STATE V. KANE

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
PABLO KANE,
Defendant-Appellee.

NO. 34,660

COURT OF APPEALS OF NEW MEXICO

December 30, 2015

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Fernando R. Macias, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Adam Greenwood, Assistant Attorney General, Albuquerque, NM, for Appellant

Sergio Viscoli, Appellate Defender, Santa Fe, NM, for Appellee

JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, LINDA M. VANZI, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} The State appeals from the district court's order entered following an evidentiary hearing, suppressing evidence obtained as a result of an expansion of a traffic stop without reasonable suspicion. This Court issued a calendar notice proposing summary

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

{2} The State raised three issues in its docketing statement: (1) the district court erred in not addressing whether the officer was acting in his capacity as a community caretaker, (2) the district court erred in suppressing the evidence given the officer's community caretaker role, and (3) the district court erred in suppressing evidence that would have been inevitably discovered. [DS 3]

{3} We first noted in our calendar notice that based on the facts as laid out in the docketing statement and summarized in our proposed disposition, the initial traffic stop appears to have been supported by reasonable suspicion of speeding. [CN 3] We then proposed to conclude that the district court did not err in determining that Sergeant Flores' observation that the female passenger looked as if she was going to cry, without more, failed to provide him with the requisite reasonable suspicion to expand his traffic investigation into a domestic violence—or any other—investigation. [CN 4] Finally, with respect to the State's Issues 1 and 2, we proposed to conclude that Officer Flores' simple observation that the passenger looked as if she was going to cry—without more—was insufficient to give rise to a concern for public safety requiring his general assistance that would justify his action in removing Defendant from the vehicle under the community caretaker exception. [CN 5] We therefore proposed to affirm the district court's suppression of evidence gathered subsequent to Defendant's removal from the vehicle. [CN 6]

{4} The State's memorandum in opposition does not point to any specific errors in fact or in law in our calendar notice. *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, the State continues to argue that Sergeant Flores had reasonable suspicion to briefly extend the traffic stop to investigate whether Defendant was involved in a "domestic incident[,]" highlighting that in addition to the testimony regarding the demeanor of the female passenger, Sergeant Flores also testified that the speeding and weaving through traffic could be associated with a domestic incident, and that Defendant's bloodshot and watery left eye could also "be indicative of heightened emotion resulting from or causing a domestic incident." [MIO 3-5] The State also continues to argue that these same facts prompted a concern for the safety of the female passenger that justified a brief investigation under the community caretaker exception. [MIO 5-6]

{5} Given the district court's factual finding that the female passenger appeared as if she was going to cry—as compared to counsel's characterization of the passenger as "distraught and on the verge of tears" [MIO 4]—we remain unconvinced that the district court erred in determining that Officer Flores did not have reasonable suspicion to expand the traffic stop into a domestic violence investigation, even in light of the speeding and weaving through traffic, as well as Defendant's bloodshot and watery left eye, nor are we persuaded that these facts gave rise to a concern for public safety

requiring Officer Flores' general assistance that would justify his action in removing Defendant from the vehicle under the community caretaker exception. *See State v. Ryon*, 2005-NMSC-005, ¶ 26, 137 N.M. 174, 108 P.3d 1032 (stating that the operative question in cases involving motor vehicles is whether the officer had a specific and articulable concern for public safety requiring the officer's general assistance). Therefore, we conclude that the district court did not err in determining that the traffic stop was unreasonably expanded by Sergeant Flores.

{6} The State argues that even if the evidence of Defendant's driving while under the influence of intoxicating liquor (DWI) and possession of drug paraphernalia was unlawfully seized following the unreasonable expansion of the traffic stop, the evidence should not have been suppressed as it would have been inevitably discovered in the course of the investigation. [MIO 6-7] This same issue was raised in the State's docketing statement, prompting this Court to observe that it did not appear that inevitable discovery was preserved below for appeal. [CN 7 (quoting *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 ("In order to preserve an error for appeal, it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked." (internal quotation marks and citation omitted))]. In its memorandum in opposition, the State argues that "Sergeant Flores and the assistant district attorney clearly informed the district court that Sergeant Flores had commenced a DWI investigation that he would have continued if it were not for his concern for the female passenger." [MIO 7] This, according to the State, was sufficient to present the issue of inevitable discovery to the district court. We disagree.

{7} We have considered an issue to be preserved where the court was "armed with the legal assertions and facts necessary" to rule on the issue and the opposing party had the opportunity to respond. *State v. Granville*, 2006-NMCA-098, ¶ 16, 140 N.M. 345, 142 P.3d 933; *see State v. Figueroa*, 2010-NMCA-048, ¶ 11, 148 N.M. 811, 242 P.3d 378 (concluding that the defendant preserved the issue of unreasonable expansion of an investigation "even if he did not primarily focus on the expansion during the suppression hearing"). Here, the State acknowledges that it did not use the phrase "inevitable discovery doctrine" during the suppression hearing. [MIO 7] Furthermore, it does not appear that the State provided the district court with facts sufficient to prove that absent the unlawful expansion of the traffic stop, the DWI and drug paraphernalia evidence "would have been discovered by independent and lawful means." *State v. Romero*, 2001-NMCA-046, ¶ 10, 130 N.M. 579, 28 P.3d 1120; *see State v. Johnson*, 1996-NMCA-117, ¶ 19, 122 N.M. 713, 930 P.2d 1165 (observing that application of the inevitable discovery doctrine permits the admission of unlawfully seized evidence if that evidence would have been seized independently and lawfully in due course). Specifically, even if we were to assume that the theoretical follow-up DWI investigation would have constituted an independent means of discovering the evidence in this case, it is not clear that Sergeant Flores would have observed signs of intoxication on Defendant—bloodshot, watery eyes and odor of alcohol—had he simply continued to interact with Defendant as part of the traffic stop, given the fact that despite a considerable amount of time discussing the reason Defendant was speeding and

looking into possible problems with Defendant's vehicle, Sergeant Flores had only observed the one bloodshot, watery eye, which he believed could be indicative of "heightened emotion" [MIO 5]. Finally, it is clear that the State did not invoke a ruling from the district court on whether the evidence would have been inevitably discovered. Therefore, because the issue was not sufficiently raised in the district court, facts necessary to the determination of the issue were not put squarely before the district court, and no ruling was invoked by the State, we are not convinced that we erred in determining that the issue of inevitable discovery was not preserved for appeal.

{8} Accordingly, for the reasons stated above, as well as those provided in our calendar notice, we affirm.

{9} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

LINDA M. VANZI, Judge