (Wash. 1968) is applicable here. The Rothenberger the defendant was in a car stopped in Oregon. The officer determined that Rothenberger could proceed but later discovered that there was an outstanding warrant for Rothenberger's arrest. The officer forwarded that information to other officers who apprehended Rothenberger. The court broke down the action of the officers as follows;

It seems to us that three questions are presented:

1. Did the stopping of Rothenberger's car by Officer Edwards, to check for the purpose indicated, constitute an arrest?

2. If it was an arrest, was it an unlawful arrest?

3. If it was an unlawful arrest, was the information acquired concerning the identity of the individuals and the car they were driving of such a character that it could not be used to cause Rothenberger to be apprehended after the arresting officer

learned from an independent source that Rothenberger was wanted on a felony charge?

An affirmative answer to the first and second questions seems to us highly debatable. An affirmative answer to the third seems indescribably silly. All three must be answered affirmatively before the appellants can prevail on this appeal. Appellants have contented themselves on their appeals with presenting an argument for an affirmative answer to questions 1 and 2. This argument consists in setting forth

...

We shall pass the two debatable questions discussed by the Attorney General and the appellants, and assume that there was an arrest and that it was unlawful; and we will base our affirmance of the convictions on a negative answer to the third question.

It is our view that Officer Edwards, having discovered from an independent source that Rothenberger was wanted on a felony charge, not only had the right but the duty to pursue Rothenberger and arrest him, if that was practicable, or to get that information to officers who could intercept him.

To illustrate just how ridiculous the appellants' contention is, let us assume that while detaining the appellants on an unlawful arrest, word had come over the radio that Rothenberger and Pernar were wanted for a burglary in Seattle. On appellants' theory, the officer supposedly had no alternative but to touch his hat and say, 'Gentlemen, be on your way. I am sorry to have unlawfully detained you.' We find neither reason nor judicial precedent for such a change in the rules of the long continued game of 'Cops and Robbers.'

(Emphasis mine.)

To place the facts in this case in context with Rothenberger, 1) the officers here made contact with Arreola just as the officers did in 1968 this contact was for the observed violation of the order to disperse. Here unlike Rothenberger the officer informed Arreola that he was under arrest 2) the arrest was clearly not illegal, the actions of this gang in the presence of the officer were clearly sufficient to meet the probable cause standard for the arrest. It was during this valid contact that the outstanding warrant was found and 3) because this was a valid arrest for the unrelated charge of failure to disperse the information gather when the warrant was found and executed could be used in the subsequent controlled substance charge.

State v. Mennegar, 114 Wn.2d 304, 314, 787 P.2d 1347 (1990);

Once the officer discovered the existence of an outstanding arrest warrant, the officer was clearly and properly performing his duty by arresting the passenger. The contraband was discovered during the search incident to a valid arrest. A reasonable search of an arrestee's person is justified by the fact of his lawful arrest. /15 The search and seizure were lawful.

15 State v. McIntosh, 42 Wn. App. 573, 712 P.2d 319, review denied, 105 Wn.2d 1015 (1986); State v. Garcia, 35 Wn. App. 174, 665 P.2d 1381, review denied, 100 Wn.2d 1019 (1983).

Attached to this supplemental brief is an appendix. The testimony contained in the appendix sets forth what the officers testified to in this

case. This testimony alone demonstrates what occurred here. The officers had a very knowledgeable understanding of the law and what that law allowed them to do. Deputy Steadman states on cross examination that he specifically performed two types of searches. The first was done as a Terry type pat down and for officer safety. There were four officers who were in contact with 12-15 gang members.

Appellant in his supplemental response indicates that factually this case is stronger than Rife and Ellwood. State v. Rife, 133 Wn.2d 140, 943 P.2d 266 (1997) is easily distinguishable because the law in that case specifically did not allow further detention of Rife. In this case the law allows for the arrest of a person who violates that failure to disburse statute. Once again this was not a group of family members who wanted to take a family picture. This was a group of 13-14 Sureno gang members wearing their colors and throwing signs in a public place where only recently there had been a drive by shooting. State v. Ellwood, 52 Wn. App. 70, 757 P.2d 547 (1988) is also clearly distinguishable. There the officer had basically nothing upon which to base his contact with Ellwood other than he was in a high crime area.

This court need only look to this brief record to ascertain that the situation which confronted the officers in this matter allowed them to take the action they took. The first officer attempted to mitigate the matter by

just warning the gang members to disburse. They chose to thumb their noses at the officer and took there photo shoot to an even more dangerous and public location.

The arrest for the failure to disburse was legal that therefore all the actions that followed from that were just.

IV. CONCLUSION

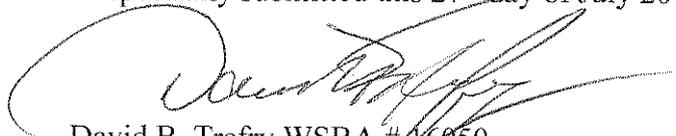
This court has requested supplemental briefing. The question posed was “what authority, if any, did Mr. Arreola’s outstanding warrant provide for police to search him incident to arrest?” The fact that the officers bifurcated the actual act of searching the appellant answers that question.

Once again as was so aptly stated by the State’s attorney:

“We’re not talking about a grandmother’s 80th birthday party where family members are all huddled together and having cake. We’re talking about 13 gang members in a public place where families where children are present, creating a risk of substantial harm to all of those people present.” (RP 45)

The officers knew the law and followed it to the “T.” They only acted according to the law and only proceeded further in their search as the facts and circumstances allowed. This appeal should be dismissed.

Respectfully submitted this 27th day of July 2011

A handwritten signature in black ink, appearing to read "David B. Trefry". The signature is written in a cursive style with a large, looping initial "D".

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Yakima County, Washington

APPENDIX 'A'

Sergeant Jake Church

Q And at that point how many officers were there?

A Initially there were just two and we did not engage them -- well, we engaged them but we did not start identifying them until I had two more backup units so there were a total of four.

Q What did you do at the point that you decided to arrest them?

A Well, I advised them that they were under arrest and we didn't have enough handcuffs because there were so many of them so not all of them are handcuffed, probably at the time from what I remember there were only three but had them -- before I told them they were under arrest they were indeed contacted and I had them all line up along the fence so that we control their movements, control their hands and once I had the backup units there, we advised them they were under arrest. They were identified, they were patted down for weapons.

Q Why did you pat them down for weapons?

A Gang members are known to carry gang members -- I mean to carry weapons. It's very common. They were wearing baggy clothing which could easily have concealed the weapons. If you, again, like I said, we had had several gang related shootings in that summer already. One just a couple days prior, that it involved this gang. So it was a concern of mine that they had weapons so, yes, we did pat them down.

Q When you patted them down, how many officers were there?

A There were four.

Q What happened next?

A Well, at that point we -- the four of us began to identify the guys and I guess each of us took a few. Once we had identified them all, we ran them for warrants. During that time we were actually approached by another female who tried to get involved in the

whole thing, basically wouldn't leave, took our attention off of all the gang members in a dangerous situation and she was ultimately arrested for obstructing.

Q Were all the individuals compliant with your orders?

A Not completely. There were a couple that wouldn't keep their hands where they were told to put them but they didn't physically fight. The ones that wouldn't do and keep their hands where we needed them so we could see them. We did handcuff at least one, I know for that, but most of them were compliant, yes.

Q (Inaudible) that you speak of that wouldn't keep his hands on the fence, what was he doing?

A He just kept putting his hands like towards the pockets which is waistband, which the concern there was that he might be looking for a weapon and that was part of that, Once that was over they were cooperative.

Q So you said you divided them up kind of, did you do the check on the defendant?

A No, I did not.

Q Who did that?

A That would be Deputy Steadman from the Yakima County Sheriff's office.

Q Did you have any other contact with the defendant after this?

RP 10-12

Direct examination of Dep. Steadman.

Q And why did you come into contact with the defendant?

A Toppenish was out with a large group of gang members in Pioneer Park and requested assistance.

Q What did you observe when you arrived?

A I saw a large group of gang members up against these -- I believe it would be the south fence at the park.

Q How did you know they were gang members?

A Their attire, their tattoos.

Q What did you do? How -- well, wait, before I ask that, how many officers were there?

A I believe it was Sergeant Church and Officer Perez.

Q Would you estimate how many individuals you identified as gang members?

A They were all gang members. I think there was probably 15 or so.

Q What did you do when you got there?

A Sergeant Church asked myself and Deputy McIlrath (phonetic) showed up and he just asked (inaudible) to take several of them, pat them down and ID them.

Q What did you do?

A I contacted three or four of the subjects, patted them down and identified them.

Q Was one of those individuals the defendant?

A Yes.

Q What else did you do?

A I checked them for outstanding warrants.

Q Did you find any?

A Yes.

Q On who?

A On the defendant. He had an outstanding valid (inaudible) arrest warrant for threats to kill out of the Sheriff's office.

Q What did you do next?

A I took him into custody.

Q Did you read him Miranda rights at that point?

A No.

Q Why not?

A I just was taking him into custody.

Q Okay. What happened next?

A I searched him further because the initial search on all the subjects was just for weapons and then the search incident to arrest based on the warrant, I found two pills in his right front pants pocket.

Q But he was advised before you searched him that he was under arrest?

A Yes.

Q I have no further questions.

...

Cross examination of Deputy Steadman

Q And your testimony today is that you searched Mr. Arreola twice, is that correct?

A Yes.

Q Okay. So when you first patted him down for weapons, did you or did you not feel the pill bottle in this pants?

A He didn't have a pill bottle.

Q Okay, so what did you feel that brought your attention to him?

A I didn't feel anything.

Q Okay, so you didn't feel anything when you searched him initially?

A No.

Q Okay, so why did you search him the second time?

A Because he had a felony warrant and I was taking custody of him.

Q Alright, but you'd already searched him.

A For weapons. (Inaudible) to a pat down for weapons, I'm not going to go inside, you know, if I don't feel anything in the pocket, there's no reason for me to look for other

--

Q Okay. So I'm looking at your report and it indicates that after you handcuffed him, you then search him again for weapons.

A Is that what it says?

Q Yeah.

A Well, it would be for weapons or contraband or anything. If I'm going to transport this subject so I don't want him to have anything when I transport him.

Q Okay. So it was basically to transport him that you searched him the second time?

A It -- yeah.

Q There wasn't another weapon search.

A No.

Q Okay. No further questions at this point, Your Honor.
(RP 34-5)

Redirect Examination of Deputy Steadman

By Ms. Foster:

Q Deputy Steadman, did you search the three individuals that you had or did you pat them down for weapons?

A I patted them down.

Q And what's the difference between that and a prolonged search?

A The pat down would just be over the clothing, look for any bulges, any hard items, any weapons that I could feel, knives, guns, and search -- and the incident to a

search, I'm looking through everything. My hands are going to go into the pockets. They're going to go into his socks, inside his wallet.

Q Why is that?

A Looking for contraband and any smaller weapons.

Q Why did you search the defendant and not the others?

A Because he was under arrest on a felony warrant. I was taking custody of him.

Q How many of these individuals did each officer have or was charged with?

A Three or four.

Q So you were outnumbered three to one?

MS. STEVENS: Objection, leading, Your Honor.

THE COURT: Overruled.

A Yes.

Q And were the other officers in the same predicament?

A Yes.

Q No further questions.

(RP 35-6)