

FILED

FEB 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 296920

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JESSE ANTONIO MORENO,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmes
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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether Jesse Antonio Moreno was lawfully arrested?
2. Whether evidence subsequently discovered pursuant to the execution of a search warrant should have been suppressed?
3. Do the trial court's findings of fact and conclusions of law support the court's denial of Moreno's motion to suppress?
4. Whether the offenses of first degree assault and unlawful possession of a firearm in the first degree merge?
5. Whether sufficient evidence supported the gang aggravator?
6. Whether the court imposed a domestic violence fee in error?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The occupants of the vehicle, including Mr. Moreno, were lawfully detained pursuant to a *Terry* stop, and while so detained, the officers developed probable cause to arrest Moreno after speaking with the occupants and a witness at the scene.
2. The court did not err in denying the motion to suppress, as the evidence retrieved from the trunk was pursuant to the execution of the search warrant, and was independent of Moreno's detention and arrest.

3. The court's findings and conclusion support the denial of the motion to suppress.
4. As a matter of law, first degree assault and unlawful possession of a firearm in the first degree do not merge.
5. There was sufficient evidence to support the jury's finding on the gang aggravator.
6. The State concedes that the domestic violence fee was included in the judgment in error, and the judgment should be corrected.

II. STATEMENT OF THE CASE

The State does not dispute the Appellant's Statement of the Case, but supplements the Statement of the Case contained in Appellant's opening brief with the following.

As Sgt. Salinas testified at the suppression hearing, at the time he was detailed to the Yakima Police gang unit the predominant gangs in Yakima were the Nortenos and Surenos. Surenos groups included Little Valley Locos, or LVL, Playboy Surenos and Southside Familia. **(5-7-10 RP 45-46)**

The area to which officers were summoned as a result of reports of shots fired, in area of north central Yakima near McKinley Avenue, was known as Surenos territory, and the Surenos "claim blue". **(5-7-10 RP 47)**

The shots fired call was directed to an alley in the area of the 1500 block of McKinley. It was in that alley that Sgt. Salinas observed the vehicle in question. Salinas believed that the vehicle was either involved, or the occupants could shed light on where the shots were fired. **(5-7-10 RP 52)**

The vehicle's travel seemed a bit hurried, and a turn signal was activated at the same time Sgt. Salinas illuminated it with a spotlight. **(5-7-10 RP 53-54)**

Sgt. Salinas decided to stop the vehicle, due to its location, that it was coming out of the alley, and that he further information from a reporting party that an individual involved in the shooting had been seen running in the alley. **(5-7-10 RP 54)**

Additionally, the vehicle came to a sudden stop, and the driver was wearing a red shirt. Sgt. Salinas was "already thinking because of the shirt and the area and the type of the crime that we're involved in here, that this car is somehow involved or, again, they can tell me more about what's happened." **(5-7-10 RP 57)**

Sgt. Salinas then elected to "freeze the scene", removing occupants of the vehicle, and separating them from each other. He also believed that there may be "weed" somewhere in the vehicle. **(5-7-10 RP 68)** Further, the driver, Mr. Bojorquez, seemed impaired, and Salinas requested a DRE

officer to assist with evaluating whether Bojorquez was driving under the influence. (5-7-10 RP 75-78)

III. ARGUMENT

1. The initial stop of the vehicle was a valid Terry stop, as Sgt. Salinas had an articulable suspicion that Mr. Moreno and the other occupants of the vehicle were involved in a possible shooting.

A trial court's conclusions of law in an order pertaining to suppression of evidence are reviewed *de novo*. State v. Carneh, 153 Wn.2d 272, 281, 103 P.3d 743 (2004). Factual findings are reviewed to determine whether they are supported by substantial evidence. State v. Aase, 121 Wn. App. 558, 564 89 P.3d 721 (2004).

A seizure is reasonable if there is an articulable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868 (1968). An officer may detain a suspect for an investigative stop even though the officer does not have probable cause to believe the suspect has committed a crime. Id. A *Terry* stop is justified under both the Fourth Amendment and art. I, s. 7 if a police officer is able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id., 392 U.S. at 21; State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997), *cited in* State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999).

The level of articulable suspicion necessary to support an investigative detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

An officer is not required to rule out all possibilities of innocent behavior before initiating a stop. State v. Anderson, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

As the term “articulable suspicion” cannot encompass all the myriad factual situations which may arise, a court must look to the totality of circumstances in determining whether an investigative stop is lawful. State v. Stroud, 30 Wn. App. 392, 398, 634 P.2d 316 (1981). *See, also*, United States v. Cortez, 449 U.S. 411, 66 L. Ed.2d 621, 101 S. Ct. 690, 695, (1981). Further, a court must weigh “(1) the gravity of the public concern, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty.” Id., at 397.

In reviewing the totality of the circumstances, a court may consider the officer’s training and experience, location of the stop, and the conduct of the person detained. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992); State v. Glover, 116 Wn.2d 509, 513, 806 P.2d 760 (1991). Another factor would be the nature of the suspected crime. Indeed,

officers are given greater latitude if the suspect conduct endangers life or personal safety; a violent felony crime more so than does a gross misdemeanor. State v. McCord, 19 Wn. App. 250, 576 P.2d 892, *review denied*, 90 Wn.2d 1013 (1978); State v. Randall, 73 Wn. App. 225, 229-30, 868 P.2d 207 (1994).

Probable cause will support an arrest of a suspect if there are sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity. State v. Gentry, 125 Wn.2d 570, 607, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). Probable cause is a quantum of evidence less than would justify a conviction, but more than a bare assertion. Brinegar v. United States, 338 U.S. 160, 175, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949); State v. Cord, 103 Wn.2d 361, 365, 693 P.2d 81 (1985).

Here, Sgt. Salinas was responding to multiple reports of shots fired, potentially a situation which would endanger members of the public, and he encountered the vehicle driven by Mr. Bojorquez in the very area from which the shots were reportedly fired.

The car came to a complete stop, and signaled a turn toward the officer. The driver was wearing a red shirt in Surenos territory. Based on his training and experience, he had more than an articulable suspicion that the vehicle was either involved, or the individuals inside may have

information about the shooting. The stop was justified given the totality of the circumstances.

Further detention was warranted when Mr. Bojorquez referenced smoking marijuana, which is a criminal violation of the law, as was Sgt. Salinas' suspicion that Bojorquez was driving while impaired.

While this detention was still ongoing, probable cause to arrest Mr. Moreno developed, as the hat, glove and sweatshirt were recovered, and Mr. Ortiz tentatively identified Mr. Moreno as the individual who was shooting near the intersection of Lewis and McKinley.

The remedy for an illegal search and seizure is the exclusion of the illegally obtained evidence and all evidence discovered as a result of the illegality, sometimes referred to as the "fruits of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). *See, also, State v. Miles*, 29 Wn.2d 921, 927, 190 P.2d 640 (1948).

Here, however, even assuming the initial investigative detention was unlawful, there is no causation relationship between the detention and arrest of Mr. Moreno. The gun in question, as well as the other evidence obtained from the trunk, were seized pursuant to a search warrant.

The court's findings were supported by substantial evidence, and the findings support the conclusions of law.

2. The offenses do not merge as a matter of law.

Mr. Moreno argues on appeal that the offenses of first degree assault with a firearm and unlawful possession of firearm in the first degree merge, and his offender score should be recalculated. He is incorrect.

Merger refers to a “doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions.” State v. Vladovic, 99 Wn.2d 413, 419, 662 P.2d 853 (1983). The doctrine only applies:

[W]here 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).

Id., at 421, *quoted in* State v. Fletcher, 113 Wn.2d 42, 47, 776 P.2d 114 (1989).

Here, it is true that Mr. Moreno was convicted of first degree assault with a firearm pursuant to RCW 9A.36.011(1), but it is *not* necessary that unlawful possession of a firearm be proven as part of the offense of first degree assault. Indeed, an element of unlawful possession

of a firearm in the first degree is that the defendant had previously been convicted of a serious offense. RCW 9.41.040(1)(a). There is no merger.

3. Sufficient evidence supported the gang aggravator.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State’s case.

State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

Here, the jury's finding that the first degree assault was gang-related is supported by Mr. Moreno's own words as he was shooting at Mr. Caoile: "South side LVL". **(12-21-10 RP 1346-47)**.

Even though Mr. Caoile was not a gang member, Mr. Moreno's intent was clear, and was consistent with the fact that he was a Norteno in Sureno territory. Rival gang members are known to go onto one another's turf to cause trouble, aka "putting in work". **(RP 1062)**.

Given that there is no other reason Mr. Moreno would call out the name of a rival gang while shooting, there is a nexus shown between the offense and gang affiliation. State v. Scott, 151 Wn. App. 520, 213 P.3d 71 (2009).

4. The State concedes error as to Assignment of Error 6.

The State has reviewed the record and the authorities cited by the Appellant, and is of the opinion that jury costs must be limited to \$250 in light of RCW 10.01.160(1) and State v. Hathaway, 161 Wn. App. 634 (2011).

Also, the convictions do not include a finding of a family relationship between Moreno and the victim, so the DVA fee was entered in error.

The judgment and sentence should be amended.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions and sentences entered by the court, but this matter should be remanded for amendment of the judgment and sentence financial order.

Respectfully submitted this 24th day of February, 2012.



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