

No. 29692-0-III

Sweeney, J. (concurring and dissenting) — I concur with the majority’s conclusion that the challenged evidence was seized pursuant to a valid search warrant, but I do not agree with its conclusion that the court properly sentenced Jesse Antonio Moreno to a sentence above the standard range based on a gang aggravator. Accordingly, I dissent from that portion of the opinion affirming the exceptional sentence.

Procedural History

We originally filed an opinion on September 18, 2012, that reversed the gang aggravator for the reasons set out in this dissent. Pursuant to a request to publish by Judge Marywave Van Deren from Division Two of this court, we unanimously ordered publication of this opinion on October 11, 2012. The State moved for reconsideration on October 8, 2012. There was no change in the law and there were no new facts disclosed after we issued our unanimous opinion. The court nonetheless granted the State’s motion for reconsideration and ordered withdrawal of the original opinion on November 15, 2012.

Analysis

In order for the court to impose a sentence above the standard range based upon a gang aggravator, the State was required to show that Mr. Moreno committed the charged

offense “with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.” RCW 9.94A.535(3)(aa). This requires a showing that the defendant committed a crime to “obtain or maintain his . . . membership or to advance his . . . position in the hierarchy of an organization, association, or identifiable group.” RCW 9.94A.535(3)(s).

The State must also establish a nexus between the charged crime and the defendant’s actual gang-related motivations. *State v. Bluehorse*, 159 Wn. App. 410, 431, 248 P.3d 537 (2011); *see State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009); *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006). Gang membership alone and general statements from police or gang experts are not sufficient to support the aggravating factor. *State v. Clark*, 170 Wn. App. 166, 283 P.3d 1116 (2012); *Bluehorse*, 159 Wn. App. at 431.

The evidence to support the gang aggravator here falls short of establishing that the crime was committed to advance gang membership. The fact that Mr. Moreno belonged to a gang and was heard calling out a gang name before the shooting, together with general police testimony regarding local gangs does not establish the requisite nexus between the specific crime and actual gang-related motivations.

*Bluehorse* is dispositive. 159 Wn. App. 410. Mr. Bluehorse, a Crips gang member, shot into the front yard barbecue of several Bloods gang members. *Id.* at 416. Somebody yelled a Crips-related phrase before the shooting began. *Id.* at 417. Mr. Bluehorse shot a nongang member bystander. *Id.* at 416. The State presented evidence that Mr. Bluehorse belonged to a gang, but no evidence of Mr. Bluehorse's actual motivation behind the shooting. *Id.* at 431. For example, nobody testified that Mr. Bluehorse generally wanted to advance his position in the gang or had ever committed drive-by shootings to advance or maintain his gang status before. *Id.* Like here, a police officer testified about the traditional rivalry between the two gangs and that people may commit crimes to gain gang membership or advance their status in a gang. *Id.* at 418. The court concluded that the evidence was so broad that it effectively relieved the State of its burden of proof:

[W]ithout evidence relating to Bluehorse's motivation, the gang sentencing aggravator would be intolerably broadened by allowing it to attach automatically whenever an aspiring or full gang member is involved in a drive-by shooting based on the detectives' generalized gang testimony; thus relieving the State of its burden to prove beyond a reasonable doubt that the specific defendant charged with a drive-by shooting sought to obtain, maintain, or advance his gang membership.

*Id.* at 431. The court ultimately concluded that evidence was insufficient to support the aggravating factor. *Id.*

*Bluehorse* addresses a different aggravating factor. But the reasoning applies equally to the enhanced sentence here. Here, only police generalizations about gang behavior tie Mr. Moreno’s crimes to any intent to cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation, influence, or membership. RCW 9.94A.535(3)(aa). That police testimony is not evidence of Mr. Moreno’s intent in and of itself. *See Yarbrough*, 151 Wn. App. at 97 (stating that expert testimony that gang members “gain status within the gang by being willing to engage in gunplay to defend the gang’s honor,” when combined with evidence of Mr. Yarbrough’s intent, supported the aggravating factor); *Monschke*, 133 Wn. App. at 333-34 (stating that expert testimony that white supremacists can gain status in the National Alliance by murdering an “inferior” person supported the aggravating factor when combined with direct evidence). Moreover, to uphold the aggravating factor on the evidence here would allow the aggravating factor to attach whenever a gang member commits a crime. *See Bluehorse*, 159 Wn. App. at 431. I therefore conclude the exceptional sentence is not supported and would remand for resentencing as we previously unanimously held.

Accordingly, I respectfully dissent.

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Sweeney, J.