

May 25, 2021

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO ANAYA-CABRERA,

Appellant.

No. 53151-8-II

UNPUBLISHED OPINION

CRUSER, J. — Alejandro Anaya-Cabrera appeals his convictions for unlawful possession of methamphetamine, unlawful possession of heroin, and carrying a concealed pistol without a license. Anaya-Cabrera also appeals the jury’s finding that he was armed with a firearm during the commission of his possession crimes. Anaya-Cabrera argues that (1) the trial court erred by denying his motion to suppress evidence discovered after he was seized, (2) the State relied on inadmissible profile testimony to convict him of the firearm sentencing enhancements, (3) he received ineffective assistance of counsel because his counsel failed to object to the profile testimony, and (4) the State presented insufficient evidence to impose the firearm sentencing enhancements. Anaya-Cabrera raises additional issues in his statement of additional grounds.

We hold that, in light of the supreme court’s recent decision in *State v. Blake*, 197 Wn.2d 170, 195, 481 P.3d 521 (2021), Anaya-Cabrera is entitled to vacation of his unlawful possession

of methamphetamine and unlawful possession of heroin convictions. With respect to Anaya-Cabrera's remaining conviction of carrying a concealed pistol without a license, we hold that the trial court properly denied Anaya-Cabrera's suppression motion.<sup>1</sup>

Accordingly, we affirm Anaya-Cabrera's conviction for carrying a concealed pistol and remand with instructions to vacate and dismiss with prejudice his unlawful possession of methamphetamine and unlawful possession of heroin convictions and the corresponding firearm enhancements.

#### FACTS

On September 7, 2018, Deputy Keith Peterson of the Grays Harbor County Sheriff's Office responded to a call regarding a possible disturbance at the property of William Hagara. Peterson was familiar with the Hagara property and referred to it as the "Hagara shop property." Clerk's Papers (CP) at 16 (internal quotation marks omitted). Dispatch informed Peterson that the disturbance involved Hagara and a Latino male. The nature of the disturbance was somewhat unclear, but Peterson understood that the disturbance involved the male preventing Hagara from leaving the property or that the male was taking items from the property without permission from Hagara.

About a quarter mile from the property, Peterson turned off the highway and began traveling down the hill toward the Hagara property when he saw a silver Avalanche pickup truck traveling up the hill. Peterson recognized the driver of the truck as Anaya-Cabrera, a Latino male whom he had arrested a few weeks prior. During the arrest a few weeks prior, Anaya-Cabrera was

---

<sup>1</sup> Because Anaya-Cabrera's remaining claims only concern his unlawful possession of methamphetamine and unlawful possession of heroin convictions, we decline to consider his remaining claims.

interviewed by police officers. Anaya-Cabrera told the officers that he either had recently moved or was in the process of moving out of Hagara's property. Anaya-Cabrera also mentioned a dispute between him and Hagara involving rent or getting kicked off of the property.

Based on his knowledge of Anaya-Cabrera's association with the Hagara property and Anaya-Cabrera's recent conflict with Hagara, Peterson believed that Anaya-Cabrera may have been involved in the disturbance when he saw him driving away from the property. Peterson turned around and activated his lights to detain Anaya-Cabrera. Peterson followed Anaya-Cabrera to a nearby traffic light where the traffic was stopped. Anaya-Cabrera rolled down his window and told Peterson that he would meet him "back down at the gate." *Id.* at 18 (internal quotation marks omitted). Peterson knew that the Hagara property had a gate.

Peterson followed Anaya-Cabrera to the Hagara property, where the gate was open. Anaya-Cabrera parked and exited his truck. After exiting, Anaya-Cabrera turned his body sideways towards Peterson in a "bladed stance," which Peterson described as suggesting that a confrontation may ensue. *Id.* (internal quotation marks omitted). When Anaya-Cabrera pulled his hand out of his pocket, a small item fell out of his pocket. The item was a package of methamphetamine. Peterson detained and arrested Anaya-Cabrera.

Peterson impounded the truck pending his application for a search warrant. After receiving a search warrant, Peterson and Detective Richard Ramirez, a member of the drug task force, searched the truck. The truck contained clothing and personal items. The officers found Anaya-Cabrera's wallet with his identification in the driver's seat and money transfer paperwork containing Anaya-Cabrera's name inside of the truck. The truck also contained drug paraphernalia,

an electronic scale, and a locking gun case. The gun case was near the front console of the truck and was visible from outside of the truck.

The officers also found a loaded handgun under the driver's seat of the truck. Peterson testified that the gun "was directly beneath where Mr. [Anaya-]Cabrera had been seated in the vehicle, so within arm's reach underneath the front driver's seat." 2 Verbatim Report of Proceedings (VRP) at 269. Peterson stated that based on where Anaya-Cabrera was located in the truck, the gun was "easily accessible." *Id.* The officers disassembled the interior of the truck after observing pry marks and loose screws in the interior. The officers found two packages of heroin and one package of methamphetamine inside the driver's side door panel.

The State charged Anaya-Cabrera with possession of methamphetamine with intent to deliver while armed with a firearm, possession of heroin with intent to deliver while armed with a firearm, and carrying a concealed pistol without a license.

Anaya-Cabrera moved to suppress evidence related to the search and seizure. Anaya-Cabrera argued that the evidence was obtained in violation of his constitutional rights because Peterson's seizure of Anaya-Cabrera was not supported by reasonable and articulable suspicion. Anaya-Cabrera argued that the seizure was not supported by reasonable and articulable suspicion because Peterson did not know of any facts that connected Anaya-Cabrera to the disturbance at the Hagara property.

The court held a hearing on Anaya-Cabrera's motion to suppress. At the hearing, Peterson testified to the facts outlined above. In addition, Peterson also testified that his decision to seize Anaya-Cabrera was also supported by the fact that dispatch had told him that a silver truck was

involved in the disturbance at the Hagara property. Peterson did not provide this fact in his written report.

After a hearing on the matter, the court denied Anaya-Cabrera's motion. The court concluded that Peterson's initial detention of Anaya-Cabrera was based on reasonable and articulable suspicion of criminal activity. The court based its decision on the following facts known to Peterson at the time and the rational inferences therefrom: (1) Peterson had been dispatched to a disturbance at the Hagara property involving a Latino male; (2) on his way to the property, Peterson observed Anaya-Cabrera, a Latino male, about a quarter mile away from the property driving away from the property; (3) Peterson knew from his recent encounter with Anaya-Cabrera that he had recently moved from the Hagara property and that there was some recent history of conflict between him and Hagara; (4) when Peterson came up behind Anaya-Cabrera's truck with his lights on, Anaya-Cabrera rolled down his window and said something to Peterson to the effect of, "I'll meet you at the gate," which Peterson took to refer to the gate at the Hagara property, and that was in fact where Anaya-Cabrera pulled over and stopped. CP at 20 (internal quotation marks omitted).

In the court's order denying Anaya-Cabrera's motion, the court did not make a finding of fact on whether dispatch told Peterson that a silver truck was involved in the disturbance at the Hagara property. However, the court's order noted that "[e]ven without information about a silver pickup truck being involved, this information was sufficient to give Deputy Peterson reasonable and articulable suspicion that the Defendant had been involved in the disturbance at the Hagara property to justify detaining him." *Id.*

The case proceeded to trial, and the jury convicted Anaya-Cabrera of the lesser included crimes of unlawful possession of methamphetamine and unlawful possession heroin. The jury returned special verdict findings that Anaya-Cabrera was armed with a firearm during the commission of the crimes. The jury also found Anaya-Cabrera guilty of carrying a concealed pistol without a license.

Anaya-Cabrera appeals.

## DISCUSSION

### I. SEIZURE

Anaya-Cabrera argues that the trial court erred in denying his motion to suppress all evidence discovered after he was seized by Peterson because Peterson did not have sufficient grounds to seize him in the first place. We disagree.

“In reviewing the denial of a motion to suppress, we review the trial court’s conclusions of law de novo and its findings of fact used to support those conclusions for substantial evidence.” *State v. Fuentes*, 183 Wn.2d 149, 157, 352 P.3d 152 (2015). If the defendant does not challenge the trial court’s findings of fact, this court considers them verities on appeal. *State v. Bray*, 143 Wn. App. 148, 152, 177 P.3d 154 (2008).

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution demand that an officer obtain a warrant before seizing an individual unless an exception to the warrant requirement applies. *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017). “The State has the burden to prove that a warrant exception applies.” *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009).

One such exception to the warrant requirement permits an officer to conduct a brief investigative stop known as a *Terry* stop. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796

(2015). A *Terry* stop is permissible if the “officer has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime.” *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). Generalized suspicion that the person may be up to no good is insufficient to justify a stop. *Bliss*, 153 Wn. App. at 204. Rather, “the facts must connect the particular person to the *particular crime* that the officer seeks to investigate.” *Z.U.E.*, 183 Wn.2d at 618.

In determining whether an officer’s suspicion was reasonable, we look to the totality of the circumstances. *Acrey*, 148 Wn.2d at 747. Among the factors to consider when evaluating whether the stop was proper are the officer’s training and experience, the location of the stop, and the conduct of the detainee. *Id.* To an extent, reasonableness of the stop depends on the seriousness of the suspected criminal conduct. *State v. McCord*, 19 Wn. App. 250, 253, 576 P.2d 892 (1978).

The parties agree that Anaya-Cabrera was seized when Peterson activated his lights while behind Anaya-Cabrera’s truck. Anaya-Cabrera does not challenge any findings of fact supporting the trial court’s conclusion that Peterson’s initial detention of Anaya-Cabrera was based on reasonable and articulable suspicion of criminal activity. Therefore, those findings are verities on appeal. *Bray*, 143 Wn. App. at 152. Rather, Anaya-Cabrera challenges only the trial court’s conclusion of law that Peterson’s detention of Anaya-Cabrera was based on reasonable suspicion, arguing that reasonable suspicion was lacking because Peterson did not know if Anaya-Cabrera had any involvement with the disturbance at the Hagara property.

Anaya-Cabrera argues that Peterson did not have reasonable suspicion to detain him based on the absence of a finding regarding whether Peterson learned from dispatch that a silver pickup truck may have been involved in the disturbance. At the hearing on Anaya-Cabrera’s motion to

suppress, Peterson claimed for the first time that dispatch told him that a silver truck was involved in the disturbance at the Hagara property. However, when denying Anaya-Cabrera's motion, the court expressly stated that "[e]ven without information about a silver pickup truck being involved, this information was sufficient to give Deputy Peterson reasonable and articulable suspicion that the Defendant had been involved in the disturbance at the Hagara property to justify detaining him." CP at 20.

Anaya-Cabrera also asserts that race played a significant role in Peterson's decision to stop Anaya-Cabrera, which is not a legitimate basis for a stop. However, the record does not support his claim. The record does not show any circumstances that indicate that Peterson's seizure of Anaya-Cabrera was pretextual or due to bias based on race or any other illegitimate consideration based on race. Rather, dispatch specifically described the person involved in the disturbance as a Latino male.

Here, the totality of the circumstances support Peterson's reasonable suspicion that Anaya-Cabrera was involved with criminal activity. *Acrey*, 148 Wn.2d at 747. The unchallenged findings of fact establish that Peterson understood the disturbance at the Hagara property involved either a possible burglary or a person being held against their will. While approaching the property, Peterson saw Anaya-Cabrera, with whom he was familiar, driving away from the property. At the time the seizure occurred, Peterson knew that Anaya-Cabrera had recently moved from the property and that Anaya-Cabrera and Hagara had a recent history of conflict. These are articulable facts that suggest a connection between Anaya-Cabrera and the disturbance at the Hagara property. *See Z.U.E.*, 183 Wn.2d at 618. Thus, the trial court correctly concluded that Anaya-Cabrera's detention was based on reasonable suspicion and did not err in denying his motion to suppress.



II. UNLAWFUL POSSESSION OF METHAMPHETAMINE AND HEROIN.

Anaya-Cabrera also asks this court, in light of *Blake*, to vacate his convictions under RCW 69.50.4013 for unlawful possession of methamphetamine and unlawful possession of heroin. The State concedes that Anaya-Cabrera is entitled to vacation of his convictions.

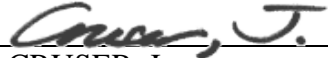
The Washington Supreme Court held that RCW 69.50.4013 violated the due process clauses of the state and federal constitutions and is void. *State v. Blake*, 197 Wn.2d 170, 195, 481 P.3d 521 (2021). *Blake* was decided after we issued our initial opinion but before the mandate was issued. Anaya-Cabrera's case is not yet final because the mandate has not yet issued; therefore, he is entitled to the benefit of this intervening appellate decision. RAP 12.7. "A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past." *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992); *State v. Abrams*, 163 Wn.2d 277, 290, 178 P.3d 1021 (2008).

We conclude that Anaya-Cabrera's unlawful possession of methamphetamine and unlawful possession of heroin convictions and the corresponding firearm enhancements should be vacated and dismissed with prejudice.

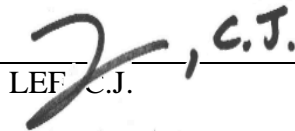
CONCLUSION


We affirm Anaya-Cabrera's conviction for carrying a concealed pistol without a license because the trial court properly denied Anaya-Cabrera's suppression motion. But we remand with instructions to vacate and dismiss with prejudice Anaya-Cabrera's unlawful possession of methamphetamine and unlawful possession of heroin convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
CRUSER, J.

We concur:

  
\_\_\_\_\_  
LEF, C.J.

  
\_\_\_\_\_  
GLASGOW, J.