

No. 290841

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ALEJANDRO MAGANA ARREOLA,

Appellant.

BRIEF OF RESPONDENT

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Attorney for Respondent

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes one assignment of error. These can be summarized as follows;

- 1) Did the court err when it denied the appellant's to suppress the evidence seized from appellant when he was arrested?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1) The court correctly denied Arreola's motion to suppress.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief 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 issues raised by Arreola are controlled by clearly settled case law, are of a factual nature or were well within the discretion of the trial court. The transcript in this case is brief; totaling approximately fifty pages, the remainder of the matter is set forth in the record in the form of a stipulated facts trial.

Appellant raises only essentially one issue, did the trial court err when it refused to suppress the evidence found on Appellant's person after

his valid arrest for an outstanding warrant. The appellant's challenge is that the officer did not have a legal basis to arrest the appellant, nor the others in his gang whom he was with on the day this matter occurred, because there was no proof by the State that the elements of the statute in question, Failure to Disperse, RCW 9A.84.020 were met and therefore the officer did not have a legal basis to contact appellant or the other gang members.

RESPONSE TO ASSIGNMENT OF ERROR ONE – THE COURT CORRECTLY DENIED APPELLANT’S MOTION TO SUPPRESS, THE OFFICERS HAD A LEGAL BASIS TO ORDER THE PARTIES TO DISPERSE.

The allegation rises or falls on the discretionary ruling made by the trial court which found that the actions of the officers, while enforcing a law which was “obnoxious” and “which goes counter to all that we think is appropriate in this county” were reasonable given the factual situation confronted by the officers. The enforcement of this statute based on the actions which took place in their presence allowed the officers to arrest appellant and search him incident to that arrest. While that action was conducted there was a valid warrant found for appellant which lead to a full custodial search of his person and the discovery of the drugs. Appellant was subsequently convicted for the possession of those drugs. That count is the legal basis for this appeal.

A full and fair reading of the verbatim report of proceedings makes it clear that the officers in this matter were facing “acts of conduct creating a substantial risk of injury to any person.” (CP 68)

The findings of fact and conclusions of law were clearly based on the testimony and reports of the officers and those findings and conclusion are supported by that testimony and reports. This court should not disturb those findings. As cited by appellant State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.

And while there is no doubt that the Fourth Amendment and Article 1 section 7 of the State constitution guarantee that the State shall not disturb the private affairs nor invade the home of the citizens of the state, it is equally clear that the law in question in this case is constitutional and that any reasonable person would find the evidence presented supported the arrest and detention of Arreola.

Appellant both at the trial court and here couches the actions of the appellant in terms of a group of friends who are merely getting together at someone’s house to take pictures. As was so aptly stated by the deputy prosecutor in this case, “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)

That the trial court did not take its duties lightly is apparent the court did not and does not like this statute;

As I read the briefing it seemed kind of the overarching theme was there's a certain obnoxious character to the statute, the failure to disburse statute, which is 9A.84.020 and I think it is a statute that goes counter to all that we think is appropriate in this country. On the other hand it is a statute and it has not been deemed invalid or unconstitutional, and the question is and I appreciate Ms. Stevens outlining and her kind of limiting where this suppression is because it seems clear that it was Deputy Steadman who recovered the evidence following a search incident to arrest which was pursuant to a felony warrant and that would seem to be appropriate. The question seems to be really whether or not the officers had a right to even identify or question Mr. Arreola and the way I interpret this is I think they clearly did. This is -- the failure to disburse statute is a valid statute. (RP 45-46) (CP 66-69)

This court will review a trial court's findings of fact in a suppression hearing for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016 (2002). Unchallenged findings are verities on appeal. State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009) (citing State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d

993 (2005)). The court will review questions of law de novo. Valdez, 167 Wn.2d at 767.

In this case the appellant did not challenge the findings of fact and conclusions of law, for either the suppression or the stipulated facts trial, therefore those must be considered verities for this appeal. Unchallenged findings of fact are verities on appeal” Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). See also, Sweeten v. Kauzlarich, 38 Wn. App. 163, 169, 684 P.2d 789 (1984) (oral opinion does not become final unless or until it is incorporated in written findings of fact and conclusions of law; oral decision can be used to explain but not to impeach written findings and conclusions).

The trial court here was very specific in indicating the actions of the appellant and his gang members was sufficient to allow the officers to contact them and to cite them for the misdemeanor of failure to disperse. This legal act led to the subsequent seizure of the drugs.

This court needs only to read the facts set forth during the hearing conducted to find that the actions of the trial court were well founded.

This is not an instance where a small group of gang members was being “harassed” by law enforcement. This was a situation where a single officer made the initial contact with the group of at least fifteen gang members.

Nowhere in the record does appellant refute that these persons were gang members. The only testimony put forth was that these people were gang members. This officer did not tell them they could not stay at this residence; he did not say that they could not go to the park. What he told them was that they needed to disperse this large group that was, in his expert opinion, acting in such a way as to cause a substantial risk of causing injury to any person.

The facts are replete with statements from Sgt. Church that the actions of these gang members fit this definition.

Sgt. Church:

A Okay. There was a large gathering of gang members in an area in Toppenish on the 400 block of South Toppenish which is an area that we have a lot of gang activity at and there was some concern because they were all -- that big of a group is very, very, uncommon to see and I went over there and saw that there was a group of 15 plus subjects that could be readily identified as gang members through their clothing, tattoos and contact them. The concern here was that with a group of that size and clearly claiming to be gang members very publicly creates a risk of retaliation from other gangs so I had made contact with them and --

...

Q How did you know they were gang members?

A They had -- the clothing that they were wearing, one. There were several that had shirts with the number 13 on them which is

indicative of being a gang member. They were flying the blue bandanas which is a lot of them what they call their flags. There was tattoos, they were blue, web belts that we also see that are handing down and these are belts that are commonly -- they'll be blue ones, they'll hang down. A lot of times they'll write what their gang is on those belts. It's a way to show that and I was basically -- and the way they were grouping up together, and some of them I had known - at least three of them I had known were documented gang members with our city -- probably and once they're identified, more than that.

Q Did you recognize them as gang members?

A Right, I did. (RP 8-9)

...

Q Okay, what did you do next?

A Well, when they started to flash the signs when they really, really drew some, I guess, real red flags for me because by doing this, through my training and experience I know that when gang members are flashing signs it's a way they claim, I guess, where they're from, show who they represent and rival gang members view this as a direct challenge. When they see these kinds of things, it results in a violent activity, almost every time. Sometimes even with police presence. So, I'm in contact with them. I call for backup units and at that point made contact with them and identified them and made the arrests of all of them at that point for the failure to disburse.

(RP 10)

...

Q Sergeant Church, why did you feel it was necessary for the individuals to disburse?

A I felt it was necessary because, like I said, a

group that large is a very uncommon one and in my experience we get a group that large something follows, whether it's a fight, whether it's a retaliation for something, like I said. We just had a shooting a few days ago. The fact that they were together like that, if anybody from a rival gang come in contact with that while they're together like that, there's going to be a confrontation. Is it a hundred percent? No. Is it ninety percent, I don't know. It's at least over fifty percent, and when the gang signs start pumping up it just increases that risk. It increases the danger and in my opinion at the time, that danger was -- it was great and it was, you know, with them together flashing the signs, you know, being like that, I don't want them to get hurt. I don't want the people around them to get hurt. Based on what they're doing, how they're acting, the signs, it's just that. It is dangerous.

Q So how was this different from any other group of people bunching up in a large group?

A They're not -- well, they're not gang members. The gang is a -- it's a criminal organization. It's, you know, they terrorize people, they commit crimes, other drive by gangs know --

(RP 23)

The claim that this was just a group of guys who wanted to take a picture of the group is specious. This was a gang, identified, a fact that is not refuted in the record, as was testified to by Deputy Steadman:

A ... Those are 15 gang members.

Q Okay. Well, you keep saying that, Deputy Steadman, did you know all these individuals?

A No, I knew none of them.

Q Okay, so you knew none of these people?
A Right.
Q So you're assuming that all these individuals are gang members?
A Mrs. Stevens --
Q Well, I'm just saying, I mean, there's a lot of assumptions that can be made, isn't that true?
A Or ID'd you were a gang member, there's no mistaking it.
Q Okay. Do you have any personal knowledge that all 15 of those or 12 of those were gang members?
A I don't need personal knowledge. They were wearing hats that said Sur, blue hats -- Sur, of course, is short for sureno. Surenos wear blue. They were wearing jerseys with the number 13. They had 13 or Sur on belt buckles, tattoos on their hands that say 13 or have Surenos, all that, there's no mistaking these subjects as gang members.
Q Okay, so that's your opinion, correct?
A No, that's a fact. There's no disputing that, Mrs. Stevens.
...
A Those are gang members.
Q Okay, so the search of all these individuals for weapons was done because you felt that all of them were gang members, correct?
A They were all gang members.
Q Okay. Did you have any personal information about any of those individuals that you knew that in the past they'd carried weapons?
A Gang members carry weapons.
Q Did you have any personal information that any of those 15 people or 12 people had previously carried weapons?
A Ma'am, based on my training and experience, gang members are extremely violent. The commit homicides, they carry weapons, they shoot each other, they shoot rifles. (RP 31-32)

The officer testified that the location of the initial contact was itself the location of a recent crime, "...because of the location that it is, the fact that that house has been hit by drive-by -- by gang violence and drive-by shootings.." (RP 14)

The unrefuted testimony of these officers makes it perfectly clear that the officers considered this group a very serious threat. Sgt. Church stated that when he drew his weapon when he first confronted the gang members at the park, an action which would be highly unusual if this was merely a group of friends who were taking a group picture as appellant would have this court believe.

This officer had, pursuant to a valid statute a statute which was not challenged at the trial court or here, the right and in this situation the duty to contact this group. He communicated his order to the group, one of which was appellant.

It must also be noted that this is not a situation where there was some extended period of time between the order to disperse and the gangs flaunting of that order by going directly to the park and reassembling, just as the officer had told them not to do. This was a continuous action. The officers testified that they ordered them to disperse then they went the short distance to the park and once again came together as a group and again began to "throw signs." It was not as if these gang members dispersed as

ordered, went home and changed into different clothing, which was not associated with their gang came back the next day and gathered together for a group picture.

Sgt Church:

Q Now, defense asked you some questions about the people in the initial group that you contacted.

A Correct.

Q How do you know those were the same individuals that you contacted later at Pioneer Park?

A Because most -- they left from that location, I followed them over there. They went directly there. I was in the area. It's one straight street, West 3rd Avenue, from basically -- they were at the corner of South Toppenish and West 3rd, following it straight to the park. I was on West 3rd the entire time, saw them the whole way.

Q Do you watch them the entire time?

A I did. I did not want them out of my sight because I was concerned about what they were going to do.

Q In that initial contact when you told the group that they needed to disburse, where was the defendant at that time, do you know?

A I believe he was along the fence. I don't know exactly but they were all basically grouped together there listening to me and everybody from that group was part of the same group at Pioneer Park. I know that.

Q You were addressing the entire group?

A Yes. (RP 24-25)

These gang members flouted this unchallenged, lawful order to disperse. They did just exactly what the officer told them they could not do, because as he termed it when asked by defense counsel “Okay. And what would do you understand the charge of failure to disburse to mean? Sgt. Church – “Basically, you got a group of people that are getting together by their actions or what they’re doing creates some risk to the public safety, that’s where I was at.”

This was not one or two or three, gang members, as the officer stated it was very, very uncommon to see this number of gang members together all in one location.

It would be inviting to believe that when the one gang member, Mr. Andrews, stated that he and the other fifteen plus “homies” were gathering merely to take a group picture they were doing just that, however for an officer who testified that this very location was the scene of a drive-by shooting to ignore this “very, very uncommon” occurrence would have been inviting disaster.

Q Sergeant Church, why did you feel it was necessary for the individuals to disburse?

A I felt it was necessary because, like I said, a group that large is a very uncommon one and in my experience we get a group that large something follows, whether it’s a fight, whether it’s a retaliation for something, like I said. We just had a shooting a few days ago. The fact that they were together like

that, if anybody from a rival gang come in contact with that while they're together like that, there's going to be a confrontation. Is it a hundred percent? No. Is it ninety percent, I don't know. It's at least over fifty percent, and when the gang signs start pumping up it just increases that risk. It increases the danger and in my opinion at the time, that danger was -- it was great and it was, you know, with them together flashing the signs, you know, being like that, I don't want them to get hurt. I don't want the people around them to get hurt. Based on what they're doing, how they're acting, the signs, it's just that. It is dangerous.

Q So how was this different from any other group of people bunching up in a large group?

A They're not -- well, they're not gang members. The gang is a -- it's a criminal organization. It's, you know, they terrorize people, they commit crimes, other drive by gangs know --

(RP 23-4)

With regard to the officer ability to search the appellant while at the scene of this crime State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (Wash. 2009) addressed the standard:

A nonconsensual " protective frisk for weapons" is warranted when a " reasonable safety concern exists ... when an officer can point to ' specific and articulable facts' which create an objectively reasonable belief that a suspect is ' armed and presently dangerous.' " *State v. Collins*, 121 Wash.2d 168, 173, 847 P.2d 919 (1993) (quoting *Terry*, 392 U.S. at 21-24, 88 S.Ct. 1868). The officer need not be absolutely certain the individual is armed, only that a reasonably prudent person in

the same circumstances would be warranted that their safety, or that of others, was in danger. *Id.* In *State v. Belieu*, 112 Wash.2d 587, 773 P.2d 46 (1989), we articulated the principle differently: "[C]ourts are reluctant to substitute their judgment for that of police officers in the field. ' A *founded suspicion* is all that is necessary, *some basis from which the court can determine that the detention was not arbitrary or harassing.* ' " *Id.* at 601-02, 773 P.2d 46, (first emphasis added) (quoting *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966)). A nonconsensual investigative detention is a seizure, albeit a legal intrusion if proper safeguards are met. *See Garvin*, 166 Wash.2d at 250, 207 P.3d 1266. (Emphasis in original.)

Here the trial court heard the testimony of the initiating officer and the arresting officer. Both testified, testimony which was not refuted, that with their background training and knowledge it was apparent that this group was a large gathering of one of the primary gangs in this community. They testified that the reason for the order to disperse was not because they were a gang but because they were a gang which was acting in manner which met the standards of RCW 9A.84.020. Sgt Church was very specific in indicating that he believed that the actions of these gang members was a threat to the safety of both themselves and the community.

The State has pointed out in this brief that the trial court appeared to dislike this statute. The court stated there was an "obnoxious character to the statute, the failure to disburse statute, which is 9A.84.020 and I

think it is a statute that goes counter to all that we think is appropriate in this country.” And yet the court found the statute was constitutional, appellant does not challenge that constitutionality and the court found the actions of the officers met the requirements of this statute. This legal contact allowed the officers to make contact with appellant during his arrest for violation of the statute officers found the valid warrant, once again not challenged by appellant, which in turn led to the full custodial search of appellant and the finding of the drugs for which he was subsequently convicted.

The courts dislike of the statute is noteworthy in that even with this obvious dislike of the law and the enforcement of that law the court still found the actions of the officer appropriate.

The State presented evidence at the hearing which established that Arreola had violated RCW 9A.84.020(1) Failing to Disperse – a person is guilty of failing to disperse, which is a misdemeanor, if:

(a) He congregates with a group of three or more other person and there are acts of conduct within that group which create a substantial risk of causing injury to any person, or substantial harm to property; and

(b) He refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing or executing the law.

It is clear he failed to disperse as directed by the officer. Therefore the officer had the ability to arrest Arreola without a warrant and search him incident to that arrest. State v. Walker, 157 Wn.2d 307, 319-20, 138

P.3d 113 (2006) and RCW 10.31.100. “Probable cause exists when the arresting officer is aware of facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed .” State v. Gaddy, 152 Wn.2d 64, 70, 93

P.3d 872 (2004) Whether an officer’s belief was reasonable depends on “all the facts within the officer’s knowledge at the time of the arrest as well as the officer’s special expertise and experience.” State v. Louthan, _ Wn.2d _, 242 P.3d 954, 959 (2010).

As stated in State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482

P.2d 775 (1971):

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. State ex rel. Clark v. Hogan, 49 Wn.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

State v. Johnson, 7 Wn. App. 527, 533, 536, 500 P.2d 788 (1972) addressing a previous version of this statute addressed the reason for this type of statute and the claim that the individuals were merely at the location of the incident and did not take any action which should subject them to criminal liability:

RCW 9.27.060 and 9.27.070 are in a group of statutes dealing with disturbances, riot and unlawful assembly to protect the public peace. RCW 9.27.060, the unlawful assembly statute, requires proof of an intention to do a prohibited act. No such proof of intent is required under RCW 9.27.070, the failure to disperse statute. *State v. Fisk*, 79 Wash.2d 318, 485 P.2d 81 (1971), distinguishes the two statutes and as to the latter states: The purpose of the statutory proscription is to provide a means whereby unlawful mob action may be peaceably averted.

...

Participating by one's presence in an unlawful assembly is the very antithesis of an innocent and unwitting presence, and requires for conviction evidence or inference from evidence to show an intent or design to engage in or further the unlawful acts while being present at the assembly, I.e., carry out any purpose in such a manner as to disturb the peace, or attempt or threaten to do so, or attempt or threaten injury to any person or property, or attempt or threaten any other unlawful acts.

IV. CONCLUSION

The assignment of error raised was factual in nature, well within the trial courts discretion or clearly controlled by settled law and the decision of the court was not an abuse of discretion.

Arreola states in closing that the statute requires more than just a possibility that harm could occur as a result of the groups conduct. What better barometer of the possibility of harm from this group than the fact that when first contacted at the park Sgt. Church an officer of fifteen years, a man very familiar with the gang problem in his town, approached this group with his weapon drawn.

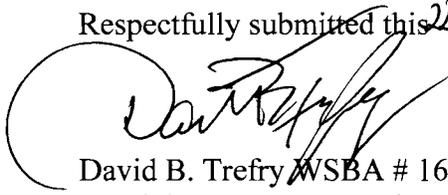
This was not as appellant likes to couch it, a group out for a friendly evening picture. This was and is a criminal enterprise which at the very house where they were ordered, appellant included, to disperse; there had been a drive by shooting. A drive by shooting, not something which a typical group getting together for picture would cause to occur; unless you are a large gathering of Sureno gang members “throwing signs” on the street in front of the location of a previous reprisal or a city park in a gang infested town.

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 actions of the trial court should be upheld, this appeal should be dismissed.

Respectfully submitted this 22 day of April 2011

A handwritten signature in black ink, appearing to read "David B. Trefry". The signature is written in a cursive style with a large, circular flourish on the left side.

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