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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

No. 34,648

5 **AMANDA COLE,**

6 Defendant-Appellant.

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

8 **John A. Dean, Jr., District Judge**

9 Hector H. Balderas, Attorney General

10 Maris Veidemanis, Assistant Attorney General

11 Santa Fe, NM

12 for Appellee

13 McGarry Law Office

14 Kathleen McGarry

15 Glorieta, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **ZAMORA, Judge.**

1 {1} Amanda Cole (Defendant) was charged with trafficking a controlled substance,
2 methamphetamine, and possession of drug paraphernalia. Defendant filed a motion
3 to suppress evidence retrieved from her flip cell phone that was discovered during a
4 search of the vehicle in which she was a passenger. Defendant claimed that the
5 officers did not possess a valid warrant, and therefore seizure of the cell phone
6 violated her Fourth Amendment rights under the U.S. Constitution, as well as the
7 protections of Article II, § 10 of the New Mexico Constitution. The motion to
8 suppress was denied. Defendant entered a conditional guilty plea for trafficking, but
9 reserved the right to appeal the denial of the suppression motion. We affirm the
10 district court's denial of Defendant's motion.

11 **I. BACKGROUND**

12 {2} Defendant was a passenger in the back seat of a vehicle owned and driven by
13 Kenneth Burrows (Burrows), who was under investigation by law enforcement for
14 trafficking methamphetamine and cocaine. During the investigation, officers worked
15 with a confidential informant (CI) to conduct controlled purchases of drugs. As a
16 result of the initial investigation, a search warrant was obtained to stop and search
17 Burrows's vehicle. When the vehicle was stopped, there were three individuals inside,
18 including Burrows, who was sitting in the driver's seat, his girlfriend who was in the
19 passenger seat, and Defendant who was in the back seat on the passenger side. The

1 officers discovered that Defendant was the subject of an out-of-state arrest warrant.

2 All three occupants and the vehicle were taken to the police station.

3 {3} When the vehicle was searched, pursuant to the search warrant, officers found
4 multiple cell phones, drugs, drug paraphernalia, guns, and money. The cell phones,
5 made up of both flip phones and smart phones, were discovered on the floorboard of
6 the front passenger seat. Agent Jacob Sanchez, a deputy with the San Juan County
7 Sheriff's Office assigned to the Region II Narcotics Task Force, opened the phones
8 in order to find out who owned them. Agent Sanchez discovered that one of the flip
9 cell phones belonged to Defendant. When Agent Sanchez opened Defendant's flip cell
10 phone, he observed text messages concerning drug trafficking. He then closed the cell
11 phone and put it with the other items seized as a result of the stop. Agent Sanchez
12 stated that a second search warrant was sought for the cell phones because it is the
13 procedure followed when cell phones are seized.

14 {4} Defendant filed a motion to suppress evidence taken from her flip cell phone.
15 Defendant argued that the officers' actions in opening her flip cell phone and using
16 information obtained from the cell phone to seek a second warrant to search her flip
17 cell phone amounted to an illegal search. Defendant claimed that the first warrant did
18 not apply to her or her property, and the second warrant was based on illegally-seized
19 evidence. In denying Defendant's motion, the district court found that Defendant did

1 not challenge the legality of the search warrant or the traffic stop related to Burrows
2 and his vehicle. The district court also found that multiple “unknown cell phones”
3 were located on the floorboard of the front passenger seat, and that law enforcement
4 officers did not remove the cell phones from the occupants’ person, nor did they order
5 them to leave their phones in the vehicle. The district court further found that Agent
6 Sanchez opened “what turned out to be Defendant’s flip cell phone in order to
7 determine who it belonged to”; a message “on what turned out to be Defendant’s flip
8 cell phone was immediately visible on the screen when opened; it contained
9 information associated with drug trafficking”; and Agent Sanchez “immediately
10 closed what turned out to be Defendant’s [flip] cell phone” and sought a search
11 warrant for the cell phone.

12 **II. DISCUSSION**

13 **A. Abandonment**

14 (5) The district court denied Defendant’s suppression motion, concluding that
15 Defendant did not have a legitimate expectation of privacy in her flip cell phone
16 because “she exited the vehicle and left her [flip] phone in the vehicle without taking
17 any steps to protect or safeguard its contents.” In other words, the district court
18 determined that Defendant abandoned her flip cell phone. We review de novo the
19 district court’s conclusion of law. *See State v. Celusniak*, 2004-NMCA-070, ¶ 27, 135

1 N.M. 728, 93 P.3d 10. On appeal, this Court may independently draw its own
2 conclusions of law. *See Bounds v. State ex rel. D'Antonio*, 2011-NMCA-011, ¶ 33,
3 149 N.M. 484, 252 P.3d 708.

4 {6} Abandonment is based on actions and intent, and the intent to abandon must be
5 shown by clear and unequivocal evidence. *See Celusniak*, 2004-NMCA-070, ¶ 26. The
6 basic question is whether Defendant disclaimed ownership of the cell phone or
7 physically relinquished it. *See id.* ¶ 28. Here, there is nothing to indicate that
8 Defendant denied ownership of the cell phone or was even asked if the cell phone
9 belonged to her. *See id.* ¶ 34 (pointing out that an officer can easily verify ownership
10 of an item by asking, and an officer should make such an inquiry before assuming that
11 the item is abandoned). There is no evidence in the record to show that Defendant left
12 the cell phone in the vehicle with the intent to abandon it. As a result, we hold that the
13 district court erred in concluding that Defendant abandoned the cell phone. *See id.*
14 ¶¶ 32-33 (holding that abandonment was not supported where the defendant did not
15 toss the purse out the window, did not leave it in a public place, was not fleeing when
16 she left the purse, and did not put the purse in a place where the defendant had no
17 plans of returning).

18 {7} However, this Court can uphold the district court's denial of the motion to
19 suppress if it is right for any reason. *See State v. Gallegos*, 2007-NMSC-007, ¶ 26,

1 141 N.M. 185, 152 P.3d 828 (stating that an appellate court will affirm a district
2 court’s decision if it is right for any reason, so long as it is not unfair to the appellant);
3 *State v. Wilson*, 1998-NMCA-084, ¶ 17, 125 N.M. 390, 962 P.2d 636 (stating that
4 fairness “tempers” the precept of affirming a decision of the district court as right for
5 any reason). Based on our review of the first affidavit for a search warrant, we
6 conclude that there already existed probable cause to search all cell phones found in
7 the vehicle.

8 **B. There Was Probable Cause to Search Defendant’s Flip Cell Phone**

9 {8} Defendant claims that the first search warrant did not cover her flip cell phone
10 because she was not specifically named in the affidavit or warrant. The district court
11 concluded that the search warrant did not specify Defendant’s flip cell phone and did
12 not contain probable cause to justify the search of her cell phone. We disagree.

13 {9} On review of the issuing court’s determination of probable cause when issuing
14 a warrant, “the reviewing court must determine whether the affidavit as a whole, and
15 the reasonable inferences that may be drawn therefrom, provide a substantial basis for
16 determining that there is probable cause to believe that a search will uncover evidence
17 of wrongdoing.” *State v. Williamson*, 2009-NMSC-039, ¶ 29, 146 N.M. 488, 212 P.3d
18 376 (overruling in part all previous case law to the extent that the cases applied a de
19 novo rather than substantial basis standard of review). On review, we consider the

1 information within the four corners of the affidavit submitted in support of a search
2 warrant. *See id.* ¶ 31. “[A]n issuing court’s determination of probable cause must be
3 upheld if the affidavit provides a substantial basis to support a finding of probable
4 cause.” *Id.* ¶ 29. There is probable cause when there is a reasonable basis to believe
5 an offense has been or is being committed in the place that is the subject of the search
6 warrant. *Id.* “[T]he substantial basis standard of review is more deferential than the de
7 novo review applied to questions of law, but less deferential than the substantial
8 evidence standard applied to questions of fact.” *Id.* ¶ 30. Thus, “if the factual basis for
9 the warrant is sufficiently detailed in the search warrant affidavit and the issuing court
10 has found probable cause, the reviewing courts should not invalidate the warrant by
11 interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.”
12 *Id.* (alteration, internal quotation marks, and citation omitted). Here, the district court
13 that issued the first search warrant found, based on the affidavit, that there was
14 probable cause to search the person, place, and property described in the affidavit, and
15 we give deference to the issuing court’s determination.

16 **1. First Affidavit for Search Warrant and Corresponding Search Warrant**

17 {10} Agent Sanchez prepared the affidavit for the first search warrant of the vehicle
18 owned and driven by Burrows, a silver Dodge Challenger. The search warrant was
19 executed on May 16, 2014, by a district court judge and authorized a nighttime search.

1 The affidavit described Burrows, the vehicle that he would be driving into New
2 Mexico from California, though the timing was unknown, and stated that the items
3 believed to be concealed in the vehicle included methamphetamine and narcotics,
4 paraphernalia, money, and items related to the sale of narcotics and
5 methamphetamine. The affidavit included requests to detain and search “any
6 occupants of the vehicle . . . proven to have a nexus with [the] person in control at the
7 time.” A detailed explanation of the use of cell phones in operations involving drug
8 distribution was included, as well as an explanation for why the information contained
9 in cell phones often indicates “who are suppliers or users of illegal drugs.” Through
10 training and experience, Agent Sanchez learned that drug distributors often use more
11 than one cell phone in their transactions. The affidavit further explained the lengthy
12 process involved in searching cell phones, computers, and other electronic storage
13 devices. Agent Sanchez requested “authority to search for cellular telephones and to
14 search for such information pertaining to the distribution of controlled substances.”

15 {11} In addition to the detailed information described above, the affidavit also
16 contained a section based on the particular investigation in this case. *See State v.*
17 *Hinahara*, 2007-NMCA-116, ¶ 21, 142 N.M. 475, 166 P.3d 1129 (stating that a search
18 warrant was sufficiently particular when all items sought under the warrant were
19 potentially connected to the crimes being investigated as described in the affidavit).

1 The search warrant affidavit included a very detailed description of surveillance of
2 Burrows and controlled purchases between the CI and Burrows during which audio
3 recordings, photographs, text messages, and information regarding contacts via cell
4 phones were collected. The information gathered by the CI and included in the
5 affidavit indicated that Burrows and his girlfriend planned to travel to California to
6 get a “big load” of dope that would be the best the CI ever had. The officers planned
7 to “conduct a traffic stop as [the vehicle] enter[ed] into San Juan County.” It was
8 around 10:00 p.m. when the officers identified and stopped the vehicle on its return
9 from California. The occupants inside the vehicle were Burrows, his girlfriend, and
10 Defendant. The vehicle was secured and taken to the Farmington Police Department
11 to execute the search warrant.

12 {12} The place to be searched in this case was a silver Dodge Challenger vehicle,
13 described in detail in the affidavit for search warrant. The search warrant applied to
14 the entire vehicle and the contents as described in the affidavit. There was reason to
15 believe that “methamphetamine/narcotics, paraphernalia, money and contraband, as
16 well as evidence relating to the sale of methamphetamine and/or other illegal
17 narcotics” were located in the vehicle. The warrant was not limited to a particular
18 person or a particular person’s property. Instead, the warrant included any and all cell
19 phones found in the vehicle. The affiant described the cell phones they believed would

1 be inside the vehicle as containing information “such as contact names, telephone
2 numbers, and text messages” related to drug trafficking. The affidavit specifically
3 requested authority “to search for cellular telephones and to search for such
4 information pertaining to the distribution of controlled substances.” Within the
5 investigation portion of the affidavit, it was stated that the CI had exchanged text
6 messages with Burrows while he was en route to New Mexico. The CI had cell phone
7 numbers for both Burrows and Burrows’s girlfriend.

8 {13} All the cell phones discovered during the search were located on the floorboard
9 of the front passenger side of the vehicle. Based on the district court’s findings, there
10 was no indication that the officers knew who owned the cell phones found in the
11 vehicle, or why all of the cell phones were found on the floorboard of the front
12 passenger seat. Burrows’s girlfriend, who had been sitting in the front passenger seat,
13 told the officers that whatever was found in the vehicle belonged to her. No other
14 occupant of the vehicle claimed ownership of any of the items found inside, and the
15 cell phones were not taken from the possession of any of the occupants. *Cf. State v.*
16 *Light*, 2013-NMCA-075, ¶¶ 43-45, 306 P.3d 534 (explaining that in situations
17 involving automobile searches, drivers and passengers possess a reduced expectation
18 of privacy in property they transport in vehicles, as opposed to the search of a building

1 in which the personal property of a person not subject to the search warrant has been
2 stored on premises that are open to the public).

3 {14} Defendant claims that she opposed the validity of the affidavit because the
4 language used in the affidavit was boilerplate language, though she never specified
5 what part of the affidavit she considered boilerplate language. As discussed above, the
6 search warrant included some broad statements, but also included specific and detailed
7 statements regarding surveillance during the investigation and the communications
8 between the subjects of the surveillance. This specific information sufficiently tied the
9 cell phones to the drug trafficking operation that was the subject of the investigation.

10 {15} The statements in the affidavit for the first search warrant, along with
11 reasonable inferences derived from those statements, provide a substantial basis to
12 support a determination of probable cause to support the search of the entire vehicle
13 for the type of evidence described in the affidavit, including “cellular telephones and
14 . . . information pertaining to the distribution of controlled substances.” Thus, the first
15 search warrant provided the officer with the authority to open the cell phones and look
16 for information connected to the trafficking investigation. Agent Sanchez opened the
17 cell phones only to determine who owned them and when doing so, he observed
18 information on the flip cell phone screen that appeared to be connected to the drug
19 trafficking investigation. The officer acted under the authority of the first search

1 warrant when he opened the cell phones. For that reason, the district court’s decision
2 to deny Defendant’s suppression motion was correct.

3 {16} Defendant further argues that the State admitted at the motion to suppress
4 hearing that there was no probable cause in the first affidavit to justify a search of
5 Defendant’s flip cell phone. However, this Court is not bound by any concessions the
6 State may have made at the district court, and as noted, we have conducted our own
7 analysis. *See State v. Caldwell*, 2008-NMCA-049, ¶ 8, 143 N.M. 792, 182 P.3d 775
8 (“This Court . . . is not bound by the [s]tate’s concession and we conduct our own
9 analysis[.]”).

10 {17} In passing, Defendant suggested in her motion to suppress and now on appeal
11 that the seizure of her flip cell phone violated “the greater protections of Article II, §
12 10 of the New Mexico Constitution.” Beyond that statement Defendant never
13 develops a supporting argument nor does she provide any legal authority to support
14 this statement. “[T]his Court’s policy is to refrain from reviewing unclear or
15 undeveloped arguments [that] require us to guess at what [a party’s] arguments might
16 be”; thus, we decline to review this undeveloped argument any further. *State v.*
17 *Urioste*, 2011-NMCA-121, ¶ 29, 267 P.3d 820 (internal quotation marks and citation
18 omitted).

19 **2. Second Affidavit for Search Warrant and Corresponding Search Warrant**

1 {18} We note that after the officer opened the cell phones in order to determine who
2 owned them, a second search warrant was obtained to search the cell phones. While
3 the first search warrant provided authority to open the cell phones to search for
4 evidence of drug trafficking, the second search warrant, although not technically
5 necessary, provided additional authority to conduct a search for such information
6 pertaining to the distribution of controlled substances.

7 **III. CONCLUSION**

8 {19} We hold that Defendant did not abandon the flip cell phone, and that Agent
9 Sanchez was properly acting under authority of the first search warrant when he
10 opened the flip cell phone to determine ownership. We affirm the district court's
11 denial of Defendant's motion to suppress the evidence taken from the flip cell phone.

12 {20} **IT IS SO ORDERED.**

13
14

M. MONICA ZAMORA, Judge

15 **WE CONCUR:**

16
17

JAMES J. WECHSLER, Judge

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19

J. MILES HANISEE, Judge