STATE V. NORIEGA

STATE OF NEW MEXICO
Plaintiff-Appellee,
v.
CHARLES NORIEGA,
Defendant-Appellant.

No. 33,323

COURT OF APPEALS OF NEW MEXICO

December 3, 2014

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY, Steven L. Bell, District Judge

COUNSEL

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

Law Offices of the Public Defender, Jorge A. Alvarado, Chief Public Defender, Sergio Viscoli, Appellate Defender, B. Douglas Wood III, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, CYNTHIA A. FRY, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Defendant appeals from his conviction for being an unlicensed dealer, wrecker, wholesaler, or distributor of vehicles, contrary to NMSA 1978, Section 66-4-1 (2005).

[DS 1; RP 217] Our notice proposed to affirm and Defendant filed a memorandum in opposition. We remain unpersuaded by Defendant's arguments and therefore affirm.

Issues 1 and 2

{2} Defendant continues to argue that the district court erred in denying his motion to suppress for two reasons. [DS 14; MIO 6-7] Defendant claims that he had standing to challenge the constitutionality of the stop of the semi-truck driver under the respondeat superior doctrine (Issue 2), and the stop was pretextual (Issue 1). [DS 14; MIO 6-7] As support for his continued argument, Defendant refers 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. [MIO 6-7]

{3} Defendant contends that, because the police officers were concerned about his activities and because the driver of the semi-truck was driving at Defendant's direction, Defendant had standing to challenge the stop. [MIO 6-7] Defendant does not provide any legal authority to support this assertion. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (holding that an appellant must submit both argument and authority in support of issues to present an argument for appellate review). Therefore, for the reasons detailed in our notice, we conclude that Defendant did not have standing to challenge Deputy Seely's stop of the semi-truck/flatbed trailer that were owned and operated by another. [CN 3-5]

{4} Defendant argues that the stop was pretextual because the district court did not specify the criminal activity that was afoot. [MIO 7] Based on the district court's findings of facts, which are discussed in our notice, Deputy Seely had reasonable suspicion to stop the semi-truck driver to determine whether Defendant was involved in dismantling vehicles without a license. [CN 6-8] Because the State established reasonable suspicion to stop the driver of the semi-truck, the burden shifted to Defendant to show that the stop "was unreasonable by proving that the totality of the circumstances indicates [Deputy Seely] had an unrelated motive to stop the motorist that was not supported by reasonable suspicion." *State v. Gonzales*, 2011-NMSC-012, ¶ 12, 150 N.M. 74, 257 P.3d 894. Defendant failed to meet his burden. Accordingly, we conclude that Deputy Seely's stop of the semi-truck driver was constitutional and not pretextual. [CN 5-8]

Issues 3, 4, and 6

{5} Defendant continues to argue that the district court erred in admitting a spreadsheet summary (Issues 3 and 4) and an order to show cause against him (Issue 6) into evidence. [DS 7, 14-15; MIO 8-13] Defendant acknowledges that, pursuant to Section 66-4-1(A)(2):

> Any person possessing three or more wrecked, dismantled or partially wrecked or dismantled vehicles and selling or offering for sale a used vehicle part and who regularly sells or offers for sale used vehicles or used vehicle parts shall be

> presumed to be conducting the business of wrecking or dismantling a vehicle for the resale of the parts[.]

[MIO 8] *See also* NMSA 1978, § 66-4-1.1(A) (2005) ("A person possessing three or more wrecked, dismantled or partially wrecked or dismantled vehicles who regularly sells or offers for sale used vehicle parts or vehicle scrap material within the period of one year shall be presumed to be conducting business as an auto recycler.").

{6} Nevertheless, Defendant asserts that the spreadsheet that included Defendant's recent activities with CMC recycling, and the order to show cause that was evidence that Defendant had failed to comply with previous orders and that he was enjoined from operating as a dismantler without a license, were irrelevant. [MIO 8-13] Defendant claims that even if these documents were relevant, they were more prejudicial than probative and evidence of prior bad acts. [MIO 8-13]

{7} We considered and addressed these arguments in our calendar notice. Defendant's memorandum in opposition fails to point out any errors in fact or law with our proposed disposition. [MIO 8-13] *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.").

{8} To the extent that Defendant now asserts that the evidence was cumulative [MIO 13], "[a]dmission or exclusion of evidence is a matter within the discretion of the trial court and the trial court's determination will not be disturbed on appeal in the absence of a clear abuse of that discretion." *State v. Marquez*, 1998-NMCA-010, ¶ 24, 124 N.M. 409, 951 P.2d 1070. Defendant has not established clear abuse of discretion.

{9} For the reasons detailed in our notice, we conclude that the spreadsheet and the order to show cause were admissible to show that Defendant intended to transport the crushed vehicles that were on the flatbed trailer. *See* Rule 11-404(B)(2) NMRA (stating that evidence of a crime, wrong, or other act may be admissible to prove intent); § 66-4-1(A)(2).

Issue 5

{10} Defendant clarifies that he is not advancing a due process claim with respect to the destruction of the vehicles at issue. [MIO 13-14] Instead, relying on *Franklin* and *Boyer*, Defendant maintains that the destruction of the vehicles that were on the flatbed trailer make this case moot (Issue 5). [DS 15; MIO 13-14] He argues that his conviction should be reversed because "there was no more criminal activity for the State to be concerned with." [MIO 14] Because Defendant's memorandum in opposition fails to point out any errors in fact or law with our proposed disposition, we affirm. *See Hennessy*, 1998-NMCA-036, ¶ 24.

Issue 7

{11} Defendant continues to argue that there was insufficient evidence to support his conviction because he was abiding by an order to remove junk cars from his family's property. [DS 15; MIO 14] Defendant acknowledges that this Court will not reweigh the evidence on appeal. [MIO 15] However, relying on *Franklin* and *Boyer*, Defendant asserts that he was simply removing scrap metal—trash—from his family's property, and the State failed to prove that he profited from the scrap metal. [MIO 16-17] *But see* § 66-4-1(A)(2) (setting forth a presumption that an individual is conducting the business of wrecking or dismantling a vehicle for the resale of parts); § 66-4-1.1(A) (setting forth a presumption that an individual is conducting business as an auto recycler). As we stated in our calendar notice, the district court was free to reject Defendant's version of the facts. [CN 12-13] *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829 ("Contrary evidence supporting acquittal does not provide a basis for reversal because the [fact-finder] is free to reject [the d]efendant's version of the facts.").

{12} For the reasons discussed in this Opinion and in our notice of proposed summary disposition, we affirm.

{13} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge