

STATE V. BIRD-LOPEZ

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
TERESA BIRD-LOPEZ,
Defendant-Appellant.**

NO. A-1-CA-37535

COURT OF APPEALS OF NEW MEXICO

December 12, 2018

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, Karen L.
Townsend, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Gregory B. Dawkins, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, J. MILES HANISEE, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Pursuant to a plea agreement reserving the right to appeal, Defendant Teresa Bird-Lopez challenges the denial of her motions to suppress. We previously issued a notice of proposed summary disposition in which we proposed to uphold the district

court's decision. Defendant has filed a memorandum in opposition, which we have duly considered. Because we remain unpersuaded by Defendant's assertions of error, we affirm.

{2} We previously set forth the relevant background information and guiding authorities at some length in the notice of proposed summary disposition. We will avoid undue repetition here, and focus instead on the content of the memorandum in opposition.

{3} Defendant continues to challenge the warrantless entry into her residence. [MIO 1-13] Fundamentally, Defendant contends that she had a reasonable expectation of privacy in the home, even if the door was ajar. [MIO 10] We agree with this basic proposition. See *State v. Halpern*, 2001-NMCA-049, ¶ 14, 130 N.M. 694, 30 P.3d 383 ("The sanctity of the home is not abandoned simply by leaving a door cracked."). However, as we previously observed and as Defendant tacitly acknowledges, [CN 4-6; MIO 9-10] the officers were permitted to approach the residence and to knock on the door, and their subsequent observation of Defendant holding drug paraphernalia in plain view supplied justification for the ensuing arrest and seizure of incriminating evidence. See *State v. Mosley*, 2014-NMCA-094, ¶¶ 22, 27, 335 P.3d 244 (recognizing that the "knock-and-talk" is a constitutionally permissible investigatory tool, and observing that the plain view exception permits officers to proceed without a warrant if they are lawfully positioned when they observe incriminating evidence).

{4} In her memorandum in opposition Defendant invites the Court to consider images that appellate counsel obtained from the internet, as well as an argument that does not appear to have been presented below, to support an inference that the police officers knocked on the wrong door. [MIO 2-12] However, "we do not consider matters that are not of record," and insofar as these specific matters are not common knowledge, we cannot take judicial notice of them. See *State v. Sanchez*, 2015-NMCA-084, ¶ 10, 355 P.3d 795. We therefore decline to entertain the argument. See generally *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 (discussing the principles of preservation, including the essential creation of a record from which the appellate court can make an informed decision, and explaining that absent preservation, we will not consider the issue).

{5} In her memorandum in opposition Defendant further contends that the knock and ensuing viewing should be regarded as a forced entry. [MIO 11] We disagree. As previously stated, it is well-established that police may approach a residence and knock on the door in the effort to communicate with occupants. *Mosley*, 2014-NMCA-094, ¶ 22. That is what occurred in this case. Although Defendant continues to encourage the Court to presume or infer that the knock was unduly forceful and therefore impermissibly intrusive, [MIO 11] in light of the standard of review, we decline to do so. See generally *State v. Lopez*, 2005-NMSC-018, ¶ 9, 138 N.M. 9, 116 P.3d 80 ("[W]e must draw all reasonable inferences in support of the district court's denial of Defendant's motion to suppress and defer to the district court's determination of the facts."). Insofar as the officers were permitted to approach the residence and knock,

they were also permitted to observe that which was within plain view through the partially open door, and to proceed to arrest Defendant based upon their observations. See, e.g., *Rodriquez v. State*, 1978-NMSC-046, ¶ 17, 91 N.M. 700, 580 P.2d 126 (holding that where officers knocked on the door of a residence and observed drug paraphernalia from the threshold of the open doorway plain view prior to entry, the evidence was not obtained as a result of an impermissible search; and since the officer was lawfully in a position which exposed the paraphernalia to the officer's plain view, this provided sufficient probable cause for the police to believe that a felony was being or had been committed, such that the ensuing warrantless arrest was permissible); cf. *State v. Krout*, 1984-NMSC-008, ¶ 11, 100 N.M. 661, 674 P.2d 1121 (holding, in a situation where a police officer was lawfully present at the relevant vantage point, the officer's act of looking through a crack in the door was permissible); *State v. Doe*, 1979-NMCA-021, ¶ 11, 93 N.M. 206, 598 P.2d 1166 (holding that an officer's act of looking through a door left open by the defendant was permissible, where the officer was lawfully positioned at the time).

{6} Finally, Defendant suggests that a different result should be reached in this case because she lacked "the choice not to answer and not to talk." [MIO 11] However, we remain unpersuaded that this is material. For the reasons previously stated, the controlling considerations are that the officers' presence, act of knocking, and ensuing observations were permissible. Under the circumstances, we perceive no basis for requiring any further volitional act on Defendant's part.

{7} Accordingly, for the foregoing reasons, as well as the reasons set forth in the notice of proposed summary disposition, we affirm.

{8} IT IS SO ORDERED.

LINDA M. VANZI, Chief Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

J. MILES HANISEE, Judge