STATE V. FRAZIER

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
JADE L. FRAZIER,
Defendant-Appellee.

No. 32,948

COURT OF APPEALS OF NEW MEXICO

December 9, 2013

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY, James Waylon Counts, District Judge

COUNSEL

Gary K. King, Attorney General, Corrina Laszlo-Henry, Assistant Attorney General, Santa Fe, NM, for Appellant

Jorge A. Alvarado, Chief Public Defender, Santa Fe, NM, for Appellee

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, M. MONICA ZAMORA, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} The State appeals from the district court's order granting Defendant's motion to suppress. This Court issued a calendar notice proposing summary affirmance. The

State filed a memorandum in opposition to this Court's notice of proposed disposition, which we have duly considered. Unpersuaded, we affirm.

{2} In our calendar notice, we proposed to agree with the district court that reasonable suspicion of drug activity did not exist as to the occupants of this particular vehicle at the time of the stop. [CN 5] We based this proposed conclusion on the facts as outlined in the docketing statement, as well as the district court's conclusion of law that the be on the lookout (BOLO) dispatch "was insufficient to create either reasonable suspicion or probable cause [that] Defendant's vehicle was the same vehicle as involved in the suspected criminal activity." [RP 71] In its memorandum in opposition, the State challenges some of the underlying facts as not supported by substantial evidence. [MIO 6-7]

{3} First, the State contends that its own docketing statement "erroneously identifies the duration between the reported drug transaction and the stop of Defendant's vehicle as being an hour and a half." [MIO 3] Instead, the State argues that the only evidence presented regarding the time frame was Officer Winrow's testimony that he observed Defendant's vehicle "within an hour" of receiving the BOLO. [MIO 3]

{4} Second, the State argues that the district court's factual finding that the BOLO identified the suspect vehicle only as "silver" [RP 71] is not supported by substantial evidence. [MIO 7] According to the State, Officer Winrow testified at the suppression hearing that the BOLO also included information that the vehicle had temporary registration tags and multiple occupants. [MIO 3, 7] However, we noted in our calendar notice that the district court appeared to have based its finding at least in part on Officer Winrow's testimony before the Grand Jury, and we urged the State to clarify the context and content of this testimony. [CN 5] The State's memorandum in opposition indicates that a portion of Officer Winrow's prior testimony to the Grand Jury was played during cross-examination of the officer at the suppression hearing. [MIO 4-5] In the recording, the prosecutor asked Officer Winrow if he was sure that Defendant's vehicle was the vehicle identified in the BOLO. [MIO 5] Officer Winrow replied, "No. No, all we had was a silver car, with um . . . ." [MIO 5] The State initially argued that the audio clip of the Grand Jury testimony was "abruptly stopped, apparently mid-sentence" [MIO 5] and "does not fully describe what information was known to the officer through the BOLO dispatch" [MIO 7]; however, the State later provided this Court with a factual supplement confirming that the "officer's voice trails off into silence and the next question changes the subject." [FS unnumbered 2] Additionally, the State acknowledged that the officer was "vigorously cross-examined by [d]efense counsel regarding his prior sworn statement." [MIO 4]

{5} "With respect to the factual review, we do not sit as trier of fact, recognizing that the district court has the best vantage from which to resolve questions of fact and to evaluate witness credibility." *State v. Neal*, 2007-NMSC-043, ¶ 15, 142 N.M. 176, 164 P.3d 57. On review, we determine whether there is substantial evidence to support the district court's findings. *Id*. In this case, we defer to the district court's credibility determination and conclude that the officer's Grand Jury testimony provided substantial

evidence to support the district court's finding that the BOLO simply contained the color of the vehicle alleged to have been engaged in drug activity at Wal-Mart.

{6} The State continues to contend that, based on the additional factual arguments listed above, the officer had reasonable suspicion to stop Defendant's vehicle to conduct an investigation regarding the alleged drug activity. [MIO 7] We review de novo the question of whether reasonable suspicion exists, based on the totality of the circumstances. *State v. Leyva*, 2011-NMSC-009, ¶ 30, 149 N.M. 435, 250 P.3d 861. We agree with the State that this question is an objective one, based on the facts available to the officer. [MIO 8 (quoting *State v. Hubble*, 2009-NMSC-014, ¶ 8, 146 N.M. 70, 206 P.3d 579 ("The subjective belief of the officer does not in itself affect the validity of the stop; it is the evidence known to the officer that counts, not the officer's view of the governing law."))]

{7} In support of its contention, the State analogizes the facts of this case with those in *State v. Funderburg*, where this Court found that reasonable suspicion existed to stop a vehicle based on a report from a casino employee. 2007-NMCA-021, 141 N.M. 139, 151 P.3d 911, *reversed on other grounds by* 2008-NMSC-026, 144 N.M. 37, 183 P.3d 922. However, the facts in *Funderburg* are not as similar to the present case as the State would have us believe. The officer in *Funderburg* had been called to the casino earlier in the day to investigate a report of forgery. *Id*. ¶¶ 2, 8. The officer at that point was provided with the name of the suspect and evidence regarding his alleged crime. *Id*. ¶ 2. Later that day, a casino employee contacted the police to let them know that the suspect had returned to the casino and was about to leave the parking lot in a dark-colored sedan. *Id*. ¶¶ 2, 8. The officer responded to the dispatch immediately and observed only one vehicle leaving the casino parking lot, which matched the description given by the employee. *Id*.

{8} In the present case, the initial report of suspected drug activity came from a Wal-Mart employee who "observed several individuals entering and exiting the vehicle." [MIO 3] Based on this activity, the employee suspected that drug transactions were taking place. There are no facts in the docketing statement or the memorandum in opposition to indicate that this unnamed employee had previous contacts with officers regarding this, or any other, situation. Further, it can be reasonably inferred that the reason dispatch put out the BOLO is that the suspect vehicle was no longer in the Wal-Mart parking lot. Approximately one hour passed from the time of the BOLO until Officer Winrow, "driving in the direction of" Wal-Mart, spotted Defendant's silver vehicle traveling "in the opposite direction." [MIO 3] The gap in time of approximately one hour, however, makes the location of this vehicle significantly less probative, because the suspect vehicle from the Wal-Mart parking lot could have traveled anywhere during this time frame.

{9} Furthermore, we have held that reasonable suspicion on the basis of an informant's tip is dependent on the content of the information and the reliability of the information. *State v. Contreras*, 2003-NMCA-129, ¶ 5, 134 N.M. 503, 79 P.3d 1111. While we have also held that citizen-informants are more reliable than police informants,

there still needs to be suitable corroboration of the information provided. *Id*. ¶¶ 5, 10. Here, the evidence before the district court was that the content of the tip included the allegation that the occupants of a silver vehicle were engaged in drug activity based on an unnamed employee's observation that several individuals were entering and exiting the vehicle. There is no corroboration noted in the docketing statement or memorandum in opposition, other than the color of Defendant's vehicle and the location of the stop, in the "direction" of Wal-Mart. Viewing the facts in the light most favorable to the district court's ruling, we hold that the district court did not err in determining that Officer Winrow did not have reasonable suspicion that the occupants of this particular silver vehicle had been engaged in criminal activity in the Wal-Mart parking lot approximately one hour earlier. The State's contention that the stop was "within an hour" of the BOLO, as opposed to one and a half hours after, does not convince us otherwise.

{10} In our calendar notice, however, we proposed to agree with the district court that Officer Winrow had probable cause to stop Defendant's vehicle for driving with expired registration tags. [CN 4] Further, we proposed to agree with the district court that the facts did not demonstrate any emerging tableau between the stop, the subsequent investigation of Defendant for driving on a suspended license, and the officer's follow-on actions in relation to the drug investigation. [CN 6-7] Therefore, we proposed to find that the district court did not err in determining that the officer's drug investigation expanded the scope of the stop without reasonable suspicion. [CN 7]

{11} The State continues to argue that Officer Winrow properly expanded the scope of the stop based on evolving circumstances, and points to *Leyva* and *Funderburg* as support. [MIO 11-13] We are not convinced. The officer's questions regarding drugs in both *Leyva* and *Funderburg* were supported by independent reasonable suspicion. In *Leyva*, the investigating officer observed the defendant making a furtive movement in appearing to place something under the seat during the traffic stop, giving the officer reasonable suspicion that weapons or drugs may be in the vehicle. 2011-NMSC-009, ¶ 60. In *Funderburg*, a discovery during the stop that the vehicle's passenger was in possession of drugs provided the officer with reasonable suspicion that more drugs may be found in the vehicle. 2008-NMSC-026, ¶ 28.

{12} On the other hand, in this Court's calendar notice, we proposed to conclude that there were not any ensuing circumstances in this case that would have given rise to independent reasonable suspicion to expand the scope of the stop. [CN 7] The State responds with the bare assertion that the fact that Defendant was driving on a suspended license in an unregistered vehicle, along with the fact that the passengers had outstanding warrants, provided Officer Winrow with independent reasonable suspicion to inquire about prior drug activity. [MIO 13] However, the State provides no authority in support of this assertion. *See In re Adoption of Doe*,1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (stating that where a party cites no authority to support an argument, we may assume no such authority exists).

{13} Finally, the State's memorandum in opposition contends that even if the officer expanded the scope of the investigation without reasonable suspicion, the drugs would

have been inevitably discovered in an inventory search when Defendant's vehicle was towed. [MIO 13] We note, however, that the inevitable discovery doctrine was not raised in the State's docketing statement and the State did not move to amend the docketing statement to add this issue. *See* Rule 12-208(F) NMRA (permitting the amendment of the docketing statement based upon good cause shown); *State v. Rael*, 1983-NMCA-081, ¶¶ 15-16, 100 N.M. 193, 668 P.2d 309 (setting out requirements for a successful motion to amend the docketing statement). The essential requirements to show good cause for our allowance of an amendment to an appellant's docketing statement are: (1) that the motion be timely, (2) that the new issue sought to be raised was either (a) properly preserved below or (b) allowed to be raised for the first time on appeal, and (3) the issues raised are viable. *See State v. Moore*, 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d 91, *superceded by rule as stated in State v. Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537, 817 P.2d 730. To the extent that we might construe the addition of this argument as a motion to amend the docketing statement, the State has failed to demonstrate that it meets the requirements for granting a motion to amend.

{14} Notably, the State's memorandum in opposition does not explain how this issue was preserved in the district court. *See Rael*, 1983-NMCA-081, ¶ 15 (requiring a motion to amend the docketing statement to include those issues sought to be added and "how they were preserved" or showing "why they did not have to be preserved"). There is nothing regarding inevitable discovery in the State's written response to Defendant's motion to suppress and the district court did not make any findings or conclusions related to inevitable discovery. The district court did make a single factual finding that Defendant's suspended license did not carry an "arrest clause" [RP 70], but the State acknowledges that this issue was brought up *sua sponte* by the district court. [MIO 13]

{15} Furthermore, the memorandum in opposition does not explain why inevitable discovery was not brought up in the docketing statement. *See Rael*, 1983-NMCA-081, ¶ 15 (requiring a motion to amend the docketing statement to state why "the issues were not originally raised and show[] just cause or excuse for not originally raising them"). The explanation for the omission of an issue may shed light for this Court on the viability of the issue. *See id*. ¶ 11 (stating that "[o]ur rules presuppose that trial counsel, who is required to file the docketing statement, is familiar with the case and will state such issues as are supported by the facts"). Therefore, because the State did not satisfy the requirements to amend the docketing statement, we decline to consider the issue of inevitable discovery.

{16} To conclude, for the reasons stated above, as well as those provided in our calendar notice, we affirm.

{17} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

M. MONICA ZAMORA, Judge