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

Court of Appeals of New Mexico

2 **STATE OF NEW MEXICO,**

Filed 3/4/2025 10:09 AM

3 Plaintiff-Appellee,



Ramon J. Maestas
Chief Clerk

4 v.

No. A-1-CA-41900

5 **AMBER MONARCO,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

8 **Daylene A. Marsh, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 MJ Edge, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **HANISEE, Judge.**

18 {1} This matter was submitted to this Court on the brief in chief pursuant to the

19 Administrative Order for Appeals in Criminal Cases from the Second, Eleventh, and

20 Twelfth Judicial District Courts in *In re Pilot Project for Criminal Appeals*, No.

21 2022-002, effective November 1, 2022. Having considered the brief in chief,

22 concluding the briefing submitted to this Court provides no possibility for reversal,

1 and determining that this case is appropriate for resolution on Track 1 as defined in
2 that order, we affirm for the following reasons.

3 {2} Defendant appeals from a judgment and sentence convicting her of aggravated
4 driving while under the influence of intoxicating liquor or drugs (DWI) (0.16 or
5 above) and having an open container. [RP 156] Defendant contends that she received
6 ineffective assistance of counsel below. “We review claims of ineffective assistance
7 of counsel de novo.” *State v. Pitner*, 2016-NMCA-102, ¶ 14, 385 P.3d 665 (internal
8 quotation marks and citation omitted).

9 {3} “To evaluate a claim of ineffective assistance of counsel, we apply the two-
10 prong test in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).” *State v. Dylan J.*,
11 2009-NMCA-027, ¶ 36, 145 N.M.719, 204 P.3d 44. “That test places the burden on
12 the defendant to show that his counsel’s performance was deficient and that the
13 deficient performance prejudiced his defense.” *Id.* Defendant asserts that “[t]he
14 parties do not dispute that the conduct underlying the charges happened completely
15 in Rio Arriba County” instead of San Juan County where Defendant was tried. [BIC
16 8] Defendant contends that her trial counsel’s performance was deficient because
17 her trial counsel did not file a motion to dismiss based on venue until after the ninety
18 days allotted to make such a motion in Rule 5-601(E) NMRA. [BIC 6]

19 {4} Regardless of whether Defendant’s trial counsel was deficient for this reason,
20 we fail to see how Defendant has established that the alleged deficient performance


1 prejudiced her defense. In this regard, Defendant provides us with no relevant legal
2 authority and asserts only that “counsel’s failure to timely file [the motion] meant
3 that, instead of having the case against [Defendant] dismissed, [Defendant] stood
4 trial and was convicted in San Juan County.” [BIC 9] However, “[t]o show actual
5 prejudice, there must have been a reasonable probability that, but for counsel’s
6 unprofessional errors, the result of the proceeding would have been different.”
7 *Lukens v. Franco*, 2019-NMSC-002, ¶ 17, 433 P.3d 288 (internal quotation marks
8 and citation omitted). Such is not the case as a matter of law, because New Mexico
9 jurisprudence establishes that venue can be waived by a defendant, and that silence
10 as to the issue constitutes such waiver. *See State v. Lopez*, 1973-NMSC-041, ¶ 16,
11 84 N.M. 805, 508 P.2d 1292. We additionally fail to see how the result would have
12 been different had Defendant’s case been dismissed and tried in Rio Arriba County.
13 The State’s evidence was significant. *See State v. Roybal*, 2002-NMSC-027, ¶ 25,
14 132 N.M. 657, 54 P.3d 61 (“[E]ven if counsel’s performance is deficient, [a
15 d]efendant is not entitled to a new trial unless, considering the totality of the
16 evidence, a reviewing court determines that there is a reasonable probability that,
17 absent the errors, the fact[-]finder would have had a reasonable doubt respecting
18 guilt.” (internal quotation marks omitted and citation omitted)).

19 {5} A New Mexico State Park Ranger contacted Defendant while she was inside
20 her vehicle and while the vehicle was parked on the side of the road with the engine

1 running. [BIC 2] According to the record, Defendant indicated that she had just left
2 the lake parking lot approximately five minutes earlier, had driven to the location
3 where they were located, and was planning on heading home soon. [RP 36, 106] *See*
4 UJI 14-4509 NMRA (requiring the state to prove as an element of aggravated DWI
5 that the defendant operated a motor vehicle). During the encounter, Defendant
6 exhibited signs of intoxication, which included the strong smell of alcohol on her
7 breath, bloodshot eyes, and poor balance. [BIC 2; RP 33, 36] *See State v. Gutierrez,*
8 1996-NMCA-001, ¶ 4, 121 N.M. 191, 909 P.2d 751 (upholding a DWI conviction
9 based on behavior evidence when the defendant smelled of alcohol, and had
10 bloodshot, watery eyes, failed field sobriety tests, admitted to drinking alcohol, and
11 the defendant’s vehicle was weaving into other traffic lanes). Defendant admitted to
12 drinking two 16-ounce beers. Also present was a half-full handle of whiskey located
13 on the passenger side floorboard, which Defendant and her passenger indicated
14 Defendant had drank from. [BIC 2; RP 36] *See id.* Defendant then declined to
15 perform the standardized field sobriety tests and ultimately registered breath alcohol
16 levels of 0.23 and 0.24 grams per 210 liters of breath on an Intoxilyzer, well above
17 the legal limit. [BIC 2; RP 36] *See* UJI 14-4509 (requiring the state to prove as an
18 element of aggravated DWI that the defendant had an alcohol concentration of .16
19 grams or more in 210 liters of breath); *State v. Sanchez*, 2001-NMCA-109, ¶ 9, 131
20 N.M. 355, 36 P.3d 446 (“The [s]tate can use evidence of a driver’s refusal to consent

1 to the field sobriety testing to create an inference of the driver’s consciousness of
2 guilt.”). Consequently, we conclude Defendant has not met her burden in showing
3 that the alleged deficient performance of her trial counsel prejudiced her defense
4 and, therefore, affirm her convictions. *See Lukens*, 2019-NMSC-002, ¶ 19 (“A court
5 may dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice
6 to avoid deficient performance analysis if this simplifies disposition.” (internal
7 quotation marks and citation omitted)).

8 {6} **IT IS SO ORDERED.**

9
10 
J. MILES HANISEE, Judge

11 **WE CONCUR:**

12 
13 **KRISTINA BOCARDUS, Judge**

14 
15 **JANE B. YOHALEM, Judge**