STATE V. LUNA

This memorandum opinion was not selected for publication in the New Mexico Appellate Reports. Please see Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions. Please also note that this electronic memorandum opinion may contain computer-generated errors or other deviations from the official paper version filed by the Court of Appeals and does not include the filing date.

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
FABIAN LUNA,
Defendant-Appellant.

No. 33,159

COURT OF APPEALS OF NEW MEXICO

December 18, 2013

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY, Mark Terrence Sanchez, District Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Tania Shahani, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: RODERICK T. KENNEDY, Chief Judge, CYNTHIA A. FRY, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Defendant, Fabian Luna, appeals from his convictions for driving while under the influence of intoxicating liquor and/or drugs (DWI) and driving while license suspended or revoked. **[RP 137]** He contends that the evidence was insufficient to support his DWI

conviction and that he received ineffective assistance of counsel. **[MIO 2, 5]** We issued a notice proposing to summarily affirm, and Defendant filed a memorandum in opposition. We remain unpersuaded by Defendant's arguments and affirm his convictions. We remand for the limited purpose of correcting an apparent clerical error in the judgment.

A. Sufficiency of the Evidence

{2} Defendant continues to argue, pursuant to *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982, and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1, that the evidence was insufficient to support his DWI conviction. **[MIO 4]** We disagree.

{3} Defendant first contends that the officer who stopped his vehicle deviated from the standard administration of the field sobriety tests and that the results of the tests were thus unreliable. **[MIO 4-5]** Defense counsel cross-examined the officer about his administration of the tests, and we believe it was for the jury to determine what weight, if any, to afford to the test results. *See generally State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789 ("The reviewing court does not weigh the evidence or substitute its judgment for that of the fact finder as long as there is sufficient evidence to support the verdict."), *abrogated on other grounds as recognized by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683.

{4} Defendant next contends that the State did not produce any evidence confirming his intoxication. **[MIO 5]** It appears that Defendant believes that the arresting officer was required to administer a breath or blood alcohol test to Defendant, though we are aware of no such requirement. As Defendant acknowledges, the State did produce additional evidence of Defendant's intoxication, which was itself sufficient to support Defendant's conviction. The officer who stopped Defendant's vehicle testified that he detected the odor of alcohol on Defendant's breath and that Defendant had bloodshot, watery eyes, and was slurring his speech. **[MIO 1]** In addition, the State introduced a video recording of the encounter between Defendant and the arresting officer, which allowed the jury to view Defendant's conduct and demeanor.

{5} Viewing the evidence in the light most favorable to the verdict, as we must, we conclude that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, and thus we reject Defendant's challenge to the sufficiency of the evidence. *See State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176 (stating standard of review for challenge to sufficiency of the evidence).

B. Ineffective Assistance of Counsel

{6} Defendant continues to argue that his trial counsel was ineffective because he failed to object to the admission of a video recording of the encounter between Defendant and the arresting officer. **[MIO 6]** He contends that his attorney's failure to object prejudiced him because it "severely undermined his theory of defense." [MIO 6]

{7} As we discussed in our notice, "[f]or a successful ineffective assistance of counsel claim, a defendant must first demonstrate error on the part of counsel, and then show that the error resulted in prejudice." *State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289. We continue to believe that Defendant cannot establish either error or prejudice. With respect to error, Defendant does not explain why the video should have been excluded. With respect to prejudice, we note that there was other evidence—specifically, the testimony of the arresting officer—that would have provided a sufficient basis for Defendant's conviction even if the video had been excluded.

{8} Because the record does not support Defendant's ineffective assistance of counsel claim, we reject this claim without prejudice to Defendant's right to assert it in a post-conviction proceeding. *See Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466 (expressing a preference for habeas corpus proceedings as "the preferred avenue for adjudicating ineffective assistance of counsel claims").

CONCLUSION

{9} For the reasons discussed above and in our previous notice, we affirm Defendant's convictions. We remand to the district court for the limited purpose of correcting the judgment entered by the district court on July 26, 2013, to reflect that Defendant was convicted of DWI based on impairment following a jury trial, not aggravated DWI based on refusal following a guilty plea. **[RP 137, MIO 7-8]**

{10} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

CYNTHIA A. FRY, Judge