IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. A-1-CA-41247

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MALINDA COHO,

Defendant-Appellant.

APPEAL FROM THE METROPOLITAN COURT OF BERNALILLO COUNTY
Michelle Castillo Dowler, Metropolitan Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM

for Appellee

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

for Appellant

MEMORANDUM OPINION

YOHALEM, Judge.

{1} Defendant appeals from her bench trial conviction of aggravated driving while under the influence of liquor or drugs (DWI). We issued a calendar notice proposing to affirm. Defendant has filed a memorandum in opposition, which we have duly considered. Unpersuaded, we affirm.

{2} Initially, we note that Defendant's memorandum in opposition abandons all but one issue raised in her docketing statement. [MIO 1] *See Taylor v. Van Winkle's IGA*

Farmer's Mkt., 1996-NMCA-111, ¶ 5, 122 N.M. 486, 927 P.2d 41 (recognizing that issues raised in a docketing statement, but not contested in a memorandum in opposition are abandoned). Defendant pursues her contention that the metropolitan court erred when it considered her refusal to submit to a breath test as consciousness of guilt. [MIO 1] We proposed to affirm on the grounds that New Mexico courts have long held that a fact-finder may reasonably infer consciousness of guilt and fear of the results from a defendant's refusal to take a breath test. [CN 7]

{3} Defendant, in her memorandum in opposition, makes numerous arguments challenging *McKay v. Davis*, 1982-NMSC-122, ¶¶ 6, 16, 99 N.M. 29, 653 P.2d 860, which provides that evidence of a breath test refusal as consciousness of guilt is admissible and relevant. First, she argues that because the "[d]rawing [of] an individual's breath or blood for purposes of testing for alcohol content constitutes a search within the meaning of the Fourth Amendment," *see State v. Storey*, 2018-NMCA-009, ¶ 24, 410 P.3d 256, "the breath alcohol test was a warrantless search" and was unreasonable. [MIO 1-2] In support of her contention, she argues that *McKay* did not address the "chilling effect" of a defendant's rights under the Fourth Amendment. [MIO 2] Defendant argues that "[t]he justification for an evidentiary exception found in *McKay* was expressly to punish drivers for asserting their right to refuse to consent to a warrantless search," and that this is contradictory to the holding in *Garcia v. State*, 1986-NMSC-007, ¶ 7, 103 N.M. 713, 712 P.2d 1375, that "[a person] has a right to refuse to consent to a warrantless search without such refusal being used to implicate his guilt." [MIO 3]

{4} Although *McKay* did not consider the Fourth Amendment in its analysis and holding that evidence of a refusal to submit to a breath test is admissible and relevant, this Court, in *Storey*, did consider the implications of the drawing of an individual's breath or blood for purposes of testing for alcohol under the Fourth Amendment. 2018-NMCA-009, ¶¶ 23-28. *Storey* recognized a distinction between a blood and breath test, explaining that the Fourth Amendment does not permit warrantless blood draws for alcohol testing as searches incident to arrest because "[i]t is significantly more intrusive," but that warrantless breath alcohol tests "are constitutional as searches incident to arrest." *Id.* ¶¶ 25, 26 (internal quotation marks and citation omitted).

{5} Moreover, we are unpersuaded that *Garcia* can be read as holding that evidence of a breath test refusal cannot be used as consciousness of guilt. The issue in *Garcia* addressed whether the defendant's "refusal to consent to an *automobile search* could be used against him at trial as proof of his guilt." 1986-NMSC-007, ¶ 2. The Court explained that "[i]f the government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a constitutional right" and as such, "[i]t cannot be evidence of a crime for a citizen to refuse entry to his or her home or possession such as an automobile." *Id.* ¶ 7 (internal quotation marks and citation omitted). Because *Garcia* addresses warrantless searches under different circumstances, we conclude that it is not controlling in the instant case. Accordingly, we remain unpersuaded that the proposition in *McKay*—that evidence of a refusal can be used to support consciousness of guilt—does not apply to Defendant's case.

{6} Second, Defendant maintains that the reasoning in *McKay* implicates the unconstitutional conditions doctrine because under the Implied Consent Act there is an implicit precondition that "[a]ny person who operates a motor vehicle within this state shall be deemed to have given consent . . . to chemical tests of his breath or blood or both." NMSA 1978, § 66-8-107(A) (1993). [MIO 4] Specifically, Defendant argues that "[m]aking a person agree to irrevocable consent to warrantless searches, . . . and in turn permitting refusal to be used as evidence of guilt, in return for the granting of a driver's license[,] is an unconstitutional condition." [MIO 6] Defendant, however, has cited to no New Mexico law in support of this contention. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists.").

{7} Third, Defendant asserts that *McKay* interpreted the Implied Consent Act as calling for an evidentiary exception for the use of refusal evidence, and that there is no statutory support for such an exception. [MIO 7] She further argues that "[i]f the [L]egislature had desired to try and create an evidentiary exception for refusal evidence, it would have said so, as [L]egislatures in other states have." [MIO 7] "[W]e presume that the Legislature knows the law and acts rationally." *Bybee v. City of Albuquerque*, 1995-NMCA-061, ¶ 11, 120 N.M. 17, 896 P.2d 1164. As such, as Defendant acknowledges, had the Legislature intended to clarify or change *McKay*'s interpretation of the Implied Consent Act with respect to the use of a refusal as evidence of guilt, it would have done so. Accordingly, we remain unpersuaded that evidence of a refusal to submit to a breath test cannot be used to show a defendant's consciousness of guilt.

{8} Fourth, Defendant states that in *McKay*, the Court cited to a United States Supreme Court case, *Schmerber v. California*, 384 U.S. 757 (1966), to find that the right to self-incrimination was not violated by using refusal as evidence of guilt. She argues that other states have refused to follow *Schmerber*. However, this Court is bound by the precedent set by our Supreme Court. *See Alexander v. Delgado*, 1973-NMSC-030, ¶¶ 8-10, 84 N.M. 717, 507 P.2d 778 (holding that the Court of Appeals is bound by, and may not overrule or deviate from New Mexico Supreme Court precedent). As such, because *McKay* provides that evidence of a breath test refusal may be used to support consciousness of guilt, we are unpersuaded by Defendant's argument.

{9} Finally, Defendant challenges the admission of the refusal evidence and argues that this Court should review the issue de novo. [MIO 9] Defendant cites to Idaho law in support of this proposition. However, this Court does not need to rely on out-of-state authorities to decide the issue here. It is well settled that "[w]e review the admission of evidence under an abuse of discretion standard." *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72.

{10} Similarly, we are unpersuaded by Defendant's assertion that evidence of a breath test refusal is irrelevant. [MIO 10] Defendant argues that "[t]he innocent and guilty equally can invoke their rights, including the right to refuse to consent to a warrantless search," such that "the refusal evidence does not have 'any tendency to

make a fact more or less probable than it would be without the evidence.'" Rule 11-401(A) NMRA. [MIO 10]. Defendant acknowledges, however, that *McKay* held that "a defendant's refusal to take a chemical test is relevant to show his consciousness of guilt and fear of the test results." 1982-NMSC-122, ¶ 16. As noted above, this Court is bound by the precedent set by our Supreme Court. *See Alexander*, 1973-NMSC-030, ¶¶ 8-10.

{11} For the reasons stated in our notice of proposed disposition and herein, we affirm Defendant's conviction.

{12} IT IS SO ORDERED.

JANE B. YOHALEM, Judge

WE CONCUR:

KRISTINA BOGARDUS, Judge

SHAMMARA H. HENDERSON, Judge