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Division III  
State of Washington

NO. 29692-0-III  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**JESSE ANTONIO MORENO,**

Defendant/Appellant.

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**APPELLANT'S BRIEF**

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## **ASSIGNMENTS OF ERROR**

1. The trial court's CrR 3.6 Findings of Fact 4, 6, 7, 10, 15 and 22 are not supported by substantial evidence. (Appendix "A"; CP 136).
2. The trial court's CrR 3.6 Conclusions of Law 1, 2, 4, 5, 6 and 10 are not supported by the findings of fact. (Appendix "B").
3. Mr. Moreno was unlawfully arrested.
4. The trial court erred in not merging Mr. Moreno's convictions for first degree assault and unlawful possession of a firearm first degree. (UPF 1°).
5. The State failed to prove, beyond a reasonable doubt, that the charged offenses were gang-related.
6. The imposition of a DVA fee and jury costs (except \$250) is contrary to existing law.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Was Mr. Moreno unlawfully arrested?

2. If Mr. Moreno's arrest was unlawful, then was any evidence subsequently discovered pursuant to the search warrant subject to suppression?
3. Do the trial court's findings of fact and conclusions of law support denial of Mr. Moreno's CrR 3.6 motion?
4. Do the offenses of first degree assault and UPF 1° merge?
5. Did the State prove the offenses were gang-related for purposes of an exceptional sentence?
6. Did the trial court improperly impose a DVA fee and jury costs?

#### **STATEMENT OF CASE**

**DATELINE:** Yakima, Washington  
October 15, 2009  
9:40 p.m.

Shots ring out. 911 is called. Officers respond to the 1500 block of McKinley. (RP 981, ll. 22-23; RP 988, ll. 24-25; RP 990, ll. 22-24).

Sgt. Salinas of the Yakima Police Department is the first officer to arrive. As he approaches McKinley he sees a car emerging from an alley. He spotlights it and blocks it. The individuals in the car act wide-eyed and/or surprised when Sgt. Salinas contacts them. (RP 59, l. 24 to RP 60, l. 4; RP 981, ll. 13-14; RP 993, l. 17 to RP 994, l. 2).

The initial contact with the car and its occupants is at 9:54 p.m. No information that a vehicle is involved is received until 9:58 p.m. The

officers become aware of bullet holes in a house at almost the same time. (RP 90, ll. 7-11; RP 97, ll. 9-24).

Officers Ileana Salinas, Yates and Padilla arrive shortly after Sgt. Salinas. Contact is made with the three individuals who are in the car. They are identified as Joshua Bojorquez, Jesse Moreno and Sebastian Lopez. (RP 1002, ll. 18-23; RP 1005, ll. 3-4; RP 1024, ll. 2-13; RP 1057, ll. 23-24; RP 1201, ll. 19-20; RP 1220, ll. 10-11).

Officer Salinas recognizes Mr. Moreno and Mr. Lopez from prior contacts. Mr. Lopez is a known member of the Norteno gang. He has the moniker "Little Dreamer." (RP 1065, l. 17 to RP 1066, l. 17).

Mr. Bojorquez is wearing a red shirt. The color red is associated with the Nortenos. The color blue is associated with the Surenos. Mr. Bojorquez is driving a blue car. (RP 57, ll. 1-12; Ex. "SE4").

Surenos are known to wear their hair in "pigtails." The Nortenos, on the other hand, wear a "Mongolian" cut (shaved head with bushy hair in the back). (RP 1005, ll. 12-21; RP 1068, ll. 13-25; RP 1069, ll. 1-2).

The Nortenos claim the area east of First Avenue and North of Lincoln in Yakima. The Surenos claim the area from First Avenue to 24<sup>th</sup> Avenue. The area near 16<sup>th</sup> and Lincoln, which includes McKinley, is Sureno turf. (RP 987, l. 15 to RP 988, l. 18; RP 991, l. 20 to RP 992, l. 6).

When questioned Mr. Bojorquez says he did not hear any shots. The car windows are down. Mr. Bojorquez claims they were in the alley

smoking “weed.” (RP 1001, ll. 15-18; RP 1004, ll. 17-21; RP 1086, ll. 14-19).

Officer Padilla handcuffs Mr. Moreno and places him in a patrol car. Mr. Lopez and Mr. Bojorquez are also handcuffed and put in separate patrol cars. (RP 90, l. 21 to RP 91, l. 7; RP 1222, ll. 12-25; RP 1225, ll. 17-19).

Mr. Bojorquez gives Sgt. Salinas permission to search the interior of the car; but not the trunk. A dark jacket with a lighter colored lining is found inside. A search warrant is later obtained for the trunk. (RP 1079, ll. 15-17; RP 1010, l. 20 to RP 1011, l. 1).

The officers do a “walk through” of the alley. They locate a baseball cap and a single glove. The day had been rainy. There are puddles and mud in the alley. The hat and glove are clean and dry. (RP 1076, l. 23 to RP 1077, l. 1; RP 1077, ll. 7-18).

Officer Yates contacts Edgar Ortiz who lives at 1508 McKinley. Mr. Ortiz looked out his window and saw an individual shooting across the street near the intersection of Lewis and McKinley. The person was wearing a hat and hoody. He had longish hair in back. (RP 1205, ll. 18-24; RP 1305, ll. 8-9; RP 1306, ll. 1-20; RP 1307, ll. 1-3; ll. 7-18; RP 1308, ll. 1-2).

Sgt. Hildebrand drives Mr. Ortiz to a show up of Mr. Moreno, Mr. Bojorquez, and Mr. Lopez. Mr. Ortiz gives a tentative identification of

Mr. Moreno based upon his hairstyle and body build. (RP 1309, ll. 18-25; RP 1310, ll. 1-2; RP 1455, ll. 7-22; RP 1456, l. 25 to RP 1457, l. 1).

Officer Yates locates bullet holes in a truck and house at 1505 McKinley, as well as a motor home at 1509 McKinley. (RP 1208, l. 12 to RP 1214, l. 11; Ex. 13A-E; 14A-D; 17A-E).

Officer Johnson, a drug recognition expert (DRE), is called to the scene to evaluate Mr. Bojorquez. Following the DRE exam Mr. Bojorquez is arrested for driving while under the influence of drugs. Other officers note the odor of marijuana on Mr. Lopez. A later blood test confirms the presence of THC in Mr. Bojorquez's blood. (RP 1008, ll. 5-22; RP 1037, ll. 2-9; RP 1215, ll. 16-17; RP 1216, l. 2; RP 1321, ll. 22-23; RP 1324, ll. 17-20; RP 1325, ll. 6-24; RP 1326, ll. 2-17; RP 1331, ll. 4-6; ll. 17-21).

After Mr. Moreno, Mr. Bojorquez and Mr. Lopez are taken to the police station, and as the officers are beginning to leave, Troy Caolie arrives. He tells the officers that he was walking to a friend's house near Lewis and McKinley. As he was walking someone in a blue car yelled "South side LVL". The car then made a left hand turn. (RP 1344, ll. 7-12; RP 1346, ll. 11-18).

Mr. Caolie describes the shooter as wearing a gray hoody with the hood up over a hat. He is also wearing jeans. He has a thick bushy goatee. He states that he saw enough of the individual's face to be able to

identify him. Mr. Caolie identifies Mr. Moreno from a photo montage based on the size of his head, the width of his face, his jawline and goatee. (RP 1349, ll. 13-18; RP 1350, ll. 1-6; RP 1353, ll. 11-12; RP 1.357, ll. 16-24; RP 1358, ll. 17-18; RP 1373, ll. 19-25).

Mr. Caolie is not a gang member. He acknowledges that the area where he was walking is a Sureno neighborhood. He describes the initial contact between himself and Mr. Moreno as two people approaching one another and one becomes scared. He does not believe Mr. Moreno was lying in wait for him. (RP 1361, l. 25 to RP 1362, l. 1; RP 1379, ll. 8-12).

Mr. Caolie sees Mr. Moreno reach into his pants and pull out a gun. He starts shooting. Mr. Caolie says the gun is aimed at him and he sees Mr. Moreno shoot it. (RP 1348, ll. 5-10; ll. 24-25; RP 1349, ll. 7-9; RP 1364, ll. 23-25).

Mr. Caolie turns and runs in a zigzag pattern from the area. He runs behind some trucks. He is not injured. (RP 1350, ll. 10-15; RP 1351, ll. 5-15).

An Information was filed on October 20, 2009 charging Mr. Moreno with drive by shooting. A gang aggravator is included. (CP 1).

Mr. Moreno was arraigned on October 30, 2009. Scheduling orders were entered. An Amended Information was then filed on December 17, 2009. It charged Mr. Moreno with first degree assault with a firearm enhancement and UPF 1°, along with aggravating factors of gang membership and recent recidivism. (CP 7; CP 10; CP 11; CP 13).

Mr. Bojorquez's case was joined with Mr. Moreno's case on December 18, 2009. The trial was continued to February 1, 2010. Mr. Moreno's attorney was disqualified on January 7, 2010. (CP 15; CP 16).

Numerous continuances and scheduling orders were entered between January 14, 2010 and December 16, 2010. A motion to sever cases was filed on December 16, 2010. The Court denied the motion. (CP 17; CP 19; CP 23; CP 25; CP 90; CP 92; CP 97; CP 106; CP 144; RP 669, l. 19 to RP 671, l. 20; RP 782, l. 17 to RP 784, l. 16).

A CrR 3.6 hearing commenced on May 7, 2010. It was periodically continued. Additional testimony was taken on July 9, 2010, December 8, 2010 and December 9, 2010. The Court issued a Memorandum Decision on December 10, 2010 denying the motion. Findings of Fact and Conclusions of Law were not filed until September 22, 2011. (RP 518, l. 16 to RP 521, l. 3; CP 131; CP 136).

Defense counsel moved to dismiss the case based upon a time-for-trial violation under the Sixth Amendment to the United States Constitution. This was based upon the various delays in the CrR 3.6 hearing. The motion was denied. (RP 236, l. 20 to RP 240, l. 19; RP 242, ll. 6-7).

The time-for-trial violation was again raised on December 10, 2010 (*pro se* by Mr. Moreno). It was also denied. (RP 521, l. 8 to RP 523, l. 16).

Mr. Moreno was found guilty of UPF 1° and first degree assault following a jury trial. The jury also found aggravating factors of recent

recidivism and gang involvement as to each offense. (CP 248; CP 249; CP 250; CP 251; CP 336; CP 337).

A special verdict involving a firearm enhancement was also entered on the first degree assault charge. (CP 335).

The Court ruled that the first degree assault and UPF 1° did not constitute the “same criminal conduct.” It determined that Mr. Moreno’s offender score was 9. The trial court imposed an exceptional sentence on February 4, 2011. The Court further imposed a DVA fee of \$100 and jury costs of \$5,780.50. (CP 344; CP 346).

Mr. Moreno filed his Notice of Appeal on February 4, 2011. (CP 355).

### **SUMMARY OF ARGUMENT**

All evidence seized on October 15, 2009 evolves from an illegal stop and seizure. The investigative stop exception does not apply to Mr. Moreno’s case.

The trial court’s findings of fact are not supported by substantial evidence. The trial court’s conclusions of law contravene caselaw as well as the Fourth Amendment and Const. Art. I, § 7. The evidence should be suppressed.

Mr. Moreno’s convictions merge. The gang aggravator was not proven beyond a reasonable doubt. The DVA fee and jury costs were improperly imposed.

Mr. Moreno is entitled to be resentenced if the evidence is not suppressed.

## ARGUMENT

### A. CrR 3.6 FINDINGS and CONCLUSIONS

...[W]arrantless searches and seizures are per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 222, 29 L. Ed. 2d 564 (1971). ...[T]here are a few “jealously and carefully drawn’ exceptions” to the warrant requirement which “provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.” *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979). *See: Jones v. United States*, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958). **The burden is on the prosecutor to show that a warrantless search or seizure falls within one of these exceptions.** *See: Arkansas v. Sanders, supra.*

*State v. Houser*, 95 Wn. 2d 143, 149, 622 P. 2d 1218 (1980). (Emphasis supplied.)

Mr. Moreno asserts that the State failed to carry its burden of proof under the facts and circumstances of his case. The only possible exception to the warrant requirement is a *Terry*<sup>1</sup> stop and investigation.

All seizures of the person, even those involving only brief detentions must be tested

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)

against the Fourth Amendment guaranty of freedom from unreasonable searches and seizures. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 17, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). ... An investigatory stop short of an arrest may be made on less than probable cause. *Terry v. Ohio, supra*. An officer making such an investigatory stop...is required by the Fourth Amendment to have a reasonable suspicion, based upon objective facts, that **the individual is involved in criminal conduct**. *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); see *Terry*, at 21-22.

*State v. Thompson*, 93 Wn. 2d 838, 840-41, 613 P. 2d 525 (1980). (Emphasis supplied.)

The only information which Sgt. Salinas had at the time he stopped the car was that shots had been fired near Lewis and McKinley.

There was no indication of any vehicle being involved. There were three people in the car. A caller provided a suspect description of a male wearing a white jacket with a dark jacket running in the alley. (RP 995, ll. 16-23).

The car was emerging from an alley. It stopped before entering the roadway. It signaled before turning toward the patrol car. (RP 53, ll. 20-23; RP 54, ll. 1-7).

Even though it was Sgt. Salinas's opinion that the car was driving "hurriedly," he still did not observe either a traffic infraction or a criminal offense. (RP 96, ll. 7-17).

The reasonableness of an officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. *Cortez* [*Unites States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 621 (1981)] at 417; *State v. Glover*, 116 Wn. 2d 509, 514, 806 P. 2d 760 (1991).

*State v. Gleason*, 70 Wn. App. 13, 17, 851 P. 2d 731 (1993).

The totality of the circumstances in Mr. Moreno's case do not support the stop of the car by Sgt. Salinas. Mr. Moreno concedes that spotlighting the car does not constitute a seizure. However, when additional facts are considered, a seizure occurred.

Sgt. Salinas parked the patrol car so as to block the other car. A number of other officers shortly arrived on the scene. It became readily apparent to the occupants of the car that they were not going anywhere. *See: State v. Stroud*, 30 Wn. App. 392, 396, 634 P. 2d 316 (1981).

While the findings of the trial court following the suppression hearing are of great significance, the constitutional rights at issue require this court to undertake an independent evaluation of the record.

*State v. Gleason, supra*, 16.

Mr. Moreno asserts that the major underlying premise involved in Sgt. Salinas's stop and detention derives from Mr. Bojorquez wearing a red shirt in a Sureno neighborhood. Sgt. Salinas testified that he would not stop a car based upon the fact that a person was wearing a red shirt. Yet, in his opinion, the fact that Mr. Bojorquez was wearing a red shirt, is highly unusual. (RP 57, ll. 1-12; RP 1036, ll. 11-16).

In the absence of a traffic infraction, and in the absence of an offense being committed in Sgt. Salinas's presence, there is no justification for the stop of the car.

Innocuous facts do not justify a stop. *State v. Armenta*, 134 Wn. 2d 1, 948 P. 2d 1280 (1997). The officer may, however, rely on experience in evaluating arguably innocuous facts. *State v. Samsel*, 39 Wn. App. 564, 570-71, 694 P. 2d 670 (1985).

*State v. Martinez*, 135 Wn. App. 174, 180, 143 P. 3d 855 (2006).

The trial court, in its findings of fact, recognized that Sgt. Salinas had considerable gang-related experience. Nevertheless, he was acting on a hunch, as opposed to a reasonable basis for stopping the car. He had no objective facts upon which to conclude that the individuals in the car had been involved with the "shots fired" call.

It also appears that the trial court placed significant weight on the fact that Nortenos were in a Sureno neighborhood. Mr. Bojorquez advised the officers that they had been smoking "weed" in the alley. Mr. Lopez had the odor of marijuana on his person. (RP 164, ll. 17-24). Mr. Bojorquez later tested positive for THC and was arrested for driving while under the influence of drugs. There was no indication that Mr. Moreno was under the influence of any drugs.

Presence in a high crime area at night is not enough. **The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so.**

*State v. Martinez, supra.* (Emphasis supplied.)

Sgt. Salinas had no specific objective facts to indicate that Mr. Moreno, a passenger in the Bojorquez car, was involved in criminal activity. (RP 91, ll. 8-16).

The trial court's findings of fact and conclusions of law cannot withstand judicial scrutiny. Mr. Moreno contends that his case is substantially similar to *State v. Thompson, supra.* The *Thompson* court concluded, at 842-43, that the suppression hearing judge committed error when determining that the officer's instinct was sufficient to justify the stop. The Court stated:

There is an understandable desire by police officers to investigate what appear to be suspicious circumstances. Those investigations, however, must comport with Fourth Amendment protections. Otherwise, when a stop is not based on specifically articulated facts, "the risk of arbitrary and abusive police practices exceeds tolerable limits."

This is exactly what occurred in Mr. Moreno's case.

As was noted in *Campbell v. Department of Licensing*, 31 Wn. App. 833, 837, 644 P. 2d 1219 (1982);

Because the initial stop was not lawful, the subsequent arrest was not lawful. The facts observed by the officer after the stop was a direct result of the illegal stop and therefore cannot serve as the basis for probable cause.

The limited information available to Sgt. Salinas, combined with his minimal observations, do not rise to a reasonable articulable suspicion

that the car emerging from the alley had been involved with the “shots fired” call.

#### B. UNLAWFUL ARREST

To justify an officer in making an arrest without a warrant for an offense not committed in his presence, he must have reasonable grounds to believe that a felony has been committed and that the person apprehended is the guilty party. A mere general suspicion is not sufficient to justify an arrest. “Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.” 4 Am.Jur. 33, 48; *State v. Hughlett*, 124 Wash. 366, 214 P. 841; *State v. Vennir*, 159 Wash. 58, 291 P. 1098.

*Kalkanis v. Willestoff*, 13 Wn. (2d ) 127, 129, 124 P.(2d) 219, 44 A.L.R. 149; 4 Am. Jur. 2d (1942) *See also: Kilcup v. McManus*, 64 Wn. (2d) 771, 777, 394 P. (2d) 375 (1964).

Sgt. Salinas responded to a call of “shots fired.” RCW 9A.230(1) states, in part:

For conduct not amounting to a violation of Chapter 9A.36 RCW, any person who:  
(a) ...  
(b) Willfully discharges any firearm...in a public place, or in any place where any person might be endangered thereby... **is guilty of a gross misdemeanor...**

(Emphasis supplied.)

Sgt. Salinas had no information that a felony had been committed. He did observe any offense prior to seizing the car and its occupants.

An officer making an arrest without a warrant, on the theory that a crime has been committed, must not only have a real belief of the guilt of the party about to be arrested, but such belief must be based upon probable cause and reasonable grounds. An officer may not arrest simply because he has some fleeting idea or suspicion that the individual has committed a felony.

*State v. Miles*, 29 Wn. (2d) 921, 930, 190 P. (2d) 740 (1948).

The record clearly reflects that none of the officers had any information, at the time of the stop, to indicate that either Mr. Moreno, Mr. Bojorquez, or Mr. Lopez had committed a felony. No offense was committed in any officer's presence. Mr. Moreno asserts that the *Miles* case is still good law.

RCW 10.31.100(1) does not allow for a warrantless arrest on a "shots fired" call. RCW 10.31.100 provides, in part:

... A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except if provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor involving physical harm or threats of harm to any person or property ... shall have the authority to arrest the person.

No officer had any information that any physical harm had occurred at the time of the stop.

No officer had any information that any property damage had occurred at the time of the stop.

Mr. Caolie did not appear to provide information to the officers until after the arrests had been made.

Mr. Moreno was under arrest at the time he was handcuffed and placed in the patrol car. He was not free to leave. *See: Michigan v. Chesternut*, 486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988); *State v. Mennegar*, 114 Wn. 2d 304, 310-11, 787 P. 2d 1347 (1990).

Further support is given to Mr. Moreno's argument by the fact that Sgt. Salinas called a sidebar of the officers. During that sidebar he stated: "We have to find something on these guys". "We have to write them up for something." (RP 209, l. 24 to RP 210, l. 20; RP 1493, ll. 20-25; RP 1494, l. 22 to RP 1495, l. 4; RP 1515, ll. 8-20).

The determination of whether or when an arrest has occurred may be of constitutional significance in delineating the rights of the accused. When the defendant challenges the legality of an arrest, **the state must show there is probable cause to make the arrest at that particular moment.** The defendant may wish to prove, for instance, that a sequence of events did constitute an arrest and that, since probable cause for the arrest did not exist at that instant, the arrest was illegal. On the other hand, the prosecution may argue that no arrest occurred. In doing so, it avoids the burden of demonstrating probable cause to arrest and may attempt to justify its

actions in terms of reasonableness in making an investigatory stop.

**12 WA. PRAC.**, Arrest § 3104. (Emphasis supplied.)

“A mere suspicion that the suspect is involved in criminal activity cannot form the basis of a valid arrest.” **12 WA. PRAC.**, Arrest § 3113.

The officers actions following the stop exceeded the scope of a *Terry* investigation. Mr. Moreno compares the actions by the officers in his case with the racial incongruity condemned in *State v. Gleason, supra*.

The officers believed that Mr. Moreno, Mr. Bojorquez and Mr. Lopez were Nortenos on Sureno turf. Thus, since rival gang members were on another gang’s turf they must be there for some nefarious reason.

“...[T]here is no crime of investigation.” *United States v. Guana-Sanchez*, 484 F. 2d 590, (7th Cir. 1973). *See: Davis v. Mississippi*, 394 U.S. 721, 726-27, \_\_\_S.Ct. 1394, 22 L. Ed. 2d 679 (1969).

The car was searched after obtaining a search warrant. Officers located a .357 Magnum, a 12 gauge shotgun and three sweatshirts in the trunk. There were six empty rounds in the .357. There was also a black glove in the trunk which was similar to the glove found in the alley. (RP 1087, ll. 9-15; ll. 19-20; RP 1090, ll. 3-13).

A hooded sweatshirt located in the trunk was black with a white lining. It had mud splashed up the back of it. (RP 1098, l. 18 to RP 1099, l. 25).

The search warrant for the car arose from the unlawful arrest and illegal stop and seizure. Because the evidence seized pursuant to the

search warrant derives directly from the illegal stop and unlawful arrest, it is the fruit of the poisonous tree and must be suppressed. *See: Wong Sung v. United States*, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The rights of individuals as guaranteed by our constitution, are not to be lightly considered. The framers of our constitution, Federal and state, realized that laws affecting the liberty of men must be safeguarded, since the wisdom of the ages has taught that unrestrained official conduct in respect to depriving men of their liberties would soon amount to a total loss of those liberties. Where procedure relating to arrest and search is provided, it must be strictly followed.

*State v. Miles, supra*, 926.

### C. MERGER

Merger is a judicial doctrine used to determine whether the legislature intended to impose multiple punishments for an act that violates more than one statute. *State v. Eaton*, 82 Wn. App. 723, 729, 919 P. 2d 116 (1996). The doctrine applies only

where the legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.*, first degree rape) the State must prove not only that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping).

*State v. Vladovic*, 99 Wn. 2d 413, 421, 662 P. 2d 853 (1983). Thus, it applies where a crime is elevated to a higher degree by proof of an act that is prohibited elsewhere in the criminal code. *Eaton*, 82 Wn. App. at 730.

*State v. L.U.*, 137 Wn. App. 410, 415, 153 P. 3d 894 (2007).

Count 1 of the Amended Information charges Mr. Moreno with first degree assault as follows:

On or about October 15, 2009, in the State of Washington, with intent to inflict great bodily harm upon the person of Troy Caolie, you assaulted that person with a firearm.

Count 2 of the Amended Information charges Mr. Moreno with UPF 1°. It states, in part:

On or about October 15, 2009, in the State of Washington, you knowingly owned or had in your possession or control a firearm, a .357 Magnum revolver...

One of the elements of RCW 9A.36.011(1), which defines the offense of first degree assault, is that the assault be with a “firearm or any deadly weapon.” The “firearm” element distinguishes first degree assault from second degree assault, as it is defined under RCW 9A.36.021(1)(c).

Second degree assault only requires the use of a “deadly weapon.”

Neither RCW 9A.36.031, which defines third degree assault, nor RCW 9A.36.041, which defines fourth degree assault, mentions the term “firearm.”

The Legislature has clearly indicated that use of a firearm elevates an assault from second degree to first degree. Therefore, UPF 1° merges with first degree assault. As a result, Mr. Moreno's offender score must be recalculated.

#### **D. GANG AGGRAVATOR**

RCW 9.94A.535(3)(s) sets forth the following aggravating factor:

The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

Mr. Moreno contends that the State presented no evidence that the events of October 15, 2009 were for the purpose of gang membership or advancement.

The testimony from the various gang unit officers and others was speculative at best.

Sgt. Salinas testified as follows: "Rivals don't hang out on another gang's turf." (RP 1007, ll. 6-8l);

He also said: "...[I]t's difficult to point out to an individual that's walking in the street and say anybody wearing red could be a Norteno." (RP 1015, ll. 13-15).

Officer Salinas testified that when rival gang members are in one another's turf it means trouble and "putting in work," *i.e.* random acts of violence. (RP 1062, ll.2-20).

She also claimed gang members may not wear colors to blend in and evade law enforcement. (Objection sustained) (RP 1151, ll. 7-22).

Sgt. Hildebrand indicated that upon arrival at the scene he determined that the gang unit would have to take over. (RP 1396, l. 18 to RP 1397, l. 6).

Corrections Officer Gamino from the Yakima County Department of Corrections testified concerning the classification process at the jail. Gang members are separated for safety reasons. Mr. Bojorquez admitted Norteno membership. Mr. Moreno also admitted Norteno membership. (RP 1429, ll. 3-4; ll. 19-23; RP 1430, ll. 17-24; RP 1431, l. 22 to RP 1432, l. 14; RP 1434, ll. 18-25).

Other than Nortenos being in Sureno territory (*i.e.*, First Amendment right to travel) and the fact that shots were fired in that area, there is no indication that the incident was gang-related.

There is no indication in the record that Mr. Ortiz, or the other homeowners who had property damaged, are gang members.

Mr. Moreno contends that a random act of violence cannot substantiate a gang-related aggravator.

“[T]estimony of criminal profiles is highly undesirable as substantive evidence because it is of low probativity and inherently prejudicial.” *United States v. Gillespie*, 852 F. 2d 475, 480 (9<sup>th</sup> Cir. 1988).

*State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864 P. 2d 426 (1994).

The entire testimony, as it pertains to gangs, is geared toward criminal profile evidence. Yet, even though it is geared in that direction, it fails to substantiate that the first degree assault was gang motivated.

Mr. Moreno maintains that the facts and circumstances of his case are clearly distinguishable from the cases that have found a gang aggravator present. *See: State v. Riley*, 69 Wn. App. 349, 355, 848 P. 2d 1288 (1993) (entry into rival gang territory in retaliation for an earlier beating with use of weapons against rival gang members who had not been at that beating); *State v. Johnson*, 124 Wn. 2d 57, 66-69, 873 P. 2d 514 (1994) (gang motivated shooting where there was a prior history between the rival gangs and the individual committing the offense); *State v. Yarbrough*, 151 Wn. App. 66, 96-97, 210 P. 3d 1029 (2009) (gang murder following an earlier confrontation between the respective gangs with a statement at the time that it was the Hilltop Crips).

Finally, Mr. Moreno asserts that *State v. Scott*, 151 Wn. App. 520, 526-27, 213 P. 3d 71 (2009) clearly establishes that there must be a nexus between the offense committed and gang membership. The nexus is missing in Mr. Moreno's case.

#### **E. DV ASSESSMENT AND JURY COSTS**

The trial court assessed a \$100 DVA fee under RCW 10.99.080.

RCW 10.99.080(1) provides, in part:

...[S]uperior courts...may impose a penalty assessment not to exceed one hundred dollars on any person convicted of a crime involving domestic violence. . . .

Mr. Moreno was convicted of UPF 1° and first degree assault. No domestic violence (DV) was involved.

The State did not assert a DV allegation in the Amended Information. No evidence was adduced that a family or household member was involved in either offense as that phrase is defined in RCW 10.99.020(1).

The DVA fee was erroneously imposed.

The trial court also imposed a jury fee of \$250 and jury costs of \$5,780.50. The jury costs are erroneously imposed.

A comprehensive analysis of the limitations on imposition of jury fees is contained in *State v. Hathaway*, 161 Wn. App. 634 (2011). The *Hathaway* Court, concluded at 652-53:

RCW 10.01.160(1) permits the trial court to impose costs on a convicted defendant. Former RCW 10.01.160(2) (2008), in part, allows the trial court to impose jury fees under RCW 10.46.190. RCW 10.46.190 allows the superior court to impose jury fees on convicted defendants using the same rules covering civil jury fees. RCW 36.18.016(3)(b) provides that “[u]pon conviction in criminal cases a jury demand charge of one hundred twenty-five dollars for a jury of six, or two hundred fifty dollars for a jury of twelve may be imposed as costs under RCW 10.46.190.”

The plain language of the statutory scheme expressly allows a superior court to impose a jury demand fee in criminal cases on a defendant after his or her conviction. RCW 10.01.160(1); former RCW 10.01.160(2); RCW 10.46.190. And the jury demand fee cannot exceed \$125.00 for a 6-person jury or \$250.00 for a 12-person jury. RCW

36.18.016(3)(b). Here, the trial court imposed a \$1,604.53 jury demand fee... .The trial court erred when it imposed a jury demand fee in excess of its statutory authority... .

Mr. Moreno should be relieved of these unauthorized assessments.

### CONCLUSION

Mr. Moreno was unlawfully arrested on October 15, 2009. There is no exception to the Fourth Amendment or Const. art. I, § 7 justifying the stop of the car and the arrest of the occupants.

The search warrant which was obtained derives from the unlawful stop and arrest. Any evidence seized under the warrant is tainted and must be suppressed.

First degree assault and UPF 1° merge. Possession and/or use of a firearm elevate the offense of second degree assault to first degree assault.

The State failed to prove, beyond a reasonable doubt, the presence of a gang aggravating factor.

Sentencing conditions including a DVA fee and jury costs were erroneously imposed.

Mr. Moreno respectfully requests that his convictions be reversed and the case dismissed based on the constitutional violations.

Alternatively, Mr. Moreno is entitled to be resentenced due to merger of the offenses, insufficient evidence of the gang aggravator and the improper imposition of the specified costs.

DATED this \_\_\_1st\_\_\_ day of November, 2011.

Respectfully submitted,

s/ Dennis W. Morgan

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**NO. 29692-0-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	YAKIMA COUNTY
Plaintiff,	)	
Respondent,	)	NO. 09 1 01939 3
	)	
v.	)	
	)	<b>CERTIFICATE OF SERVICE</b>
JESSE ANTONIO MORENO,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 1st day of November, 2011, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

Renee S. Townsley, Clerk  
Court of Appeals, Division III  
500 North Cedar Street  
Spokane, Washington 99201

E-FILE

Yakima County Prosecutor's Office  
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E-FILE (per agreement)

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## APPENDIX "A"

4. Sgt. Salinas immediately noticed the defendant's vehicle as it attempted to exit an unpaved alley onto the street. The car was traveling swiftly given road conditions. The car came to an abrupt stop. The car immediately signaled that it was going to turn towards Sgt. Salinas's patrol vehicle.

6. The defendants were dressed in red (the chosen color of the nortenos) and were loitering in a sureno neighborhood.

7. Defendant Bojorquez stated Moreno and Lopez had been hanging out in the alley smoking marijuana. The alley was the location where gunshots had been heard.

10. Bojorquez gave permission to search the cabin of the car but refused to consent to a search of the trunk. Given the totality of the circumstances that refusal raised further suspicions for law enforcement.

15. The officers were dealing with an extremely violent felony situation that posed an immediate life threatening risk to members of the community.

22. This event was fast moving and fluid.

## APPENDIX "B"

1. Law enforcement was authorized to stop and make contact with the defendants in their vehicle.
2. Following the vehicle stop and given defendants responses to officers' questions, it was appropriate to take the defendants into custody.
4. The discovery of the firearm was a direct consequence of the search warrant and not by the arrest of Moreno.
5. The discovery of the weapons was based on a lawful search based on a search warrant.
6. There is no relationship between the arrest, which is questioned by defendant and the subsequent discovery of the weapons.
10. There was probable cause to issue the warrant.