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

7 **CITY OF RIO RANCHO,**

8 Plaintiff-Appellee,

9 v.

**NO. 31,094**

10 **WAYNE KING,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY**

13 **John F. Davis, District Judge**

14 City of Rio Rancho  
15 Gina R. Manfredi, City Attorney  
16 Rio Rancho, NM

17 for Appellee

18 Fuentes & Associates, P.C.  
19 Robert R. Fuentes  
20 Rio Rancho, NM

21 for Appellant

22 **MEMORANDUM OPINION**

23 **VANZI, Judge.**

1 Defendant appeals his conviction for DWI, third offense. We proposed to  
2 affirm in a calendar notice, and we have received a memorandum in opposition as well  
3 as a supplemental memorandum in opposition to our notice. We have duly considered  
4 Defendant's arguments, but we find them unpersuasive. We affirm.

5 In his memorandum in opposition, Defendant continues to make arguments  
6 previously made in the docketing statement, including claims that he was denied his  
7 right to a jury trial, he should have been given *Miranda* warnings, the city ordinance  
8 and state statute are in conflict with each other, and his refusal to submit to chemical  
9 testing was testimonial. We pointed out that similar arguments were addressed in *City*  
10 *of Rio Rancho v. Mazzei*, 2010-NMCA-054, 148 N.M. 553, 239 P.3d 149, *cert.*  
11 *denied*, 2010-NMCERT-005, 148 N.M. 575, 240 P.3d 1049, and we proposed to  
12 affirm on that basis. To the extent that Defendant provides new argument and new  
13 authority for his claims, we address those claims below.

14 Defendant claims that "*Mazzei* . . . does not address the argumentation  
15 advanced by [Defendant]" and that *Mazzei*, "if announced today, would be in error."  
16 [MIO 2, 10] We disagree with Defendant's contentions that certain cases decided  
17 prior to *Mazzei* call the holding in *Mazzei* into doubt. The facts and legal questions  
18 addressed in *Mazzei* were different from the circumstances in the older cases referred  
19 to by Defendant. On the other hand, the situation in *Mazzei* is almost identical to that

1 in this case, and *Mazzei* directly addresses the issues raised by Defendant in this  
2 appeal.

3 In this case, Defendant either uttered words or remained silent when asked if  
4 he would consent to be tested. Defendant's response was deemed a refusal. [DS 2]  
5 Defendant claims that the officer would have been required to later testify about  
6 Defendant's refusal in order to prove the case. Defendant refers to the description of  
7 "testimonial" statements in a recent United States Supreme Court decision and argues  
8 that his refusal to submit to chemical testing fits squarely within the description of a  
9 "testimonial" statement because its primary purpose was to establish events used for  
10 criminal prosecution. Again, the specific question in this case was not presented in  
11 the case cited by Defendant. As explained in *Mazzei*, there is no requirement for  
12 *Miranda* warnings to prove physical evidence such as breath or blood, and the  
13 privilege against self-incrimination does not protect an individual from being  
14 compelled to produce physical evidence. *Id.* ¶¶ 25-26. As stated in *Mazzei*, when a  
15 DWI suspect is compelled to submit a sample for testing, there is no enforced  
16 communication and no "testimonial" compulsion involved. *Id.* ¶ 26. We reject  
17 Defendant's argument.

18 Defendant filed a supplement to his memorandum in opposition, which is not  
19 permitted by our appellate rules. Even if we were to consider the supplement, we

1 would not agree with the argument advanced by Defendant. In the supplement,  
2 Defendant again argues that his refusal to submit to testing was a “testimonial”  
3 statement in response to custodial interrogation, and he claims that his argument is  
4 supported by a recent decision stating that un-warned statements cannot be used as  
5 evidence by the prosecutor in the case in chief. Defendant argues that it is not the  
6 “gathering of the evidence,” but the “method by which the evidence is gathered” that  
7 required *Miranda* warnings. [Supp. 4] Defendant claims that this argument was not  
8 addressed in *Mazzei*. Contrary to Defendant’s claim, we pointed out in *Mazzei* that  
9 a simple yes or no response was not testimonial, and *Miranda* warnings were not  
10 required before the defendant was advised and tested. *Id.* ¶ 27.

11 As discussed in this opinion and in our calendar notice, we affirm the judgment  
12 and sentence.

13 **IT IS SO ORDERED.**

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15 **LINDA M. VANZI, Judge**

16 **WE CONCUR:**

17 \_\_\_\_\_  
18 **MICHAEL D. BUSTAMANTE, Judge**

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2 **RODERICK T. KENNEDY, Judge**