STATE V. LOVATO

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ROBERT LOVATO,
Defendant-Appellant.

No. A-1-CA-36313

COURT OF APPEALS OF NEW MEXICO

December 11, 2017

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY, Jeff McElroy, District Judge

COUNSEL

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

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JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, STEPHEN G. FRENCH, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Defendant has appealed from his convictions for possession of a controlled substance. We previously issued a notice of proposed summary disposition in which we

proposed to reverse the denial of Defendant's motion to suppress. The State has filed a memorandum in opposition. After due consideration, we remain unpersuaded. We therefore reverse and remand for further proceedings.

{2} Because we set forth the relevant background information in the notice of proposed summary disposition and because the memorandum in opposition does not disagree with that recitation, we will avoid lengthy reiteration here. Instead, we will focus on the substantive content of the memorandum in opposition.

{3} We previously observed that the officers entered a constitutionally protected space when they drove onto Defendant's property and walked into the open garage or carport. *See State v. Davis*, 2016-NMCA-073, ¶ 12, 387 P.3d 274 (indicating that a carport is a place where the occupants have a reasonable and legitimate expectation of privacy, and concluding that law enforcement officers are not permitted to enter and seize an object placed there), *rev'd on other grounds*, ___-NMSC-___, ___ P.3d ___ (No. S-1-SC-35976, Nov. 9, 2017); *see generally State v. Davis*, 2015-NMSC-034, ¶¶ 26-28, 360 P.3d 1161 (explaining that the curtilage of a home is constitutionally protected space). The State does not dispute this. [MIO 1-9] We therefore conclude that the stated basis for the decision rendered below was erroneous. [1 RP 221]

{4} We previously suggested that the officers' initial entry into the driveway was permissible to the extent that it could be characterized as an attempt to engage in a knock-and-talk. [CN 5-6] *See generally State v. Mosley*, 2014-NMCA-094, ¶ 27, 335 P.3d 244 (recognizing a "knock-and-talk" as a permissible investigative tactic). However, any attempt to expand the encounter into a search of the premises would require consent. *Id.* This was neither sought nor obtained. As a result, this does not supply a valid basis for the officers' entry into the carport to view the object that Defendant had dropped there.

{5} In an apparent effort to avoid the foregoing limitations, the State argues that the officers' conduct should be regarded as permissible under the emergency assistance doctrine. [MIO 3-5] It continues to assert that the caller's stated concern that her sister had overdosed on drugs at some point in the indeterminate past and belief she might have been "partying" at Defendant's house should be deemed sufficient to satisfy the requisites. [MIO 4-5] However, we remain unpersuaded that these vague assertions validate the officers' actions. *See, e.g.*, *See State v. Baca*, 2007-NMCA-016, ¶ 27, 141 N.M. 65, 150 P.3d 1015 (rejecting an argument that a warrantless entry into a residence was permissible under the emergency assistance doctrine, where "the [prosecution's] presentation was devoid of specific and articulable facts necessary to rationally support a conclusion that there was a drug overdose or other condition requiring immediate intervention"). The officers' entry into the carport to search for and identify the small object that Defendant had dropped to the ground cannot be said to fit within the narrow parameters of the emergency assistance doctrine. *See generally State v. Ryon*, 2005-NMSC-005, ¶ 39, 137 N.M. 174, 108 P.3d 1032 (adopting a three-part test relative to the emergency assistance doctrine, which requires "reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the

protection of life or property; the search must not be primarily motivated by an intent to arrest a suspect or to seize evidence. . . . ; and there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched”).

{6} The State’s reliance upon the plain view doctrine is similarly misplaced. [MIO 5-8] As we previously observed, the incriminating nature of the object only became apparent once the officers entered the carport and looked under the vehicle. [CN 8-9] For the reasons previously stated, the officers were not legally present in that location. As a result, the plain view doctrine is inapplicable. *See State v. Ochoa*, 2004-NMSC-023, ¶ 9, 135 N.M. 781, 93 P.3d 1286 (“Under the plain view exception to the warrant requirement, items may be seized without a warrant if the police officer was lawfully positioned when the evidence was observed, and the incriminating nature of the evidence was immediately apparent, such that the officer had probable cause to believe that the article seized was evidence of a crime.”). Nevertheless, the State argues that Defendant’s act of dropping the item should be regarded as a “furtive movement,” which was sufficient to give rise to probable cause for belief that the object constituted contraband, and as such, the entry into the carport and the seizure of the unidentified object should be deemed permissible. [MIO 7-8] However, as we previously observed [CN 8-9], “where the criminal nature of an object is not identifiable, other circumstances that indicate criminality have been required, in addition to a suspect’s attempt to conceal the object from police,” in order to support a seizure pursuant to the plain view doctrine. *State v. Sanchez*, 2015-NMCA-084, ¶ 18, 355 P.3d 795. We conclude that neither the officers’ non-specific previous dealings with Defendant, nor their belief that “partying” occurred on the premises [MIO 8] supply sufficiently compelling indicia of criminality to support the warrantless entry into the carport and seizure of the object that Defendant had dropped there.

{7} Accordingly, for the reasons stated in this opinion and in the notice of proposed summary disposition, we reverse and remand for further proceedings consistent herewith.

{8} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

STEPHEN G. FRENCH, Judge