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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. 34,186

MARCOS AMAYA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Briana Zamora, District Judge

Hector H. Balderas, Attorney General

Santa Fe, NM

for Appellant

Jorge A. Alvarado, Chief Public Defender

Sergio J. Viscoli, Assistant Appellate Defender

Santa Fe, NM

for Appellee

MEMORANDUM OPINION

BUSTAMANTE, Judge.

1 {1} Defendant appeals his metropolitan-court conviction for driving under the
2 influence (“DWI”) in violation of NMSA 1978, Section 66-8-102 (2004), which was
3 affirmed by the district court. We issued a notice of proposed disposition proposing
4 to affirm, and Defendant has responded with a memorandum in opposition. We have
5 carefully considered the arguments raised in the memorandum in opposition, but
6 continue to believe that affirmance is the correct result in this case. Therefore, for the
7 reasons stated below and in our notice of proposed disposition, we affirm.

8 {2} As we discussed in the notice of proposed disposition, the dispositive question
9 in this case is the temporal length of the deprivation period that occurred prior to the
10 administration of the breath test. If that deprivation period was less than twenty
11 minutes long, it would be a violation of the applicable regulations; on the other hand,
12 if the period was twenty or more minutes, the regulations were complied with and
13 there was no reason for the metropolitan court to disregard the breath-test results. In
14 our notice we pointed out the evidence relied on by the district court in its opinion
15 affirming Defendant’s conviction. This evidence consisted of the arresting officer’s
16 testimony that he recorded a deprivation period of 19 minutes, recording the end of
17 the period at the same time the breath-test machine began to warm up. [RP 75] The
18 officer also testified that the machine takes two minutes to warm up and run through
19 its diagnostic checks. [RP 75] Thus, the district court found that the deprivation period

1 in this case was twenty-one minutes, greater than the twenty minutes specified by the
2 regulations. [RP 75]

3 {3} In response to our notice, Defendant does not claim that the above testimony
4 was not presented to the metropolitan court. However, he maintains that the officer
5 said in his pretrial interview that the deprivation period was nineteen minutes long,
6 recorded a deprivation period of nineteen minutes in his police report, and at trial
7 initially testified that the period was nineteen minutes long. [MIO 16] Defendant states
8 that the officer then contradicted that testimony during the re-direct examination,
9 pursuant to coaching from counsel for the State; counsel for the State apparently
10 directed the officer's attention to the time recorded for the initiation of the deprivation
11 period, or 1:26 a.m., and the time stated on the breath-test card for the first test, or
12 1:48 a.m. [MIO 16, 17]

13 {4} Defendant in effect requests that we disregard the testimony the officer gave
14 during the re-direct examination, because in his view that testimony conflicts with the
15 officer's earlier statements and testimony. However, we are aware of no authority that
16 would allow us to do so. On appeal we view the evidence in the light most favorable
17 to the decision reached below, resolving all conflicts in the testimony in favor of that
18 decision and drawing all reasonable inferences in support of the decision. *See State*
19 *v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057. Doing so, we view

1 the testimony in the following manner: although the recorded deprivation period was
2 nineteen minutes long, the breath test was not administered immediately after the
3 expiration of the recorded deprivation period. Instead, it was administered after the
4 test machine warmed up and went through its diagnostic checks, a process that took
5 two minutes and that was not started until the official deprivation period ended.
6 Therefore, there was evidence to support the metropolitan court's determination that
7 the actual deprivation period, as opposed to the recorded period, was greater than the
8 twenty minutes required by the regulations.

9 {5} Defendant again argues that if the breath-test results are excluded, the evidence
10 was insufficient to convict him of DWI. Since we are affirming the metropolitan
11 court's refusal to exclude those results, this argument is moot.

12 {6} Based on the foregoing discussion and on the analysis set out in the notice of
13 proposed disposition, we affirm Defendant's conviction for DWI.

14 {7} **IT IS SO ORDERED.**

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16

MICHAEL D. BUSTAMANTE, Judge

17 **WE CONCUR:**

18

19 **MICHAEL E. VIGIL, Chief Judge**

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2 **LINDA M. VANZI, Judge**