STATE V. ARMITIGE

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOSEPH ALAN ARMITIGE,
Defendant-Appellant.

NO. A-1-CA-37011

COURT OF APPEALS OF NEW MEXICO

December 13, 2018

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

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Mary Barket, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: M. MONICA ZAMORA, Judge, JULIE J. VARGAS, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Defendant Joseph Alan Armitige appeals his convictions for trafficking cocaine, possession of marijuana, possession of drug paraphernalia, and speeding. We issued a

calendar notice proposing to affirm. Defendant has responded with a memorandum in opposition. We affirm.

Sufficiency

{2} Defendant continues to challenge the sufficiency of the evidence to support his conviction for trafficking cocaine. [MIO 11] A sufficiency of the evidence review involves a two-step process. Initially, the evidence is viewed in the light most favorable to the verdict. Then the appellate court must make a legal determination of "whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *State v. Apodaca*, 1994-NMSC-121, ¶ 6, 118 N.M. 762, 887 P.2d 756 (internal quotation marks and citations omitted).

{3} In order to convict Defendant, the evidence had to show that Defendant possessed cocaine with the intent to distribute. *See* NMSA 1978, § 30-31-20(A)(3)(a) (2006). Here, the cocaine was discovered in the center console of Defendant's vehicle during a traffic stop. [RP 102, 104] The cocaine was subsequently tested and weighed 12.83 grams. [RP 104] A normal "personal use unit" of cocaine is .20 grams. [RP 104] Possession of 3 or more grams is considered greater than that used for personal consumption. [RP 104-05] A digital scale was found in the console with the cocaine, and baggies found elsewhere in the vehicle. [RP 103-04] This supported the conclusion that Defendant knew about the cocaine, that he knew where the cocaine was, and that he exercised control over it. *See* UJI 14-3130 NMRA.

Vagueness

{4} Defendant continues to claim that the statute criminalizing possession of less than an ounce of marijuana is void for vagueness. [MIO 7] "[T]he vagueness doctrine is based on the principle of fair notice in that no one may be held criminally responsible and subject to criminal sanctions for conduct without fair warning as to the nature of the proscribed activity." *State v. Lovato*, 2011-NMCA-065, ¶ 14, 150 N.M. 39, 256 P.3d 982 (internal quotation marks and citation omitted). "[A] statute denies constitutional due process if it is so vague that persons of common intelligence must necessarily guess at its meaning." *Id*. (internal quotation marks and citation omitted).

{5} Here, the statute is not vague, since it clearly defines the crime as possession of less than an ounce of marijuana. NMSA 1978, § 30-31-23(B)(1) (2011). Instead, we construe Defendant's argument as a challenge to the selective prosecution of the statute, which does not establish that a statute is unconstitutionally vague. *See State v. Altgilbers*, 1989-NMCA-106, ¶ 44, 109 N.M. 453, 786 P.2d 680. As such, we are unpersuaded by Defendant's vagueness argument. We also note that Defendant abandoned the selective prosecution claim below because he did not have the records to support his claim. [MIO 4] We therefore do not have an adequate record on appeal to review the claim. *See State v. Hunter*, 2001-NMCA-078, ¶ 18, 131 N.M. 76, 33 P.3d 296 ("Matters not of record present no issue for review.").

{6} For the reasons set forth above, we affirm.

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

MICHAEL E. VIGIL, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

JULIE J. VARGAS, Judge