

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

CRYSTAL MARTINEZ,

Defendant-Appellant.


Mark Reynolds

A-1-CA-37108
Taos County
D-820-CR-2016-00150

NOTICE
PROPOSED SUMMARY DISPOSITION

You are hereby notified that the:

Record Proper

was filed in the above-entitled cause on **March 19, 2018**.

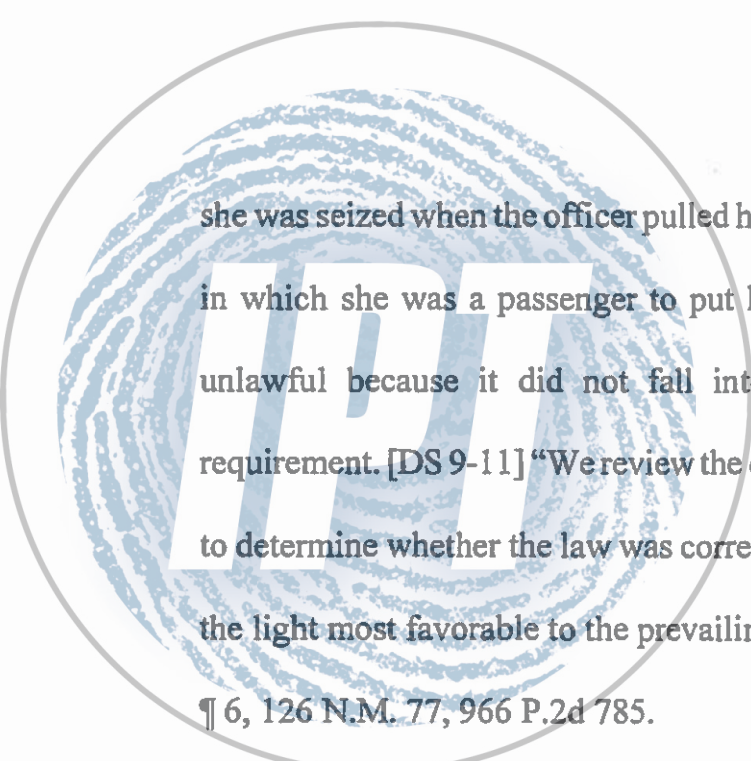
This case has been assigned to the **SUMMARY CALENDAR** pursuant to Rule 12-210(D) NMRA.

Summary affirmance is proposed.

Note: This is a *proposal* of how the Court views the case. It is not a final decision. You now have twenty (20) days to file a memorandum telling the Court any reasons why this proposed disposition should or should not be made.

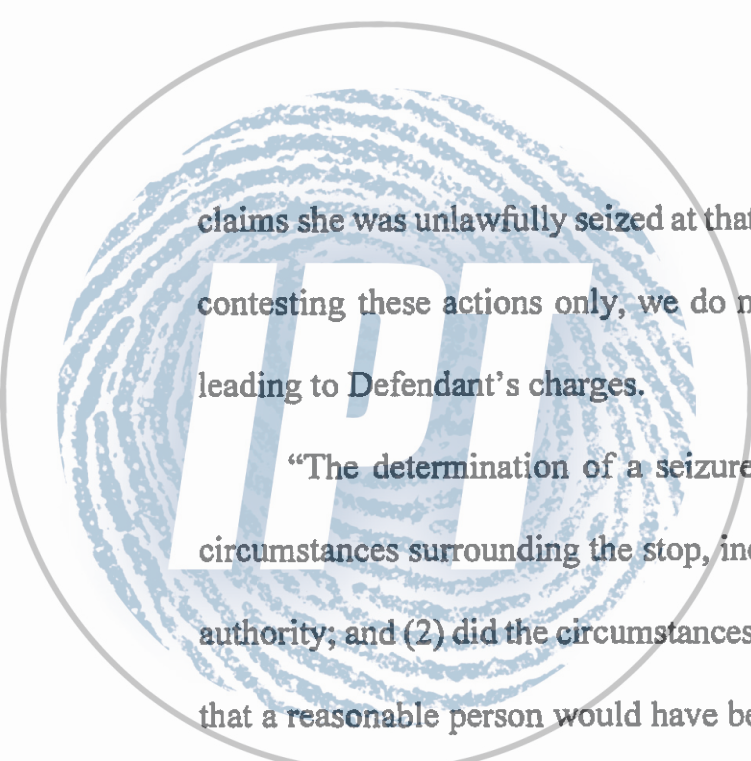
See Rule 12-210(D) NMRA.

Defendant, pursuant to a conditional plea, appeals the denial of her motion to suppress evidence. [DS 2] Defendant focuses her appeal on the sole issue of whether



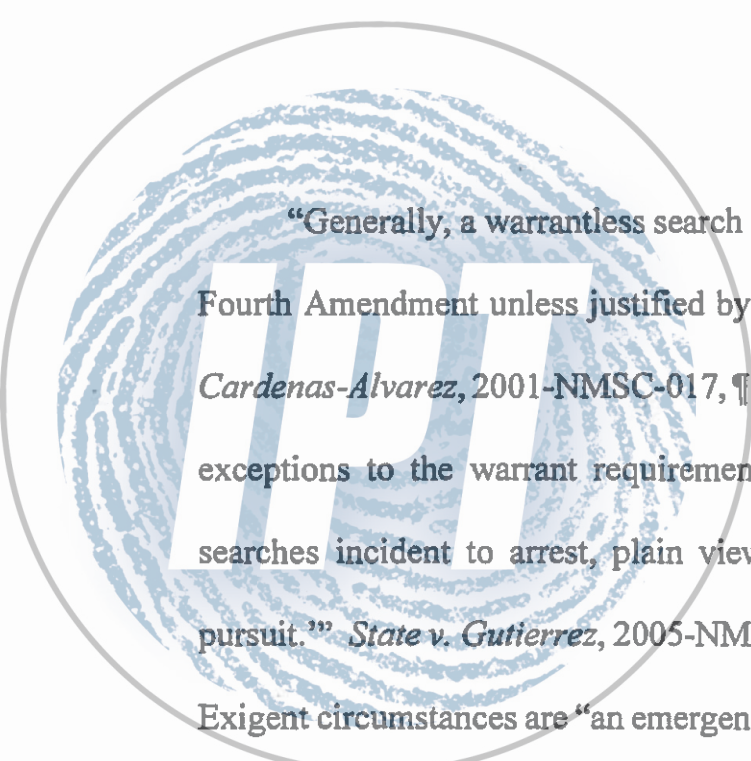
she was seized when the officer pulled his weapon and instructed the driver of the car in which she was a passenger to put his hands up, and whether the seizure was unlawful because it did not fall into a recognized exception to the warrant requirement. [DS 9-11] “We review the district court’s ruling on a motion to suppress to determine whether the law was correctly applied to the facts, viewing the facts in the light most favorable to the prevailing party.” *State v. Cline*, 1998-NMCA-154, ¶ 6, 126 N.M. 77, 966 P.2d 785.

Defendant was seated in the passenger seat of a parked car. [DS 5] An officer who was on patrol parked behind the car without blocking it in. [DS 4] The officer had received reports of drug activity in that area. [DS 4, RP 127] According to the district court’s order denying the motion to suppress, the officer knew the vehicle belonged to an individual whom the officer knew and who was a suspect in a prior shooting. [RP 127] The officer knew the individual was someone known to possess firearms and either had a warrant or would soon have a warrant for the shooting. [RP 127] The officer approached the vehicle and intended to have a consensual encounter. [RP 127] As he approached, he saw the individual whom he knew to own the car—who was sitting in the driver’s seat—turn toward the center console. [DS 4; RP 128] Fearing that the driver was reaching for a weapon, the officer drew his own weapon and instructed the driver to put his hands up. [DS 4; RP 128] As Defendant



claims she was unlawfully seized at that moment and appears to focus her appeal on contesting these actions only, we do not examine the remainder of the encounter leading to Defendant's charges.

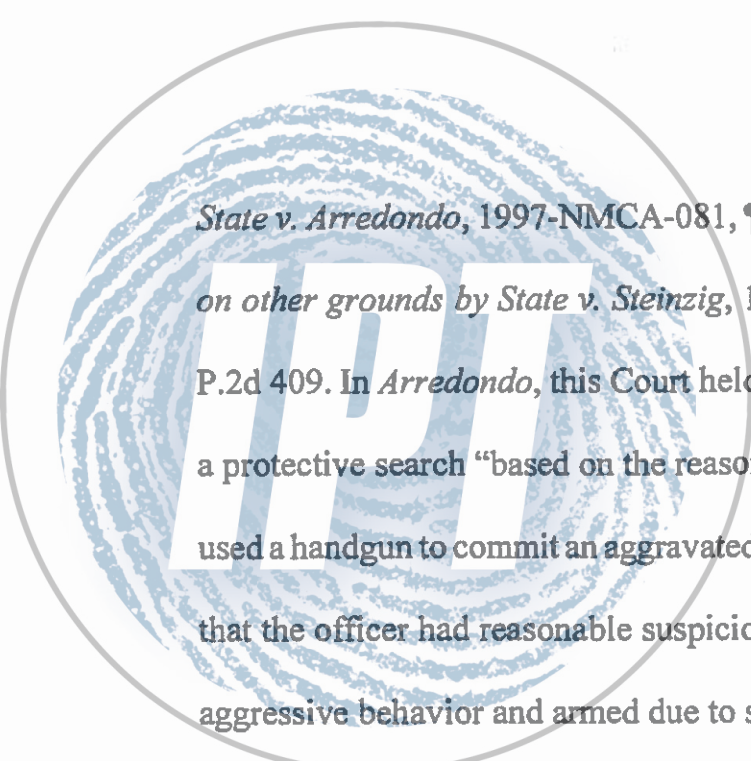
"The determination of a seizure has two discrete parts: (1) what were the circumstances surrounding the stop, including whether the officers used a show of authority; and (2) did the circumstances reach such a level of accosting and restraint that a reasonable person would have believed he or she was not free to leave? The first part is a factual inquiry, which we review for substantial evidence. The second part is a legal inquiry, which we review de novo." *State v. Jason L.*, 2000-NMSC-018, ¶ 19, 129 N.M. 119, 2 P.3d 856. "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Jason L.*, 2000-NMSC-018, ¶ 16 (internal quotation marks and citation omitted). As the officer displayed his weapon at the vehicle and instructed the driver to put his hands up, we conclude that the officer made a show of authority and a reasonable passenger in the vehicle would not have felt free to leave. Therefore, Defendant was seized at the time the officer drew his gun and pointed it at the driver.

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“Generally, a warrantless search and seizure is per se unreasonable under the Fourth Amendment unless justified by an exception to the general rule.” *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶39, 130 N.M. 386, 25 P.3d 225. “Recognized exceptions to the warrant requirement include ‘exigent circumstances, consent, searches incident to arrest, plain view, inventory searches, open field, and hot pursuit.” *State v. Gutierrez*, 2005-NMCA-015, ¶ 11, 136 N.M. 779, 105 P.3d 332.

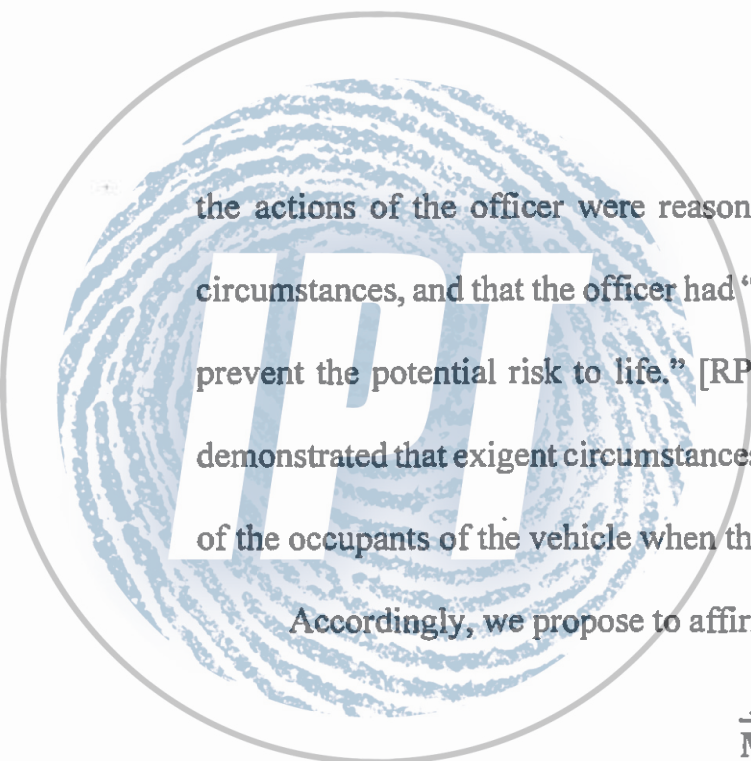
Exigent circumstances are “an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.” *State v. Gomez*, 1997-NMSC-006, ¶ 39, 122 N.M. 777, 932 P.2d 1 (internal quotation marks and citation omitted). “The inquiry [into whether exigent circumstances exist] is an objective test . . . into whether a reasonable, well-trained officer would have made the judgment this officer made. If reasonable people might differ about whether exigent circumstances existed, we defer to the officer’s good judgment.” *Gomez*, 1997-NMSC-006, ¶ 40.

The State is required to show more than just the presence of a gun in the car before officers can conduct a warrantless seizure. *State v. Garcia*, 2005-NMSC-017, ¶ 31, 138 N.M. 1. “[T]here must be a reasonable suspicion the suspect is both armed and dangerous.” *Id.* “Aggravated assault [. . .] is one of the inherently dangerous crimes which provide a police officer with reason to conduct a protective search.”



State v. Arredondo, 1997-NMCA-081, ¶ 16, 123 N.M. 628, 944 P.2d 276, *overruled on other grounds by State v. Steinzig*, 1999-NMCA-107, ¶ 16, 127 N.M. 752, 987 P.2d 409. In *Arredondo*, this Court held that the officer was justified in conducting a protective search “based on the reasonable suspicion that Defendant had recently used a handgun to commit an aggravated assault.” *Id.* In *Garcia*, the court determined that the officer had reasonable suspicion that the suspect was dangerous due to his aggressive behavior and armed due to seeing a gun in his vehicle. *Id.* “If the police officers have information indicating not only that a gun is on the premises but also that defendant is likely to use it, exigent circumstances requiring swift action to prevent imminent danger to life exists.” *State v. Attaway*, 1992-NMCA-043, ¶ 12, 114 N.M. 83, 835 P.2d 81, *aff’d*, 1994-NMSC-011, ¶ 12, 117, N.M. 141, 870 P.2d 103.

In the present case, the officer was encountering an individual whom he believed was likely to be in possession of weapons, who was a suspect in a shooting, and whom he believed had a warrant or would have one soon for the shooting. [RP 127] From the officer’s knowledge of the driver’s involvement in a shooting and likelihood of possession of weapons, we propose to conclude the officer had a reasonable belief that the driver could be both armed and dangerous. The officer also believed the driver’s sudden turn toward the console could be a reach for a weapon, and thus potentially dangerous in that moment. [RP 128] The district court found that



the actions of the officer were reasonable and justified under the totality of the circumstances, and that the officer had “articulated facts that justified swift action to prevent the potential risk to life.” [RP 129] Therefore, the State appears to have demonstrated that exigent circumstances existed that justified the warrantless seizure of the occupants of the vehicle when the officer pointed his weapon at the driver.

Accordingly, we propose to affirm.



MICHAEL E. VIGIL, Judge