STATE V. STEVENSON

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CLIFTON STEVENSON,
Defendant-Appellant.

NO. A-1-CA-36451

COURT OF APPEALS OF NEW MEXICO

December 18, 2017

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

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Santa Fe, NM, Steven J. Forsberg, Assistant Public Defender, Albuquerque, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: TIMOTHY L. GARCIA, Judge, EMIL J. KIEHNE, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Defendant Clifton Stevenson appeals from his convictions, following a jury trial, of trafficking a controlled substance (methamphetamine), contrary to NMSA 1978, Section 30-31-20 (2006); abuse of a child, contrary to NMSA 1978, Section 30-6-1(D)

(2009); possession with intent to distribute marijuana/synthetic cannabinoids, contrary to NMSA 1978, Section 30-31-22(A)(1)(b) (2011); and use or possession of drug paraphernalia, contrary to NMSA 1978, Section 30-31-25.1(A) (2001). In this Court's notice of proposed disposition, we proposed to summarily affirm. Defendant filed a memorandum in opposition (MIO), which we have duly considered. Remaining unpersuaded, we affirm.

{2} **Suppression**. Defendant continues to argue that the district court erred in denying suppression based on a faulty warrant. [MIO 1] Defendant asserts no new facts, law, or arguments, so we refer Defendant to our notice of proposed disposition. *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."); *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that a party responding to a summary calendar notice must come forward and specifically point out errors of law and fact, and the repetition of earlier arguments does not fulfill this requirement), *superseded by statute on other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374. [CN 3-10] For the reasons stated in our calendar notice, we conclude that the district court did not err in denying Defendant's motion to suppress.

{3} ***Brady***. Defendant continues to argue that the district court erred in denying his motion for a new trial based on a purported *Brady v. Maryland*, 373 U.S. 83 (1963), violation. [MIO 1] Defendant discusses federal law and contends that the United States Supreme Court as well as several federal circuits have rejected a "duty of due diligence by the defendant with regards to *Brady* violations[.]" [MIO 2; *see also* MIO 2-4] Defendant then acknowledges that several federal circuits do still recognize a due diligence exception to *Brady*. [MIO 4-5] Importantly, Defendant also acknowledges that New Mexico is in line with the latter group of courts recognizing the exception. [MIO 5-6] Defendant nonetheless argues that, because our Supreme Court's opinion in *Montoya v. Ulibarri*, 2007-NMSC-035, 142 N.M. 89, 163 P.3d 476, relies on case law that traces back to a 1903 opinion, it has been "imported from a time long predating *Brady*" [MIO 6], implying that our Supreme Court was unaware of *Brady*, a 1963 opinion, when it entered its opinion in *Montoya* in 2007, instead simply repeating old law without consideration of *Brady* or its progeny. [*See* id.] Defendant then essentially asks this Court to reconsider our Supreme Court's holding in light of the fact that "[t]he due diligence requirement has been made inapplicable in cases falling under the newly created *Brady* violation." [MIO 6] We decline Defendant's invitation. *See Dalton v. Santander Consumer USA, Inc.*, 2015-NMCA-030, ¶ 30, 345 P.3d 1086 (stating that "[a]ppeals in this Court are governed by the decisions of the New Mexico Supreme Court—including decisions involving federal law, and even when a United States Supreme Court decision seems contra" (internal quotation marks and citation omitted)), *rev'd on other grounds*, 2016-NMSC-035, 385 P.3d 619. Thus, for the reasons stated in our notice of proposed disposition and herein, we conclude that the district court did not err in denying Defendant's motion for a new trial. [*See* CN 10-13]

{4} **Ineffective Assistance of Counsel**. Defendant continues to argue that his trial counsel was ineffective for not interviewing Defendant's wife prior to trial and for not calling her as a witness. [MIO 7] Defendant contends that, because we conclude that he could have discovered certain evidence from his wife prior to trial and, thus, there was no *Brady* violation, then his counsel was ineffective for failing to do so. [*See* MIO 7] We disagree.

{5} We reiterate that, although Defendant *could have* discovered his wife's testimony through due diligence—and the State's failure to provide that information did not, therefore, constitute a *Brady* violation—that does not necessarily mean that he *ought* to have done so or that it was crucial to his defense. [*See* CN 12-13; *see also* CN 13-14] Indeed, Defendant's trial counsel's failure to discover something that he *could* have discovered through due diligence does not necessarily constitute ineffective assistance of counsel because, as we suggested in our notice of proposed disposition, it is unknown why trial counsel chose not to interview Defendant's wife, whether and how he would have used any information gleaned from her during the interview, and whether it would have in fact been beneficial to Defendant's defense in light of the fact that the State would likely have impeached the witness with her prior statements that Defendant forced her to be involved in the use and trafficking of methamphetamine and was generally abusive. [*See* CN 13-14] Thus, on the record before us, we cannot say whether Defendant's trial counsel's failure to interview or call the witness constitutes ineffective assistance of counsel or trial tactics, and we cannot say whether, "but for counsel's [unreasonably] unprofessional errors, the result of the proceeding would have been different." *See State v. Aker*, 2005-NMCA-063, ¶ 34, 137 N.M. 561, 113 P.3d 384 (internal quotation marks and citation omitted).

{6} Moreover, as we explained in our notice of proposed disposition, if Defendant continues to believe his counsel's assistance was ineffective, habeas corpus proceedings is the preferred avenue to develop the factual record regarding his trial counsel's performance and pursue his claim of ineffective assistance of counsel. *See State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61 ("When an ineffective assistance claim is first raised on direct appeal, we evaluate the facts that are part of the record. If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition[.]"). It is well established that "[h]abeas corpus proceedings are the preferred avenue for adjudicating ineffective assistance of counsel claims, because the record before the trial court may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness." *State v. Grogan*, 2007-NMSC-039, ¶ 9, 142 N.M. 107, 163 P.3d 494 (internal quotation marks and citation omitted).

{7} Accordingly, for the reasons stated in our notice of proposed disposition and herein, we affirm Defendant's convictions.

{8} **IT IS SO ORDERED.**

LINDA M. VANZI, Chief Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

EMIL J. KIEHNE, Judge