


1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
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2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

No. A-1-CA-39725

5 **ARIANA MONTOYA,**

6 Defendant-Appellant.

7 **APPEAL FROM THE METROPOLITAN COURT OF BERNALILLO**
8 **COUNTY**

9 **David A. Murphy, Metropolitan Court Judge**

10 Raúl Torrez, Attorney General

11 Santa Fe, NM

12 John Kloss, Assistant Attorney General

13 Albuquerque, NM

14 for Appellee

15 Bennett J. Baur, Chief Public Defender

16 Santa Fe, NM

17 Luz C. Valverde, Assistant Appellate Defender

18 Albuquerque, NM

19 for Appellant

20 **MEMORANDUM OPINION**

21 **DUFFY, Judge.**

22 {1} Defendant Ariana Montoya appeals her conviction for per se driving while
23 intoxicated (DWI). *See* NMSA 1978, § 66-8-102(C)(1) (2016). She argues probable

1 cause did not support her arrest, and the State failed to lay a proper foundation for
2 the admission of her breathalyzer test results. We affirm.

3 **BACKGROUND**

4 {2} An officer was on patrol when a black Nissan passed him at a high rate of
5 speed. The car swerved in and out of traffic and tailgated at least two other cars. The
6 officer did not clock the car's speed, but at one point the officer was driving at 60
7 miles per hour in a 35-mile-per-hour zone in an attempt to keep up. Even at 60 miles
8 per hour, the other car continued to put distance between itself and the officer's car.
9 Eventually, the car stopped at a red light, and the officer caught up to it and initiated
10 a traffic stop. The officer noted that the driver—Defendant—smelled of alcohol, and
11 her eyes were watery. Defendant told the officer she had taken prescription
12 medication earlier.

13 {3} The officer administered two field sobriety tests, the walk and turn and the
14 one-leg stand. He observed two out of eight indications of intoxication during the
15 walk and turn test and three out of four during the one-leg stand test. The officer
16 then arrested Defendant. He read the Implied Consent Act to Defendant, and she
17 agreed to undergo breath alcohol testing. The officer administered two breath tests,
18 which registered an alcohol concentration of .09 and .08.

19 {4} Defendant was charged with four counts: (1) DWI (first offense), (2) careless
20 driving, (3) driving on a suspended license, and (4) open container. Before trial, the

1 State dismissed Counts 2 and 3. After a bench trial, the court found Defendant not
2 guilty on Count 4 and convicted her of Count 1.

3 {5} Defendant timely appealed to this Court.

4 **DISCUSSION**

5 **I. Probable Cause Supported Defendant’s Arrest**

6 {6} Defendant first challenges whether probable cause supported her arrest. The
7 metropolitan court determined that the officer had probable cause to arrest based on
8 the driving observed by the officer, Defendant’s admission that she had taken
9 medication earlier, the odor of alcohol, and her mixed performance on the field
10 sobriety tests. On appeal, Defendant argues that the only evidence of impairment
11 was that Defendant was speeding; she contends her performance on the standard
12 field sobriety tests was nearly perfect and that the one leg stand was unreliable due
13 to her weight.

14 {7} An officer has probable cause to arrest when “facts and circumstances within
15 the officer’s knowledge, or about which the officer has reasonably trustworthy
16 information, are sufficient to warrant an officer of reasonable caution to believe that
17 an offense is being committed or has been committed.” *State v. Sanchez*, 2001-
18 NMCA-109, ¶ 6, 131 N.M. 355, 36 P.3d 446. “Whether probable cause exists is a
19 mixed question of law and fact. We review legal conclusions de novo but defer to
20 the trial court’s findings of fact. Our review of factual determinations is limited to

1 determining whether there was substantial evidence to justify a warrantless arrest.”
2 *State v. Granillo-Macias*, 2008-NMCA-021, ¶ 7, 143 N.M. 455, 176 P.3d 1187
3 (internal quotation marks and citation omitted).

4 {8} In this case the officer observed Defendant driving at a high rate of speed,
5 swerving in and out of traffic, and tailgating at least two other cars. Defendant
6 smelled of alcohol, had watery eyes, and admitted that she had taken prescription
7 medication earlier. Likewise, her performance on the field sobriety tests showed
8 impairment. In addition to the officer’s testimony about the interaction, the
9 prosecution submitted the officer’s lapel cam video. The court had the opportunity
10 to see the entire incident, make credibility determinations, and resolve conflicts in
11 the facts. *See State v. Gonzales*, 1997-NMSC-050, ¶ 18, 124 N.M. 171, 947 P.2d 128
12 (“Determining credibility and weighing evidence are tasks entrusted to the trial court
13 sitting as fact-finder.”).

14 {9} While Defendant argues that her performance on the field sobriety tests was
15 almost perfect, the officer’s testimony noted multiple indications of intoxication on
16 each test. Likewise, while Defendant argues that the walk and turn test was
17 unreliable due to her weight, the totality of the facts and circumstances noted above
18 were sufficient to give rise to an objectively reasonable belief that Defendant had
19 been driving while intoxicated. *See Granillo-Macias*, 2008-NMCA-021, ¶¶ 6, 12
20 (holding that probable cause existed for a DWI arrest where the defendant smelled

1 of alcohol, had difficulty balancing, and performed poorly on field sobriety tests);
2 *Sanchez*, 2001-NMCA-109, ¶ 8 (holding that probable cause existed for a DWI arrest
3 where the defendant smelled of alcohol, admitted to consuming alcohol, and the
4 defendant’s eyes were bloodshot and watery). The same facts and circumstances also
5 support the conclusion that Defendant posed a danger to the motoring public, and
6 thus, exigent circumstances justified the warrantless arrest. *See City of Santa Fe v.*
7 *Martinez*, 2010-NMSC-033, ¶ 13, 148 N.M. 708, 242 P.3d 275 (noting that a DWI
8 is treated as a felony for the purpose of warrantless arrests); *Campos v. State*, 1994-
9 NMSC-012, ¶ 14, 117 N.M. 155, 870 P.2d 117 (“If an officer observes the person
10 arrested committing a felony, exigency will be presumed.”); *see also Martinez*,
11 2010-NMSC-033, ¶¶ 15-16 (noting that the warrantless arrest of a DWI suspect is
12 justified based on concerns regarding the dissipation of evidence and the “untenable”
13 risk of danger a DWI suspect poses to himself and to the public at large if allowed
14 to drive away). *Cf. State v. Wright*, 2022-NMSC-009, ¶ 29, 503 P.3d 1161
15 (concluding the defendant posed no danger when she was off the road, parked at her
16 home, and blocked in).

17 **II. The Breathalyzer Test Was Properly Admitted**

18 {10} Defendant also challenges the admission of her breath test results, arguing that
19 the State failed to lay a proper foundation showing that the machine was calibrated
20 at the time the test was taken. “We review evidentiary rulings for abuse of

1 discretion.” *Granillo-Macias*, 2008-NMCA-021, ¶ 8. “A court abuses its discretion
2 when it makes an evidentiary ruling that is clearly against the logic and effect of the
3 facts and circumstances of the case and [is] clearly untenable or not justified by
4 reason.” *State v. Patterson*, 2017-NMCA-045, ¶ 11, 395 P.3d 543 (internal quotation
5 marks and citation omitted).

6 {11} To admit the results of a breathalyzer test, the State must show that “at the
7 time of the test, the machine was properly calibrated and that it was functioning
8 properly.” *State v. Martinez*, 2007-NMSC-025, ¶ 9, 141 N.M. 713, 160 P.3d 894.
9 The State can meet this requirement by offering evidence that the machine was
10 calibrated in compliance with Scientific Laboratory Division (SLD) regulations,
11 which require that “[a] calibration check on the instrument(s) shall be conducted at
12 least once every seven calendar days or a 0.08 calibration check shall be conducted
13 with each subject test or both.” 7.33.2.10(B)(1)(c) NMAC; *see also* 7.33.2.14(C)(2)
14 NMAC (setting out the requirements for an evidential breath sample); *State v.*
15 *Hobbs*, 2016-NMCA-022, ¶ 20, 366 P.3d 304 (noting that the calibration check
16 ensures that the instrument produces a reading within a range specified by
17 7.33.2.14(C)(2) NMAC); *State v. Christmas*, 2002-NMCA-020, ¶ 10, 131 N.M. 591,
18 40 P.3d 1035 (noting that the state can meet its threshold showing for the admission
19 of a breath test result by putting on evidence that the machine had been properly
20 calibrated within one week of the test).

1 {12} During trial, the officer testified that the machine had been certified for the
2 date range when he used it. *See Martinez, 2007-NMSC-025, ¶ 23* (affirming that the
3 foundational requirement for establishing certification of a breathalyzer is
4 sufficiently established by an officer’s testimony that “he saw an SLD sticker on the
5 machine indicating that it was certified by SLD when he conducted the test”). He
6 also testified that there was no indication it was not working properly: it passed a
7 diagnostic check and did not show an error message. Most importantly, the trial court
8 heard testimony from the officer regarding calibration:

9 Defense: And so your testimony is that you actually calibrated it?
10 On that day?

11 Officer: It went through a calibration check.

12 Defense: Right. And isn’t the calibration check to... see if it’s
13 working properly—but that’s not actually when it was calibrated. It’s
14 not calibrating at that time, right?

15 Officer: Yes, it is. That is—that is a calibration check. And it shows
16 it is within range.

17 Defense: Okay. And so, the calibration check is the same as it being
18 calibrated?

19 Officer: No. The check shows that it was calibrated within range.

20 Defense: Okay. And you can’t testify that it was actually calibrated
21 within a certain amount of time—you don’t know when it was
22 calibrated before the test was taken by Ms. Montoya, right?

23 Officer: It was calibrated on that date. As to the time before, I don’t
24 know.

1 This testimony was sufficient for the trial court to infer that the instrument used to
2 obtain Defendant's breath sample was properly calibrated when used. We perceive
3 no abuse of discretion in the trial court's admission of Defendant's breath test results.

4 **CONCLUSION**

5 {13} We affirm.

6 {14} **IT IS SO ORDERED.**

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MEGAN P. DUFFY, Judge

9 **WE CONCUR:**

10 
11 _____
JENNIFER L. ATTREP, Chief Judge

12 
13 _____
GERALD E. BACA, Judge