

FILED
June 5, 2012
Court of Appeals
Division III
State of Washington

No. 299651

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ALAN SANCHEZ-HERNANDEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE BLAINE G. GIBSON, JUDGE

BRIEF OF RESPONDENT

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Rules

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether Mr. Sanchez-Hernandez was illegally seized by an officer?
2. Whether the jury's verdicts on the underlying charge of attempted first degree assault and a firearm enhancement are inconsistent such that the conviction should be reversed and the matter remanded for a new trial?
3. Did sufficient evidence support the conviction for attempted first degree assault?
4. Should the gang-related prohibitions contained in the judgment and sentence be struck, as they violate Mr. Sanchez-Hernandez' rights under the First Amendment?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Mr. Sanchez-Hernandez was lawfully subject to an investigation *Terry* detention, and the defendant's furtive movement and refusal to comply with the officer's commands caused concern for the officer's safety.
2. The jury verdicts may be facially inconsistent, but are not irreconcilable in light of the instructions to the jury.

3. Sufficient evidence supported the conviction for attempted first degree assault, as Mr. Sanchez-Hernandez took a substantial step toward the commission of the crime of first degree assault.
4. The State concedes that the gang-related prohibitions should be struck, and the community custody order amended to prohibit association with convicted felons, as the court granted a defense motion *in limine* as to gang affiliation evidence, and the restrictions are therefore not crime-related.

II. STATEMENT OF FACTS

The Respondent does not dispute Sanchez-Hernandez' Statement of the Case, but it is supplemented with the following narrative. RAP 10.3(b)

Officer Glasenapp testified at the suppression hearing that at the time he was dispatched to the Douglas Street address, he was informed that the reporting party was concerned that several individuals were smoking marijuana "in the front yard." (**Vol. 1 RP 7**) Further, the homeowner believed that some of the individuals had previously been involved in a burglary at the home of the homeowner's parents. (**Vol. 1 RP 10**)

The officer recognized the individuals, who were wearing blue clothing, and were members of the BGL gang. One individual was out on bail on one shooting-related offense. Another was a suspect in a drive-by shooting. **(Vol. 1 RP 11-12)**

His intent in making contact with the individuals was to investigate whether they were smoking marijuana, and to tell them to stay on their own property. **(Vol. 1 RP 16)**

As Officer Glasenapp returned to the residence after attempting to locate an individual who ran from the scene, he observed movement in the back of the vehicle from a vantage point some forty feet away. **(Vol. 1 RP 12-13)** He saw the rear shoulders of the rear passenger dip, and “it appeared he was reaching towards the floorboard.” **(Vol. 1 RP 13)**

At that point, the officer drew his weapon and ordered everyone to the ground. **(Vol. 1 RP 14)**

The weapon was held in a “low ready” position, angled at the ground. **(Vol. 1 RP 14)**

The individuals outside the vehicle complied with the officer’s command, as did a female from inside. Sanchez-Hernandez, the other passenger, complied after repeated orders to step out of the vehicle, but did not comply with orders to show his hands. **(Vol. 1 RP 15)**

The officer kept his weapon at the low ready position as he reached out with his left hand to gain Sanchez-Hernandez' compliance with his orders. **(Vol. 1 RP 17)**

At trial, the officer testified that after he observed Sanchez-Hernandez dip his shoulder toward the floorboard, he did not comply with the officer's first request to leave the vehicle. **(Vol. 2 RP 115)** There was likewise no response to a second request. **(Vol. 2 RP 116)**

When Sanchez-Hernandez finally got out, he did not follow the officer's command to put his hands on the car. **(Vol. 2 RP 116-17)** Instead, he grabbed at something in his waistband. It was "pistol size", and Sanchez-Hernandez had four fingers on one side, his thumb on the other, though the object got caught in his clothing. **(Vol. 2 RP 117)**

Officer Glasenapp saw the metal object in the defendant's waistband, and was positive that it was a firearm. **(Vol. 2 RP 118)**

At trial, the jury was instructed in part that "A person commits the crime of First Degree Assault when, with intent to inflict great bodily harm, he assaults another with a firearm." **(CP 116)**

Further: "A person commits the crime of Attempted First Degree Assault when, with intent to commit First Degree Assault, he does any act which is a substantial step toward the commission of that crime. A

substantial step is conduct which strongly indicates a criminal purpose and that is more than mere preparation.” (CP 118)

Also, the elements instruction for Count 2 set forth what the State had to prove beyond a reasonable doubt:

- (1) That on or about the April 24, 2010, the defendant did an act which was a substantial step toward the commission of First Degree Assault;
- (2) That the act was done with the intent to commit First Degree Assault; and
- (3) That the act occurred in the State of Washington.

(CP 119)

Finally, with respect to the firearm enhancement:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count 2.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

(CP 121)

III. ARGUMENT

1. Sanchez-Hernandez was lawfully subject to a *Terry* investigative detention and the defendant’s furtive movement and refusal to obey the officer’s commands caused concern for the officer’s safety.

An officer may detain an individual for a brief investigatory stop under the articulable suspicion standard. State v. Duncan, 146 Wn.2d 166, 173-74, 43 P.3d 513 (2002), *citing* United States v. Hensley, 469 U.S. 221, 229, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985); State v. Ladson, 138 Wn.2d 343, 350-51, 979 P.2d 833 (1999); Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

An officer need not have probable cause to believe that the suspect is involved in criminal activity, but rather a “well-founded suspicion not amounting to probable cause” upon which they may stop a suspect, identify themselves, and ask for identification and an explanation of his or her activities. State v. Little, 116 Wn.2d 488, 495, 806 P.2d 749 (1991), *citing* State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

A court must look at the totality of the circumstances known to the officer at the time of the stop in evaluating the reasonableness of the stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

A police officer may draw a weapon when detaining persons suspected of criminal activity if an officer reasonably fears for his or her own safety, or the safety of others, as measured by a reasonably prudent standard. State v. Belieu, 112 Wn.2d 587, 602, 773 P.2d 46 (1989).

Further:

It is not practical to prescribe an objective formula for police conduct to determine when an investigative stop becomes an arrest. There are only two places pertinent to this case for drawing a firm line where force will convert a stop into an arrest: (1) when a weapon is drawn by police; or, (2) when a weapon is pointed at a suspect by police. Courts generally have not drawn such lines, preferring to make fact-specific determinations of the reasonableness of force on a case-by-case basis. *See United State v. Ceballos*, 654 F. 2d 177, 182-83 nn. 7, 10 (2d Cir. 1981). No hard and fast rule governs the display of weapons in an investigatory stop. Rather, the court 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 police, all of which bear on the issue of reasonableness. *State v. Thornton*, 41 Wn. App. 506, 512 n. 1, 705 P.2d 271, *review denied*, 104 Wn.2d 1022 (1985).

Contrary to the Appellant's characterization, the circumstances facing Officer Glasenapp more than justified the *Terry* detention of Sanchez-Hernandez, as well as the drawing (not pointing) of the officer's weapon.

First, the officer was aware that the reporting party was concerned that individuals were smoking marijuana in his front yard, possibly trespassing, and that some of the individuals were suspected in an unrelated burglary.

As the officer approached, one individual ran from the residence, and upon re-approaching that location, the officer was aware that the remaining subjects were wearing blue, and were associated with BGL. It

is significant, as well, that two individuals were suspects in prior shootings.

When Sanchez-Hernandez made a furtive movement toward the floor of the car, did not initially respond to the officer's command to exit the vehicle, and would not show the officer his hands, that reaction to the approach of the officer certainly justified detaining Sanchez-Hernandez for further investigation, and keeping a weapon in the "low ready" position while doing so.

The trial court did not err in denying the motion to suppress.

2. Although the jury verdicts appear to be facially inconsistent, they are not irreconcilable given the instructions to the jury, and sufficient evidence supports the guilty verdict on the underlying charge of attempted first degree assault.

As Sanchez-Hernandez notes in his opening brief, the jury found him guilty on Count II, attempted first degree assault, but answered 'no' on the firearm special verdict form. He asserts that since the verdicts are irreconcilable, and there is insufficient evidence to support the guilty verdict on the underlying charge, the assault conviction must be vacated and dismissed.

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), *cited in* State v. Holmes, 106 Wn. App. 775, 779, 24 P.3d 1118 (2001). 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.” Id., *quoting* State v. Robinson, 84 Wn.2d 42, 45, 523 P.2d 1192 (1974).

Even inconsistent verdicts do not mandate reversal unless there is also insufficient evidence to support the guilty verdict. Id., *citing* State v. Wai-Chiu Ng, 110 Wn.2d 32, 48, 750 P.2d 632 (1988) (adopting the rule announced in United States v. Powell, 469 U.S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 356 (1932)).

In Holmes, the jury found the defendant guilty of first degree robbery under the statutory alternative that he was armed with a deadly weapon, but rejected a special verdict that he was armed with a deadly weapon at the time he committed the crime. The Court of Appeals found that the verdicts were not irreconcilable, since the jury could find that the weapon in question, was readily capable of causing substantial bodily injury, as contemplated by the definition of a deadly weapon as an element of the offense, but not persuaded beyond a reasonable doubt that it was likely to produce or may easily produce death, as defined by the enhancement statute. Id., at 780.

The Supreme Court has likewise held that inconsistent verdicts did not compel reversal of a guilty verdict if sufficient evidence supports the general verdict. State v. Goins, 151 Wn.2d 728, 733, 92 P.3d 181 (2004), citing Ng, Powell, and State v. McNeal, 145 Wn.2d 352, 357, 37 P.3d 280 (2002).

At issue in Goins was difference in statutory scheme between the underlying offense of second degree assault with intent to commit indecent liberties, and a rejected finding that the offense was committed with sexual motivation. Id., at 735-736.

Here, it should be noted that Sanchez-Hernandez was not charged with the completed crime of first degree assault, but rather *attempted* first degree assault. As the jury was instructed that they needed to be convinced beyond a reasonable doubt only that Sanchez-Hernandez took a *substantial step* toward the commission of first degree assault, that verdict does not necessarily require that the jury find beyond a reasonable doubt that a weapon was actually used in the commission of the crime. The verdicts, when examined closely, are only facially inconsistent, but not actually irreconcilable.

Also, sufficient evidence supports the underlying verdict.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to

find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

Here, Sanchez-Hernandez was making furtive movements in the back of the vehicle, When he finally got out of the car, he grasped a metal pistol-sized object, which Officer Glasenapp was convinced was a gun, and attempted to pull it out of his clothing. A rational trier of fact could

reasonably conclude that the defendant took a substantial step toward firing a firearm at Officer Glasenapp, given his movements in trying to produce the item from his waist band in the face of repeated instructions from the officer, and the fact that an actual weapon was retrieved from the vehicle.

For the same reasons as outlined above, the court's denial of the motion for a mistrial was not error.

3. The State concedes error as to the community custody condition.

The State has reviewed the trial record, as well as the authorities cited, and is of the opinion that the community custody condition that Mr. Sanchez-Hernandez not have contact with known gang members be amended to reflect a general prohibition on contact with felons. This is principally based upon the court's pre-trial order granting the defense motion in limine to exclude gang evidence. The restrictions at issue were not related to the crime for which Mr. Sanchez-Hernandez was convicted.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions.

Respectfully submitted this 5th day of June, 2012.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail (June 1, 2012)

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