

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Court of Appeals of New Mexico
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Mark Reynolds

No. A-1-CA-40097

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

SANDRA PERRY,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY

Tom Stewart, District Court Judge

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for Appellee

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OPINION

HENDERSON, Judge.

{1} Defendant Sandra Perry appeals the denial of her motion to suppress and her convictions for possession of a controlled substance (methamphetamine), in violation of NMSA 1978, Section 30-31-23(A) (2019, amended 2021); and possession of drug paraphernalia, in violation of NMSA 1978, Section 30-31-25.1(A) (2019, amended 2022). Defendant contends that the district court erred in denying her motion to suppress evidence obtained pursuant to a search of her truck by arguing that (1) the officer did not have probable cause to obtain a search warrant because the smell of marijuana could not support a finding of probable cause when possession of less than one-half ounce of marijuana was a penalty assessment rather than a criminal offense; and (2) Defendant's consent to search her truck was involuntary.

{2} This Court certified the question of whether the smell of marijuana alone can support a finding of probable cause for the search of a vehicle in light of New Mexico's progressive decriminalization of marijuana possession to our Supreme Court. *See* Rule 12-606 NMRA. Our Supreme Court accepted certification, holding that "the smell of marijuana alone can satisfy the probable cause requirement for a warrantless search . . . in the postdecriminalization, prelegalization setting"¹ under

¹The postdecriminalization, prelegalization setting refers to the brief period of

1 the Fourth Amendment of the United States Constitution. *State v. Perry*, ____-
2 NMSC-____, ¶¶ 2, 13, ____ P.3d ____ (S-1-SC-40187, July 9, 2025) (alteration, internal
3 quotation marks, and citations omitted). Our Supreme Court remanded the case to
4 this Court for proceedings consistent with their opinion. *Id.* ¶¶ 12-13. We now hold
5 that the smell of marijuana alone can satisfy the probable cause requirement for a
6 warrantless search in the postdecriminalization, prelegalization setting under Article
7 II, Section 10 of the New Mexico Constitution. We further hold that Defendant’s
8 consent was specific and unequivocal, and that the officer’s assertion of lawful
9 authority was justified because the officer in fact possessed probable cause, such that
10 any coerced consent does not mandate suppression. We accordingly affirm.

11 **BACKGROUND**

12 {3} In November 2020, Defendant’s truck was stopped by a Silver City Police
13 Department officer after committing several traffic infractions. The officer noticed
14 the smell of marijuana coming from the truck and asked Defendant for permission
15 to search the truck due to the smell of marijuana. Defendant did not respond, and the

time between the Legislature’s 2019 amendments to the Controlled Substances Act (CSA), which changed the penalty for possession of one-half ounce of marijuana or less from a petty misdemeanor punishable by a fine and imprisonment to a noncriminal penalty (a fine alone), § 30-31-23(B)(1), and the Legislature’s 2021 amendments to the same statute, which removed possession and recreational use of marijuana from the CSA in accordance with the Cannabis Regulation Act’s recently enacted marijuana legalization provisions. *See* NMSA 1978, § 26-2C-25(A)(1) (2021).

1 officer prompted her for “a yes or a no.” When Defendant hesitated, the officer
2 stated, “I can tell you what your options are: . . . because I can smell [marijuana] . . . ,
3 I can get a search warrant and tow [the truck] . . . so either you can allow me consent
4 now and deal with it or I can get a search warrant.” The officer then reasserted that
5 those were “the only two options” Defendant had. After more hesitation, Defendant
6 responded, stating, “Yes, I guess, I don’t know what else to do.” The officer then
7 asked, “You’re consenting for me to search the vehicle?” Defendant responded,
8 “Yeah, yeah I am.” During the search, the officer found a bag with a green substance,
9 seven glass pipes, two bags with white residue, and a bag with a white, crystalline
10 substance.

11 {4} Before trial, Defendant filed a motion to suppress the evidence obtained from
12 the search of the truck, arguing that (1) the officer did not have probable cause to
13 obtain a search warrant because the smell of marijuana could not support a finding
14 of probable cause when possession of less than one-half ounce of marijuana was a
15 penalty assessment rather than a criminal offense; and (2) the officer coerced
16 Defendant into consenting to the search. The district court denied Defendant’s
17 motion, finding that the smell of marijuana gave the officer probable cause to search
18 the truck even though the officer did not know how much marijuana was present. At
19 trial, the State introduced the evidence obtained pursuant to the search of the truck
20 and a jury convicted Defendant of all counts. Defendant appealed.

DISCUSSION

{5} Defendant argues that the district court erred in denying her motion to suppress because (1) there was no probable cause to support a search of the truck, and (2) her consent to the search of the truck was involuntary. We first address Defendant's probable cause argument.

I. Probable Cause

{6} Defendant contends that the smell of marijuana alone did not support the probable cause necessary for the officer to search the truck under the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution during the postdecriminalization, prelegalization period. Because our Supreme Court answered the initial question of whether the smell of marijuana alone satisfies the probable cause requirement for a warrantless search in the postdecriminalization, prelegalization setting under the Fourth Amendment of the United States Constitution, *Perry*, ___-NMSC-___, ¶¶ 2, 13, the question before us on remand from our Supreme Court is whether the smell of marijuana alone provided probable cause for a warrantless search of Defendant's truck under Article II, Section 10 of the New Mexico Constitution.

{7} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Paananen*, 2015-NMSC-031, ¶ 10, 357 P.3d 958 (internal quotation marks and citation omitted). "[W]e defer to the district court's factual

1 findings if they are supported by substantial evidence.” *State v. Lovato*, 2021-
2 NMSC-004, ¶ 14, 478 P.3d 927. Thus, we “review[] the application of the law to
3 those facts de novo.” *Id.* Additionally, we apply the interstitial approach when
4 analyzing a claim of broader rights under the New Mexico Constitution.² *See State*
5 *v. Gomez*, 1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1. “Under the interstitial
6 approach, the court asks first whether the right being asserted is protected under the
7 federal constitution. If it is, then the state constitutional claim is not reached. If it is
8 not, then the state constitution is examined.” *Id.* ¶ 19. The state constitution may
9 provide additional protections “for three reasons: a flawed federal analysis,
10 structural differences between state and federal government, or distinctive state
11 characteristics.” *Id.* We move directly to the second part of the interstitial analysis
12 in light of our Supreme Court’s conclusion in *Perry* that no protection exists under
13 the federal constitution.

14 {8} Under Article II, Section 10 of the New Mexico Constitution, law
15 enforcement may not perform a warrantless search of an automobile “[a]bsent
16 exigent circumstances or some other exception to the warrant requirement.” *State v.*

² We conclude that Defendant’s state constitutional issue was properly preserved—a matter the State does not contest—and adequately briefed for our consideration. *See Perry*, ____-NMSC-____, ¶ 12 (providing that “nothing precludes the Court of Appeals from itself considering the state constitutional issue upon remand, assuming that [the] Court were to establish that the issue was properly preserved in the district court and adequately briefed on direct appeal by the parties” (citation omitted)).

1 *Bomboy*, 2008-NMSC-029, ¶ 17, 144 N.M. 151, 184 P.3d 1045; *see State v. Rowell*,
2 2008-NMSC-041, ¶ 1, 144 N.M. 371, 188 P.3d 95 (“[A]bsent a valid exception to
3 the warrant requirement . . . a warrant is required for a search of an automobile under
4 Article II, Section 10 of the New Mexico Constitution.”). “These exceptions include
5 searches incident to arrest, exigent circumstances, hot pursuit, consent, inventory
6 searches, open field, and plain view.” *State v. Howl*, 2016-NMCA-084, ¶ 15, 381
7 P.3d 684.

8 {9} In *State v. Capps*, our Supreme Court held that “[t]he smell of marijuana alone
9 can satisfy the probable cause requirement for a warrantless search.” 1982-NMSC-
10 009, ¶ 12, 97 N.M. 453, 641 P.2d 484. Though Defendant acknowledges the
11 precedent set in *Capps*, she argues that we should diverge from federal constitutional
12 precedent and conclude that the New Mexico Constitution provides broader
13 protection because (1) *Capps* is based on a flawed federal analysis; and (2) since
14 *Capps*, New Mexico has reduced the penalties associated with the possession of
15 small amounts of marijuana—a distinctive state characteristic. We are unconvinced.

16 {10} First, Defendant argues that we should diverge from federal precedent because
17 the relevant holding in *Capps* involved the federal automobile exception to the
18 warrant requirement—a doctrine that New Mexico departed from in *Gomez*.³ In

³ Defendant also asserts that “the *Capps* holding regarding the smell of marijuana as sufficient alone to establish probable cause was supported by federal cases dealing with other warrantless searches, such as an automobile search at a

1 *Capps*, our Supreme Court held that the smell of marijuana alone satisfies the
2 probable cause requirement because, in part, the distinctive smell of an illicit
3 substance is evidence of a crime. 1982-NMSC-009, ¶ 12; *see State v. Sandoval*,
4 1979-NMCA-006, ¶ 5, 92 N.M. 476, 590 P.2d 175 (stating that “an odor sufficiently
5 distinctive to identify a forbidden substance might be evidence of the most
6 persuasive character”). In *Gomez*, our Supreme Court examined the automobile
7 exception under the New Mexico Constitution—adopting the interstitial approach,
8 *see* 1997-NMSC-006, ¶ 21, describing preservation requirements, *see id.* ¶¶ 22-32,
9 and clarifying that the broader rights afforded under New Mexico’s Constitution
10 “requires a particularized showing of exigent circumstances,” *id.* ¶ 39, *in addition to*
11 *probable cause*. Thus, our Supreme Court “reject[ed] the federal automobile
12 exception to the warrant requirement, . . . dismiss[ing] the notion that an individual
13 lowers [their] expectation of privacy when [they] enter[] an automobile, and elected
14 instead to provide motorists with a ‘layer of protection’ from unreasonable searches
15 and seizures that is unavailable at the federal level.” *State v. Cardenas-Alvarez*,
16 2001-NMSC-017, ¶ 15, 130 N.M. 386, 25 P.3d 225 (quoting *Gomez*, 1997-NMSC-

border checkpoint, and exigent circumstances.” However, Defendant does not explain why reliance on these cases demonstrates that *Capps* was based on a flawed federal analysis warranting this Court’s departure from its analysis. *See State v. Randy J.*, 2011-NMCA-105, ¶ 30, 150 N.M. 683, 265 P.3d 734 (declining to decide an undeveloped state constitutional argument). Accordingly, we decline to address this argument.

006, ¶ 38). Defendant argues that as a result of our Supreme Court’s holding in *Gomez*, “one of the primary bases for the holding in *Capps* has been rejected.” However, nothing in *Gomez* requires us to change how we determine what qualifies as probable cause. The broader protection under the New Mexico Constitution recognized in *Gomez* was based on the requirement of a “particularized showing of *exigent circumstances*.” 1997-NMSC-006, ¶ 39 (emphasis added). In this case, the officer’s warrantless search of Defendant’s truck was based on Defendant’s *consent* to the search. Further, Defendant fails to develop an argument as to how our Supreme Court’s reasoning in *Gomez* for departing from federal precedent—based on privacy expectations affording broader protections from unreasonable searches and seizures, *see id.* ¶ 38—would apply in the context of the consent exception at issue here. *See State v. Randy J.*, 2011-NMCA-105, ¶ 30, 150 N.M. 683, 265 P.3d 734. Thus, Defendant has not demonstrated that the holding in *Capps* is based on a flawed federal analysis, and we decline to depart from federal precedent on this ground.

{11} Second, Defendant argues that New Mexico’s progressive decriminalization of marijuana is a distinctive state characteristic warranting departure from federal precedent. However, as our Supreme Court stated in *Perry*: “[T]he decriminalization of possession of small amounts of marijuana in New Mexico did not alter the reality that the possession of marijuana in any amount continued to be unlawful during the decriminalization period—whether marijuana is viewed merely as *contraband* or

1 more broadly as *seizable evidence*.” ____-NMSC-____, ¶ 11 (citation omitted). We
2 accept our Supreme Court’s articulation of the status of marijuana in the
3 postdecriminalization, prelegalization setting. Thus, we conclude that Defendant has
4 not provided this Court with an argument sufficient to warrant departure from federal
5 constitutional law, and we confirm that the smell of marijuana alone can constitute
6 probable cause for a warrantless search in the postdecriminalization, prelegalization
7 period under Article II, Section 10 of the New Mexico Constitution.

8 **II. Consent**

9 {12} Next, Defendant claims that the district court erred in concluding that
10 Defendant voluntarily consented to the search of her truck, such that the district
11 court’s denial of her motion to suppress warrants reversal. Specifically, Defendant
12 argues that her consent was not specific and unequivocal and that she was coerced
13 into consenting to the search of her truck when the officer told her that she had “two
14 options”—to consent to a search or the officer would obtain a search warrant.

15 {13} “When a person voluntarily consents to a search, it is lawful regardless of
16 whether the officer had constitutional justification to conduct an unwarranted
17 search.” *State v. Olson*, 2012-NMSC-035, ¶ 18, 285 P.3d 1066. “Whether consent
18 to search is voluntary is a question of fact that depends on the totality of the
19 circumstances.” *Lovato*, 2021-NMSC-004, ¶ 15. “The district court must weigh the
20 evidence and decide if it is sufficient to clearly and convincingly establish that the

1 consent was voluntary.” *Id.* (internal quotation marks and citation omitted).
2 “Voluntariness is evaluated utilizing a three-tiered analysis: (1) there must be clear
3 and positive testimony that the consent was specific and unequivocal; (2) the consent
4 must be given without duress or coercion; and (3) the first two factors are to be
5 viewed in light of the presumption that disfavors the waiver of constitutional rights.”
6 *Id.* (internal quotation marks and citation omitted). “Ultimately, the essential inquiry
7 is whether the defendant’s will has been overborne.” *Id.* (alteration, internal
8 quotation marks, and citation omitted).

9 {14} Here, Defendant ultimately gave specific and unequivocal consent. After
10 smelling marijuana, the officer first asked for permission to search the truck and after
11 Defendant did not respond, the officer prompted her for “a yes or a no.” When
12 Defendant hesitated, the officer stated, “I can tell you what your options are: . . .
13 because I can smell [marijuana] . . . , I can get a search warrant and tow [the
14 truck] . . . so either you can allow me consent now and deal with it or I can get a
15 search warrant.” Defendant eventually responded, “Yes, I guess, I don’t know what
16 else to do.” The officer then asked, “You’re consenting for me to search the
17 vehicle?” Defendant responded, “Yeah, yeah I am.” Because Defendant gave
18 specific and unequivocal consent, we turn next to the issue of coercion. *See Lovato*,
19 2021-NMSC-004, ¶ 15.

1 {15} “When an officer unequivocally asserts that [they] will be able to obtain a
2 warrant, a defendant’s belief that refusal to consent would be futile demonstrates
3 involuntary consent.” *State v. Davis*, 2013-NMSC-028, ¶ 23, 304 P.3d 10. However,
4 even when “an officer’s statements amount to an unequivocal assertion that a search
5 warrant will be obtained, such an assertion does not vitiate subsequent consent
6 provided there is probable cause to support a warrant.” *Lovato*, 2021-NMSC-004,
7 ¶ 22. “[I]t is not enough that the threat to obtain a search warrant is made in good
8 faith; there must *in fact* be probable cause.” *Id.* (internal quotation marks and citation
9 omitted); *see State v. Ochoa*, 2004-NMSC-023, ¶ 9, 135 N.M. 781, 93 P.3d 1286
10 (“Probable cause exists when the facts and circumstances warrant a belief that the
11 accused had committed an offense, or is committing an offense.”). Even assuming
12 without deciding that Defendant’s consent was coerced in light of the officer’s
13 assertions that she would obtain a search warrant if Defendant did not consent, we
14 discern no error.

15 {16} While evidence obtained as a result of a coerced consent must generally be
16 suppressed, our Supreme Court has made an exception in cases where “the officer
17 in fact possessed probable cause to search or, in other words, where an assertion of
18 lawful authority was justified.” *Lovato*, 2021-NMSC-004, ¶ 21. In this case, the
19 officer had probable cause to support a search warrant. After stopping Defendant,
20 the officer noticed the smell of marijuana coming from Defendant’s truck and, as we

1 discussed above, the smell of marijuana alone can satisfy the probable cause
2 requirement for a warrantless search under Article II, Section 10 of the New Mexico
3 Constitution. The officer's assertion that she would obtain a search warrant if
4 Defendant did not let the officer search Defendant's truck was supported by actual
5 probable cause—the smell of marijuana. *See Capps*, 1982-NMSC-009, ¶ 12. Thus,
6 because the officer had probable cause, Defendant's subsequent consent was
7 sufficient to satisfy a warrantless search of Defendant's vehicle under our Supreme
8 Court precedent. *See Lovato*, 2021-NMSC-004, ¶ 22. Therefore, we cannot say that
9 the district court erred by denying Defendant's motion to suppress.

10 **CONCLUSION**

11 {17} Based on the foregoing, we affirm.

12 {18} **IT IS SO ORDERED.**

13
14 

SHAMMARA H. HENDERSON, Judge

15 **WE CONCUR:**

16 
17 _____
JENNIFER L. ATTKER, Judge

18 
19 _____
GERALD E. BACA, Judge