IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28149-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
CLARISSA E. RIVAS,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — This is a prosecution for possession of marijuana, use of drug paraphernalia, and obstructing an officer. The trial judge concluded that the defendant's location in a high crime area, her furtive and suspicious conduct, and her refusal to follow police instructions were sufficient to support the officer's seizure and subsequent search of the defendant. We see neither the particularized suspicion of criminal activity nor the requisite objective and reasonable belief that the defendant here was armed and dangerous sufficient to support the warrantless seizure or the subsequent search. And we then reverse the trial court and dismiss the prosecution.

FACTS

Someone called police and complained about skateboarders in a city park in Toppenish, Washington. A police officer responded. The park was described as a high crime area and one known for gang and drug activity. The officer arrived at the park as the skateboarders were leaving. The officer saw people he knew were gang members sitting at a picnic table marked with gang-related graffiti. He recognized the members from "previous activity, gang activity, suspicious circumstances, assaults[, and] things like that." Report of Proceedings (RP) at 8.

The officer approached the group. One of them, Juan Rivas, Clarissa Rivas's brother, got up on top of the table and obstructed the officer's view of the others. The officer saw furtive movements from the people around the table and became concerned for his safety. He then ordered the people to remove their hands from their pockets. The people at the table complained to the officer that he was harassing them. Everyone but Clarissa Rivas complied with the officer's order to take their hands out of their pockets. The officer ordered Ms. Rivas to remove her hands from her pockets at least three times. The officer saw a wire hanging from her pocket. Ms. Rivas told the officer that he could not search her because she was female. The officer then arrested Ms. Rivas for obstructing.

The officer handcuffed Ms. Rivas and sat her down on the edge of the cement

picnic area. The officer waited for backup to conduct the search in front of a video camera mounted in his patrol car. He noticed that Ms. Rivas slipped one hand out of her handcuffs and into her pocket. The officer stood her back up and again put the handcuffs on her. He discovered a glass pipe with burnt residue that smelled like marijuana on the ground where she was sitting. Backup arrived. The officer then searched Ms. Rivas and discovered marijuana in her pocket.

The State charged Ms. Rivas with possession of marijuana, use of drug paraphernalia, and obstructing a law enforcement officer. Ms. Rivas moved to suppress the drug evidence. The officer testified that the park was used for gang and drug activity. The court did not find that the park was used for gang or drug activity. The officer testified that the people at the table were gang members. The court did not find that they were gang members. The court concluded that the officer had a reasonable suspicion of criminal activity and denied Ms. Rivas's motion to suppress the drug evidence. The court found Ms. Rivas guilty on all counts.

DISCUSSION

Ms. Rivas contends that the court should have suppressed the drug evidence because the State failed to show that the officer had a reasonable suspicion of criminal activity or that she was otherwise a threat to him. The State responds that the totality of

the circumstances here suggests otherwise.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution guarantee a right to be free from unreasonable searches and seizures apart from a few well-established and delineated exceptions. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). These include searches made during a valid investigative stop. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). For an investigative stop to pass constitutional muster,

> the State must show that (1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes.

Id. at 172. A stop is justified if an officer has "a reasonable, articulable suspicion, based on specific, objective facts, that the person has committed or is about to commit a *crime*." *Id.* And an officer is justified in taking protective measures, such as a warrantless search, where the officer can point to "specific articulable facts that create an 'objectively' reasonable belief that a suspect is armed and 'presently' dangerous." *State v. Xiong*, 164 Wn.2d 506, 514, 191 P.3d 1278 (2008).

We review conclusions of law from a suppression hearing de novo. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

Ms. Rivas challenges the court's conclusions that police had sufficient cause to

detain Ms. Rivas by ordering her to remove her hands from her pockets, and to subsequently search her. The court based its conclusion on the officer's knowledge of prior gang activity by the people present, their location (a high crime area), and the furtive movements by those around the picnic table.

First, the area was a public park where these people and anyone else had a right to be. *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980) ("It is beyond dispute that many members of our society live, work, and spend their waking hours in high crime areas, a description that can be applied to parts of many of our cities. That does not automatically make those individuals proper subjects for criminal investigation."). So Ms. Rivas correctly points out that mere presence in this area was not enough to justify an investigative seizure. *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006); *State v. Doughty*, 148 Wn. App. 585, 589, 201 P.3d 342, *review granted*, 166 Wn.2d 1019 (2009).

Second, a major premise of our criminal justice system is that we as a society will punish people for what they do, not who they are. *Robinson v. California*, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). So, while gangs are certainly a problem, this system will, and must, punish people not because they choose to associate with a gang[1]

[1] *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992).

but because they or their group engage in criminal activity—specific, identifiable criminal activity, as opposed to some vague suspicion (no matter how well founded) that these people are up to no good.[2] There is no showing on this record of that particularized suspicion of criminal activity. A protective frisk is justified only when the officer can point to "specific and articulable facts" that create an objective, reasonable belief that the suspect is armed and dangerous. *State v. Lennon*, 94 Wn. App. 573, 580, 976 P.2d 121 (1999).

The State agrees that Ms. Rivas was seized when the officer told the group to remove their hands from their pockets. RP at 47. So, of course, *State v. Nettles*[3] is inapposite since there the essential question was whether the defendant was seized. The court concluded he was not. Nor is *City of Seattle v. Hall*[4] helpful. There, the defendant voluntarily approached the officer. That did not happen here and no one suggests that it did. Incidentally, what is not at issue here is the propriety of the officer's conduct as good police practice. And we do not pass on that. What is at issue here is the

[2] *State v. Rowell*, 144 Wn. App. 453, 457, 182 P.3d 1011 (2008).

[3] *State v. Nettles*, 70 Wn. App. 706, 711-12, 855 P.2d 699 (1993).

[4] *City of Seattle v. Hall*, 60 Wn. App. 645, 651, 806 P.2d 1246 (1991).

constitutional implications of that conduct, i.e., whether the drugs and paraphernalia he seized are admissible as evidence on behalf of the State in its criminal prosecution of Ms. Rivas.

As to the requirement of reasonable suspicion of criminal activity, there is no showing of a particularized suspicion of any criminal activity. *Doughty*, 148 Wn. App. at 589. And that is what is required. A general showing of a suspicion that these kids were generally up to no good (valid as it might be) is not sufficient to support the seizure or subsequent search. *Id.* And, while they may have been members of a gang in a high crime area, no one points to suspicion of any criminal activity, let alone a reasonable suspicion of specific criminal activity.

As to the concerns of threats to the officer, here the officer saw no weapons; no one suggested the use of weapons or other particularized threats to the officer. The test is rigorous. The officer must point to "specific articulable facts that create an 'objectively' reasonable belief that a suspect is armed and 'presently' dangerous." *Xiong*, 164 Wn.2d at 514. No one suggests that is the case here.

Obstructing Charge

This brings us to the final question—whether these people were obstructing the officer from his official duties. Investigation and the right to investigate assume some

suspicion—reasonable suspicion of criminal activity. *State v. Barnes*, 96 Wn. App. 217, 224, 978 P.2d 1131 (1999). That is missing here. And so the State can hardly argue that the officer was discharging his lawful police duties. *Id.*

It is unlawful to hinder, delay, or obstruct a law enforcement officer in the discharge of his official powers or duties. RCW 9A.76.020(1). A refusal to follow police directions may constitute hindrance, delay, or obstruction. *See State v. Little*, 116 Wn.2d 488, 806 P.2d 749 (1991) (refusal to stop fleeing when requested was hindrance). But the wording of the statute assumes the defendant obstructed police exercising a lawful duty.

Here, there was no reasonable suspicion of criminal activity and therefore there was nothing for this officer to investigate. At the end of the day, we have suspected gang members in a park, not engaged in anything that can be characterized, or was characterized, by the officer as criminal activity. Furtive movements and hands in pockets may justifiably make an officer nervous but they again do not provide the necessary objective reasonable suspicion required by this "jealously guarded" exception to the requirement of probable cause and a warrant. *State v. Ladson*, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999). There was nothing to investigate. And there was then no lawful police duty to obstruct. *Barnes*, 96 Wn. App. at 224-25. The court erred in

finding Ms. Rivas guilty of obstruction.

Holding

We reverse the juvenile court adjudications and dismiss the prosecution.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

I CONCUR:

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Kulik, C.J.