

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

No. 29,557

OSCAR CASTRO H.,

Defendant-Appellee.

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

SEP 23 2011

*Ben M. Martinez*

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**STATE'S SUPPLEMENTAL BRIEF**

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*On appeal from the Ninth Judicial District Court  
Curry County, New Mexico  
The Honorable Robert S. Orlik, Children's Court Judge*

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## ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING THE DELINQUENCY PETITION WITH PREJUDICE FOR FAILURE TO MEET THE TIME REQUIREMENTS OF RULE 10-243. THE GRAND JURY'S RETURN OF A NO-BILL EFFECTIVELY DISMISSED THE CHARGES WITHOUT PREJUDICE.

A. Introduction and standard of review.

In dismissing the delinquency petition, the trial court applied Rule 10-243(A) NMRA. That rule establishes a 30-day time limit, and events that trigger the time limit, for commencing an adjudicatory hearing when the alleged delinquent offender is placed in detention. The question on appeal is whether the trial court correctly applied that rule in this case. Thus, the question on appeal is a matter of rule interpretation, which is reviewed de novo. *See Apodaca v. AAA Gas Co.*, 2003-NMCA-85, ¶ 87, 134 N.M. 77, 73 P.3d 215 (interpretation of court rule is a question of law that is review de novo); *State v. Anthony M.*, 1998-NMCA-65, ¶ 4, 125 N.M. 149, 958 P.2d 107 (appellate court reviews de novo the trial court's application of children's court rule to facts of the case).

In construing a court rule, this Court "applies the same rules of construction" it applies in construing statutes. *In the matter of Dominick Q.*, 113 N.M. 353, 354, 826 P.2d 574, 575 (Ct.App. 1992). Thus, the Court's primary goal in construing a court rule is "to discern and give effect to the author's intent." *Id.* (internal quotation marks omitted). In so doing, the Court will apply a common sense

approach so as to avoid an absurd, unreasonable, or unjust application of the rule.

Id.

In the brief in chief, the State argued that the reasonable and just interpretation of Rule 10-243(A)(9) is that a notice of intent to seek an adult sentence tolls the time for commencing an adjudicatory hearing and that a grand jury's determination re-starts the time limitation. That interpretation is consistent with the obvious purpose of the rule, which is to provide time for the grand jury hearing, or preliminary hearing, mandated when the State files a notice of intent to seek an adult sentence. The mandated grand jury hearing or preliminary hearing protects a child's constitutional right to such a hearing when facing a potential felony conviction. *See* N.M. Const. Art. II, § 14. Thus, the tolling of time provided by Rule 10-243(A)(9) furthers the child's constitutional right to a grand jury or preliminary hearing.

The proceedings below, however, raised a question regarding the application of Rule 10-243(A)(9) in this case. Child was charged by delinquency petition and the State filed a notice of intent to seek an adult sentence. RP 1-3, 13. The grand jury hearing was held within the required fifteen days from filing of the notice of intent. RP 20; Rule 10-213(B) NMRA. The grand jury returned a no bill. Stipulated Transcript, ¶ 11. Based on information in the record, counsel for the State assumed that the grand jury was presented only with the youthful offender

offenses and, therefore, the no bill applied only to those offenses. That assumption was based on the fact that neither defense counsel nor the trial court noted a problem with proceeding after the grand jury entered a no bill on all of the charges. Thus, in the brief in chief, the State addressed the question whether the no bill affected application of Rule 10-243(A)(9) to toll the time for commencing the adjudicatory hearing on the non-youthful offender offenses not addressed by the grand jury.

However, the grand jury transcript and the sealed no bill establish that the grand jury did, in fact, return a no bill on all of the offenses charged in the delinquency petition, including the non-youthful offender offenses. The Court has asked the parties to address whether Rule 10-243(A)(9) provides for tolling and restarting the time for commencing an adjudicatory hearing on non-youthful offender offenses for which the jury returned a no bill.

- B. Rule 10-243(A)(9) should be construed as providing a time limit for commencing an adjudicatory hearing only on non-youthful offender offenses for which a grand jury returns an indictment when the State has filed a notice of intent to seek an adult sentence.

Rule 10-243(A)(9) NMRA provides that, when the State files a notice of intent to seek an adult sentence, the adjudicatory hearing shall commence within thirty days from “the return of an indictment or the filing of a bind over order that does not include a ‘youthful offender’ offense.” In the context of this case, where the grand jury is presented with and returns a no bill on all of the offenses charged, including the non-youthful offender offenses, the rule has two possible constructions.

First, as Defendant may argue, the rule could be construed as providing for no tolling of the time to commence the adjudicatory hearing when the grand jury returns a no bill on all offenses charged. Under such a construction, the adjudicatory hearing would have to commence within thirty days of service of the delinquency petition, or of the date of detention, even though the children’s court attorney filed a notice of intent to seek an adult sentence triggering the need for a grand jury or preliminary hearing. *See* Rule 10-243(A)(1), (2) NMRA.

This Court should reject such a construction as absurd and unfair. Rule 10-213(A) NMRA gives the children’s court attorney ten days to file the notice of intent to seek an adult sentence. Rule 10-213(B) NMRA gives the children’s court

attorney fifteen days from the filing of the notice of intent in which to present the charges to the grand jury. The grand jury has twenty four hours to make its decision. NMSA 1978, § 31-6-5 (2003); Rule 10-213(B) NMRA (“provisions of Section 31-6-1 NMSA et seq. shall apply”). Thus, a grand jury decision rendered twenty-six days after the filing of the delinquency petition is timely. But if the notice of intent to seek an adult sentence does not toll the time for commencing the adjudicatory hearing when the grand jury’s decision is to return a no bill, then the trial court, the children’s court attorney, and defense counsel have only four days’ notice of that fact. This defeats the purpose of tolling the time in the first place and, thus, is an absurd construction of the rule.

On the other hand, Rule 10-243(A)(9) may be construed as recognizing the ordinary effect of a no bill: discharge of the defendant and dismissal of charges without prejudice. As noted above, and argued in the brief in chief, the purpose of requiring a grand jury or preliminary hearing when the State is seeking an adult sentence for an alleged youthful offender is to ensure the child his constitutional right to be charged by either a grand jury indictment or an information based on findings of probable cause. Thus, the failure of a grand jury to return an indictment, in other words the return of a no bill, prevents the State from proceeding further in the case. In effect, the no bill acts as a dismissal of the charges. Such dismissal, however, is not dismissal with prejudice. “[T]he State



may proceed by information after the return of a no-bill.” State v. Isaac M., 2001-NMCA-088, ¶ 1, 131 N.M. 235, 34 P.3d 624 (citing State v. Chavez, 93 N.M. 270, 599 P.2d 1067 (Ct. App. 1979)).

As the State noted in the brief in chief, leaving the State the option of charging the child by information seems inconsistent with the purpose for providing a short time to commence the adjudicatory hearing. However, as noted above, it is inconsistent with the purpose of the tolling period to suggest that the Supreme Court, in adopting Rule 10-243(A)(9), intended to provide only four days for the children’s court to commence an adjudicatory hearing on the non-youthful offender offenses.

Certainly, if the child is concerned that the children’s court attorney filed the notice of intent in bad faith to toll the time limitation and get around the short time limitation for commencing the adjudicatory hearing, or filed an information in bad faith, those concerns can be raised in response to the filing of an information following the no bill. Such concerns, however, are premature in this case. *See Isaac M.*, 2001-NMCA-088, ¶ 16 (rejecting view that law should be construed to limit prosecutorial discretion to file information after grand jury returns a no bill and noting that trial court has the discretion to evaluate whether a prosecutors actions are an abuse of the process or taken in bad faith). There is no evidence in the record suggesting prosecutorial misconduct or bad faith in filing the notice of

intent in this case. Moreover, claims of prosecutorial vindictiveness are premature, as the prosecutor might not seek to file an information charging the offenses alleged in this case and no billed by the grand jury.

For the foregoing reasons, the State asserts that Rule 10-243(A)(9) should be construed as (1) recognizing that a no bill acts as a dismissal without prejudice, and (2) requiring an adjudicatory hearing on non-youthful offender offenses to commence within thirty days after a grand jury returns an indictment on non-youthful offender offenses alleged in a delinquency petition. Because a grand jury does not return an indictment on any offenses charged in a delinquency petition unless the petition includes youthful offender offenses and the children's court attorney has filed a notice of intent to seek an adult sentence, the filing of a notice of intent always tolls the time to commence the adjudicatory hearing. The time restarts, however, only when the grand jury returns an indictment on non-youthful offender offenses. When the grand jury no bills the non-youthful offender offenses as well as the youthful offender offenses, the charges are dismissed without prejudice.

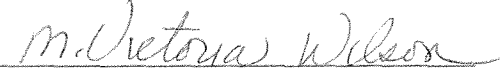
### **CONCLUSION**

The State respectfully requests this Court to reverse the trial court's dismissal of the delinquency petition with prejudice under Rule 10-243(A) NMRA,

and order the court to enter dismissal without prejudice pursuant to the grand jury's  
no bill.


Respectfully submitted,

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