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64028-3

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JAN 20 2010

KING COUNTY SUPERIOR COURT  
APPELLATE DIVISION

NO. 64028-3-I

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

GEINLY DIAZ-DIAZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Helen Halpert, Judge

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OPENING BRIEF OF APPELLANT

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REC'D  
APPELLATE DIV. #1  
COURT OF APPEALS  
STATE OF WASHINGTON  
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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied a motion to suppress evidence obtained as a result of appellant's unlawful arrest.<sup>1</sup>

2. The trial court erred when it entered the second and third paragraphs in its conclusions of law supporting its probable cause finding.

Issues Pertaining to Assignments of Error

1. Appellant drove a car in which a drug dealer was a passenger. After observing the dealer exit the car and make several quick sales, police arrested all occupants of the car, including appellant. Did the court err when it concluded the arresting officer had probable cause to believe appellant was involved as an accomplice to the sales?

2. Following appellant's arrest, a search revealed that he possessed cocaine. Should this evidence have been suppressed?

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<sup>1</sup> The court's written findings and conclusions in support of its decision are attached to this brief as an appendix.

B. STATEMENT OF THE CASE

a. Procedural Facts

The King County Prosecutor's Office charged Geinly Diaz-Diaz with possessing cocaine, in violation of RCW 69.50.4013. CP 3. Diaz-Diaz moved to suppress all evidence of the cocaine, arguing it was the product of an unlawful search and seizure – that he had been arrested without probable cause and the fruits of that arrest had to be suppressed. CP 11-13.

Following a CrR 3.6 hearing, the court denied the motion. 1RP<sup>2</sup> 82-83; CP 59-61. A jury convicted Diaz-Diaz, the court imposed a standard range sentence of 20 days, and Diaz-Diaz timely filed his Notice of Appeal. CP 15, 44, 50-58.

b. Evidence at the CrR 3.6 Hearing

The facts are not in dispute. In January and February 2009, Seattle Police Detective Diana LaFreniere worked with a confidential informant to buy cocaine from Rafael Diaz-Alvarado. 1RP 27. During the first buy, on January 13, Diaz-Alvarado arrived in a green Ford Taurus. He exited from the rear passenger side of the car, sold

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<sup>2</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – July 27-28, 2009; 2RP – July 29, 2009.

cocaine to the informant, and then left in the Taurus. 1RP 30-31. The informant arranged a similar buy the next day. 1RP 31. As before, Diaz-Alvarado arrived as a passenger in the green Taurus, sold cocaine to the informant, and left in the same car. 1RP 32-33. The informant believed that Diaz-Alvarado "went all day long making drug transactions" in this manner. 1RP 33. Detective LaFreniere determined that Diaz-Alvarado was not the registered owner of the Taurus. Nor was Diaz-Diaz. 1RP 60-62.

Seattle Police decided to arrange a third buy, on February 10, with the intent to arrest Diaz-Alvarado once he sold cocaine to the informant. 1RP 33. With arrest teams in place, the informant arranged to meet Diaz-Alvarado in Ballard. 1RP 34-35. Within ten minutes, the green Taurus arrived, Diaz-Alvarado exited from the back seat, and he sold cocaine to the informant about ten feet from the car. 1RP 36-37. Just as Detective LaFreniere was about to order the arrest teams to converge on the scene, several individuals approached Diaz-Alvarado. 1RP 37. It appeared that half a dozen people then purchased cocaine from Diaz-Alvarado as he slowly made his way back to the car. 1RP 38-39. During these sales, the driver of the Taurus kept inching the car forward as if he were anxious and wanted to leave. 1RP 54-55, 70.

When another vehicle pulled alongside the Taurus, LaFreniere called in the arrest teams. 1RP 38. Police found two other people in the Taurus – one in the front passenger seat and Diaz-Diaz in the driver's seat. 1RP 9, 66. Diaz-Diaz never exited the car while Diaz-Alvarado made his deliveries. Nor did he have any visible interaction with Diaz-Alvarado during this time. 1RP 66-69. Police arrested him anyway. 1RP 9. In a search incident to arrest, officers found \$230.00 and a gum container in his front pants pocket. Inside the container was crack cocaine. 1RP 9-10.

The State conceded it did not know if Diaz-Diaz had been present for either of the January 2009 sales to the confidential informant. 1RP 71-72; Supp. CP \_\_\_\_ (sub no. 27B, State's Response to Defendant's Motion to Suppress, at 2). But the State argued there was probable cause to believe he was an accomplice to Diaz-Alvarado on February 10 because, as the driver, he had aided the deliveries. 1RP 71. The defense argued that given the absence of any interactions between Diaz-Diaz and Diaz-Alvarado once Diaz-Alvarado left the car, Diaz-Diaz's mere presence – even as the driver – was insufficient to make him an accomplice. 1RP 74-79.

The trial court indicated the issue was "close," but ultimately found it reasonable for officers to conclude that Diaz-Diaz knew Diaz-Alvarado was selling cocaine. 1RP 82-83; CP 60. A defense motion for reconsideration was denied. CP 38-40, 49.

At trial, Diaz-Diaz presented an unwitting possession defense. CP 26; 2RP 73-83. Diaz-Alvarado is his cousin and the two are former roommates. 2RP 35, 49. Prior to his arrest, Diaz-Diaz had not seen Diaz-Alvarado for many months, but hoped Diaz-Alvarado could help him find work painting homes. Therefore, he arranged to get together with Diaz-Alvarado on February 10. 2RP 36-37, 51. Diaz-Diaz, Diaz-Alvarado, and another of Diaz-Alvarado's cousins decided to go to lunch. They took the green Taurus, which Diaz-Alvarado said was his car. Diaz-Alvarado asked Diaz-Diaz if he wanted to drive, and Diaz-Diaz said yes. 2RP 38-39.

Diaz-Alvarado directed Diaz-Diaz to the location of the drug sale with the informant. 2RP 39-40. Diaz-Diaz asked why they were stopping at that location, but Diaz-Alvarado merely replied that he would be right back and got out of the car. Diaz-Diaz could see Diaz-Alvarado in the rearview mirror, but did not watch what he was doing. 2RP 40-41, 52-53. Diaz-Diaz and the other passenger just sat in the car talking. 2RP 41.

According to Diaz-Diaz, just as the arrest teams arrived, Diaz-Alvarado opened the car door, got in, and handed him the gum container. Diaz-Diaz did not think anything of it and simply placed it in his pocket. 2RP 42-43, 46-48. Earlier, Diaz-Alvarado also gave Diaz-Diaz \$230.00 in cash to help pay his rent, which Diaz-Diaz had placed in the same pocket. 2RP 38, 43, 50. Diaz-Diaz denied that he had discussed the sale of drugs with Diaz-Alvarado or knew that Diaz-Alvarado intended to deliver drugs that day. Moreover, he believed the gum container had gum inside, not crack cocaine. 2RP 58-62.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION TO SUPPRESS.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution,<sup>3</sup> warrantless arrests must be supported by probable cause. State v. Bonds, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982), cert. denied, 464

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<sup>3</sup> The Fourth Amendment provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”

Article 1, § 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

U.S. 831 (1983); RCW 10.31.100 (warrantless arrests justified if police have probable cause defendant has committed a felony in their presence).

Probable cause exists only "when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed." State v. Huff, 64 Wn. App. 641, 646-47, 826 P.2d 698, review denied, 119 Wn.2d 1007 (1992). Whether the facts satisfy the probable cause requirement is a question of law this Court reviews de novo. Ornelas v. United States, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). The State bears the burden of proof. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 249 (2008).

Here, the suspected crime was delivery of cocaine – that Diaz-Diaz was acting as an accomplice to Diaz-Alvarado by knowingly assisting the deliveries and serving as his driver. The trial judge recognized that whether there was probable cause to arrest Diaz-Diaz is a “close” issue. It is close, but ultimately the evidence known to officers on February 10, 2009, falls short of the mark.

A person is an accomplice of another person if:

- (a) With knowledge that it will promote or

facilitate the commission of the crime, he

....

- (ii) aids or agrees to aid such other person in planning or committing it[.]

RCW 9A.08.020(3). “Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime.” In re Wilson, 91 Wn.2d 487, 491-492, 588 P.2d 1161 (1979) (quoting State v. J-R Distribs., Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949 (1974)).

Similarly, merely associating with an individual suspected of a crime does not establish probable cause. See State v. Broadnax, 98 Wn.2d 289, 296, 654 P.2d 96 (1982), overruled on other grounds, Minnesota v. Dickerson, 508 U.S. 366 (1993). Moreover, where an arrest involves a vehicle, “article 1, section 7 of the Washington Constitution requires individualized probable cause for each occupant[.]” Grande, 164 Wn.2d at 138. Restated, “[o]ur state constitution protects our individual privacy, meaning that we are free from unnecessary police intrusion into our private affairs unless a police officer can *clearly associate* the crime with the individual.” Id. at 146 (emphasis added).

In State v. Robinson, 73 Wn. App. 851, 872 P.2d 43 (1994), the defendant was driving a car with four friends as passengers. As the car passed slowly through an intersection, one of Robinson's friends (Baker) jumped out of the car and onto the sidewalk. Robinson asked what Baker was doing and then pulled over to the side of the road. *Id.* at 852. Robinson could see Baker and it appeared he might be struggling with a girl. He did not leave, however. Baker forcefully stole the purse of a 14-year-old girl. When Baker returned to the car with the purse, Robinson panicked and drove off quickly. An eyewitness, however, recorded the car's license plate, allowing police to trace the car to Robinson. *Id.* at 852-853.

Robinson was charged with one count of robbery in the second degree on a theory of accomplice liability. *Id.* at 853. The trial court found him guilty, concluding that Robinson had a general idea of what was happening as Baker stole the purse and, with that knowledge, transported Baker away from the crime scene. *Id.* at 853-854. The Court of Appeals reversed. Even examining the evidence favorably for the State, the Court concluded it was insufficient to find Robinson guilty:

He neither associated himself with Baker's undertaking, participated in it with the desire to bring it about, nor sought to make the crime succeed by any actions on his own. His knowledge that Baker seemed to be struggling with [the victim] and his mere presence at the scene cannot amount to accomplice liability for Baker's crime. . . .

Id. at 857 (citations omitted).

While Robinson addresses sufficiency of the evidence, rather than probable cause to arrest, its analysis and holding are relevant to the question here. See State v. Galbert, 70 Wn. App. 721, 727-728, 855 P.2d 310 (1993) (looking to sufficiency cases to determine probable cause in drug possession case). As in Robinson, Detective LaFreniere had insufficient evidence – certainly not the “clear evidence” Grande requires – that Diaz-Diaz associated himself with Diaz-Alvarado's deliveries, participated in them with a desire to bring them about, or sought to make them succeed by his actions. Even if Diaz-Diaz became aware after Diaz-Alvarado left the car that he appeared to be selling drugs, applying the probable cause standard, no person of reasonable caution would conclude that he knowingly assisted Diaz-Alvarado in his deliveries.

Notably, police had no proof Diaz-Diaz was associated with Diaz-Alvarado's prior deliveries in January. The first time they saw Diaz-Diaz was February 10, and they knew he was not the registered

owner of the green Taurus. At no time did officers see any interaction between Diaz-Diaz and Diaz-Alvarado once Diaz-Alvarado exited the car. In fact, it appeared as if Diaz-Diaz was anxious to leave while Diaz-Alvarado made his sales; Diaz-Diaz repeatedly inched the car forward.

In State v. Dorsey, 40 Wn. App. 459, 698 P.2d 1109, review denied, 104 Wn.2d 1010 (1985), this Court said:

In order to find probable cause based on association with persons engaging in criminal activity, some additional circumstances from which it is reasonable to infer participation in criminal enterprise must be shown. One important consideration in assessing the significance of the association is whether the known criminal activity was contemporaneous with the association. Another is whether the nature of the criminal activity is such that it could not normally be carried on without the knowledge of all persons present.

Id. at 467-468 (quoting United States v. Hillison, 733 F.2d 692, 697 (9th Cir. 1984)).

In Dorsey, both of these considerations clearly militated in favor of probable cause. Over the course of a few hours, Dorsey had been seen in a car with three other individuals, two of whom had engaged in a series of thefts from banks using counterfeit Visa cards while Dorsey remained in the vehicle. The rental car the group used also was obtained with a counterfeit Visa card. The

four obtained over \$8,000.00 from six banks and then purchased airplane tickets for themselves to California. They were arrested, still together, when they arrived in Burbank. Dorsey, 40 Wn. App. at 460-462, 468. Dorsey's association with the others was contemporaneous with prolonged criminal activity *and* the multiple thefts could not have been carried out without his knowledge. Probable cause was therefore established. Dorsey, 40 Wn. App. at 468-69. In contrast, while Diaz-Diaz was in the nearby car when Diaz-Alvarado committed his crimes on February 10, the deliveries occurred quickly and – unlike the more sophisticated thefts in Dorsey – this was not the type of crime that normally could only be planned and carried out with Diaz-Diaz's knowing participation.

Because police did not have probable cause to arrest Diaz-Diaz, all fruits of this illegal seizure must be suppressed. State v. Byers, 88 Wn.2d 1, 7-8, 559 P.2d 1334 (1977)(citing Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963)), overruled in part on other grounds, State v. Williams, 102 Wn.2d 733, 741 n.5, 689 P.2d 1065 (1984). The court erred when it refused to suppress the evidence in this case.

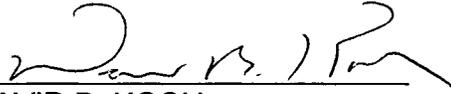
D. CONCLUSION

There was no probable cause to arrest Diaz-Diaz for delivering cocaine. The fruits of that arrest must be suppressed. His conviction for possession should be reversed and dismissed.

DATED this 20<sup>th</sup> day of January, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH

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Attorneys for Appellant

## **APPENDIX**

**FILED**  
KING COUNTY, WASHINGTON

SEP 02 2009

SUPERIOR COURT CLERK  
BY **Melissa Ehlers**  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 09-C-00980-1 SEA

vs.

GEINLY F. DIAZ- DIAZ,

Defendant,

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.6  
MOTION TO SUPPRESS PHYSICAL,  
ORAL OR IDENTIFICATION  
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on July 27, 2009 before the Honorable Judge Halpert. After considering the evidence submitted by the parties and hearing argument, to wit: testimony from Seattle Police Detective Diana LaFreniere, Seattle Police Officer Alex Chapackdee, and Seattle Police Officer Christopher Gregorio, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- a. The Defendant was the driver of the 1997 green Ford Taurus, WA license plate 673XRX on February 10, 2009.
- b. The green Ford Taurus had been involved in two previous drug transactions with the co-defendant, Rafael Diaz- Alvarado.
- c. The Confidential Informant described Rafael as someone who runs a mobile drug selling operation.
- d. On February 10, 2009 the green Ford Taurus pulled up to the intersection of NW 64<sup>th</sup> Street and 17<sup>th</sup> Ave NW in Seattle.
- e. Rafael was a passenger in the vehicle.
- f. Rafael got out of the car and met with the Confidential Informant.
- g. Rafael sold the Confidential Informant cocaine.



WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 1

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- 1 h. Detective LaFreniere was observing Rafael from an unmarked Seattle Police vehicle.
- 2 i. After Rafael engaged in a transaction with the Confidential Informant, he engaged in
- 3 approximately 5-6 other hand-to-hand transactions.
- 4 j. The first transaction with the Confidential Informant took place approximately 10 feet
- 5 from the vehicle.
- 6 k. In the subsequent transactions, Rafael moved closer and closer to the vehicle.
- 7 l. One of the transactions occurred when Rafael was standing right next to the passenger
- 8 side of the green Ford Taurus.
- 9 m. Detective LaFreniere, based on her training and experience, noted that these
- 10 transactions were consistent with narcotic transactions.
- 11 n. Detective LaFreniere called for the arrest teams to move in and contact Rafael and the
- 12 occupants of the green Ford Taurus.
- 13 o. The Defendant was in the driver's seat of the green Ford Taurus, and Officer
- 14 Chapackdee placed him under arrest.
- 15 p. In a search incident to arrest, Officer Chapackdee discovered 3.2 g of crack cocaine in
- 16 the Defendant's front pant pocket.

17 2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE  
 18 SOUGHT TO BE SUPPRESSED:

19 The Defendant was the driver of a vehicle that transported a drug dealer to a location  
 20 where Rafael then engaged in multiple narcotic transactions. These transactions all occurred in  
 21 close proximity to the vehicle.

22 Taking into account all of the observations made by Detective LaFreniere, her belief that  
 23 the Defendant, as the driver of the vehicle, was aiding Rafael in the commission of a crime was a  
 24 reasonable one. The belief that someone in the Defendant's position would, under the  
 circumstances, have knowledge of Rafael's criminal acts is also reasonable.

Probable cause to arrest exists where the totality of the facts and circumstances known to  
 the officers at the time of arrest would warrant a reasonably cautious person to believe an offense  
 is being committed. That standard has been met here.

In addition to the above written findings and conclusions, the court incorporates by  
 reference its oral findings and conclusions.

Signed this 1 day of <sup>Sept</sup>~~July~~, 2009.

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*John d. Naegert*

JUDGE

Presented by:

*[Signature]*  
Deputy Prosecuting Attorney 37701

*[Signature]*  
Attorney for Defendant 30531

*As to form only... defense objects to conclusions of law.*

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64028-3-1
	)	
GEINLY DIAZ-DIAZ,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20<sup>TH</sup> DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GEINLY DIAZ-DIAZ  
23414 93<sup>RD</sup> AVENUE W.  
EDMONDS, WA 98020

**SIGNED** IN SEATTLE WASHINGTON, THIS 20<sup>TH</sup> DAY OF JANUARY, 2010.

x *Patrick Mayovsky*

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STATE OF WASHINGTON  
2010 JAN 20  
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