

**STATE V. AGUIRRE**

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**STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
RICHARD AGUIRRE,  
Defendant-Appellant.**

NO. 34,800

COURT OF APPEALS OF NEW MEXICO

December 30, 2015

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Marci Beyer,  
District Judge

**COUNSEL**

Hector H. Balderas, Attorney General, Santa Fe, NM, John Kloss, Assistant Attorney General, Albuquerque, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Santa Fe, NM, Ryan A. Bird, Assistant Appellate Defender, Las Cruces, NM, for Appellant

**JUDGES**

M. MONICA ZAMORA, Judge. WE CONCUR: MICHAEL E. VIGIL, Chief Judge, LINDA M. VANZI, Judge

**AUTHOR:** M. MONICA ZAMORA

**MEMORANDUM OPINION**

**ZAMORA, Judge.**

{1} Following a conditional guilty plea, [RP 119] Defendant appeals his convictions for possession of a controlled substance and tampering with evidence. [DS unnumbered

2] This Court issued a notice of proposed summary disposition proposing to reverse. The State has filed a memorandum in opposition to this Court's proposed disposition, which we have duly considered. Unpersuaded, we reverse.

### **Reasonable Suspicion**

{2} As an initial matter, our notice proposed to conclude that Defendant adequately preserved his state constitutional claim below, [CN 5] and the State's memorandum in opposition does not dispute this. Accordingly, our notice proposed to summarily reverse on the grounds that Officer Lucero lacked reasonable suspicion at the point when the seizure occurred, which under the New Mexico Constitution, would have been at the point when a reasonable person would not have felt free to leave. [CN 5-6] The State also does not dispute this point.

{3} Our notice further proposed to hold that the point at which reasonable suspicion was required was when Officer Lucero activated his lights and said "Police! Can you come over here?" [CN 6] In response, the State argues that Defendant was not seized when Officer Lucero said "Police! Can you come over here?" Instead, the seizure occurred when Officer Lucero activated his lights and yelled "stop" three times. [MIO 10] The State suggests that the record is unclear whether Officer Lucero said "Police! Can you come over here?" or just said "stop" three times. [MIO 3] The State takes the position that Officer Lucero activated his lights and just yelled "stop" three times and it was at that point that Defendant was seized. [MIO 10–11] However, the State does not assert that Officer Lucero yelled "stop" at a different point in time than the one at which our notice proposed that he said "Police! Can you come over here?" Accordingly, we are unpersuaded that this would alter our analysis with respect to the point at which Defendant was seized.

{4} Having determined the point in time at which Defendant was seized, we turn next to the inquiry of whether Officer Lucero had reasonable suspicion at that juncture. Our notice explained why we believed that Officer Lucero did not based on the information before us, have reasonable suspicion that criminal activity was afoot. [CN 2–3, 7] In its memorandum in opposition, the State adds two additional facts to the reasonable suspicion analysis set forth in our notice. First, the State notes that Defendant was peering over a rock wall into Officer Lucero's backyard, and not merely present outside of the backyard. [MIO 12] Second, the State explains that Defendant began walking away from Officer Lucero after Officer Lucero activated his emergency lights but before he said "Police! Can you come over here?" [MIO 3]

{5} Accordingly, the State argues that Officer Lucero had reasonable suspicion to stop Defendant based on the following sequence of events: Defendant was peering over a rock wall into Officer Lucero's backyard, although Defendant was not on the officer's property; this alerted Officer Lucero's patrol dog; Defendant was not on his own property; Defendant needed to look in his wallet when asked where his home was; even though Defendant started walking in the direction pointed to him by the officer, he changed directions shortly thereafter; and when approached by Officer Lucero's patrol

car, Defendant squatted behind a bush. [MIO 12] The State contends that each of these events, when considered independently, are seemingly innocuous, but when taken together, rise to the level of reasonable suspicion that criminal activity was afoot. [MIO 13] Specifically, the State asserts that the fact that Defendant hid behind a bush was the critical fact giving rise to reasonable suspicion, and if not, then reasonable suspicion existed at the moment Defendant froze and began walking away after Officer Lucero activated his emergency lights. [MIO 13–14]

{6} We remain unpersuaded. As our notice discussed, this series of events does not give rise to the level of reasonable suspicion that criminal activity was afoot. Additionally, just because Defendant squatted behind a bush does not give rise to an inference that he had committed, or was committing, a crime. *See State v. Garcia*, 2009-NMSC-046, ¶¶ 44-46, 147 N.M. 134, 217 P.3d 1032 (holding that there was no reasonable suspicion to stop a defendant when the officer lacked any information that a crime had been or was being committed, and even if the officer had information regarding a crime that had been committed, the defendant was merely walking in the vicinity at seven o'clock in the evening, when it was not unusual to be walking around). With respect to Defendant "increasing his distance from [Officer] Lucero," in response to the activation of emergency lights, [MIO 15] we remain unpersuaded. Defendant did not run away at this point, but simply "began walking away," and the State does not explain how this rises to the level of active flight. More importantly, we do not see, and the State does not explain, how Defendant's act of freezing and beginning to walk away after seeing emergency lights would otherwise give rise to an inference of criminal activity where none existed previously. As such, we conclude that Defendant's behavior suggested "nothing more than a nervous and possibly furtive demeanor[.]" which did not amount to reasonable suspicion. *See State v. Gutierrez*, 2008-NMCA-015, ¶ 21, 143 N.M. 522, 177 P.3d 1096. We therefore reverse.

{7} In sum, for the foregoing reasons and for the reasons set forth in our notice of proposed summary disposition, we reverse.

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

**M. MONICA ZAMORA, Judge**

**WE CONCUR:**

**MICHAEL E. VIGIL, Chief Judge**

**LINDA M. VANZI, Judge**