

STATE V. BACA

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 Please see Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions.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.
FRANKIE RAY BACA,
Defendant-Appellant.

NO. A-1-CA-37041

COURT OF APPEALS OF NEW MEXICO

December 13, 2018

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Conrad Frederick Perea, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Kathleen T. Baldridge, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: HENRY M. BOHNHOFF, Judge, JENNIFER L. ATTREP, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Defendant Frankie Ray Baca appeals his convictions of two counts of battery upon a peace officer. In his docketing statement, Defendant challenged the denial of a motion to suppress evidence as well as the denial of his request for a self-defense

instruction. [DS 7-8] This Court issued a notice of proposed summary disposition, proposing to affirm with regard to the district court's denial of his motion to suppress evidence based upon the "new crime" exception to the exclusionary rule. Similarly, we proposed to affirm the instructional issue based upon a lack of evidence concerning the use of excessive force "measured from the perspective of an objectively reasonable officer," *State v. Ellis*, 2008-NMSC-032, ¶ 24, 144 N.M. 253, 186 P.3d 245. Defendant has filed a memorandum in opposition to that proposed disposition.

{2} In that memorandum, Defendant continues to assert that evidence should have been suppressed because he was illegally stopped and that his jury should have been instructed with regard to self-defense. [MIO 2, 5] Having duly considered that memorandum, we are unpersuaded. *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (explaining that the repetition of earlier arguments does not meet a party's burden to come forward and specifically point out errors of law or fact in a notice of proposed summary disposition, *superseded by statute on other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374).

{3} Regardless of the legality of the initial stop, Defendant did not have a license to physically attack a law enforcement officer. *See State v. Doe*, 1978-NMSC-072, ¶ 11, 92 N.M. 100, 583 P.2d 464 (holding that "a private citizen may not use force to resist a search by an authorized police officer engaged in the performance of his duties *whether or not the arrest is illegal*" (emphasis added)). Under such circumstances, the vindication of Defendant's constitutional rights would "lie in a civil action, not in a physical attack." *State v. Travison B.*, 2006-NMCA-146, ¶ 9, 140 N.M. 783, 149 P.3d 99. And, more directly to the point, such an attack constitutes "new criminal activity that is not subject to the exclusionary rule." *Id.*

{4} With regard to any evidence that would have justified a self-defense instruction, Defendant informs us that the officers involved "attempted to question" him, "thrust him to the ground," opened the door to a police car to look at him, and also that "the handcuffs were painful." [MIO 7] Defendant also reasserts his own testimony that he "was convinced that police while booking him *would use excessive force* and perceived he was in imminent danger." (Emphasis added.) [*Id.*] We are not persuaded that a reasonable juror could find that any of these facts justified Defendant's spitting on, kicking, or head butting the officers who arrested him.

{5} Thus, for the reasons stated here and in our notice of proposed summary disposition, we affirm the order of the district court.

{6} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

HENRY M. BOHNHOFF, Judge

JENNIFER L. ATTREP, Judge