IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs. No. 29,557

OSCAR CASTRO H.

Child-Appellee.

APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT
CURRY COUNTY, NEW MEXICO
THE HONORABLE ROBERT S. ORLIK

CHILD-APPELLEE'S ANSWER BRIEF

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NOTE REGARDING CITATIONS

Citations to the transcript of proceedings contained on the compact disc are set forth as [CD hour:minute:second] and those to the Stipulated Transcript are [Stipulated Transcript paragraph]. Citations to the Record Proper are [RP page], while citations to the State's Brief in Chief are [BIC page].

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The issue in this case is whether, under Rule 10-243(A), the return of a "no bill" from a grand jury following the State's attempt to seek adult sanctions on youthful offender charges triggers a new thirty-day period for holding the adjudicatory hearing. It is undisputed that the return of a "no bill" is not listed as a triggering event. Moreover, contrary to the State's circuitous argument, there is no evidence that the Supreme Court intended for it to be a triggering event or that it should be a triggering event. In fact, there are policy reasons indicating that it should not be included as a triggering event and that, under the circumstances of this case, the time required for the grand jury proceedings should not be tolled.

First, a "no bill" from a grand jury on all of the charges presumably requires some additional act for the Child's prosecution to continue. Alternatively, if a "no bill" does not undermine a State's separate pursuit of delinquency charges or has no bearing on it, then there is no reason to automatically give the State an additional thirty days to hold the adjudicatory hearing; its prosecution of the delinquency charges never ceased. Thus, there is no reason to read the return of the "no bill" from the grand jury into Rule 10-243.

As Rule 10-243 makes sense as written and was construed and applied in accordance with its plain language by the trial court, this Court should refrain from adding unnecessary words to it and should uphold the trial court's dismissal.

PROCEDURAL SUMMARY

March 16, 2009 The State filed a delinquency petition that included two youthful offender offenses – aggravated burglary with a deadly weapon and armed robbery. Child was being held in the detention center when the petition was filed. [RP 1-4].

March 17, 2009 An arraignment and detention hearing was held.[1] The trial court determined that Child would remain in detention and set the adjudicatory hearing for April 10. [CD 9:22:50–9:24:05].

March 23, 2009 The State filed a Notice of Intent to Seek Adult Sanctions, requiring it to proceed within fifteen days with either a preliminary hearing or a Grand Jury hearing under Rule 12-213(B). [RP 13].

March 27, 2009 The Grand Jury hearing was cancelled due to bad weather.

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[1] After asking Child for his plea, the following exchange occurred:

Judge: Very well, the court will enter denials as to all counts. This matter is set for trial on the 10th of April at 10:45. Mr. Stover, what do you have on detention?

State: Your Honor, this child has several other cases pending in which the State has filed petitions to seek adult sanctions. Bonds have been set in those matters and the child is in detention. When we look at the nature of the activity and the charges against the child in this case, I believe that there is ample reason to believe this child, if not detained, presents a serious likelihood of harm to himself or to others and I would ask that he remain in detention.

Judge: Thank you Mr. Stover. Miss Fields?

Defense Counsel: Your Honor my only request – because of the charges, I understand the detention – my only request is that if it is moved to a YR case, that we get bond set immediately.

Judge: The court will note that if in fact this is bound-over to a YR status then a new arraignment will be held and bond will be set with regard to the circumstances surrounding Mr. Hernandez. [CD 9:22:50–9:24:05].

April 3, 2009 The Grand Jury returned a "no bill" on the youthful offender charges and whatever other charges were presented to it.[2] Child remained in custody.

April 9, 2009 The trial court reset the adjudicatory hearing for April 17, 2009. [RP 22].

April 13, 2009 The State filed a motion for extension of time for commencing the adjudicatory hearing, noting that the current time limit would expire on April 17, 2009. The State asked for 90 days pursuant to Rule 5-604. [RP 23].

April 14, 2009 Child filed a motion to deny the State's motion for extension of time, pointing out the State's error in citing to Rule 5-604 and asserting that, by counsel's calculation, the time limit was set to expire on April 16, 2009. [RP 25-27].

Child also argued that the State failed to provide any basis for good cause for the extension, that the State failed to send notice to Child's mother about the detention hearing, that the target notice was uncertified and did not list specific dates of the alleged offense, and that defense counsel had not yet been provided with any discovery or a witness list in the case. *Id.*

April 17, 2009 The trial court held a hearing on the motions. At the hearing, the State changed its argument and asserted for the first time that the time for commencing the adjudicatory hearing was tolled by the filing of the notice of intent to invoke an adult sentence, and that the time re-started on April 3, 2009, when the Grand Jury returned a "no bill" on the charges presented to it. The trial court dismissed the petition as the State had failed to comply with the time requirements set forth in the Children's Court Rules. [Stipulated Transcript ¶¶ 16-22].

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[2] The State asserts that the grand jury only considered the Youthful Offender Offenses. [BIC 14]. The record itself does not establish whether this is the case. Child assumes nothing in this regard and addresses both scenarios in the Argument.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE PETITION UNDER RULE 10-243.

A. Introduction and Standard of Review.

The interpretation of a rule is a question of law that is reviewed *de novo*. *See* ***Apodaca v. AAA Gas Co.,*** 2003-NMCA-085, ¶ 87, 134 N.M. 77, 73 P.3d 215. In construing a court rule, this Court "applies the same rules of construction" it applies in construing statutes. ***Id.***

When language is clear and results in a reasonable and logical interpretation of a rule, it is well established that a court need not and should not employ further tools of construction. Moreover, courts are strongly discouraged from expanding the scope of a rule beyond that readily ascertained from the language of the rule itself. As our Supreme Court indicated in ***De Graftenreid v. Strong***, 28 N.M. 91, 206 P. 694, 695 (1922):

> What the [author] intends is to be determined, primarily, by what it says in the act. It is only in cases of ambiguity that resort may be had to construction. Courts cannot read into an act something that is not within the manifest intention of the [author], *as gathered from the [rule] itself.* To do so would be to legislate, and not to interpret. *There is no ambiguity in this [rule] and it neither requires nor admits of construction.* It is a plain statement, in unequivocal terms.

See also ***State v. Gutierrez,*** 102 N.M. 726, 730, 699 P.2d 1078, 1082 (Ct. App. 1985) (stating that when statute makes sense as written this Court does not read words into the statute).

B. The return of a "no bill" from a grand jury is not listed as one of the triggering events in Rule 10-243 and should not be included as a triggering event.

Rule 10-243(A) provides that if the child is in detention, which Child was in this case, the adjudicatory hearing shall be commenced within thirty days of the latest of one of the following events:

> (1) the date the petition is served on the child; (**March 16, 2009**)
>
> (2) the date the child is placed in detention; (**March 16 or 17, 2009**)
>
> (3) if an issue is raised concerning the child's competency to participate at the adjudicatory hearing, the date an order is entered finding the child is competent to participate at the adjudicatory hearing. The court may order periodic judicial reviews pending completion of the competency evaluation. At each judicial review the child's attorney shall advise the court of the status of the evaluation; **(Not Applicable)**
>
> (4) if the proceedings have been stayed pursuant to Rule 10-242 NMRA on a finding of incompetency to stand trial, the date an order is filed finding the child competent to participate in an adjudicatory hearing; **(Not Applicable)**
>
> (5) if a mistrial is declared or a new adjudicatory hearing is ordered by the children's court, the date such order is filed; **(Not Applicable)**
>
> (6) in the event of an appeal, the date the mandate or order is filed in the children's court disposing of the appeal; **(Not Applicable)**
>
> (7) if the child fails to appear at any time set by the court, the date the child is taken into custody in this state after the failure to appear or the date an order is entered quashing the warrant for failure to appear. If the child is taken into custody in another state, the thirty days shall begin to run on the date the child is returned to this state. **(Not Applicable)**

(8) the date the court allows the withdrawal of a plea or rejects a plea; or **(Not Applicable)**

(9) if a notice of intent has been filed alleging the child is a "youthful offender", as that term is defined in the Children's Code [Chapter 32A NMSA 1978], the return of an indictment or the filing of a bind over order that does not include a "youthful offender" offense. **(Not Applicable)**

The return of a "no bill" from the grand jury is not listed as a triggering event. Thus, under a plain reading of the Rule, it does not act as a triggering event. *See* ***State v. Loretto***, 2006-NMCA-142, ¶ 9, 140 N.M. 705, 147 P.3d 1138 (finding that attempted first degree CSP is not an offense enumerated in the EMDA – even though first degree CSP is enumerated – and refusing to limit a defendant's good time eligibility accordingly); ***State v. McDonald***, 2004-NMSC-033, ¶ 23, 136 N.M. 417, 99 P.3d 667 (holding that a defendant convicted of conspiracy was not disqualified from good time eligibility under the EMDA because conspiracy was not an enumerated crime).

The State asserts that this Court may read the return of a "no bill" into this Rule because it would make sense for it to restart the time and because the Supreme Court intended to include the return of a "no bill" from a grand jury, but may not have foreseen this precise situation and, therefore, failed to do so.

As an initial matter, our case law presumes the opposite of what the State suggests here. The Supreme Court is presumed to know the law and presumably aware of the possibility that a grand jury might not indict an individual, however

rarely it might occur. The absence of a provision restarting the time on the return of a "no bill," therefore implies that the Supreme Court *did not intend* for the return of a "no bill" from a grand jury to restart the thirty days. *See* ***State v. Isaac M.***, 2001-NMCA-088, ¶ 10, 131 N.M. 235, 34 P.3d 624 ("[W]e conclude that the legislature did not intend for Section 31-6-11.1 to apply to the filing of an information on the ground that the legislature is presumed to have been aware of the availability of this method of initiating a prosecution and yet chose not to address it"); *see also* ***Benavidez v. Sierra Blanca Motors***, 120 N.M. 837, 843, 907 P.2d 1018, 1024 (Ct.App. 1995) (discussing rule of *expressio unius est exclusio alterius*).

Even assuming that the Supreme Court did not contemplate the possibility that a grand jury might return a "no bill," there are valid policy reasons for excluding the return of a "no bill" on some or all of the charges from Rule 10-243.

First, the Children's Court Rules "are intended to provide for the just determination of children's court proceedings" and "shall be construed to secure simplicity in procedure, fairness in administration, elimination of unjustifiable expense and delay and to assure the recognition and enforcement of constitutional and other rights." Rule 10-101(C) NMRA; *see also* ***State v. Stephen F.***, 2006-NMSC-030, ¶ 11, 140 N.M. 24, 139 P.3d 184 ("Clearly, the child must be protected from indefinite periods of custody while awaiting disposition").

Automatically giving the State extra time to continue to pursue delinquency charges after a grand jury finds that there is no probable cause for some or all of the charges would be unfair to the child, who deserves to be tried within the initial time limits provided for in the Children's Code. This is particularly true because the State's decision to seek adult sanctions is manifestly not for the benefit of the child. *See* ***State v. Coburn***, 120 N.M. 214, 217, 900 P.2d 963, 966 (Ct. App. 1995) (strictly construing six-month rule and noting that "a literal application of SCRA 5-604(B) will be set aside only when there is an event extending pretrial activities *to the mutual benefit of the parties*, or where there is an attempt by the State to circumvent the rule without justification") (emphasis added). As the State decided to seek adult sanctions to the detriment of Child and was unsuccessful, the State ought to bear the burden of its decision to do so and should not receive an extension of time absent a request and a showing of good cause.

Beyond unfairly extending the time, however, reading the return of a "no bill" into the Rule as a triggering event in and of itself runs contrary to logic regardless of whether the grand jury considered all or only some of the delinquency charges.

1. Further action by the State should be required if all of the charges were considered and rejected by the grand jury.

As a policy matter, the return of a "no bill" from a grand jury should not be read into the Rule as a triggering event in and of itself since the return of a "no

bill" on all of the charges implies that further action by the State is required for Child's prosecution to continue. Rule 10-222 specifically indicates that probable cause is required – even for delinquency charges – if the child is to remain in detention. Rule 10-222 NMRA. Assuming that all the charges were put before the grand jury, and the grand jury found no probable cause supported the charges, it appears that at least some action by the State is required for the State to continue to hold and prosecute Child.

Given the reputation grand juries have acquired, the State may very well decide not to proceed any further in prosecuting a child if the grand jury finds that no probable cause exists for any of the charges. *See* ***Miller v. Brunsman***, 599 F.3d 517, 527 (6th Cir. 2010) ("[M]any have observed that the modern grand jury is not exactly a robust check on prosecutorial discretion") (citing ***United States v. Navarro-Vargas***, 408 F.3d 1184, 1195 (9th Cir. 2005)); *see also* ***United States v. Budd***, 496 F.3d 517, 537 n. 9 (6th Cir. 2007) (Cook, J. concurring in part and dissenting in part) (citing the adage that the grand jury "would indict a ham sandwich"). At the very least, a "no bill" from a grand jury ought to give the State pause and force it to reconsider whether it should expend limited State resources in pursuing the child's prosecution.

Of course, the State may wish to proceed with the prosecution and, if it does, has different options available to it. It may pursue the youthful offender charges

again by filing an information. *See* ***Isaac M.***, 2001-NMCA-088, ¶ 10. Alternatively, the State could file a new delinquency petition that does not include the youthful offender offenses. As the State acknowledges, this would be the triggering event that restarts the thirty days. [BIC 14]. It would also, however, give Child an opportunity to be released on the newly amended, less serious charges.

Whatever the State decides to do, however, it would seem that the grand jury's rejection of all the charges requires some further act for the State to continue to hold and prosecute Child. Under these circumstances, the return of a "no bill" should not restart the clock as further action by the State is required. *Cf.* ***State v. Martinez***, 2010-NMCA-003, ¶ 9, 147 N.M. 500, 226 P.3d 14, *cert. granted* 2009-NMCERT-012, 147 N.M. 601, 227 P.3d 91 (noting that a defendant's failure to appear is not itself a triggering event that resets the six-month rule but that the issuance of the bench warrant for the failure to appear is).

2. *Alternatively, if the State only put the youthful offender charges before the grand jury or if a "no bill" simply has no impact on delinquency proceedings, then it would be unnecessary and unfair to read the return of a "no bill" as restarting the thirty-days for the delinquency charges.*

If the State is free to continue prosecuting a delinquency petition regardless of a grand jury's return of a "no bill" on some or all of the charges, then there is no reason why the grand jury's return of a "no bill" should restart an ongoing prosecution of a delinquency petition. In other words, if the grand jury's findings

only impact the delinquency proceedings when the grand jury finds probable cause, then the grand jury's failure to do so has no bearing upon the delinquency proceedings and should not toll the time in which the State has to adjudicate the child or result in the State receiving additional time.

The State asserts that the grand jury was only asked to consider the youthful offender offenses. [BIC 2]. Assuming that this is true, then the State was very clearly continuing to pursue the delinquency charges separately and likely doing so because it was aware that its case was not particularly strong and did not wish for rejection by the grand jury to hinder its ability to continue detaining or prosecuting Child on something. The State was, therefore, acting with full awareness that its pursuit of the delinquency charges would only be impacted by the grand jury proceedings if the grand jury found probable cause. Because the grand jury did not find probable cause, however, the State's pursuit of the delinquency charges continued unabated and unaffected by the grand jury's findings. This, in fact, appears to have been the State's understanding of the situation and its position up until the motion to dismiss hearing. *See* [RP 23] (requesting a continuance for the adjudicatory hearing and basing the expiration of time on the date Child was ordered detained pursuant to these charges).

Where the State employs such a strategy (i.e. seeking adult punishment while simultaneously protecting its ability to continue pursuing delinquency

charges regardless of the grand jury's findings) or where the grand jury's findings only impact the delinquency proceedings if the grand jury finds probable cause, there is no reason to *automatically* give the State more time for the adjudicatory hearing as the State's pursuit of the delinquency charges never really ceased. The State may decide it needs more time and request an extension, and the trial court may, for good cause shown, grant it. But an automatic extension for delinquency charges that the State has continued to pursue as delinquency charges is neither necessary nor in keeping with the policy reasons underlying Rule 10-243 and the Children's Court Rules as a whole. Accordingly, the State's decision to seek adult sanctions on some but not all of the charges should not toll its otherwise continuous pursuit of delinquency charges. Nor should the return of a "no bill" on some or all of the charges be read into Rule 10-243 as an event automatically restarting the thirty-day time limit for the adjudicatory hearing where the State never actually terminated its prosecution of delinquency charges.

C. The trial court correctly applied the Rule and properly dismissed the case.

The State's only argument in this appeal is that the return of a "no bill" from a grand jury should be read into Rule 10-243 as restarting the thirty-day time limit for an adjudicatory hearing. The State does not assert that, assuming the State's proposed interpretation of Rule 10-243 is rejected, the trial court abused its discretion in granting the motion to dismiss under Rule 10-243. Thus, should the

trial court's straightforward interpretation of the triggering provisions in Rule 10-243 prove sound, it can be assumed that the trial court did not commit error in its application. *See* ***Bauer v. Coll. of Santa Fe***, 2003-NMCA-121, ¶ 17, 134 N.M. 439, 78 P.3d 76 (arguments not made in brief in chief are deemed abandoned on appeal); *see also* ***State v. Cearley***, 2004-NMCA-079, ¶ 7, 135 N.M. 710, 92 P.3d 1284 (indicating same).

CONCLUSION

Rule 10-243 makes sense as written and does not lend itself to the State's proposed interpretation. Accordingly, this Court should decline to read the return of a "no bill" into the Rule and should affirm the trial court's dismissal of the charges against Child.

Respectfully submitted,

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I hereby certify that a copy of this pleading was served by hand delivery to the Attorney General's Box in the Court of Appeals this 29th day of October, 2010.

Public Defender Department