STATE V. HAYDEN

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ERICH HAYDEN,
Defendant-Appellant,

NO. 34,706

COURT OF APPEALS OF NEW MEXICO

December 7, 2015

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Brett R. Loveless, District Judge

COUNSEL

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

Jorge A. Alvarado, Chief Public Defender, Santa Fe, NM, Josephine H. Ford, Assistant Appellate Defender, Albuquerque, NM, for Appellant

JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, RODERICK T. KENNEDY, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} Defendant appeals from the district court's on-record review and affirmance of the metropolitan (metro) court's judgment and sentence entered following his conditional plea of guilty to driving while intoxicated. This Court issued a calendar notice

proposing summary affirmance. Defendant filed a memorandum in opposition to this Court's notice of proposed disposition, which we have duly considered. Unpersuaded, we affirm.

{2} Defendant contends that the metro court erred in denying his motion to suppress officer testimony based on an alleged deficiency with the officer's lapel video recording. [DS 8] In essence, Defendant argues that the video recording was incomplete and did not capture the officer administering a portable breath test (PBT) to Defendant, and that the PBT score—if captured on the video—could have potentially been exculpatory. [DS 6] According to Defendant, the missing portion of the video was material to his defense and the failure of the officer to record this portion of the investigation was prejudicial. [DS 8; MIO 2]

{3} As we noted in our calendar notice, Defendant raised the same appellate issue before the district court. [CN 2] In light of the district court's well-reasoned analysis of Defendant's assertion of error, we proposed to agree with and adopt the district court's opinion as our own for purposes of this appeal. [CN 2] Defendant's memorandum in opposition does not point to any specific errors in fact or in law in our calendar notice or in the district court's opinion. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law."). Instead, Defendant continues to argue that the "missing portion" of the video recording was material, and that the officer's failure to record his entire interaction with Defendant was prejudicial. [MIO 2] For the reasons set forth in the district court's opinion, we are not persuaded by this argument. Specifically, we note that the metro court and the district court each treated the issue in this case as a failure to collect evidence under *State v. Ware*, 1994-NMSC-091, 118 N.M. 319, 881 P.2d 679. [DS 3; RP 67-70] Defendant's memorandum in opposition does not convince us that the district court erred in its application of the two-part *Ware* test. *See id.* ¶¶ 25-26 (adopting a two-part test for deciding whether to sanction the state when police fail to gather evidence from the crime scene, requiring as a threshold matter that the evidence be material to the defendant's defense, and if so, then requiring consideration of the conduct of the investigating officers).

{4} Additionally, we proposed in our calendar notice to agree with the district court that the applicable standard of review in this case is abuse of discretion. [CN 2-3] *See State v. Duarte*, 2007-NMCA-012, ¶ 3, 140 N.M. 930, 149 P.3d 1027 (stating that "[t]he denial of a motion to sanction by dismissal or suppression of evidence is reviewed for abuse of discretion"); *cf. State v. Riggs*, 1992-NMSC-057, ¶ 10, 114 N.M. 358, 838 P.2d 975 (stating that we review the decision of the trial court in determining what remedy to apply for a failure to preserve evidence for abuse of discretion). As he did on appeal to the district court, as well as in his docketing statement, Defendant cites again in his memorandum in opposition to *State v. Sewell*, 2008-NMCA-027, ¶ 8, 143 N.M. 485, 177 P.3d 536, *rev'd,* 2009-NMSC-033, 146 N.M. 428, 211 P.3d 885, for the proposition that we should review the present issue de novo. [RP 52; DS 8; MIO 1-2] We remain unconvinced by this inapposite citation to *Sewell*, a case that dealt with a motion to

suppress in the context of search and seizure, and we point out that in the two primary cases relied upon by Defendant to support his contention that the officer's testimony should have been suppressed—*State v. Chouinard*, 1981-NMSC-096, 96 N.M. 658, 634 P.2d 680, and *Ware*—the applicable standard of review was abuse of discretion. *See Chouinard*, 1981-NMSC-096, ¶ 26; *see also Ware*, 1994-NMSC-091, ¶ 27.

{5} We conclude that Defendant has not met his burden to clearly demonstrate that the metro court erred in this case. Accordingly, for the reasons stated above, as well as those provided in our calendar notice, we affirm.

{6} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

RODERICK T. KENNEDY, Judge