

64008-9

64008-9

NO. 64008-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GREGORIO ORTEGA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF
GREGORIO ORTEGA
NANCY P. COLLINS
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A. SUMMARY OF ARGUMENT.

A Seattle police officer arrested Gregorio Ortega after another police officer reported seeing Ortega suspiciously huddling and apparently exchanging unknown objects with three other people. Because the arresting officer had not seen Ortega commit any misdemeanor offense, he lacked authority to arrest Ortega without a warrant. Without probable cause that Ortega committed a felony, Ortega's arrest violated the Fourth Amendment and Article I, section 7 of the Washington Constitution and the evidence seized from Ortega at the time of his arrest must be suppressed.

B. ASSIGNMENTS OF ERROR.

1. Ortega was arrested and searched in violation of the Fourth Amendment and Article I, section 7 of the Washington Constitution.

2. The court improperly entered Finding of Fact (g) because it was not supported by substantial evidence. CP 81.¹

3. The court improperly entered Finding of Fact (h) because it was not supported by substantial evidence. CP 81.

¹ The findings of fact and conclusions of law from the CrR 3.6 hearing are attached as Appendix A.

4. The court improperly entered Finding of Fact (i) because it was not supported by substantial evidence. CP 81.

5. The court improperly entered Finding of Fact (j) because it was not supported by substantial evidence. CP 81.

6. The court improperly entered Finding of Fact (k) because it was not supported by substantial evidence. CP 81.

7. The court improperly entered Finding of Fact (l) because it was not supported by substantial evidence. CP 81.

8. The court improperly entered Finding of Fact (m) because it was not supported by substantial evidence. CP 81.

9. The court improperly entered Finding of Fact (p) because it was not supported by substantial evidence. CP 81.

10. The court improperly entered Finding of Fact (q) because it was not supported by substantial evidence. CP 81.

11. To the extent the conclusions of law are construed as factual findings, the court's finding that Officer McLaughlin had probable cause to arrest Ortega is not supported by substantial evidence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. In Washington, an officer lacks authority to effect a warrantless arrest for a misdemeanor offense unless the offense occurred in the officer's presence or the officer has a warrant. An officer arrested Ortega without a warrant even though he had not seen Ortega commit any crime. Does the officer's lack of legal authority to arrest Ortega for a misdemeanor require suppression of the evidence seized immediately from Ortega's person upon his arrest?

2. Probable cause that a person possesses illegal drugs must be based on specific evidence showing the suspect has a substance that is likely to be an illegal drug. A police officer saw Ortega huddle on the street with people and possibly exchange something. The officer did not see Ortega handle money, substances that looked like drugs, packaging used for drugs, or paraphernalia used to ingest drugs. The officer did not think he had probable cause to arrest Ortega for having drugs. Under these circumstances, did the police lack lawful authority to arrest Ortega?

D. STATEMENT OF THE CASE

Shortly after 12 p.m. on a Wednesday in March, Officer Chad McLaughlin watched activity along a Seattle street from the second story window of a building. RP 16-17.² He did not have binoculars, but used the video function of a camera to record the scene he witnessed on the street below. RP 67-68; Pretrial Exhibit 1 (video). He was looking for any criminal activity, including potential drug traffic and car prowls. RP 49-50.

McLaughlin saw two men he did not know walking down the street, later identified as Gregorio Ortega and Daniel Cuevas. RP 50. The men nodded their heads at two other men walking by, but those passersby continued without responding. RP 18-19. Two other people stopped when they saw Ortega and Cuevas and walked alongside them for half of the block. RP 20-21. All four men paused by a pay telephone. Two men appeared to have rapid separate interactions with Ortega and then walked away. RP 21. Another person approached Ortega and walked alongside side him for a few feet. Ortega and the other person paused, huddled next to each other, and this third person walked away. RP 22.

McLaughlin did not see Ortega, Cuevas, or anyone else holding money or substances that could be narcotics. RP 77-78. But because of the huddled nature of these quick on-the-street interactions, McLaughlin suspected Ortega was selling drugs with Cuevas as a lookout. RP 26.

McLaughlin believed he had probable cause to arrest Ortega and Cuevas for “drug traffic loitering,” a gross misdemeanor. RP 27. He contacted two other officers who were patrolling the neighborhood in separate cars and told them to arrest Ortega and Cuevas. Officers David Hockett and Anthony Gaedcke arrested Ortega and Cuevas. RP 96-98. The officers seized, handcuffed, arrested and searched both men incident to their arrests. RP 98. Ortega had small rocks of cocaine in his coat pocket and \$780 in cash in his pants pockets. Id.

The police did not stop or arrest any of the people who had “huddled” with Ortega on the street. RP 83. McLaughlin did not believe he had grounds to stop these other individuals because he had not seen them buy anything. RP 85-86.

² The verbatim report of proceedings (RP) is comprised of four consecutively paginated volumes of transcripts. The sole issue on appeal involves the suppression hearing held on July 1, 2006, contained in Volume 1.

The prosecution charged Ortega and Cuevas with possession of a controlled substance with intent to deliver. CP 7. The court denied their motions to suppress evidence based on the unlawfulness of their arrests. CP 80-82. The jury found Cuevas not guilty, but convicted Ortega of the charged offense. CP 39; RP 573. Pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

THE ARRESTING OFFICER LACKED PROBABLE
CAUSE TO ARREST AND SEARCH ORTEGA,
REQUIRING SUPPRESSION OF UNLAWFULLY
SEIZED EVIDENCE

1. A police officer must have probable cause and authority of law when arresting someone without a warrant. Under the Fourth Amendment, a lawful custodial arrest must be based on either an arrest warrant or upon probable cause. Graham v. Connor, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Under Article I, section 7, an arrest must be predicated on a valid warrant or upon authority of law, which is not established simply by an officer's possession of probable cause. State v. O'Neill, 148 Wn.2d 564, 585, 62 P.2d 489 (2003) ("authority of law" mandatory prerequisite for arrest under Washington Constitution);

State v. Barker, 143 Wn.2d 915, 921, 25 P.3d 423 (2001)

(“probable cause alone does not establish the authority of law for an officer outside his jurisdiction to effect a warrantless arrest.”).

Article I, section 7 “is a jealous protector of privacy.” State v. Valdez, 167 Wn.2d 761, _ P.3d _, 2009 WL 4985242, *8 (2009); State v. Rankin, 151 Wn.2d 689, 694, 76 P.3d 217 (2003) (“well-settled” that the Washington Constitution, Article I, section 7, provides greater protection to individual privacy than the Fourth Amendment. The lawfulness of a search and seizure under Washington constitutional law “begins with the presumption that a warrantless search is *per se* unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement.” State v. Patton, 167 Wn.2d 379, 387, 219 P.3d 651 (2009).

An arrest occurs when a police officer “manifests an intent to take a person into custody and actually seizes or detains such person.” Patton, 167 Wn.2d at 387. When a uniformed police officer approaches an individual, tells him he is under arrest, and directs him to put his hands behind his back, an arrest has occurred. Id. Ortega was arrested when a uniformed officer in a marked patrol car stopped him, “immediately” handcuffed him, and then he “searched his person and his pockets.” RP 96-98.

2. The arresting officer did not see Ortega commit any crime. Hockett did not have a warrant and had not seen Ortega commit any criminal offense. RP 96-97. A police officer lacks authority to arrest a person for committing a misdemeanor offense unless the officer witnessed the offending behavior, or a statutory exception applies. RCW 10.31.100; State v. Walker, 157 Wn.2d 307, 138 P.3d 113 (2006).

The “in the presence” requirement stems from long-standing common law principles. Walker, 157 Wn.2d at 315-16; see also Staats v. Brown, 139 Wn.2d 757, 767, 991 P.2d 615 (2000); State v. Hornaday, 105 Wn.2d 120, 130, 713 P.2d 71 (1986). The only permissible limitations to this common law principle are those expressly dictated by the legislature. Walker, 157 Wn.2d at 314; Staats, 139 Wn.2d at 767.

RCW 10.31.100 recognizes and codifies the common law rule requiring a warrant for a misdemeanor arrest unless the offense happened in the presence of the arresting officer. Walker, 157 Wn.2d at 316; Staats, 139 Wn.2d at 767. The statute authorizes a police officer to arrest a person without a warrant if the officer has “probable cause to believe that a person has committed or is committing a felony.” (emphasis added.). It allows a

warrantless arrest for a misdemeanor or gross misdemeanor “only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.” (emphasis added.) RCW 10.31.100.

Subsections (1) through (10) of RCW 10.31.100 list specific exceptions to the “in the presence of the officer” rule for misdemeanors. Exceptions include crimes involving physical harm or threats of harm; the use or possession of cannabis; illegal firearm possession at an elementary or secondary school; and certain traffic offenses. RCW 10.31.100(1), (3), (4), (10).

McLaughlin testified that upon seeing Ortega’s three “transactions” with people on the street, he believed he had probable cause to arrest Ortega for the gross misdemeanor of “drug traffic loitering.” RP 27, 57. He did not know the legal definition of this offense, but he had been trained that three suspicious, potentially drug-related transactions supplied probable cause for this misdemeanor offense. RP 42, 57-58.

McLaughlin candidly conceded he had no evidence that drug transactions had occurred. RP 53-54, 77-78. He did not see drugs exchanged and did not see money exchanged. RP 86. In fact, he did not see anything exchanged. RP 53-54. He simply saw brief

meetings, huddling, and possibly hands touching for an instant, in the middle of the day on a reasonably busy city street, albeit in an area known for criminal activity including illegal drug sales. RP 26, 62-64; Pretrial Ex. 1.

He suspected Ortega was handling drugs even though he had not seen any. He did not believe he had probable cause to detain or arrest the people who met with Ortega and walked away, because he had no idea what, if anything, they received in their individual transactions with Ortega. RP 86. Without seeing what, if anything, had been passed between Ortega and the other people, McLaughlin sought Ortega's arrest based on his repeated contacts with individuals under the "drug traffic loitering" statute. RP 27.

Drug traffic loitering is a gross misdemeanor defined under the Seattle Municipal Code. SMC 12A.20.050(E). The offense occurs when a person "remains" in a public place and "intentionally solicits, induces, entices, or procures another to engage in unlawful conduct contrary to Chapter 69.50, Chapter 69.41, or Chapter 69.52, Revised Code of Washington." SMC 12A.20.050(B). The statute offers examples such as "repeatedly" engaging passersby and hailing motorists as conduct that may show an intent to engage in unlawful drug activity. SMC 12A.20.050(C).

The trial court upheld Ortega's arrest and search by finding McLaughlin had "probable cause to stop and search both defendants." CP 81. The court did not name the offense for which McLaughlin had probable cause. CP 81-82. McLaughlin unambiguously testified that he did not believe he had probable cause that narcotics transactions occurred. RP 27, 77, 86. Without having seen any narcotics or money, he believed he could only accuse Ortega of "drug traffic loitering" based on his repeated contacts with passersby. SMC 12A.20.050(C)(3).

Drug traffic loitering is not exempt from the "in the presence" requirement of RCW 10.31.100 and the common law. The court's findings of fact pretend that McLaughlin arrested Ortega when the undisputed evidence was that two other officers arrested Ortega and Cuevas. CP 81 (McLaughlin "did have probable cause to stop and search both defendants."). Even if McLaughlin had probable cause to arrest Ortega for drug traffic loitering, McLaughlin was not the arresting officer.

Arresting Officer Hockett learned Ortega's description and location from McLaughlin. RP 27, 96-97. He arrested Ortega and immediately handcuffed him. RP 98. After handcuffing him, he

searched his pockets, finding small rocks of crack cocaine in a cost pocket and cash in his pants pockets. Id.

Hockett did not observe Ortega commit any felony or misdemeanor offense. Later, either at the police precinct or at the scene of the arrest, McLaughlin “advised” the police that they “had the correct individuals.” RP 28, 100. Ortega’s arrest occurred when Hockett handcuffed him, and Hockett lacked authority to arrest him at that time. O’Neill, 148 Wn.2d at 585.

3. The fellow officer rule does not apply to misdemeanors.

RCW 10.31.100 lists the misdemeanor³ offenses for which an officer may arrest an individual without a warrant and without personally observing the criminal activity constituting probable cause.

Under the Fourth Amendment, an officer may arrest a person based on information gathered by a fellow officer, when the fellow officer and the arresting officer are working as a unit, even when the facts supporting probable cause are not known to the arresting officer at the time of arrest. State v. Maesse, 29 Wn.App. 642, 647, 629 P.3d 1349, rev. denied, 96 Wn.2d 1009 (1981).

³ For purposes of simplicity, references herein to misdemeanors includes gross misdemeanors.

RCW 10.31.100 codifies a long-standing common law rule that an officer may not arrest a person for a misdemeanor offense that has not happened in the officer's presence, absent a warrant. Cerney v. Smith, 84 Wn.2d 59, 62, 524 P.2d 230 (1974). The requirement of an officer's presence may be relaxed by statute, but the statute is strictly construed. Walker, 157 Wn.2d at 315.

RCW 10.31.100 does not authorize an officer to arrest a person without a warrant for drug traffic loitering or any equivalent misdemeanor offense. Because the offense for which Ortega was arrested is not an enumerated exception to the common law and statutory rule requiring it be committed in the officer's presence, the arresting officer lacked legal authority to arrest Ortega.

When a statute specifically lists certain situations, a reviewing court must assume that no further situations or exemptions apply. State v. Delgado, 148 Wn.2d 723, 728, 63 P.3d 792 (2003). "Plain language does not require construction." Id. (quoting State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)). Courts must interpret criminal law statutes literally and strictly. Id. This Court's inquiry, "thus, ends with the plain language before us." Id.

RCW 10.31.100 contains precise exemptions authorizing arrests for offenses committed outside the officer's presence. For example, it provides: "[a]n officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest" a suspect. RCW 10.31.100(6). The Legislature did not extend authority to officers to act upon the request of another officer in other circumstances not listed in the statute, and thus the inquiry ends.

The lone published case discussing the fellow officer rule in the context of a misdemeanor arrest is Torrey v. City of Tukwila, 76 Wn.App. 32, 882 P.2d 799 (1994). Torrey was a civil rights action filed under 42 U.S.C. § 1983, and necessarily predicated on the federal constitution. Id. at 37 (plaintiffs were required to show the officers "deprived them of rights secured by the United States Constitution or federal law"). In the context of analyzing the lawfulness of the arrest under federal law, the court noted that RCW 10.31.100 allows arrests for misdemeanor offenses only when committed in the officer's presence. Id. at 39-40. The court refused to apply RCW 10.31.100 to the plaintiffs' arrests in Torrey because it stems from common law and "is not grounded in the Fourth Amendment." Id. at 40. No published cases adopt the

fellow officer rule to misdemeanor arrests for offenses not specifically allowed under RCW 10.31.100 and consistent with Washington constitutional and common law. Hockett did not see Ortega commit any crime and he lacked authority to arrest Ortega for any misdemeanor offense.

4. The arresting officers did not detain Ortega for investigatory purposes. While RCW 10.31.100 requires police officers to witness criminal behavior when arresting someone for a misdemeanor offense unless an exemption applies, the police retain authority to investigate potential criminal activity. As explained in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 20 L.Ed.2d 889 (1968), an officer may briefly detain and question a person reasonably suspected of criminal activity. See State v. Lee, 147 Wn.App. 912, 916, 199 P.3d 455 (2008). A reasonable suspicion is the “substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Here, the police did not attempt any investigation before arresting Ortega. They immediately handcuffed him and searched him. RP 96-98.

After Ortega's arrest and search, McLaughlin identified him as a person he saw involved in potential drug-related transactions. RP 28, 100. Because Ortega was arrested and searched before this confirmatory identification, he was improperly seized under Article I, section 7, and the search lacked authority of law. O'Neill, 148 Wn.2d at 585.

5. The police lacked probable cause to arrest Ortega for a felony. Assuming for the purpose of argument that the court implicitly found the officers had probable cause to arrest Ortega for selling narcotics, or anticipating this Court's consideration of potential alternative grounds to affirm the search, the record does not provide sufficient evidence supporting probable cause to arrest Ortega for selling drugs.

Probable cause requires the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe the accused is guilty of the indicated crime. State v. Clark, 143 Wn.2d 731, 748, 24 P.2d 1006 (2001). Probable cause requires more than "mere suspicion or personal belief that evidence of a crime will be found" if the police conduct a search. State v. Neth, 165 Wn.2d 177, 183 P.3d 658 (2008). Probable cause is distinguished from the less

stringent standard of “reasonable suspicion” by its requirement that the officer not only reasonably believes criminal activity may be occurring, but that belief is grounded in circumstances showing the probability that the person has in fact committed a crime. Lee, 147 Wn.App. at 916.

In Neth, the court noted a number of odd and suspicious circumstances used to obtain a search warrant for a car, including the presence plastic baggies typically used to sell drugs, the driver’s extreme nervousness, thousands of dollars in cash in the car, no proof of car ownership, no driver’s license or identification, and three “hits” by a K-9 dog trained in detecting illegal narcotics. 165 Wn.2d at 184. The driver also had a prior heroin conviction. Id.

Despite these suspicious circumstances, the Supreme Court ruled there was insufficient evidence of specific illicit activity to support a finding of probable cause. Id. at 185. The police did not see narcotics residue in the plastic baggies or witness transactions involving the baggies, and without such concrete evidence of drug activity, the suspicious but potentially innocuous circumstances did not amount to probable cause. Id. at 185 n.3.

Likewise, McLaughlin did not see paraphernalia consistent with narcotics, substances that looked like narcotics, or transactions of money. He conceded it was “possible” that nothing was exchanged or that whatever was exchanged was perfectly legal. RP 53-54. Neth dictates these suspicious circumstances do not amount to probable cause.

In another case, the court found multiple exchanges of plastic baggies for cash may establish probable cause. State v. Fore, 56 Wn.App. 339, 343-45, 783 P.2d 626 (1980), rev. denied, 114 Wn.2d 1011 (1990). In Fore, an experienced officer saw the defendant repeatedly exchange a substance packaged in small plastic baggies for cash. He saw the defendant “pull[] out a small plastic bag out of his left pants pocket,” hand it to someone inside a car, and receive what looked like green paper money that he put into his pants pocket. Id. at 341. The officer also saw the suspect with several smaller bags containing “green vegetable matter.” Id. at 340-42. These repeated exchanges combined with the exchanges of money for plastic baggies supplied probable cause.

Similarly, in State v. Rodriguez-Torres, 77 Wn.App. 687, 783 P.2d 650 (1995), the police officer saw paper money being exchanged for another small object. When the police suddenly

appeared, the man holding the small object dropped it to the ground and fled, while the defendant picked it up, put it in his pocket, and hurried away. Id. at 689. Based on the totality of the circumstances, the court found probable cause supporting an arrest for possession of a controlled substance with the intent to deliver. Id. at 694.

McLaughlin saw short, quick meetings where hands may have touched for an instant. Pretrial Ex. 1. He did not see money in anyone's hands. He did not see substances in anyone's hands. McLaughlin had a reason to be suspicious based on his training and experience. But a reasonable suspicion is not the equivalent of probable cause. The police could have investigated the incident. They could have spoken to Ortega and Cuevas, or with any of the people with whom Ortega had an interaction. Absent further information, the police only had a reasonable hunch that Ortega committed a felony, not a reasonable belief supported by evidence.

McLaughlin had information to support an investigation, but no more. The court found that McLaughlin "believed" narcotics transactions had occurred yet it did not say this belief was reasonable, was supported by a cautious view of the evidence, and amounted to probable cause. CP 81-82; RP148-49. The

vagueness of the court's conclusions of law reflect and document the lack of evidence establishing probable cause drug transactions occurred. Cf., Neth, 165 Wn.2d at 184.

6. The findings of fact improperly and misleadingly indicate the police officer saw narcotics transactions. Challenged findings of fact are disregarded on appeal when not supported by substantial evidence in the record. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal." Id. Legal conclusions are reviewed *de novo*. Id. at 646.

Finding of fact (g) claims that McLaughlin saw Ortega "appear[] to engage in two separate narcotics transactions." CP 81. Findings of fact (h), (i), (j), (k), and (q) each characterize the individuals who approached Ortega and walked away as "buyers." CP 81. Findings of fact (g), (h), (i), (k), (l), (m), (p), and (q) portray the interactions between Ortega and the three other individuals as "transactions" or even "narcotics transactions." CP 81.

As explained above, McLaughlin did not see any narcotics and he never claimed otherwise. RP 53-54. He did not see money or any object being exchanged. He did not know if anything was

purchased. Id. He saw interactions that may have involved hand-to-hand contact, which he suspected could be narcotics transactions, although it was entirely possible that nothing was exchanged or whatever was exchanged was innocuous. Id. Characterizing these interactions as narcotics transactions, with buyers and sellers, misstates the record and overstates the degree of evidence supporting Ortega's arrest.

McLaughlin did not see any exchange of narcotics, a substance that looked like narcotics, money, packaging or paraphernalia consistent with illegal drugs. McLaughlin only saw suspicious interactions on the street in a busy downtown area of the city. McLaughlin did not have probable cause that Ortega sold drugs, the court did not find the State proved he acted upon probable cause of a drug sale, and the arrest was not supported by probable cause.

7. Suppression of unlawfully seized evidence is the necessary remedy. Ortega's arrest and search violated both the Fourth Amendment and Article I, section 7. "The evidence gathered during that search is therefore inadmissible." Valdez, 2009 WL 4985242, *8; State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002) ("The exclusionary rule mandates the suppression

of evidence gathered through unconstitutional means.”); Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (“The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.”). Evidence of the cocaine found in Ortega’s coat pocket and money in his pants pockets must therefore be suppressed. Valdez, at *8.

F. CONCLUSION.

For the foregoing reasons, Mr. Ortega respectfully requests this Court reverse his conviction, suppress unlawfully seized evidence, and dismiss the charge due to insufficient evidence.

DATED this 18th day of March 2010.

Respectfully submitted,



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APPENDIX A

FILED
KING COUNTY, WASHINGTON

OCT 21 2009

SUPERIOR COURT CLERK
BY ANDREW T. HAVLIS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)

Plaintiff,)

No. 09-C-02649-8 SEA

vs.)

GREGORIA BRAVO ORTEGA
AKA MARTIN DOMINGUEZ,)

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 1, 2009 before the Honorable Judge Chris Washington. After considering the evidence submitted by the parties and hearing argument, to wit: testimony from Seattle Police Officer Chad McLaughlin, Seattle Police Officer David Hockett, and State's pretrial exhibit number one; the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- a. Officer Chad McLaughlin was conducting surveillance on March 11, 2009 in the area of Western Avenue and Blanchard Street in Seattle.
- b. Officer McLaughlin began watching the Defendant and a co-defendant, Alfonso Cuevas.
- c. As Officer McLaughlin watched, the defendants appeared to attempting to make contact with passers-by. The contact included eye contact and head nods.
- d. Officer McLaughlin testified that, based on his training and experience, the way in which the defendants were engaging passers-by was consistent with attempting to find someone with whom to conduct a narcotics transaction.
- e. The defendants made contact with two separate individuals, and the group of four walked a short distance together.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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- 1 f. All four individuals stopped in front of a phone booth, and there they were joined by
2 a fifth person.
3 g. As Officer McLaughlin watched, the Defendant (Ortega) appeared to engage in two
4 separate narcotic transactions.
5 h. The first apparent transaction occurred with one of individuals who walked to the
6 phone booth with the group. The two huddled together, and made a quick hand-to-
7 hand transaction.
8 i. After this transaction, the first buyer leaves the area, walking away quickly.
9 j. A second suspected narcotics buyer then steps up to Defendant Ortega.
10 k. Defendant Ortega again engages in a quick hand-to-hand transaction with the
11 suspected second buyer.
12 l. Once the second transaction is complete, Defendant Ortega and Defendant Cuevas
13 began walking away together.
14 m. During the first two suspected narcotic transactions, Defendant Cuevas was pacing
15 along the sidewalk and looking around. It was Officer McLaughlin's perception that
16 Defendant Cuevas was acting as a lookout.
17 n. As the defendants walk away, they are approached by a female who then walks with
18 them for a few feet.
19 o. A short time later, Defendant Ortega and the female stop and step off of the sidewalk
20 together.
21 p. Defendant Ortega then engages in a third hand-to-hand transaction with the female.
22 q. Once the third suspected transaction had occurred, Defendant Ortega quickly walks
23 away with Defendant Cuevas, and the female buyer also leaves the area.
r. Officer McLaughlin calls in to the arrest team (Officers Hockett and Gaedcke) to
make an arrest.
s. Both defendants are arrested.
t. A search incident to arrest of Defendant Ortega yields 2.5 g of crack cocaine and
\$780 cash.

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

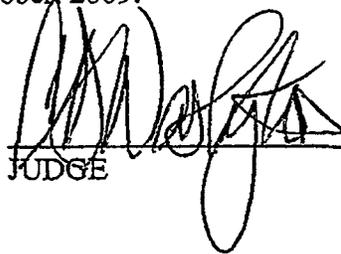
Officer McLaughlin, relying on his training, experience, and observations of the
defendants did have probable cause to stop and search both defendants. Specifically, Officer
McLaughlin observed Defendant Ortega engage in what Officer McLaughlin believed to be three
separate transactions in a short amount of time. The transactions were hand-to-hand and
involved furtive gestures. In the officer's experience, they were consistent with narcotic
transactions. The two defendants appeared to be working together. Officer McLaughlin testified
that lookouts will sometimes be used in drug deals in order to help avoid police detection. In

1 Officer McLaughlin's experience, there is a significance to head nods, and that is a common way
2 to express a willingness to engage in a narcotic transaction.

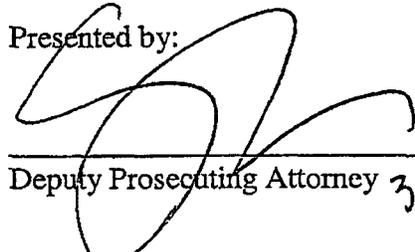
3 All of the above observations, coupled with Officer McLaughlin's training and
4 experience about the meaning of what he had observed, made Officer McLaughlin's belief that a
5 crime, specifically narcotic transactions, had occurred. As a result, the officers were justified in
6 stopping, arresting, and searching the defendants. The Defendant's motion to suppress physical
7 evidence is denied.

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

10 Signed this 21 day of October, 2009.

11 
12 _____
13 JUDGE

14 Presented by:

15 
16 _____
17 Deputy Prosecuting Attorney 37701

18 Kevin MacCune
19 _____
20 Attorney for Defendant WSPA#16374

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64008-9-I
v.)	
)	
GREGORIO ORTEGA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

APPELLATE PROJECT
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| <input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> GREGORIO ORTEGA
(NO VALID ADDRESS)
C/O COUNSEL FOR APPELLANT
WASHINGTON APPELLATE PROJECT | ()
()
(X) | U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF MARCH, 2010.

X _____ 

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