STATE V. HARTMAN

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
HEATH HARTMAN,
Defendant-Appellant.

No. A-1-CA-36365

COURT OF APPEALS OF NEW MEXICO

December 27, 2017

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, John A. Dean Jr., District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Aja Oishi, Appellate Public Defender, Santa Fe, NM, for Appellant

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: LINDA M. VANZI, Chief Judge, J. MILES HANISEE, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Defendant appeals from the district court's judgment, sentence, and order partially suspending sentence, convicting him following his conditional plea of no contest to one count of possession of a controlled substance (methamphetamine). [CN

1-2] This Court issued a notice proposing summary affirmance. Defendant filed a memorandum in opposition to this Court's notice of proposed disposition, including what we construe to be a motion to amend his docketing statement that we have duly considered. Remaining unpersuaded, we deny the motion to amend, and we affirm.

{2} Defendant originally raised two issues on appeal: (1) the district court erred in denying his motion to dismiss, and (2) the district court erred in denying his motion to suppress. [DS 2, 4] In his memorandum in opposition, Defendant has added a new suppression argument not presented to the district court. [MIO 4-12]

{3} With respect to Defendant's first issue—that the district court erred in denying his motion to dismiss based on an improperly filed criminal complaint—we proposed to conclude in our notice of proposed disposition that we were not convinced that the district court erred, relying on the district court's factual finding that new and additional evidence was presented during the second preliminary hearing, as well as on the fact that both preliminary hearings occurred before the same magistrate. [CN 2-4 (*citing State v. White*, 2010-NMCA-043, ¶ 16, 148 N.M. 214, 232 P.3d 450 (stating that it is not proper for the prosecution to seek to allow one magistrate to overrule another magistrate on the issue of probable cause after a review of the same evidence and that "[w]hen an examining magistrate rules that the evidence offered by the [prosecution] is insufficient to hold the accused over for a trial on the charge, such a ruling is binding and final on him and any other examining magistrate *unless* the [prosecution] produces *additional* evidence" (emphases added) (internal quotation marks and citation omitted)). In his memorandum in opposition, Defendant continues to rely on the facts and arguments presented in his docketing statement and maintains that the district court erred. [MIO 13] Notably, Defendant does not address this Court's calendar notice at all. [*See generally* id.] Accordingly, we are not convinced that our proposed disposition is incorrect. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law.").

{4} With respect to the second issue, relying on the facts as found by the district court and summarized in our calendar notice, we suggested that it appeared the officers had a reasonable suspicion that Defendant was acting at least as an accomplice or accessory to the trafficking of a controlled substance, as well as a reasonable suspicion that Defendant may be armed and dangerous, at the time Defendant was seized for purposes of the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. [*See* CN 4-8] In his memorandum in opposition, Defendant does not appear to take issue with our proposed disposition, not only by again failing to directly address the analysis contained in our calendar notice, but also by apparently acquiescing in our conclusion that the initial seizure of Defendant was supported by reasonable suspicion. [*See generally* MIO 1-12] We therefore consider this particular suppression challenge—lack of reasonable suspicion to detain Defendant—to be abandoned. *See State v. Johnson*, 1988-NMCA-029, ¶ 8, 107 N.M. 356, 758 P.2d 306 (stating that when a case is decided on the summary calendar, an

issue is deemed abandoned where a party fails to respond to the proposed disposition of the issue); *cf. Hennessy*, 1998-NMCA-036, ¶ 24.

{5} The majority of Defendant's memorandum in opposition is directed at the officers' actions after the initial seizure, including drawing their weapons; ordering Defendant to take his hands out of his pockets; ordering him to lie on the ground; climbing on top of him; using a Tazer on him; and pepper spraying him. [*See* MIO 1; *see also* MIO 1-2, 5, 11-12] Defendant contends that these actions were unreasonable and excessive, thus running afoul of the Fourth Amendment and Article II, Section 10 and necessitating the suppression of evidence. [MIO 11-12] This argument, as Defendant acknowledges, was not made in the district court. [*See* MIO 6] Therefore, it is unpreserved for review on appeal. *See* Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."); *see also State v. Montoya*, 2015-NMSC-010, ¶ 45, 345 P.3d 1056 ("In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." (internal quotation marks and citation omitted)). Nevertheless, Defendant urges us to exercise our discretion to consider unpreserved issues affecting fundamental rights of a party. [MIO 6] *See* Rule 12-321(B)(2)(d) (stating that the preservation rule does not preclude an appellate court's discretionary consideration of issues involving fundamental rights of a party); *see also State v. Vargas*, 2017-NMSC-029, ¶ 14, 404 P.3d 416 ("Freedom from illegal search and seizure is a fundamental right, which is a matter of general public interest, and an appellate court may exercise its discretion to consider an issue involving search and seizure protections even if it is not preserved by a defendant." (alteration, internal quotation marks, and citation omitted)).

{6} Because this unpreserved issue was not raised in Defendant's docketing statement, we construe its inclusion in the memorandum in opposition as a motion to amend the docketing statement. *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) that the issues raised are viable. *See State v. Moore*, 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d 91, *overruled on other grounds by State v. Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537, 817 P.2d 730.

{7} Defendant's new suppression argument actually appears to consist of two separate contentions: (1) the officers conducted a weapons pat-down that went beyond the proper scope of a *Terry*-frisk [MIO 7-8, 11-12 (citing *Terry v. Ohio*, 392 U.S. 1 (1968))]; and (2) the officers used excessive force in detaining Defendant. [MIO 9-12] We are not convinced that Defendant's first contention applies here, where there is no indication that the officers conducted or attempted to conduct a search of Defendant's

person during the struggle at issue, or that evidence was discovered as the result of such a search. We therefore move on to Defendant's excessive force claim.

{8} We note that Defendant's argument appears to be dependent on the fact—as presented in his memorandum in opposition—that he was cooperative and obeyed the officers' orders to keep his hands away from his pockets [*see* MIO 1-2], presumably making the officers' actions, including grabbing, Tazing, and pepper spraying Defendant, unreasonable under the circumstances. *Cf. State v. Ellis*, 2008-NMSC-032, ¶ 26, 144 N.M. 253, 186 P.3d 245 (recognizing that "any determination about the reasonableness of an officer's use of force must be judged from the perspective of a reasonable officer on the scene" and that "[a] court considers the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" (internal quotation marks and citations omitted)). In addressing this argument, we observe again, as we did in our calendar notice, that Defendant has not provided us with a factual recitation based on testimony and evidence presented at the suppression hearing. [*See* CN 4-5 (noting that the docketing statement contains a statement of facts which appear to mirror the facts recited in Defendant's brief in support of his motion to suppress, but makes no mention of the testimony provided by Sergeant Burns, Corporal Spruell, and Detective Kempton at the suppression hearing)] Instead, Defendant continues to provide us with facts taken from the criminal complaint [*see* MIO 1-2], with the exception of the facts amplifying his level of cooperation with the officers, which appear to have come from conversations with trial counsel. [*See* MIO 2] It is not clear from the memorandum in opposition, however, from whence the facts relayed by trial counsel come. That is, we are still unsure whether the facts demonstrating Defendant's level of cooperation were developed at the suppression hearing. We note, however, that the factual recitations contained in Defendant's brief in support of his motion to suppress, the State's response, and Defendant's docketing statement all indicate that Defendant put his hands back in his pockets following the officers' order to take his hands out, and after complying with the officers' order to lie on the ground, Defendant continued to place his hands near his pockets in contravention of the officers' orders (even while struggling with the officers). [*See* RP 121-22, 130-31; *see also* DS 5] These facts are noticeably missing from the factual recitation in Defendant's memorandum in opposition/motion to amend. [*Compare* DS 5, *with* MIO 1-2 (stating that Defendant put his hands above his head with his fingers splayed and that when he was ordered to the ground by the officers, he complied with their orders)] We remind counsel of her obligation to provide this Court with "a concise, accurate statement of the case summarizing *all* facts material to a consideration of the issues presented[.]" Rule 12-208(D)(3) (emphasis added); *see also Rael*, 1983-NMCA-081, ¶ 10 ("We deem it self-evident that the rules applicable to docketing statements apply with equal, if not greater, force to requests to amend docketing statements and to fulfill showings of good cause that would persuade us to allow any motion to amend.").

{9} This situation illustrates the importance of compliance with our appellate procedural requirements, specifically with our requirement that a motion to amend the

docketing statement explain why an issue was not raised in the docketing statement and that it show just cause or excuse for not originally raising the issue. *See Rael*, 1983-NMCA-081, ¶ 15. This requirement assists us with assessing the viability of an issue. *Moore*, 1989-NMCA-073, ¶ 44. Here, Defendant's appellate counsel has not provided us with any explanation as to why trial counsel did not include this excessive force argument in the docketing statement. In the absence of such an explanation, we are left to wonder if the reason trial counsel did not raise the issue in the district court, and subsequently did not raise the issue on appeal, is that the facts do not support the argument. At this juncture, we conclude that even construing the addition of this new and unpreserved suppression argument as a motion to amend the docketing statement, Defendant's presentation does not satisfy our requirements for the granting of a motion to amend; specifically, in the absence of an explanation as to why this argument was not originally made in his docketing statement and a showing of just cause for not raising it originally, we are not persuaded that this issue is viable. *See Rael*, 1983-NMCA-081, ¶ 15; *see also Moore*, 1989-NMCA-073, ¶ 44. Consequently, Defendant's motion to amend the docketing statement is denied.

{10} Accordingly, for the reasons stated in this opinion, as well as those provided in our notice of proposed disposition, we affirm.

{11} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge

J. MILES HANISEE, Judge