

FILED

OCT 06 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29084-1-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ALEJANDRO MAGANA ARREOLA,

Appellant.

On Appeal from the Yakima County Superior Court
Cause No. 09-1-01571-1
The Honorable David Elofson, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Appellant's CrR 3.6 Motion to Suppress.
2. The trial court erred when it concluded that the arresting officer had authority to contact and arrest Appellant for failing to disperse.
3. The trial court erred when it concluded that the arresting officer's order to disperse was proper, and that Appellant was acting in a way that created a risk of harm.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it denied Appellant's motion to suppress, where Appellant was arrested for failing to follow an order to disperse, but Appellant's group did nothing more than gather while wearing and displaying symbols of gang membership? (Assignments of Error 1, 2, & 3)
2. Where Appellant's group did nothing more than gather while wearing and displaying symbols of gang membership, did the arresting officer have sufficient facts to warrant a belief that the group's behavior presented an immediate and substantial risk of injury to other people or harm to property? (Assignments of Error 1, 2 & 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL FACTS

The State charged Alejandro Magana Arreola with one count of unlawful possession of a controlled substance, vicodin (RCW 69.50.4013). (CP 60) Arreola filed a motion to suppress the vicodin, arguing that the preceding arrest was invalid. (CP 54-56; RP 40-43) The trial court denied the motion. (CP 66-69; RP 45-47) Arreola submitted to a stipulated bench trial, and the court found him guilty. (RP 49-50; CP 61-65) The court sentenced Arreola to a standard range sentence totaling 10 days. (RP 51; CP 16) This appeal timely follows. (CP 14)

B. FACTS FROM CRR 3.6 HEARING

On the afternoon of August 16, 2009, Toppenish Police Sergeant Jake Church was advised of a “large gathering of gang members” at a residence on South Toppenish Street. (RP 7, 8) He responded because it is “uncommon” to see a large group of gang members together. (RP 8)

When he arrived, Sergeant Church saw approximately 15 men gathered outside of a private residence. (RP 8, 14) He recognized three of the men as known members of a local street gang. (RP 8) This particular gang identifies its members by

wearing clothing, accessories and tattoos that are blue or that contain the number 13. (RP 8-9) Because the other men were also dressed in blue and wearing the number 13 on their clothing or on tattoos, Sergeant Church assumed that they were members of the same gang. (RP 8-9, 31) Sergeant Church testified that he noticed several of the men standing together “flashing” gang signs with their hands. (RP17)

Sergeant Church contacted one of the “known” gang members, Jaime Andrews, who told Sergeant Church that he had arranged the gathering because he wanted to take pictures of himself with his “homies.” (RP 9, 16) Sergeant Church testified that “with a group of that size and clearly claiming to be gang members very publicly creates a risk of retaliation from other gangs.” (RP 8) Sergeant Church advised Andrews and the group that a gathering of that size was dangerous and a “public nuisance,” and told them they needed to disperse. (RP 9)

The group wanted to go to nearby Pioneer Park, and Sergeant Church advised them that he “could not stop them” but that if they did go they must “obey the law and not engage in this activity” or “group up” in this manner. (RP 9) The men dispersed, with some men leaving in cars and some on foot. (RP 9) Sergeant

Church followed them to Pioneer Park, where a slightly smaller group of about 12 men gathered in one corner of the park. (RP 9)

Sergeant Church testified that there were about 50 people already at the park when the men arrived. (RP 9) The other groups and families were having picnics or playing games. (RP 9) The men did not engage or interfere with any of the other people at the park. (RP 9, 19) They stood around talking in a corner by themselves, then lined up to take photographs. (RP 9, 19)

Officer Church testified that flashing gang signs is perceived as a "direct challenge" to members of other gangs, and if rival gang members observe this activity they might retaliate with violence. (RP 10, 19-20) So when Officer Church saw the men flashing gang signs at the camera while posing for pictures, he decided to place the entire group under arrest for failing to disperse. (RP 9, 10, 19)

Officer Church called for backup, then approached the group with his firearm drawn and ordered the men to turn around and place their hands on the fence. (RP 11, 20) He told the men that they were under arrest. (RP 11, 21) Sergeant Church testified that none of the men were free to leave at that point. (RP 11, 21)

Once backup officers arrived, Church and the other officers began the process of patting-down and identifying each of the men.

(RP 11, 28) Yakima County Sherriff's Deputy Matt Steadman contacted Arreola. (RP 28) Deputy Steadman conducted a warrant check, and discovered that Arreola had one outstanding arrest warrant. (RP 29) During a search incident to arrest, Steadman discovered several pills in Arreola's pants pocket.¹ (RP 29)

The trial court denied Arreola's CrR 3.6 motion to suppress, and entered the following relevant written conclusions of law:

2. The question here is whether the officers had a right to identify or question the defendant in the first place, which they clearly did.
3. The statute requires these individuals be ordered to disperse.
4. The statute requires that [there be] acts of conduct creating a substantial risk of causing injury to any person.
5. The defendant was acting in a way that created harm, because flashing gang signs is seen as a threat.
- ...
7. Because all of these individuals were dressed the same and flashing the same signs, the Failure to Disperse statute was appropriate.
8. Furthermore, the officers had the right to contact and cite the individuals because a misdemeanor had been committed in their presence.

(CP 67-68; RP 45-47)

¹ The white pills were later identified as vicodin. (RP 49; 63)

IV. ARGUMENT & AUTHORITIES

When reviewing the denial of a motion to suppress, the court should determine whether substantial evidence supports the challenged findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Mendez, 137 Wn.2d at 214 (citing Hill, 123 Wn.2d at 644). The trial court's conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 214 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. AMD. IV. Article 1, section 7 of the Washington Constitution states that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Under both constitutions, warrantless searches and seizures are presumptively unreasonable unless they fall into one or more of the narrowly drawn exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000).

One exception allows a police officer to make a warrantless arrest for a misdemeanor committed in an officer's presence, provided the arrest is supported by probable cause. State v. Walker, 157 Wn.2d 307, 319, 138 P.3d 113 (2006); RCW 10.31.100. Probable cause to arrest exists where reasonably trustworthy facts and circumstances within the arresting officer's knowledge are sufficient to merit a belief in the mind of a reasonably cautious person that an offense has been committed. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

Sergeant Church placed the entire group of men, including Arreola, under arrest for failing to disperse. (RP 11, 22) Under RCW 9A.84.020, a person is guilty of the misdemeanor crime of failure to disperse if:

- (a) He congregates with a group of three or more other persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person, or substantial harm to property; and
- (b) He refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing or executing the law.

In this case, Arreola's arrest was improper because the order to disperse was invalid and because the group did not engage in conduct that created a substantial risk of injury.

The First Amendment guarantees freedom of speech and

the associational right “peaceably to assemble” free from government intrusion. U.S. CONST. AMD. I. As this Court has previously recognized, “[l]ike membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association.” State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (citing Dawson v. Delaware, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L.Ed.2d 309 (1992) (gang membership inadmissible to prove abstract belief because it is protected by constitutional rights of freedom of association and freedom of speech)).

Arreola’s group was gathered peaceably in front of a private residence. (RP 15) Sergeant Church ordered them to disperse because, in his opinion, a large gathering of gang members is a “danger to public safety.” (RP 15-16) Sergeant Church ordered the group to disperse not because of any immediately threatening, dangerous or criminal actions on their part, but simply because he believed they were members of a gang. (RP 23-24) Therefore, the order to disperse was invalid and Arreola’s failure to follow the order is not a criminal act.

Furthermore, the statute specifically requires that a group engage in conduct that creates a “substantial risk” of causing injury

to any person or property. RCW 9A.84.020(1)(a). In State v. Dixon, the Washington Supreme Court considered a constitutional challenge to RCW 9A.84.020's predecessor, which prohibited three or more persons from gathering together with intent to disturb the public peace, or after assembling to attempt any acts or threaten to do anything tending to produce a breach of the peace or to injure or damage property. 78 Wn.2d 796, 479 P.2d 931 (1971) (interpreting Former RCW 9.27.060). The Court rejected the defendant's argument that the statute "purports to override and deprive one of freedom of speech and the right peaceably to assemble," noting:

"When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."

Dixon, 78 Wn.2d at 808 (emphasis added) (quoting Cantwell v. Connecticut, 310 U.S. 296, 308, 60 S. Ct. 900, 905, 84 L. Ed. 1213 (1940)). Accordingly, to support an arrest under this statute, and avoid running afoul of the constitutional rights to free speech and assembly, a group's conduct must create more than just a *possibility* that injury or harm might occur. But that is all that the evidence shows in this case.

After being ordered to disperse at the residence, most of

Arreola's group went to a public park, where they talked and took pictures. (RP 9, 19) They did not make contact or interfere with any of the other people at the park. (RP 8-9, 19) They did not direct hand signs towards any other individuals, and took no other actions with the aim of intimidating or inciting the other park patrons. (RP 19)

Sergeant Church testified that gangs are known for violent behavior and that the flashing of gang signs can be seen as a challenge to rival gangs. (RP 10) According to Sergeant Church, there might have been subsequent violence if members of a different gang drove by and saw Arreola's group making hand gestures. (RP 10, 19-20) But there was no evidence that any rival gang members were in the area of the residence or park. (RP 19-20) Sergeant Church's concerns were purely speculative, and not based on any actual facts or circumstances existing at the time of arrest. (RP 19-20)

If an arrest is permissible under the circumstances presented in this case, then any citizen who is a member of a gang will have his or her constitutional freedom of association and expression unfairly impacted. This Court would be saying that any time three or more gang members gather in public and do not hide

their gang affiliation, they may be ordered to separate or face arrest. Such an interpretation would not be limited to gangs either; law enforcement could issue dispersal orders for any gathering of groups identified with controversial or offensive ideas that have the potential to enrage or upset other people.

The broad interpretation of the failure to disperse statute approved by the trial court in this case cannot withstand constitutional scrutiny. There must be some specific action that creates a direct and immediate threat to the safety of the group or the public. No such actions were present in this case, and Arreola's arrest was therefore improper.

V. CONCLUSION

Even unpopular groups maintain a right to free association and free speech, and cannot be ordered to disperse simply because they subscribe to certain beliefs or codes of conduct. Sergeant Church exceeded his authority as a law enforcement officer when he told Arreola's group that they could not gather together in front of a private residence, and when he ordered them to disperse.

Moreover, both as written and interpreted, the failure to disperse statute requires more than just a *possibility* that harm

could occur as a result of the group's conduct. It requires an immediate, substantial threat or risk to public safety. There is no evidence in this case that such a risk existed. The facts and circumstances did not provide Sergeant Church with probable cause to arrest Arreola for the crime of failure to disperse.

The trial court erred when it denied Arreola's motion to suppress the evidence seized as a result of this unlawful arrest. Arreola's conviction should be reversed, and this case remanded with an order to suppress the evidence.²

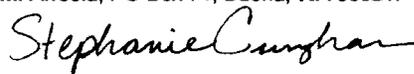
DATED: October 4, 2010



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CERTIFICATE OF MAILING

I certify that on 10/04/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) (Attorney for Respondent) David B. Trefry, Attorney at Law, P.O. Box 4846, Spokane, WA 99220-0846; and (2) Alejandro M. Arreola, PO Box 71, Buena, WA 98921.



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² See State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (holding that because the initial contact was a seizure and detention, conducted without a reasonable and articulable suspicion of criminal activity, all evidence obtained as a result of the contact should have been suppressed).