

NO. 44789-4-II

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

STATE OF WASHINGTON,

Appellant,

v.

BRYAN ANAYA-DEGANTE, and WILIBALDO HERRERA-IBARRA,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY
CAUSE NO. 13-1-00041-5 AND 13-1-00040-7

The Honorable Judge Rich Melnick

BRIEF OF RESPONDENT WILIBALDO HERRERA-IBARRA

Attorney for Respondent Wilibaldo Herrera-Ibarra:

JOHN C. TERRY, WSBA # 41337
Of Morse Bratt Andrews & Foster, PLLC

MORSE BRATT ANDREWS & FOSTER, PLLC
108 E Mill Plain Blvd.
Vancouver, WA 98660
Telephone: (360) 213-2040
Fax: (360) 213-2030

TABLE OF CONTENTS

A. REPLY TO ASSIGNMENTS OF ERROR.....1

I. RE: ASSIGNMENTS OF ERROR TO FINDINGS OF FACT "DECISION OF THE COURT".....1

a. THIS ERROR, AS ALLEGED IN ASSIGNMENT OF ERROR (I)(a) IN APPELLANT'S BRIEF DOES NOT APPLY TO STATE V. HERRERA-IBARRA.1

b. THE TRIAL COURT DID NOT ERR IN FINDING THAT "DETECTIVE SGT. MOORE TESTIFIED THAT ANY HISPANIC MALES WHO SHOWED UP AT THE APARTMENT WHILE THEY WERE EXECUTING THE WARRANT WERE GOING TO BE CONSIDERED SUSPICIOUS." H-I CP 62.1

c. THE TRIAL COURT DID NOT ERR IN FINDING THAT "THE FACTS CLEARLY DEMONSTRATE THAT THE OFFICERS WERE GOING TO DETAIN ANY HISPANIC MALE WHO ARRIVED AT THE RESIDENCE WHILE THEY WERE EXECUTING THE SEARCH WARRANT." H-I CP 66......1

d. THE TRIAL COURT DID NOT ERR IN FINDING THAT "[T]HEY PRE-DETERMINED THAT NO INDIVIDUALIZED SUSPICION OR PROBABLE CAUSE WAS GOING TO BE NEEDED FOR THEM TO DETAIN ANYBODY WHO ARRIVED AT THE RESIDENCE." H-I CP 67......1

e. THIS ERROR, AS ALLEGED IN ASSIGNMENT OF ERROR (I)(e) IN APPELLANT'S BRIEF DOES NOT APPLY TO STATE V. HERRERA-IBARRA.1

II. RE: ASSIGNMENTS OF ERROR TO CONCLUSIONS OF LAW FROM "DECISION OF COURT"1

a.	<u>THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT STATE V. BROADNAX, 98 WN.2D 289, 654 P.2D 96 (1982) IS APPLICABLE LAW TO THE FACTS OF THIS CASE.....</u>	1
b.	<u>THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT HERRERA-IBARRA'S ACTION BY TURNING AND WALKING DOWN THE STEPS DOES NOT JUSTIFY HIS ARREST OR DETENTION. H-I CP 67.....</u>	2
c.	<u>THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE FACTS OF THIS CASE ARE COMPARABLE TO THE FACTS IN STATE V. GATEWOOD, 163 WN.2d 534, 182 P.2D 426 (2008).....</u>	2
d.	<u>THE TRIAL COURT DID NOT ERR IN SUPPRESSING THE EVIDENCE FOUND ON HERRERA-IBARRA.....</u>	2
III.	<u>RE: ASSIGNMENTS OF ERROR TO FINDINGS OF FACT ENTERED AS "FINDINGS OF FACT AND CONCLUSIONS OF LAW" IN STATE V. WILIBALDO HERRERA-IBARRA, 13-1-00041-5.....</u>	2
a.	<u>THE TRIAL COURT DID NOT ERR IN ENTERING FINDING OF FACT 2.....</u>	2
b.	<u>THE TRIAL COURT DID NOT ERR IN ENTERING FINDING OF FACT 5.....</u>	2
c.	<u>THE TRIAL COURT DID NOT ERR IN ENTERING FINDING OF FACT 6.....</u>	2
d.	<u>THE TRIAL COURT DID NOT ERR IN ENTERING FINDING OF FACT 7.</u>	2
IV.	<u>RE: ASSIGNMENTS OF ERROR TO CONCLUSIONS OF LAW ENTERED AS "FINDINGS OF FACT AND CONCLUSIONS OF LAW" IN STATE V. WILIBALDO HERRERA-IBARRA, 13-1-00041-5.....</u>	2

a.	<u>THE TRIAL COURT DID NOT ERR IN ENTERING CONCLUSION OF LAW (B) 1.....</u>	2
b.	<u>THE TRIAL COURT DID NOT ERR IN ENTERING CONCLUSION OF LAW (B) 2.....</u>	3
c.	<u>THE TRIAL COURT DID NOT ERR IN ENTERING CONCLUSION OF LAW (B) 3.....</u>	3
d.	<u>THE TRIAL COURT DID NOT ERR IN ENTERING CONCLUSION OF LAW (B) 4.....</u>	3
V.	<u>RE: GENERAL ASSIGNMENTS OF ERROR TO BOTH STATE V. ANAYA-DEGANTE AND STATE V. HERRERA-IBARRA.....</u>	3
a.	<u>THIS ERROR, AS ALLEGED IN ASSIGNMENT OF ERROR (V)(a) IN APPELLANT'S BRIEF DOES NOT APPLY TO STATE V. HERRERA-IBARRA.....</u>	3
b.	<u>THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE DETENTION OF HERRERA-IBARRA WAS UNLAWFUL.....</u>	3
c.	<u>THIS ERROR, AS ALLEGED IN ASSIGNMENT OF ERROR (V)(c) IN APPELLANT'S BRIEF DOES NOT APPLY TO STATE V. HERRERA-IBARRA.....</u>	3
d.	<u>THE TRIAL COURT DID NOT ERR IN SUPPRESSING THE EVIDENCE FOUND ON HERRERA-IBARRA'S PERSON.....</u>	3
VI.	<u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	
a.	<u>THE OFFICER DID NOT HAVE REASONABLE, ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY THE BRIEF DETENTION OF ANAYA-DEGANTE.....</u>	3

b.	<u>THE OFFICER DID NOT HAVE REASONABLE, ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY THE BRIEF DETENTION OF HERRERA-IBARRA.....</u>	3
B.	<u>STATEMENT OF THE CASE.....</u>	4
I.	<u>PROCEDURAL HISTORY.....</u>	4
II.	<u>TESTIMONY AT THE SUPPRESSION HEARING.....</u>	4
C.	<u>ARGUMENT.....</u>	6
I.	<u>THE TRIAL COURT DID NO ERR IN SUPPRESSING THE EVIDENCE FOUND ON HERRERA-IBARRA AS THE OFFICERS LACKED REASONABLE, ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY, AND ANY DETENTION, NO MATTER HOW BRIEF, WAS UNLAWFUL.....</u>	6
D.	<u>CONCLUSION.....</u>	11

TABLE OF AUTHORITIES

Cases

<i>Dunaway v. New York</i> , 442 U.S. 200, 208, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979).....	9
<i>Michigan v. Summers</i> , 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).....	9
<i>State v. Broadnax</i> , 98 Wn.2d 289, 654 P.2d 96 (1982).....	1, 8, 9, 10, 13
<i>State v. Gatewood</i> , 163 Wn2d 534, 182 P.2d 426 (2008).....	2, 11
<i>State v. Pressley</i> , 64 Wn. App. 591, 825 P.2d 749 (1992).....	6, 7, 8, 12
<i>Tacoma v. Mundell</i> , 6 Wash.App. 673, 495 P.2d 682 (1972).....	10
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d [654 P.2d 100] 889 (1968).	9
<i>United States v. Vilhotti</i> , 323 F.Supp. 425, 432 (S.D.N.Y.1971).....	10
<i>Ybarra v. Illinois</i> , 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979).....	9

A. REPLY TO ASSIGNMENTS OF ERROR

I. RE: ASSIGNMENTS OF ERROR TO FINDINGS OF FACT "DECISION OF THE COURT"

- a. THIS ERROR, AS ALLEGED IN ASSIGNMENT OF ERROR (I)(a) IN APPELLANT'S BRIEF DOES NOT APPLY TO STATE V. HERRERA-IBARRA.
- b. THE TRIAL COURT DID NOT ERR IN FINDING THAT "DETECTIVE SGT. MOORE TESTIFIED THAT ANY HISPANIC MALES WHO SHOWED UP AT THE APARTMENT WHILE THEY WERE EXECUTING THE WARRANT WERE GOING TO BE CONSIDERED SUSPICIOUS." H-I CP 62.
- c. THE TRIAL COURT DID NOT ERR IN FINDING THAT "THE FACTS CLEARLY DEMONSTRATE THAT THE OFFICERS WERE GOING TO DETAIN ANY HISPANIC MALE WHO ARRIVED AT THE RESIDENCE WHILE THEY WERE EXECUTING THE SEARCH WARRANT." H-I CP 66.
- d. THE TRIAL COURT DID NOT ERR IN FINDING THAT "[T]HEY PRE-DETERMINED THAT NO INDIVIDUALIZED SUSPICION OR PROBABLE CAUSE WAS GOING TO BE NEEDED FOR THEM TO DETAIN ANYBODY WHO ARRIVED AT THE RESIDENCE." H-I CP 67.
- e. THIS ERROR, AS ALLEGED IN ASSIGNMENT OF ERROR (I)(e) IN APPELLANT'S BRIEF DOES NOT APPLY TO STATE V. HERRERA-IBARRA.

II. RE: ASSIGNMENTS OF ERROR TO CONCLUSIONS OF LAW FROM "DECISION OF COURT"

- a. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT *STATE V. BROADNAX*, 98 WN.2D 289, 654 P.2D 96 (1982) IS APPLICABLE LAW TO THE FACTS OF THIS CASE.

- b. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT HERRERA-IBARRA'S ACTION BY TURNING AND WALKING DOWN THE STEPS DOES NOT JUSTIFY HIS ARREST OR DETENTION. H-I CP 67.
- c. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE FACTS OF THIS CASE ARE COMPARABLE TO THE FACTS IN STATE V. GATEWOOD, 163 WN.2d 534, 182 P.2D 426 (2008).
- d. THE TRIAL COURT DID NOT ERR IN SUPPRESSING THE EVIDENCE FOUND ON HERRERA-IBARRA.

III. RE: ASSIGNMENTS OF ERROR TO FINDINGS OF FACT ENTERED AS "FINDINGS OF FACT AND CONCLUSIONS OF LAW" IN STATE V. WILIBALDO HERRERA-IBARRA, 13-1-00041-5

- a. THE TRIAL COURT DID NOT ERR IN ENTERING FINDING OF FACT 2.
- b. THE TRIAL COURT DID NOT ERR IN ENTERING FINDING OF FACT 5.
- c. THE TRIAL COURT DID NOT ERR IN ENTERING FINDING OF FACT 6.
- d. THE TRIAL COURT DID NOT ERR IN ENTERING FINDING OF FACT 7.

IV. RE: ASSIGNMENTS OF ERROR TO CONCLUSIONS OF LAW ENTERED AS "FINDINGS OF FACT AND CONCLUSIONS OF LAW" IN STATE V. WILIBALDO HERRERA-IBARRA, 13-1-00041-5

- a. THE TRIAL COURT DID NOT ERR IN ENTERING CONCLUSION OF LAW (B) 1.

- b. THE TRIAL COURT DID NOT ERR IN ENTERING CONCLUSION OF LAW (B) 2.
- c. THE TRIAL COURT DID NOT ERR IN ENTERING CONCLUSION OF LAW (B) 3.
- d. THE TRIAL COURT DID NOT ERR IN ENTERING CONCLUSION OF LAW (B) 4.

V. RE: GENERAL ASSIGNMENTS OF ERROR TO BOTH STATE V. ANAYA-DEGANTE AND STATE V. HERRERA-IBARRA

- a. THIS ERROR, AS ALLEGED IN ASSIGNMENT OF ERROR (V)(a) IN APPELLANT'S BRIEF DOES NOT APPLY TO STATE V. HERRERA-IBARRA.
- b. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE DETENTION OF HERRERA-IBARRA WAS UNLAWFUL.
- c. THIS ERROR, AS ALLEGED IN ASSIGNMENT OF ERROR (V)(c) IN APPELLANT'S BRIEF DOES NOT APPLY TO STATE V. HERRERA-IBARRA.
- d. THE TRIAL COURT DID NOT ERR IN SUPPRESSING THE EVIDENCE FOUND ON HERRERA-IBARRA'S PERSON.

VI. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- a. THE OFFICER DID NOT HAVE REASONABLE, ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY THE BRIEF DETENTION OF ANAYA-DEGANTE.
- b. THE OFFICER DID NOT HAVE REASONABLE, ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY THE BRIEF DETENTION OF HERRERA-IBARRA.

B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Respondent Wilibaldo Herrera-Ibarra (hereafter "Herrera-Ibarra") substantially agrees with the procedural history as outlined by the appellant except as follows:

No name, age, or description, other than "Hispanic Male" was provided to law enforcement about the Hispanic males that were suppliers for Dena Albert (hereafter "Albert") prior to executing the search warrant or detaining the respondents. 1 RP 28, 69-70.

II. TESTIMONY AT THE SUPPRESSION HEARING

Respondent Wilibaldo Herrera-Ibarra (hereafter "Herrera-Ibarra") substantially agrees with the "Testimony at the Suppression Hearing" as outlined by the appellant except as follows:

No name, age, or description, other than "Hispanic Male" was provided to law enforcement about the Hispanic males that were suppliers for Dena Albert (hereafter "Albert") prior to executing the search warrant or detaining the respondents. 1 RP 28, 69-70.

Herrera-Ibarra's response to seeing law enforcement at the top of the stairs was - in Sgt. Pat Moore's opinion - a startled response. 1 RP 61.

When Herrera-Ibarra saw law enforcement, and Mr. Anaya-Degante being taken into the residence, "he turned and start- -- you know, he didn't turn, he didn't run, he turned, and -- and just kinda walked down the stairs quietly and then we followed behind him. By the time we

caught up to him, he was down the stairs, had made a right from the little alcove and was in the parking lot standing next to his car." 1 RP 61.

Sgt. Moore did not notice Mr. Herrera-Ibarra's hands in his pockets or see any objects therein. 1 RP 64. His hands were simply at his side. 1 RP 64.

When Sgt. Moore was saying "Hey, hold on, wait, I want to talk to you", and "[s]how me your hands", it was possible that the subject (later determined to be Herrera-Ibarra) did not understand him, as Sgt. Moore did not know whether the subject spoke any English. 1 RP 64-65.

No firearm or weapon was reported as recovered during the search of Ms. Albert's residence. 1 RP 58-59. No firearm or weapon was seen or suspected on Mr. Herrera-Ibarra's person. 1 RP 60-61. Mr. Herrera-Ibarra was not known, described, or personally expected, to law enforcement executing the search. 1 RP 62-63, 69-70.

No testimony was provided regarding the apartment complex or the neighborhood being a known drug area, only that Ms. Albert sold drugs from her apartment, which was one of several in the area. 1 RP 19-21.

Albert's apartment was one of two apartments at the top of the stairs leading up to Albert's apartment. There was a small landing at the top of the stairs, with access to two apartments. 1 RP 20.

Sgt. Moore stated as to detaining the subjects: "He was detained from the moment he knocked on the door and I answered the door. My

sole purpose was to detain him." 1 RP 78. And he further stated: "And the mind-set was, I was already going to detain the individual knocking at the door and the individual walking down the stairs. Okay?" 1 RP 79.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN SUPPRESSING THE EVIDENCE FOUND ON HERRERA-IBARRA AS THE OFFICERS LACKED REASONABLE, ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY, AND ANY DETENTION, NO MATTER HOW BRIEF, WAS UNLAWFUL.

The police in the current case did not have reasonable, articulable suspicion that Herrera-Ibarra was engaged or about to engage in criminal activity based on the totality of the circumstances. The trial court correctly applied the facts of this case to appropriate and relevant case law. The trial court's decision to suppress the evidence obtained thereafter was without err. Based on the specific facts of this case, the officers had no legal authority to stop and detain the Respondent, no matter how brief, to investigate their suspicions. Thus, the subsequent searches, whether or not fruitful, were illegal and the evidence was correctly suppressed by the trial court. This Court should affirm the trial court's rulings.

The appellant correctly and appropriately summarizes search and seizure law and appellate review. However, the appellant incorrectly attempts to apply the facts of this case to *State v. Pressley*, 64 Wn. App. 591, 825 P.2d 749 (1992). This case is majorly distinguishable from the current case as follows:

First, in *Pressley*, the officer was on routine patrol near the vicinity of 20th and Yesler in Seattle, King County, Washington, which was a location well-known to the police for narcotics, where citizens had requested the police patrol the area because of the number of narcotics transactions at that location. *Pressley* at 593. Whereas, in the current case, the police were inside 3015 N.E. 57th Avenue, Apartment B, Vancouver, Washington, executing a search warrant. The vicinity of said apartment was not a "location well-known to the police for narcotics." It was an apartment residence wherein officers were executing a search warrant.

Second, in *Pressley*, the officer alleged seeing two young females, with their hands chest high, wherein one female (the respondent therein) appeared to be pointing to an object in her hand or counting objects in her hand, while the other female intently looked at the respondent's hands. The officer, based on his training and experience - which included training to watch the hands of people suspected of narcotics transactions, and experience in observing drug transaction wherein he commonly saw the seller and the buyer examine the drugs before the transaction was complete - believed he was witnessing a narcotics transaction. *Pressley* at 593-594. In the current case, nothing resembling a drug transaction was witnessed. All that was witnessed was Herrera-Ibarra beginning to ascend stairs that led up to a landing with access to Albert's apartment and another apartment.

Third, in *Pressley*, the officer drove up to the respondent therein in his marked patrol car and the respondent looked at him and said "Oh Shit", and immediately closed the hand that contained the objects, parted ways from the other female and walked away. *Pressley* at 594. In the current case, upon seeing law enforcement, and seeing law enforcement, Herrera-Ibarra quietly turned and walked down the stairs. 1 RP 61.

Lastly, in *Pressley*, the officer believed he saw the female respondent conceal something in her pocket and/or reach for a weapon. In his training and experience, reaching into a coat pocket could be concealment of contraband and/or reaching for a weapon. *Pressley* at 594. In the current case, Sgt. Moore did not notice Herrera-Ibarra's hands in his pockets or see any objects therein. 1 RP 64. His hands were simply at his side. 1 RP 64.

Further, the appellant herein incorrectly attempts to distinguish the facts of the current case from *State v. Broadnax*, 98 Wn.2d 289, 654 P.2d 96 (1982). The State attempts to distinguish *Broadnax* by arguing that:

- (a) Herrera-Ibarra was not merely present when the police first served the search warrant;
- (b) Herrera-Ibarra fit the description (Hispanic male) of Albert's drug suppliers;
- (c) Herrera-Ibarra arrived at a residence wherein a search warrant was being executed while the search warrant was being executed,

which was alleged to be a time frame wherein a Hispanic male, or Hispanic males, would make a delivery of drugs.

Prior to relying on *Broadnax*, the trial court correctly found that the facts "clearly demonstrate that the officers were going to detain any Hispanic male who arrived at the residence while they were executing the search warrant. *See* Decision of the Court, Page 6; and 1 RP 78-83. The court found that the officers "predetermined that no individualized suspicion or probable cause was going to be needed for them to detain anybody who arrived at the residence."

The court relied on *Broadnax*, which succinctly stated the applicable law:

The general rule is that an official "seizure" of a person must be supported by probable cause, even if no formal arrest is made.¹ Those cases authorizing seizures of persons on lesser cause are narrowly drawn and carefully circumscribed.² Specifically, *Terry* permits an officer to briefly detain, for limited questioning, a person whom he reasonably suspects of criminal activity and to frisk the person for weapons if he has reasonable grounds to believe the person to be armed and presently dangerous.³

Drawing from *Summers*⁴ and *Ybarra*⁵, the Court in *Broadnax* reasoned:

It becomes clear that persons not directly associated with the premises and not named in the warrant cannot be detained or searched without some independent factors tying those persons to the illegal activities being investigated.⁶ In other words, "mere presence" is not enough; there must be "presence plus" to justify

¹ *Broadnax*, at 293; citing *Dunaway v. New York*, 442 U.S. 200, 208, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979).

² *Broadnax* at 293.

³ *Id* at 293-294, relying on *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d [654 P.2d 100] 889 (1968).

⁴ *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

⁵ *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979).

⁶ *Broadnax* at 300-301.

the detention or search of an individual, other than an occupant, at the scene of a valid execution of a search warrant.⁷ It is well established that a warrant authorizing the search of a premises does not also extend to authorize the search of an individual found on the premises.⁸

A person's mere presence at the scene of suspected criminal activity does not entitle police officers to search that individual. *Broadnax* at 302. Neither may the police seize an individual, other than an occupant of the premises, so as to make him available in case probable cause is later developed to arrest him.⁹ As described by one court:

The "mere presence" doctrine seeks to protect persons innocently in the company of a known or suspected criminal. Therefore, some additional circumstance from which it is reasonable to infer knowledge of or participation in criminal enterprise must be shown.¹⁰

The appellant attempts to unfairly provide the requisite "presence plus" by rephrasing "mere presence" as "arri[val] at the known and confirmed drug dealer's residence." Further, the appellant attempts to indicate that "Hispanic male" is sufficient description to warrant detention. Further, although the appellant fails to ever elicit testimony or provide a factual basis about an actual specific time frame wherein Albert's suppliers would be arriving, the appellant claims Herrera-Ibarra's arrival - sometime during the execution of the search warrant - provides probable cause. However, this alleged time frame is even looser than the description "Hispanic male". It is not indicated how long of a time period their expectation lasted, nor when it commenced. 1 RP 23.

⁷ *Broadnax* at 301.

⁸ *Id.*, citing *Tacoma v. Mundell*, 6 Wash.App. 673, 495 P.2d 682 (1972).

⁹ *Id.* at 302.

¹⁰ *Id.* at 302, quoting *United States v. Vilhotti*, 323 F.Supp. 425, 432 (S.D.N.Y.1971).

Moreover, the state relies heavily on Sgt. Moore's opinion that Herrera-Ibarra had a startled response. No physical facts of his alleged startled response are provided - just an opinion. 1 RP 61-62. Further, he says nothing and quietly turns and walks away, to his car. 1 RP 61.

He quietly walked away to his car upon seeing law enforcement. This is certainly not fleeing. The trial court further relied on *State v. Gatewood*, 163 Wn2d 534, 182 P.2d 426 (2008), in determining that a reaction to police presence accompanied with walking away is insufficient "plus" to warrant a detention. Moreover, Herrera-Ibarra's response is not described and his response cannot be used as evidence to support anything.

Additionally, the state fails to fully recognize herein that Herrera-Ibarra did not actually arrive at Albert's residence, but near it. He was at the bottom of a staircase that led up to a shared landing between two residences, only one of which was Ms. Albert's.

D. CONCLUSION

The detectives involved in the execution of the search warrant at Albert's apartment did not have specific and articulable facts which reasonably warranted the detention, no matter how brief, of Herrera-Ibarra. The appellant provides a loose description (Hispanic male) of subjects which may come to Albert's residence during an undefined time (during our execution of the search warrant). No name or physical description is given. No time frame is given.

Further, there are no facts - other than Mr. Herrera-Ibarra's mere proximity which warrant his detention. There were no weapons visible or suspected, no contraband visible, no suspicious movements or hand gestures (as distinguished from *Pressley*), his hands were at his side and not in his pocket (as distinguished from *Pressley*), he said nothing when he saw the police (as distinguished from *Pressley* who said "Oh Shit"), officers did not see Herrera-Ibarra attempt to conceal something (as distinguished from *Pressley*), and further, quietly walking away is not fleeing. Lastly, though his proximity is all the appellant can assert as a basis for the stop, Mr. Herrera-Ibarra was hardly in proximity as he was at the bottom of a stair case that led up to two apartments, only one of which was Albert's.

As stated by Sgt. Moore,

He was detained from the moment he knocked on the door and I answered the door. My sole purpose was to detain him.¹¹

And he further stated:

And the mind-set was, I was already going to detain the individual knocking at the door and the individual walking down the stairs. Okay?¹²

It is clear from the evidence that the trial court was correct in its finding that the facts clearly demonstrate that the officers were going to detain any Hispanic male who arrived at the residence while they were executing the search warrant. They predetermined that no individualized

¹¹ 1 RP 78.

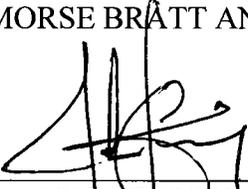
¹² 1 RP 79.

suspicion or probable cause was going to be needed for them to detain anybody who arrived at the residence. Therefore, it is clear that the Court's subsequent reliance on *Broadnax* and legal conclusion was proper.

The police lacked individualized suspicion and probable cause to detain Herrera-Ibarra. Therefore, the trial court's suppression of the evidence obtained after the unlawful detention of Herrera-Ibarra should be affirmed.

Respectfully submitted this 9th day of October, 2013.

MORSE BRATT ANDREWS & FOSTER, PLLC



By: JOHN TERRY, WSBA # 41337
Of Attorneys for Respondent Wilibaldo Herrera-Ibarra

MORSE BRATT ANDREWS FOSTER PLLC

October 09, 2013 - 2:19 PM

Transmittal Letter

Document Uploaded: 447894-Respondent's Brief.pdf

Case Name: State of Washington v. Bryan Anaya-Degante, and Wilibaldo Herrera-Ibarra

Court of Appeals Case Number: 44789-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: John C Terry - Email: jterry@mbavancouverlaw.com

A copy of this document has been emailed to the following addresses:

rachael.probstfeld@clark.wa.gov
byrdl@pacifier.com