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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Mark Reynolds

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v. **No. A-1-CA-43004**

EZEKIEL HINOJOS,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
Michael H. Stone, District Court Judge

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for Appellee

MEMORANDUM OPINION

HENDERSON, Judge.

{1} The State appeals the district court's order granting Defendant's motion to suppress evidence. In this Court's notice of proposed disposition, we proposed to summarily affirm. The State filed a memorandum in opposition, which we have duly considered. Remaining unpersuaded, we affirm.

{2} In our proposed disposition, we considered whether the deputy's questioning of Defendant amounted to an improper expansion of the deputy's scope of inquiry beyond the circumstances that justified the initial traffic stop. [CN 4] We analyzed the question under the New Mexico Constitution, which allows for questions unrelated to the initial stop only when they are supported by independent reasonable suspicion, for reasons of officer safety, or as part of a consensual encounter. [CN 6] In its memorandum in opposition, the State continues to assert that the deputy involved in Defendant's arrest properly expanded the scope of the traffic stop based on either reasonable suspicion or for reasons of officer safety. [MIO 5]

{3} As to reasonable suspicion, in the district court, the State articulated that the basis for suspicion of criminal activity was the deputy's visual scan of Defendant that occurred after the consensual search of the vehicle had concluded. [DS 4, 6; RP 109-110] On appeal, however, the State asserts the deputy had independent reasonable suspicion of criminal activity based on his observation of Defendant inside the car. [MIO 8] Specifically, the State points to the deputy's observation that Defendant dropped something from a napkin while sitting in the passenger seat. [MIO 3 n. 1, 9]

{4} "[R]easonable suspicion is a particularized suspicion, based on all the circumstances, that a particular individual[—]the one detained[—]is breaking, or has broken, the law." *State v. Garcia*, 2009-NMSC-046, ¶ 43, 147 N.M. 134, 217 P.3d

1032 (alteration, internal quotation marks, and citation omitted). "Reasonable suspicion must consist of more than an officer's hunch that something is amiss; it requires objectively reasonable indications of criminal activity." *State v. Leyva*, 2011-NMSC-009, ¶ 23, 149 N.M. 435, 250 P.3d 861; *see id.* ¶ 24 ("[W]e underscore that the requirement of reasonable suspicion demands objective and articulable observations that indicate further police action is necessary."). Although we review determinations of reasonable suspicion de novo on appeal, we do not sit as a trier of fact, and we view the facts in the manner most favorable to the prevailing party, deferring to the district court's factual determinations where there is substantial evidence to support them. *State v. Urioste*, 2002-NMSC-023, ¶ 6, 123 N.M. 592, 52 P.3d 964.

{5} The deputy in this case saw something that looked like a napkin in Defendant's hand; when asked, Defendant showed the deputy the napkin, and the deputy saw "something" fall out of the napkin. [CN 11] The State emphasizes that the deputy also testified to having witnessed Defendant "kind of throw something underneath his seat." [MIO 8] The State also asserts that a reasonable officer could infer from those circumstances that Defendant was attempting to hide contraband. [MIO 9] Under these circumstances, we disagree.

{6} As discussed in our proposed disposition, the deputy did not testify to what he thought the something was or whether something being held in a napkin was, in his

experience, indicative of any criminal activity. [CN 11] In addition, the deputy did not testify to having any specialized training or familiarity with scenarios like this that might allow him to make reasonable inferences regarding the presence of drugs or weapons at the scene. [CN 12] *See State v. Neal*, 2007-NMSC-043, ¶ 21, 142 N.M. 176, 164 P.3d 57 (recognizing that officers may draw from experience and specialized training to make inferences and deductions that might otherwise elude an untrained person, but that "does not mean that unsupported intuition and inarticulate hunches are sufficient to constitute reasonable suspicion justifying a detention" (text only) (citation omitted)). The State has not identified anywhere in the record where the deputy suggested that Defendant's demeanor was out of the ordinary or indicated he had reason to believe Defendant's demeaner was consistent with criminal activity.

{7} Based on the foregoing, the deputy's suspicion of criminal activity was little more than a hunch; the State has not identified facts in the record indicating the deputy had an objectively reasonable factual basis to believe that Defendant was breaking or had broken the law. *See State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (noting that a conclusion based on a logical inference that "must be buttressed by surmise and conjecture" cannot stand (internal quotation marks and citation omitted)); *cf. Bowman v. Inc. Cnty. of Los Alamos*, 1985-NMCA-040, ¶ 9, 102 N.M. 660, 699 P.2d 133 ("An inference is more than a supposition or conjecture. It is a

logical deduction from facts which are proven, and guess work is not a substitute therefor." (internal quotation marks and citation omitted)). Accordingly, we affirm the district court's determination that independent reasonable suspicion did not exist for the deputy to question Defendant under the facts of this case. [RP 116]

{8} Next, we turn to the State's assertion that concern for officer safety justified the deputy's questioning of Defendant. [MIO 2, 6] An officer may conduct a limited search for weapons upon a reasonable suspicion that the suspect might be armed and presently dangerous. *State v. Ketelson*, 2011-NMSC-023, ¶ 15, 150 N.M. 137, 257 P.3d 957. In assessing this issue, "we must balance the threat posed to officer safety under the circumstances[] against the individual's right to personal security free from arbitrary interference by law officers." *State v. Vandenberg*, 2003-NMSC-030, ¶ 23, 134 N.M. 566, 81 P.3d 19 (internal quotation marks and citation omitted). Our test in reviewing actions attributed to officer safety is an objective one. *See Leyva*, 2011-NMSC-009, ¶ 25.

{9} As discussed in our proposed disposition, Defendant was a passenger in a car stopped for traffic violations. [CN 2] The deputy testified that he did not conduct a pat down search of Defendant or the driver when they got out of the car, but he instead made a visual inspection and did not detect any weapons. [CN 13] The deputy did not initially conduct any inquiry into visible bulges in Defendant's socks while conversing with Defendant outside the car during what he characterized as a

casual conversation. [CN 13; MIO 3-4] Defendant was not placed in handcuffs or otherwise restrained, and the officer did not testify that Defendant made any furtive movements while outside the car or exhibited an aggressive demeanor. [CN 13] There was also no testimony that Defendant was known to have a history of confrontations with police. [CN 13] The deputy testified that he thought the bulges in Defendant's socks could have been knives because they looked long and thin, but he also testified that he was not sure what the bulges were. [CN 13]

{10} The State points to the deputy's testimony that he noticed the bulge in Defendant's sock during an "initial scan" of Defendant and asserts that the deputy asked Defendant about the bulges "imminently after his initial visual scan." [MIO 7 (text only)] The deputy also testified that he acted out of concern for his safety. [Id.] According to the State, based on the deputy's testimony that the long, thin item in Defendant's sock could be a knife, the deputy was permitted to question Defendant. [Id.] Again under the circumstances of this encounter, we disagree.

{11} Insofar as the State asserts the deputy questioned Defendant out of concern for officer safety immediately after an initial visual inspection based on his belief that the bulges could have been knives, we note that the State also recognizes that after Defendant got out of the car, there was time for two other police officers to begin their search of the car and for Defendant and the deputy to engage in casual conversation. [MIO 3-4] The deputy also admitted he was not sure what the bulges

were, and claimed that law enforcement's interactions with Defendant were casual. [RP 108; MIO 3-4]

{12} While the State is correct in its assertion that matters of officer safety "are not subject to a temporal limit," [MIO 6] it fails to recognize conflicts in the deputy's testimony or that the deputy's testimony was subject to a credibility determination. [CN 13-14] *See Neal*, 2007-NMSC-043, ¶ 15 (observing, with respect to suppression orders, that on appeal "we do not sit as trier of fact" and "the district court has the best vantage from which to resolve questions of fact and to evaluate witness credibility"); *State v. Jason L.*, 2000-NMSC-018, ¶ 11, 129 N.M. 119, 2 P.3d 856 (recognizing that when evidence conflicts, we "will draw all inferences and indulge all presumptions in favor of the district court's ruling"). We therefore conclude that substantial evidence supports the district court's implicit determination that the deputy did not question Defendant out of any pressing concern for officer safety. *Cf. Vandenberg*, 2003-NMSC-030, ¶ 23 (recognizing that the purpose of a protective frisk for weapons is to allow an officer to conduct an investigation without fear of violence). Viewing the evidence in the light most favorable to the district court's decision, *see Urioste*, 2002-NMSC-023, ¶ 6, we conclude that the State has not demonstrated that the deputy had an objectively reasonable belief that Defendant posed a threat to officer safety. *See State v. Martinez*, 2019-NMCA-063, ¶ 18, 450 P.3d 405 (concluding that the state failed to present evidence of additional

articulable facts of potential danger to support a protective search as part of a traffic stop).

{13} Additionally, we note that to the extent the State previously asserted that the encounter between Defendant and the deputy was consensual, it has abandoned that argument. [DS 6; MIO 5] *See State v. Johnson*, 1988-NMCA-029, ¶ 8, 107 N.M. 356, 758 P.2d 306 (recognizing that when a case is decided on the summary calendar, an issue is deemed abandoned when a party fails to respond to the proposed disposition of that issue).

{14} For the reasons stated in our notice of proposed disposition and herein, we affirm.

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

SHAMMARA H. HENDERSON, Judge

WE CONCUR:

J. MILES HANISEE, Judge

GERALD E. BACA, Judge