STATE V. CORBETT

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
JOSHUA ISMENDUS CORBETT,
Defendant-Appellee.

No. A-1-CA-36458

COURT OF APPEALS OF NEW MEXICO

December 11, 2017

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY, Gary L. Clingman, District Judge

COUNSEL

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

Templeman and Crutchfield, C. Barry Crutchfield, Lovington, NM, for Appellee

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: M. MONICA ZAMORA, Judge, HENRY M. BOHNHOFF, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} The State has appealed from a suppression order. We issued a notice of proposed summary disposition in which we proposed to reverse. Defendant has filed a memorandum in opposition. After due consideration, we remain unpersuaded. We therefore reverse and remand for further proceedings.

{2} The pertinent background information was set forth in the notice of proposed summary disposition. [CN 2-5] To very briefly reiterate, Officer Brandon Marinovich based his affidavit for the initial search warrant upon the odor of marijuana emanating from Defendant's residence. The odor of marijuana was sufficient to support the municipal court judge's probable cause determination. *See, e.g.*, *State v. Wagoner*, 1998-NMCA-124, ¶ 19, 126 N.M. 9, 966 P.2d 176 (observing that the odor of marijuana emanating from a residence gave police officers probable cause to believe that evidence of crime was within). Insofar as municipal courts are authorized to issue warrants to search for and seize property that is possessed in violation of municipal ordinances, *see* Rule 8-207(A)(1), (3) NMRA, and insofar as possession of marijuana is prohibited by a specific municipal ordinance [RP 67], we conclude that the initial search was valid.

{3} In his memorandum in opposition, Defendant contends that "no evidence of any ordinance involving marijuana was offered to the district court." [MIO 2] However, the record reflects that the State cited, quoted, and summarized the pertinent ordinance provisions to the district court in its timely motion for reconsideration. [RP 67] We therefore reject Defendant's factual assertion. *See generally Udall v. Townsend*, 1998-NMCA-162, ¶ 3, 126 N.M. 251, 968 P.2d 341(indicating that on the summary calendar, although "we rely in large part" upon statements of the facts supplied by the parties, "if the record shows otherwise, we will not accept that factual recitation"); *State v. Calanche*, 1978-NMCA-007, ¶ 10, 91 N.M. 390, 574 P.2d 1018 (observing that when the record of the trial proceedings demonstrates that factual representations contained within a submission to this Court is inaccurate, we will not utilize the "non-facts" in our review of the district court's ruling).

{4} We surmise that Defendant may take issue with the State's failure to supply a copy of the ordinance at the hearing on the motion. However, the New Mexico Supreme Court has held that "municipal ordinances are law" rather than "adjudicative facts," and as a result, it is no longer necessary for prosecutors to present them as evidence. *City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 16, 147 N.M. 693, 228 P.3d 477. Accordingly, we reject Defendant's suggestion that the State failed to present "evidence" of the ordinance in support of its legal argument.

{5} In his memorandum in opposition, Defendant further contends that Officer Marinovich was not investigating a violation of a municipal ordinance, but rather he utilized the municipal court to investigate his suspicion of a violation of state law. [MIO 1-2] However, even if Officer Marinovich suspected that evidence of a felony-level offense might be found within the residence, we are aware of no authority (and Defendant has cited none) that could be said to have required the officer to act on his suspicion by seeking a search warrant from the district court, as opposed to the municipal court. Insofar as we are dealing with a search conducted pursuant to a warrant, the officer's subjective state of mind is largely irrelevant. *See State v. Williamson*, 2009-NMSC-039, ¶ 30, 146 N.M. 488, 212 P.3d 376 (observing that when an application for a search warrant is based on an affidavit, "the issuing magistrate [must] *independently* . . . pass judgment on the existence of probable cause" and stating

that “[m]ere affirmance of belief or suspicion by the affiant is not enough” (alteration, internal quotation marks, and citation omitted)). And insofar as the evidence was consistent with a municipal violation, we conclude that the warrant issued by the municipal court and the ensuing search were valid.

{6} Accordingly, for the reasons stated, we reverse and remand for further proceedings.

{7} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

HENRY M. BOHNHOFF, Judge