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Court of Appeals
Division III
State of Washington

NO. 29965-1-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ALAN SANCHEZ-HERNANDEZ,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court's denial of Alan Sanchez-Hernandez's CrR 3.6 motion is not justified under the current state of the law.

2. Inconsistent verdicts as to attempted first degree assault and a special verdict concerning a firearm require reversal of that conviction and remand for a new trial.

3. The trial court should have granted the mistrial motion.

4. The State failed to prove, beyond a reasonable doubt, the offense of attempted first degree assault.

5. Gang-related prohibitions in the Judgment and Sentence are not crime-related.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Was the contact with Mr. Sanchez-Hernandez an illegal seizure?

2. Does an inconsistency between a special verdict involving a firearm enhancement and the underlying conviction, which requires a firearm as an element of the offense, justify a mistrial and/or reversal of the conviction and remand for a new trial?

3. Did the State present sufficient evidence that Mr. Sanchez-Hernandez was armed with a firearm in order to establish, beyond a reasonable doubt, the offense of attempted first degree assault?

4. Do the gang-related prohibitions contained in the Judgment and Sentence violate Mr. Sanchez-Hernandez's First Amendment rights?

STATEMENT OF CASE

Office Glasenapp of the Grandview Police Department was on duty on April 24, 2010 when he received a call of individuals near 211 Douglas Street who may be smoking marijuana and/or trespassing. The call came in at approximately 1:42 p.m. (RP 6, ll. 9-11; RP 7, ll. 11-14; ll. 16-20; RP 107, ll. 11-12; RP 108, ll. 1-8; ll. 14-18).

Officer Glasenapp drove by that address before stopping. He saw several males outside a car that was parked partially in a driveway and partially in the street. The car was a two door Monte Carlo. Two other individuals were in the backseat of the car. None of the individuals were on the property at 211 Douglas. The officer did not see anyone smoking marijuana. (RP 11, ll. 1-5; RP 14, ll. 9-16; RP 29, ll. 11-17; RP 30, ll. 11-16; RP 35, ll. 11-13; RP 110, ll. 9-17; RP 137, ll. 1-5; RP 138, ll. 20-21).

Prior to turning around Officer Glasenapp noticed one of the individuals run from the area. He followed him in the patrol car but was unable to catch him. (RP 12, l. 15 to RP 13, l. 3).

Officer Colley of the Grandview Police Department arrived and contacted the individuals outside the car. He engaged them in a general conversation. Officer Colley did not see anyone committing any offense. (RP 31, l. 24 to RP 32, l. 5; RP 37, ll. 1-6; RP 43, ll. 5-21; RP 111, ll. 14-20; RP 185, ll. 17-25).

Both officers recognized two of the individuals who were standing outside the car. They were both out on bail in connection with violent crimes. The two individuals belong to the BGL gang. (RP 8, ll. 20-22; RP 111, l. 21 to RP 112, l. 19).

Upon returning to 211 Douglas, and as his patrol car came to a stop, Officer Glasenapp saw the male passenger's shoulders dip toward the floorboard in the backseat of the car. As he was getting out of the patrol car Officer Glasenapp drew his service weapon. He ordered the individuals to the ground. Officer Colley also drew his service weapon. The two passengers were ordered to get out of the car. (RP 13, ll. 6-8; ll. 18-20; RP 112, ll. 23-25; RP 113, ll. 8-22; RP 114, ll. 11-16; RP 115, ll. 4-8; RP 186, ll. 2-7; RP 187, ll. 22-24).

The female passenger got out of the car as directed. The male passenger continued to sit in the car. After additional orders he finally got out and turned to face the officer. (RP 15, ll. 6-21; RP 16, ll. 14-20; RP 115, ll. 17-25; RP 116, ll. 10-20).

The passenger was Mr. Sanchez-Hernandez. Due to his actions Officer Glasenapp reached for his arm. Mr. Sanchez-Hernandez grabbed

at an area under her shirt. He then took off running. (RP 17, l. 10 to RP 18, l. 15).

Officer Glasenapp thought he saw a small portion of a metal object as Mr. Sanchez-Hernandez grabbed it. He believed it was the size of a pistol. When Mr. Sanchez-Hernandez tugged upwards the officer yelled “gun!” (RP 32, ll. 18-19; RP 117, ll. 11-25; RP 118, ll. 1-14; RP 119, ll. 5-18).

Officer Glasenapp chased Mr. Sanchez-Hernandez. He did not catch him. He returned to the car and looked through the rear passenger window. He saw a pistol barrel under the passenger side front seat. This was near the area where Mr. Sanchez-Hernandez had been sitting. (RP 19, l. 21 to RP 20, l. 8; RP 120, ll. 2-14; RP 121, ll. 13-25).

Mr. Sanchez-Hernandez’s clothes included a baggy black shirt which came down to his mid-thigh area. After he took off running he continued to grab at the waistband area of his baggy, khaki pants. (RP 119, ll. 5-18; RP 150, ll. 7-10; ll. 20-23; RP 153, ll. 5-13).

The Monte Carlo was impounded. A search warrant was obtained. A 9 mm Beretta was found under the passenger seat. (RP 126, ll. 21-22; RP 128, ll. 16-18).

An Information was filed on April 30, 2010 charging Mr. Sanchez-Hernandez with being an `alien in possession of a firearm and attempted second degree assault. The assault count carried a firearm enhancement. (CP 1).

An Amended Information was filed on May 19, 2010. The attempted second degree assault was amended to second degree assault. (CP 6).

A suppression hearing was conducted on October 8, 2010. No Findings of Fact and Conclusions of Law were entered. The Court denied the suppression motion. (10/8/10 RP 1 *et seq.*).

Numerous continuances and time-for-trial waivers were filed with the Court. (CP 7; CP 8; CP 9; CP 10; CP 11; CP 12; CP 32; CP 33; CP 35; CP 39; CP 40; CP 41; CP 42).

On November 16, 2010 the State filed a Notice of Intent to use gang evidence. Defense counsel filed a Motion in Limine to prohibit gang testimony. The trial court ruled that gang evidence was inadmissible under the facts and circumstances of Mr. Sanchez-Hernandez's case. (CP 34; CP 36; CP 47; RP 76, ll. 15-16).

A Second Amended Information was filed on March 28, 2011. The assault count was amended to attempted first degree assault with a firearm enhancement. (CP 45).

In conjunction with Count 1, Mr. Sanchez-Hernandez stipulated that he was not a United States citizen. (CP 43).

At the end of the State's case defense counsel moved to dismiss Count 2 (attempted first degree assault) due to insufficient evidence. The motion was denied. (RP 256, l. 8 to RP 258, l. 6).

During the deputy prosecutor's rebuttal argument he denigrated defense counsel's argument. He cast aspersions on defense counsel by accusing him of mischaracterizing the evidence. (RP 290, ll. 1-3; ll. 13-15; ll. 20-24; RP 291, ll. 5-7; ll. 17-20; RP 292, ll. 10-12).

During deliberations the jury submitted a note to the trial court. It set forth two questions:

Does 1st Degree Assault need to involve a
firearm?

Does Attempted 1st Degree Assault need to
involve a firearm?

The trial court referred the jury to Instructions 10 and 12. (CP 124).

The jury found Mr. Sanchez-Hernandez guilty of both counts. It answered the special verdict form, which asked the question whether or not Mr. Sanchez-Hernandez was armed with a firearm as to Count 2, in the negative. (CP 125; CP 126; CP 127).

Due to the inconsistent verdicts on Count 2 and the special verdict form defense counsel moved for a mistrial. A sidebar discussion was held on the inconsistent verdicts. (CP 129; RP 303, l. 22 to RP 307, l. 21).

Argument on a motion for mistrial occurred on June 6, 2011. The motion was denied. Judgment and Sentence was then entered. (CP 139; RP 313, ll. 11-15).

The Judgment and Sentence, at paragraph 4.C.2 (pp.3 & 4), sets forth several conditions pertaining to gangs. (CP 141-142).

Mr. Sanchez-Hernandez filed his Notice of Appeal on June 8, 2011. (CP 147).

SUMMARY OF ARGUMENT

Mr. Sanchez-Hernandez was illegally seized when he was ordered out of the car at gunpoint. The officer had not seen any evidence of criminal activity. A furtive movement, in and of itself, is insufficient to justify the officer's actions.

Inconsistent verdicts regarding Count 2 require reversal of the conviction and remand for a new trial. On the other hand, insufficient evidence that a real firearm was involved, as to the attempted first degree assault, requires reversal and dismissal of that Count.

If Count 2 is not dismissed or reversed, then the gang-related prohibitions and/or conditions in the Judgment and Sentence must be removed.

ARGUMENT

A. ILLEGAL SEIZURE

The trial court did not enter Findings of Fact and Conclusions of Law as required by CrR 3.6(b). However, Mr. Sanchez-Hernandez submits that

the trial court's oral opinion provides sufficient information for review.
See: State v. Radka, 120 Wn. 43, 48, 83 P. 3d 1038 (2004).

The trial court, in its oral opinion, relied upon the following facts:

1. A citizen informant contacted the Grandview Police Department in reference to individuals smoking marijuana on his property. (RP 52, l. 21 to RP 53, l. 8).
2. Upon arrival both officers' recognized two individuals who were gang members and out on bond. (RP 53, ll. 9-14).
3. Mr. Sanchez-Hernandez made a reaching motion toward the floorboard of the car by dipping his shoulder. (RP 53, ll. 24-25).

After stating the foregoing findings the trial court then concluded:

1. The officers had a responsibility to respond to a citizen's complaint. (RP 53, ll. 6-8).
2. The presence of gang members out on bond aroused the officer's suspicion. (RP 53, ll. 12-15).
3. The furtive movement by Mr. Sanchez-Hernandez raised a concern for officer safety. (RP 53, ll. 19-25).
4. Officer experience plays a part in determining whether or not a seizure is reasonable. (RP 54, ll. 1-10).
5. The officers had a responsibility to investigate further based upon the stated facts and foregoing conclusions. (RP 54, ll. 16-22).

Warrantless seizures are *per se* unreasonable. There are a few jealously and carefully drawn exceptions to the search warrant requirement of the Fourth Amendment to the United States Constitution and Const. art. I, § 7. See: *State v. Houser*, 95 Wn. 2d 143, 149, 622 P. 2d 1218 (1980).

It appears from the trial court's oral opinion that it justified the warrantless seizure on the basis of either the community caretaking function or a *Terry*¹ investigative stop.

Mr. Sanchez-Hernandez contends that the community caretaking function cannot be used under the facts and circumstances of his case. Since Officer Glasenapp exited his patrol car with his gun drawn, this negates any consideration of the community caretaking function.

The Court noted in *State v. Kinzy*, 141 Wn. 2d 373, 388, 5 P. 3d 668 (2000):

When weighing the public's interest, this Court must cautiously apply the community caretaking function exception because of "a real risk of abuse in allowing even well intentioned stops to assist." Once the exception does apply, police officers may conduct a non-criminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. The non-criminal investigation must end when reasons for initiating an encounter are fully dispelled. [quoting *State v. DeArman*, 54 Wn. App. 621, 626, 774 P. 2d 1247 (1989) (citing *United State v. Dunbar*, 470 F. Supp. 704, 708 (D. Conn.), *aff'd* 610 F.2d 807 (2d Cir. 1979))].

¹ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)

It is obvious that when an officer draws his weapon any investigation seizes to be non-criminal in nature. Thus, if the warrantless seizure of Mr. Sanchez-Hernandez is to be upheld, it must fall under the *Terry* stop analysis.

In *State v. Belieu*, 112 Wn. 2d 587, 602, 773 P. 2d 46 (1989) the court analyzed the use of guns by law enforcement officers in conjunctions with a *Terry* stop. The Court stated:

The question whether the use of drawn guns is justified in effecting a stop may be analogized to the standard for frisking one who is the subject of a “Terry” stop. That standard is that the “officer need not be absolutely certain that the individual is armed; *the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.*” (Italics ours) *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). In determining whether the officer acted reasonably in such circumstances, due weight must be given, not to the officer’s inchoate and unparticularized suspicion or “hunch,” but to the specific reasonable inferences the officer is entitled to draw from the facts in light of the officer’s own experience. *Terry*, at 27. **A frisk must not be undertaken as a result of the product of the officer’s “volatile or inventive imagination” or “simply as an act of harassment” rather, the record must evidence “the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.”** *Terry*, at 28.

(Emphasis supplied.)

Mr. Sanchez-Hernandez asserts that Officer Glasenapp's actions were not justified based upon what he knew at the time contact was initiated. The facts were:

1. A report of marijuana smoking and possible trespass;
2. The presence of a number of individuals who were not on the property at 211 Douglas;
3. A car parked partially in a driveway and partially in the street;
4. One person flees after the officer drives by;
5. While the first officer chases the individual who ran a second officer arrives;
6. The second officer engages the individuals around the car in a conversation;
7. When the first officer returns he sees the backseat passenger in the car dip his shoulder toward the floorboard. He exits his patrol car with gun drawn and orders everyone to the ground.

Mr. Sanchez-Hernandez distinguishes *State v. Belieu, supra* and *State v. Thornton*, 41 Wn. App. 506, 705 P. 2d 271 (1981) from the facts and circumstances of his case.

In the *Belieu* case a citizen informant had contacted law enforcement about a potential burglary. Burglaries had occurred in that specific neighborhood where guns had been stolen. Several officers made direct observations of two individuals trying to avoid contact with them.

There is no indication of any felony being involved when dispatch was contacted by the citizen informant in this case. The report was of a possible criminal trespass and marijuana smoking.

Other than the fact that one individual fled upon Officer Glase-napp's approach, the only other pertinent observation which he made was the shoulder dip.

The *Thornton* case involved immediate pursuit of a car which was speeding. The car and the men in it matched the description of a recent armed robbery in the vicinity. Again, the facts are clearly distinguishable.

The *Thornton* Court noted at 512, fn. 1:

No hard and fast rule governs the display of weapons in an investigatory stop. Rather, the courts must look at the "nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, [and] the reaction of the suspect to the approach of police...all [of] which bear on the issue of reasonableness." ... *United States v. Harley*, 682 F. 2d 398, 402 (2d Cir. 1982); accord, *United States v. Nargi*, 732 F. 2d 1102, 1106 (2d Cir. 1984).

The officers were investigating possible possession of marijuana and second degree criminal trespass. These are misdemeanors.

Contact occurred during the middle of the day on a public street in a residential area of Grandview.

Mr. Sanchez-Hernandez's movement inside the car is not necessarily indicative of a threat to the officers.

The flight of one individual may have provided Officer Glasenapp with some suspicion, but it was not an individualized suspicion directed at Mr. Sanchez-Hernandez. “[...] Mere proximity to others independently suspected of criminal activity does not justify [a] stop.” *State v. Thompson*, 93 Wn. 2d 838, 841, 613 P. 2d 525 (1980).

Officer Glasenapp seized all five individuals when he exited his patrol car with his gun drawn. He had not observed any criminal activity by any individual.

Officer Colley was already on the scene. He was engaged in a conversation with at least one of the individuals who was outside the car. He had not seen any criminal activity.

The Court in *State v. Hobart*, 94 Wn. 2d 437, 442-43, 617 P. 2d 429 (1980), citing *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), noted:

Declaring that when an officer accosts an individual and restrains his freedom to walk away, he performs a seizure of that person within the meaning of the Fourth Amendment, ... [and] that such seizures, though less intrusive than an arrest, must be reasonable. Such reasonableness depends upon a balance between the public interest in law enforcement and the individual's right to personal security, free from arbitrary interferences by law officers. Constitutionality of such seizures involves the weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity

of the interference with individual liberty. And, the court said, a central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based upon specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual law officers (citing *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); and *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976)).

The trial court places great reliance on the presence of two gang members who had recently been arrested for violent offenses, as well as the furtive movement by Mr. Sanchez-Hernandez. Mr. Sanchez-Hernandez contends that the presence of the two gang members does not constitute a basis for his seizure.

If a prior conviction, not to mention a prior arrest, should afford grounds for believing that an individual is engaging in criminal activity at any given time thereafter, that person would never be free of harassment, no matter how completely he had reformed. **To the best of our knowledge, the law does not countenance such an assumption.**

State v. Hobart, *supra* 446-47. (Emphasis supplied.)

The totality of the circumstances do not justify Officer Glasenapp's seizure of the individuals with his gun drawn. No threat had been directed at the officers. No threat had been directed at any bystanders. There were no indications of current criminal activity.

Officer Glasenapp's actions exceed the scope of a *Terry* investigative stop/seizure. The trial court should have granted the suppression motion.

B. INCONSISTENT VERDICT

Generally, a special finding will not control a general verdict unless the two are irreconcilably inconsistent. *State v. Baruso*, 72 Wn. App. 603, 616, 865 P. 2d 512 (1993). Thus, "where a special verdict is susceptible of two constructions, one of which will support the general verdict and the other of which will not, we will give such construction as will support the general verdict." *State v. Robinson*, 84 Wn . 2d 42, 45, 523 P. 2d 1192 (1974).

State v. Holmes, 106 Wn. App. 775, 779, 24 P. 3d 1118 (2001).

The special verdict in this case is irreconcilably inconsistent with the general verdict on attempted first degree assault. Attempted first degree assault has, as a required element, use of a firearm. The special verdict determined that Mr. Sanchez-Hernandez was not armed with a firearm.

...[I]rreconcilable verdicts do not necessitate reversal in Washington. Thus, "[w]here the jury's verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, we will not reverse on grounds that the guilty verdict is inconsistent with an acquit-

tal on another count.” *State v. Ng*, 110 Wn. 2d 32, 48, 750 P. 2d 632 (1988) (adopting rule of *Dunn v. United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932)). This rule recognizes that a variety of factors may affect a jury’s verdict including mistake, compromise and lenity. *United States v. Powell*, 469 U.S. 57, 63, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). A court’s independent review of the sufficiency of the evidence is adequate protection against jury irrationality or error. *See: Powell*, 469 U.S. at 67-68.

State v. Holmes supra.

Mr. Sanchez-Hernandez maintains that the evidence as to the attempted first degree assault offense is insufficient to support each and every element of that offense. The trial court’s independent analysis of the evidence, and denial of the mistrial motion, is error.

Mr. Sanchez-Hernandez also incorporates his argument concerning the insufficiency of the evidence into this portion of his brief.

C. INSUFFICIENT EVIDENCE

In analyzing a challenge to the sufficiency of the evidence the test is set forth in *State v. Green*, 94 Wn. 2d 216, 221, 616 P. 2d 628 (1980):

“...[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.” *Jackson v. Virginia*, 443 U. S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

The critical missing component in the State's case is the lack of positive identification that whatever was in Mr. Sanchez-Hernandez's waistband was a real firearm.

Initially, Mr. Sanchez-Hernandez concedes that his suppression motion is inapplicable to the offense of attempted first degree assault.

When an individual assaults a police officer whose intrusion allegedly violates Fourth Amendment protections, evidence of the assault is outside the scope of the exclusionary rule.

State v. McKinlay, 87 Wn. App. 394, 398, 942 P. 2d 999 (1997).

RCW 9A.36.011(1) provides, in part:

A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm... .

Count 2 of the Second Amended Information parallels the statutory language. It states:

On or about April 24, 2010, in the State of Washington, with intent to commit the crime of First Degree Assault, and with intent to inflict great bodily harm upon the person of Officer Glasenapp #474, you took a substantial step toward assaulting that person with a deadly weapon, a pistol.

Based upon the charging language, along with the statutory elements, the State was required to prove that Mr. Sanchez-Hernandez was armed with a pistol.

The Comment to WPIC 2.06 contains the following language:

Firearm-Definitional issue. The instruction above follows the statutory approach by using the term “firearm” but not defining it. The statute that defines “deadly weapon,” RCW 9A.04.110, does not define “firearm.” There are no cases indicating whether the definition of “firearm” set forth in RCW 9.41.010(1) would apply. *See: State v. Edwards*, 17 Wn. App. 355, 563 P. 2d 212 (1977) (former deadly weapon and firearm enhancement statutes, dictionary definition acceptable in absence of statutory definition of firearm).

A pistol is “a short firearm intended to be held and fired with one hand.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.)

Officer Glasenapp’s observations were of a portion of a shiny metallic object. He saw that Mr. Sanchez-Hernandez was gripping the object through his shirt in a manner consistent with a pistol grip. The officer then yelled “gun” as Mr. Sanchez-Hernandez tugged at his waistband.

A pistol is a firearm. A necessary predicate to determine whether or not a person is armed with a firearm is identification that the particular object is a real gun. As the Court stated in *State v. Faust*, 93 Wn. App. 373, 380, 967 P. 2d 1284 (1998):

...[W]hen the Legislature adopted the definition of a firearm in 1983, the Washington Supreme Court had clearly set out the definition of firearm in both *Tongate* [*State v. Tongate*, 93 Wn. 2d 751, 613 P. 2d 121 (1980)] and *Pam* [*State v. Pam*, 98 Wn. 2d 748, 659 P. 2d 454 (1983)] *overruled on other grounds by State v. Brown*, 111 Wn. 2d

124, 761 P. 2d 588 (1988)]. And the definition did not limit firearms to only those guns capable of being fired during the commission of the crime. Rather, the court characterized a firearm as **a gun in fact, not a toy gun**; and the **real gun** need not be loaded or even capable of being fired to be a firearm.

(Emphasis supplied.)

If, indeed, Mr. Sanchez-Hernandez was armed, no weapon was ever recovered. Officer Glasenapp's limited observation, of what he believed to be a gun, does not substantiate that what he observed was a real gun. His precautionary shout of "gun" does not mean that there was a real gun in Mr. Sanchez-Hernandez's possession.

The first means of assault requires a completed battery; intentionally touching or striking someone in a harmful or offensive manner. ...An attempt would appear possible.[A]n attempted unlawful touching would seem to constitute an attempted assault.

State v. Hall, 104 Wn. 2d 56, 64, 14 P. 3d 884 (2000).

The trial court correctly limited its jury instruction to the first alternative of WPIC 35.50.

Under the facts and circumstances of Mr. Sanchez-Hernandez's case the attempted assault was by means of shooting. No shots were fired. No real gun was observed. Even though Mr. Sanchez-Hernandez's actions may have been threatening in nature, the absence of proof that he was

armed with a real gun precludes a finding of guilt on attempted first degree assault.

D. JUDGMENT AND SENTENCE CONDITIONS

The Judgment and Sentence contains the following conditions of community custody under paragraph 4. C. 2:

1. Not knowingly associate or communicate with other criminal street gang members or associates, except as authorized by law enforcement officials, prosecutorial authorities, or the court, for the purpose of aiding in the investigation of criminal activity.
2. Wear no clothing associated with signifying membership in a criminal street gang.
3. Do not obtain any new tattoos, brands, burns, piercings, or any voluntary scarring relating to gang membership or association.

It is Mr. Sanchez-Hernandez's position that the conditions, as set forth above, invade his First Amendment rights and should be stricken from the Judgment and Sentence.

“Like 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).

The trial court excluded testimony concerning gang membership during the course of the trial. The trial court determined that the offenses being tried were not gang-related.

The First Amendment protects an individual's right to freedom of speech and association. Because the SRA expressly authorizes a sentencing court to order that the defendant "not have direct or indirect contact with the victim of the crime or a specified class of individuals," a sentencing court may restrict an offender's freedom of association as a condition of sentencing "**if reasonably necessary to accomplish the essential needs of the state and public order.**".

State v. Moultrie, 143 Wn. App. 387, 399, 177 P. 3d 776 (2008) quoting RCW 9.94A.700(5)(b) and *State v. Riley*, 121 Wn. 2d 22, 37-38, 846 P. 2d 1365 (1993) (quoting *Malone v. United States*, 502 F. 2d 554, 556 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975)). (Emphasis supplied.)

Mr. Sanchez-Hernandez concedes that a prohibition against associating with convicted felons would be appropriate. However, to direct that he can have no contact with a gang, when the offenses are not gang-related, unduly restricts his First Amendment right to association.

The prohibition concerning clothing, tattoos or other markings impacts his First Amendment right to freedom of speech and freedom of expression.

In *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P. 2d 239 (1992) the Court stated:

No causal link need be established between the condition imposed and the crime committed, **so long as the condition relates to the circumstances of the crime.** *See: State v. Parramore*, 53 Wn. App. 527, 768 P. 2d 530 (1989).

(Emphasis supplied.)

Since Mr. Sanchez-Hernandez's convictions are for crimes that are not gang-related, the particular conditions imposed do not relate to the circumstances of the crimes.

Recently, in *State v. Bahl*, 164 Wn. 2d 739, 753, 193 P. 3d 678 (2008) the Court ruled as follows:

In addition, when a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms. ... For this reason courts have held that a stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition. As the Eleventh Circuit observed, "Vagueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statutes because their consequences are more severe." *United States v. Williams*, 444 F. 3d 1286, 1306 (11th Cir. 2006), *rev'd on other grounds*, ___ U.S. ___, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

While many courts apply to sentencing conditions the same vagueness doctrine that applies with respect to statutes and ordinances, there is one distinction. In the case of statutes and ordinances, the challenger bears a

heavy burden of establishing that the law is unconstitutional. This burden exists because of the presumption of constitutionality afforded legislative enactments. A sentencing condition is not a law enacted by the legislature, however, and does not have the same presumption of validity. Instead, imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. *State v. Riley*, 121 Wn. 2d 22, 37, 846 P. 2d 1365 (1993). **Imposition of an unconstitutional condition would, of course, be manifestly unreasonable.**

(Emphasis supplied.)

The gang-related conditions imposed on Mr. Sanchez-Hernandez are unconstitutional. They invade his First Amendment rights. The State did not justify the conditions to the trial court. The conditions are unrelated to the underlying crimes.

CONCLUSION

Mr. Sanchez-Hernandez was illegally seized. Any evidence seized from the car should be suppressed.

Inconsistent verdicts render Mr. Sanchez-Hernandez's conviction of attempted first degree assault invalid. A mistrial should have been declared. Mr. Sanchez-Hernandez is entitled to a new trial.

The evidence was insufficient to establish that Mr. Sanchez-Hernandez was armed with a real gun. The evidence is so vague as to

render it incomprehensible that a rational juror could convict him of the offense. This is supported by the inconsistent verdicts.

Mr. Sanchez-Hernandez's conviction of attempted first degree assault should be reversed and dismissed.

The gang-related conditions of community custody unconstitutionally invade Mr. Sanchez-Hernandez's First Amendment rights. They should be removed from the Judgment and Sentence if his conviction for attempted first degree assault is not reversed or dismissed.

DATED this 7th day of October, 2011.

Respectfully submitted,

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NO. 29965-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	YAKIMA COUNTY
Plaintiff,)	NO. 10 1 00691 1
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
ALAN SANCHEZ-HERNANDEZ,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 7th day of October, 2011, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

Renee S. Townsley, Clerk
Court of Appeals, Division III
500 North Cedar Street
Spokane, Washington 99201

E-FILE

Yakima County Prosecutor's Office
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E-FILE (per agreement)

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