IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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STATE OF NEW MEXICO,

Plaintiff-Appellee,

COPY

vs. No. 33,041

LUIS MADRIGAL,

Defendant-Appellant.

APPEAL FROM
THE THIRD JUDICIAL DISTRICT COURT
DONA ANA COUNTY
THE HONORABLE FERNANDO R. MACIAS, DISTRICT JUDGE

PLAINTIFF-APPELLEE STATE OF NEW MEXICO'S ANSWER BRIEF

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The pre-trial and sentencing hearings below are contained on an audio FTR CD. The trial is contained in one volume of transcript. Citations to the CD are to the hearing date and the exact time – e.g. [8-14-13 CD 11:34:35]. Citations to the transcript are denoted by "Tr" followed by the page number – e.g. [Tr 89]. Citations to the record proper are denoted by "RP" followed by the page number – e.g. [RP 67].

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NATURE OF THE CASE

This is Defendant's appeal from his conviction of three criminal charges and a forfeiture of United States currency. Defendant claims on appeal that his criminal convictions violated double jeopardy because they were obtained in a proceeding separate from his forfeiture. Defendant also claims he received ineffective assistance of counsel because his trial attorney failed to file certain motions. Finally, Defendant claims the State presented insufficient evidence to support his convictions.

The State concedes that the forfeiture was improperly obtained under the applicable statutes and should be vacated. As such, any claim of double jeopardy is mooted. Even if double jeopardy is considered, there was no violation as the two matters were brought in a single proceeding. As to his criminal convictions, Defendant has not shown a prima facie case that his attorney was constitutionally ineffective and he retains the ability to bring up such claims under Rule 5-802 NMRA. The evidence was also sufficient to show Defendant committed drug trafficking, conspiracy to do the same, and possession of drug paraphernalia.

SUMMARY OF RELEVANT FACTS

On June 30, 2009, Agent DiMatteo was conducting surveillance on an apartment that he had suspicion to believe was being used to traffic or distribute drugs. [10-3-12 Trial Transcript ("Tr") 216-217]. He saw Defendant leave the

apartment, open the trunk of one of the cars out front, remove an item, and return back inside. Shortly thereafter, Defendant and co-defendant Chipres left the residence in the car. DiMatteo then instructed Agents Rios and Flores, narcotics unit agents who were in uniform and driving a marked police unit, to stop the car on suspicion of drug trafficking. [*Id.* 218]. Defendant was not stopped for a traffic violation but rather in reference to a narcotics investigation and Agent Rios explained this to Defendant. [*Id.* 129-130; 136; 147]. Agent Rios asked Defendant for consent to search his person and Defendant agreed. Rios found a white powdery substance, later identified as cocaine with a $600 street value, in Defendant's front pants pocket. He also found $1514 in cash on Defendant. [*Id.* 137-140; 146]. Agent Rios' canine had alerted to the front passenger side of the car and Rios obtained consent to search the vehicle. [*Id.* 141-142]. The agent found more cocaine in the vehicle near the floorboard; one plastic bag with seven small bags inside. [*Id.* 145]. Defendant was cooperative, admitted that he was delivering cocaine, and volunteered to point out the "stash house" to the agents. [*Id.* 182-183].

Chipres said he lived at the apartment and Defendant stayed with him. Defendant confirmed this but also provided an El Paso address. Chipres gave written consent to search the residence. [*Id.* 223-225]. The apartment contained many items used for cocaine trafficking; a metal press, a bottle jack used to press

cocaine, plastic bags, scales, and inositol powder used to add to the cocaine to dilute it for sale. [*Id.* 226-232]. There was also a paucity of furniture and food indicating that it was used less for living and more as a stash house for narcotics. [*Id.* 233-234]. According to DiMatteo, Defendant gave "in-depth detail as to his involvement in the [narcotics] organization, in furtherance of identifying a separate stash house location with this separate investigation." [*Id.* 239]. These details were not recorded in the agents' reports to protect Defendant's safety. [*Id.*].

A forensic examiner confirmed that all the white powder seized from the car was cocaine. The bag found on Defendant's person had 4.91 grams of cocaine. The larger bag had seven smaller bags inside with amounts ranging from 6.74 grams to 25.58 grams for a total weight of over 100 grams. [*Id.* 201-207].

The jury convicted Defendant on all three charges. [*Id.* 285-288; RP 169A-169C].

ARGUMENT

I. DEFENDANT'S CRIMINAL CONVICTIONS DID NOT VIOLATE DOUBLE JEOPARDY

A. Standard of Review

Defendant raises a double jeopardy claim for the first time on appeal, claiming that the default judgment which forfeited $1514 in currency as proceeds of the drug trafficking violated his right to double jeopardy. However, the State

contends that the initial issue to be decided is the validity of the default judgment on the forfeiture and concedes that the judgment was procured in violation of provisions of the Forfeiture Act and should be vacated. Issues regarding the interpretation and applicability of the Forfeiture Act are reviewed de novo. *Albin v. Bakas*, 2007-NMCA-076, ¶ 11, 141 N.M. 742.

B. Summary of Relevant Facts

Defendant was indicted by a district court grand jury on July 16, 2009, for trafficking, conspiracy to traffic, and possession of drug paraphernalia, for the incident occurring on June 30, 2009. [RP 13-14]. Judge Stephen Bridgforth set bail at $15,000 secured and the case was assigned number D-307-CR-200900748. [RP 15]. A criminal summons was sent to Defendant c/o the Dona Ana County Detention Center for personal service. [RP 19]. The case was assigned to Judge Bridgforth on July 24, 2009. [RP 20]. Defendant appeared for arraignment on July 27, 2009, before Judge Fernando Macias and bond was set at $50,000 secured. [RP 24-25; 7-27-09 CD 8:59:12 to 9:01:13].

Three days later, on July 30, 2009, a Controlled Substances Forfeiture Complaint was filed under the same case number and also assigned to Judge Bridgforth. [RP 26-29]. The complaint, submitted by Agent Ernesto DiMatteo, sought forfeiture of $1514.00 in United States currency as a "fruit or instrumentality of the crime of trafficking (by possession with intent to

distribute)." [RP 28]. A criminal summons addressed to Defendant's address in El Paso was issued by Judge Bridgforth on July 30, 2009. [RP 31]. The last paragraph of the summons stated:

> This summons does not require you to see, telephone or write to the District Judge of the Court at this time. It does require you or your attorney to file your legal defense to this case in writing with the Clerk of the District Court within **thirty (30) days** after the summons is legally served on you. If you do not do this, the party suing may get a Court Judgment by default against you.

[RP 31]. The return on this summons indicated that Defendant was personally served with it on August 4, 2009. [RP 35].

On November 2, 2009, the State filed an Application for Default Judgment on the grounds that Defendant had "failed to plead or otherwise defense as to these forfeiture proceedings as provided by the Rules of Civil Procedure for the District Courts." [RP 48]. On November 5, 2009, the court clerk filed a "Certificate as to the State of the Record and Non-Appearance" confirming that Defendant had made no entry of appearance or answer to the forfeiture complaint. [RP 50]. On November 9, 2009, Judge Bridgforth entered a Default Judgment and Order on Forfeiture Complaint, finding that: (1) Defendant was personally served with the forfeiture complaint; (2) the forfeiture complaint was authorized; and (3) Defendant failed to make any entry of appearance or answer to the forfeiture proceedings. Therefore, the "right, title and interest" in the $1514.00 was forfeited

to the Las Cruces-Dona Ana County Metro Narcotics Agency. [RP 51-52]. No other pleadings regarding the forfeiture are in the record.

C. The Default Judgment on the Forfeiture Did Not Comply with the Applicable Statutes and Should Be Vacated

Defendant argues that the forfeiture proceeding was contrary to the statutory requirements of the Forfeiture Act in several ways. However, Defendant does not seek reversal on these grounds and argues only that double jeopardy was violated. The State responds that double jeopardy need not be reached because the default judgment can be vacated on narrower statutory grounds.

First, Defendant claims that he was not properly served and that this was not only a violation of the Forfeiture Act but of due process. [BIC 10-11]. Section 31-27-5(B) states in relevant part:

> The complaint [of forfeiture] shall be served upon the person from whom the property was seized, and, if that person is a criminal defendant, upon the person's attorney of record and upon all persons known or reasonably believed by the state to claim an interest in the property.

NMSA 1978, § 31-27-5(B) (2002). The forfeiture complaint was timely filed on July 30, 2009. *See* Section 31-27-5(A) (complaint of forfeiture is to be filed "[w]ithin thirty days of making a seizure. . . ."). Whereas the criminal indictment was served upon Defendant in care of the county jail, the forfeiture complaint was served on him at his residence in El Paso. [RP 19; 31]. The criminal summons on the forfeiture complaint was issued on July 30th; Defendant had appeared for

arraignment on the criminal matter three days before and bond had been set at $50,000 secured. [RP 22-25]. As Defendant points out, "the state is presumed to know a defendant's whereabouts when he is in its custody." *State v. Tartaglia*, 1990-NMCA-045, ¶ 4, 109 N.M. 801.

However, the return on the summons indicates it was personally served on Defendant. The return does not indicate if Defendant was located in El Paso or at the detention center but the disposition officer certified that Defendant was served. [RP 35]. Moreover, the district court found in its default judgment that "service of process was completed on *Luis Madrigal* by personal service." [RP 51]. The issue was never raised or litigated below and there is a presumption of correctness to the district court's findings. *See e.g. Ramirez v. State*, 2014-NMSC-023, ¶ 4, 333 P.3d 240 ("[W]e will indulge all presumptions in favor of the correctness of the procedures in the trial court.").

Second, Defendant complains that his attorney of record was not served with the summons or the forfeiture complaint, but counsel did not enter an appearance for Defendant until after the summons was issued. [RP 33; August 10, 2009, Entry of Appearance of Mr. Pedro Pineda]. Again, it cannot be determined on this record that Mr. Pineda was not properly served or made aware of the forfeiture complaint.

Third, Defendant claims that Section 31-27-6(E)(2) was violated. That provision provides in relevant part:

> The court shall enter a judgment of forfeiture and the property shall be forfeited to the state if the state proves by clear and convincing evidence that:
>
> (1) the property is subject to forfeiture;
>
> (2) the criminal prosecution of the owner has resulted in a conviction; and
>
> (3) the value of the property to be forfeited does not unreasonably exceed:
>
> (a) the pecuniary gain derived or sought to be derived by the crime;
>
> (b) the pecuniary loss caused or sought to be caused by the crime; or
>
> (c) the value of the convicted owner's interest in the property.

NMSA 1978, § 31-27-5(E).

As Defendant points out, the State did not show by clear and convincing evidence that the criminal prosecution of the owner of the currency had resulted in a conviction because Defendant was not convicted on the indictment until three years later. There is also no record of a hearing on the forfeiture and the district court's order did not address the three statutory requirements listed above. The only findings made by the district court were that the forfeiture complaint was served personally on Defendant and that no entry of appearance was made by, or on behalf of, Defendant in the matter. In its application for default judgment on the forfeiture complaint, the State cited only to Rule 1-055 NMRA as authority. [RP 48].

On this record, therefore, it appears the State did not make the required showing to establish a forfeiture default judgment under Section 31-27-6(E) and

that judgment should be vacated. *See generally Albin v. Bakas* (compliance with the Forfeiture Act is mandatory and violation of its provisions was grounds to reverse the summary judgment in favor of the forfeiture).

However, this concession is not related to the issue of double jeopardy. The State is not conceding that double jeopardy was violated but only that the forfeiture judgment was not properly obtained under the Forfeiture Act.

D. If the Forfeiture is Vacated, There is No Double Jeopardy as Defendant was Subject to Only One Proceeding; the Criminal Prosecution

The purpose of the double jeopardy protection in this context is to ". . . stop[] the State, with all its resources and power, from mounting abusive, harassing reprosecutions, which subject a defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent." *Blueford v. Arkansas*, ___ U.S. ___, 132 S.Ct. 2044, 2053-54 (2012) (internal quotation marks and citations omitted).

If the forfeiture is vacated, then the double jeopardy issue is mooted. Defendant has not undergone a trial or any added expense due to the forfeiture. Defendant and his attorney never entered an appearance and Defendant never had to endure even a hearing on the matter. He can be returned to his original position as if the forfeiture had not taken place; the money can be returned to him. The State did not rehearse its proof or have the opportunity to subject Defendant to

more than one proceeding. He could have had no expectation of finality in the forfeiture matter as his criminal case was pending for another three years and he attended various hearings on the matter. *See State v. Esparza*, 2003-NMCA-075, ¶ 26, 133 N.M. 772 (holding that the "policies underlying the prohibition against double jeopardy were not implicated" where the defendant had clear notice of the "dual penalties and "no expectation of finality" upon the acceptance of his plea in the criminal case).

Thus, there is no reason to reach the double jeopardy issue where, if the forfeiture is vacated, there as only one proceeding. As stated by our Supreme Court:

> It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so. We have repeatedly declined to decide constitutional questions unless necessary to the disposition of the case.

Schlieter v. Carlos, 1989-NMSC-037, ¶ 13, 108 N.M. 507. *See also Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 12, 132 N.M. 282 (courts exercise judicial restraint by deciding cases on the narrowest possible grounds and avoid reaching unnecessary constitutional issues). Here, the narrowest ground is to vacate the forfeiture judgment on statutory, and not constitutional, grounds.

E. Even if the Double Jeopardy Claim is Considered, the Forfeiture and Criminal Conviction Did Not Violate Double Jeopardy

No issue of double jeopardy was raised below by the court, the defense, or the State. However, *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, held that civil forfeiture is punishment for the purposes of the Double Jeopardy Clause and that to avoid double jeopardy "all forfeiture complaints and criminal charges for violation of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding." *Id.* ¶ 104.

Defendant argues that jeopardy attached when the default judgment on the forfeiture was entered and the subsequent criminal trial on the trafficking, conspiracy, and possession charges constituted double jeopardy. Defendant correctly notes that *Nunez* held that a default judgment is punitive and thus "jeopardy does attach upon entry of a default judgment in a forfeiture proceeding under the Controlled Substances Act." *Id.* ¶ 103. Defendant claims there were two separate proceedings, rather than a single bifurcated proceeding, in this case which was violative of double jeopardy as explicated in *Nunez*. [BIC 7-12].

The two cases cited by the *Nunez* Court as examples of bifurcated proceedings are *Christopher P. v. State*, 1991-NMSC-073, 112 N.M. 416, and *State v. Luna*, 1980-NMSC-009, 93 N.M. 773, *abrogated on other grounds by*, *Horton v. California*, 496 U.S. 128 (1990). *Nunez*, ¶ 105. In *Christopher P.*, the Court considered a case in which the children's court proceeding was "bifurcated"; the "initial" stage of the proceedings considered whether there were reasonable

grounds to believe the child committed the delinquent acts, and the "subsequent" stage addressed whether the child was amenable to treatment or rehabilitation. *Id.* ¶ 2. Similarly in *Luna*, the Court rejected defendant's claim that the trial court should have afforded him a bifurcated trial and separated the claim of insanity from the underlying criminal charges to protect his Fifth Amendment and due process rights. *Id.* ¶ 23. Both cases dealt with bifurcation in its literal sense; "to divide into two branches; to fork." Webster's New International Dictionary, 2nd ed. There is no reason to suppose that *Nunez* used this term intending it to have some other meaning. *Nunez* thus allows for the forfeiture portion of the case to take place before the conclusion of the criminal case as long as both are in the same proceeding.

In keeping with this holding, in 2003, this Court decided *State v. Esparza*, 2003-NMCA-075, 133 N.M. 772, which is directly on point with this case. In *Esparza*, three cases were considered in light of *Nunez*. This Court held that *Nunez* does not require that the criminal charges and forfeiture be resolved in one trial and the two proceedings can "advance independently" of one another. *Id.* ¶¶ 20; 22. The single bifurcated proceeding mandated in *Nunez* does not require the "culminat[ion] in a single judgment." *Id.*

There was no subsequent initiation of either the criminal or the forfeiture complaint; in compliance with *Nunez* they were consolidated into one proceeding with one judge. The Defendant was not put in jeopardy as elucidated in *Nunez*; he was not subjected to multiple prosecutions. Separate settings in one prosecution, with different attorneys for the plaintiff, does not violate double jeopardy under *Nunez*. *Nunez* does not forbid separate settings on one proceeding, it only forbids actual separate proceedings, i.e. different forum, different judge, different case file. *Compare United States v. One Single Family Residence Located at 18755 N. Bay Rd.*, 13 F.3d 1493, 1499 (11th Cir. 1994) (the court found the proceedings were a "single, coordinated prosecution" even though the civil and criminal proceedings were conducted at separate times under separate docket numbers). Under *Nunez*, parallel proceedings, i.e. proceedings which are happening in the same time frame, are not the same proceeding. The same proceeding means just that; a single proceeding presided over by a single judge.

As also stated by our Supreme Court, "The [Double Jeopardy] Clause protects only against the imposition of multiple criminal punishments for the same offense and then only when such occurs in successive proceedings." *City of Albuquerque ex rel. Albuquerque Police Dept. v. One (1) 1984 White Chevy Ut.*, 2002-NMSC-014, ¶ 7, 46 P.3d 94 (quoting *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citations and emphasis omitted)). The evil that the *Nunez* court sought

to avoid was that of a defendant undergoing two proceedings. As to this successive prosecution aspect of double jeopardy, the United States Supreme Court has said: "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for this defense more than once for the same alleged criminal acts." *Abbate v. United States*, 359 U.S. 187, 198-99 (1959). The consolidation of the two cases avoided this aspect of potential double jeopardy. Under *Nunez*, a person can no longer be subject to separate proceedings of a criminal trial and a civil forfeiture proceeding. As noted by one court, "Civil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema." *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir. 1994). The consolidated proceeding also discounts the double jeopardy concern that the "government might act abusively by seeking a second punishment when it is dissatisfied with the [first] punishment." *United States v. Millan*, 2 F.3d 17, 20-21 (2nd Cir. 1993).[1]

In requiring a single, bifurcated proceeding, the *Nunez* court was addressing the concern of multiple prosecutions. Although *Nunez* was not analyzed as a

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[1] However, unlike this case and the *Nunez* requirement, *Millan* actually involved separate filings of the criminal and civil actions. *Id.* at 20. The *Nunez* court specifically rejected the *Millan* court's "attempt to contrive an identity" between the two proceedings. *Id.* ¶ 55.

multiple prosecutions case, that case and others have recognized that successive prosecutions raise concerns not present in the multiple punishment context. *Id.* ¶ 38; *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3; *State v. Powers*, 1998-NMCA-133, ¶ 28, 126 N.M. 114. The primary consideration in such cases is whether the subsequent prosecution was oppressive or overreaching and allowed the State to rehearse its proof thereby "increasing the risk of an erroneous conviction" in a subsequent prosecution. *Swafford*, ¶ 6; *Powers*, *id.* Such an interest must be balanced against the state's countervailing interest in the "orderly administration of justice" including "giving the prosecution one complete opportunity to convict those who have violated its law" and "insuring that justice is meted out to offenders." *Id.* (internal citation and quotation marks omitted).

The dangers that can be found in multiple prosecutions are not present in this case. The civil forfeiture and the criminal charges were brought under the same cause number with one presiding judge. This is not a case in which the State used its resources to repeatedly persecute the Defendant and/or force him to run the gauntlet more than once. *See Powers*, ¶ 28 (State did not have unfair opportunity to rehearse its case where the district attorney's office was unaware of the prior contempt proceeding in domestic relations court).

II. DEFENDANT HAS NOT ESTABLISHED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

The issue of ineffective assistance of counsel is reviewed de novo on appeal as a mixed question of fact and law. *Lytle v. Jordan*, 2001-NMSC-016, ¶ 28, 130 N.M. 198.

New Mexico follows the test for ineffective assistance of counsel as established in *Strickland v. Washington*, 466 U.S. 668 (1984). *See e.g. Jordan*, 2001-NMSC-016, ¶ 26. Proving ineffective assistance of counsel under the *Strickland* standard is two-fold: (1) defendant must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) that the defendant suffered prejudice in that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* at 689-694.

The Defendant has the burden of proving both prongs of the test. Assistance of counsel is presumed to be competent unless the Defendant clearly demonstrates otherwise. *State v. Jacobs*, 2000-NMSC-026, ¶ 48, 129 N.M. 448. In particular, bad tactics or improvident strategies do not necessarily translate into ineffective assistance. The Sixth Amendment demands only reasonable competence and a defendant is not guaranteed an errorless defense. *State v. Orona*, 1982-NMSC-002, ¶ 9, 97 N.M. 232. The ineffective assistance of counsel inquiry is highly

deferential, cannot rely on hindsight, and must take into account all the circumstances surrounding the defense. *Jordan*, 2001-NMSC-016, ¶ 26.

B. Failure to File a Motion to Suppress Was Not Prima Facie Ineffective Assistance of Counsel

Defendant contends that his attorney was ineffective for failure to file a motion to suppress the traffic stop which led to his arrest. As Defendant notes, the reviewing court looks to whether the record supports the motion and then "whether a reasonably competent attorney could have decided that a motion to suppress was unwarranted." *State v. Martinez*, 1996-NMCA-109, ¶ 33, 122 N.M. 476 (internal quotation marks and citation omitted).

Defendant asserts that the stop should have been challenged as a pretextual stop. As held by this Court:

> A pretextual traffic stop is a detention supportable by reasonable suspicion or probable cause to believe that a traffic offense has occurred, but is executed as a pretense to pursue a "hunch," a different more serious investigative agenda for which there is no reasonable suspicion or probable cause.

State v. Ochoa, 2009-NMCA-002, ¶ 25, 146 N.M. 32. This Court concluded that pretextual stops are violative of Article II, Section 10, of the New Mexico Constitution. The purpose of the reasonable suspicion/probable cause exception to the warrant requirement would be "undermined" if an officer was allowed to rely

upon an unsupported hunch for the stop. *Id.* ¶ 37. When faced when an issue of a pretextual stop courts should consider:

> the totality of the circumstances, judge the credibility of the witnesses, weigh the evidence, make a decision, and exclude the evidence if the stop was unreasonable at its inception. The totality of the circumstances includes considerations of the objective reasonableness of an officer's actions and the subjective intent of the officer – the real reason for the stop. . . . In the context of an alleged pretext stop, the officer's intent is determined like any other fact, based on the evidence presented and consideration of the factors describe below.

Id. ¶ 39.

But here, as Defendant acknowledges [BIC 15], the agents were clear that the real reason the car was stopped was due to suspicion of drug trafficking and not for some trumped-up traffic charge. Officer DiMatteo testified, "At that time, I had directed Agent Rios to not conduct a pretextural [sic] stop. To immediately identify himself with the suspicion of possible trafficking narcotics, and attempt to obtain consent from them." [Tr 218]. Agent Rios confirmed that he did not stop the vehicle for a traffic violation but instead "we have information in reference to him involved in a narcotics investigation. I stopped him, and specifically explained to him the reason I had pulled him over was because we had information he was involved in narcotics trafficking." [Tr 131]. There is nothing on this record to support the notion that the agents conducted a pretextual stop and a reasonably competent attorney would not have such a challenge to be worthwhile.

See State v. Sanchez, 1982-NMCA-155, ¶ 10, 98 N.M. 781 ("Failure to file a non-meritorious motion cannot be declared ineffective assistance").

Defendant also argues at length that the stop was not supported by the articulated reason for the stop; i.e. suspicion of suspected drug trafficking. [BIC 15-21]. Defendant cites to *State v. Alderete*, 2011-NMCA-055, 149 N.M. 799, arguing that the officers in that case "had far more facts" to conduct a stop than the officers here. [BIC 16-18]. In *Alderete*, the district court had granted the motion to suppress on the grounds that the traffic stop was pretextual and the defendant would not have been stopped "but for the drug investigation." *Id.* ¶ 1. This Court held that reasonable suspicion justified an investigatory stop of the vehicle. *Id.* ¶ 18. The officers had a reliable tip that marijuana was being distributed from the residence, had the residence under surveillance, and observed three large boxes delivered to the residence by men who were clearly on the lookout. *Id.* ¶ 2. A few hours later, the defendant's husband left the residence with one of three boxes and forty-nine packages of marijuana were found in his vehicle. The defendant then left the house ten minutes after that and was stopped and marijuana was found in her vehicle. *Id.* ¶ 3-5. This Court held that the "closeness in time of the two departures from the house" led to a reasonable inference that the second vehicle, driven by the defendant, contained one or more of the remaining boxes. *Id.* ¶ 19.

Defendant uses the facts of *Alderete* to contrast it to the record in this case claiming that there are fewer facts to support reasonable suspicion of drug trafficking than were present in *Alderete*. As this claim comes in the form of ineffective assistance of counsel, there was no hearing on a motion to suppress where the facts were fully elucidated. Nevertheless, the record does reveal at least two salient facts from which to judge trial attorney's competence on failing to file such a motion.

First, at the grand jury, Officer DiMatteo testified that within twenty-four hours of the vehicle stop, he had used a confidential informant to conduct a controlled purchase of cocaine from Defendant and his co-defendant. He and his agents then conducted surveillance on their residence and witnessed Defendant and his co-defendant leaving the residence later that day. The stop was then made on suspicion of narcotics trafficking. [7-16-09 CD 11:36:20 to 11:46:20].

Second, defense counsel was aware of this drug buy and surveillance because he was adamant that the agents should not be allowed to testify at trial about the confidential informant or the surveillance. [Tr. 16-17]. The prosecutor said he would not elicit information about the specifics of the controlled buy but needed some information to explain why the officers made the traffic stop. [*Id.* 19].

Defendant relies upon the lack of more facts to argue that the information was not enough. But, as noted above, the State was not called upon to fully elucidate the justification for the stop. Second, the information that is present on this record is not that Defendant was tangentially associated with someone who may or may not have been dealing drugs, but that a controlled buy of cocaine was made from Defendant and his co-defendant on the same day as the stop. Unlike *Alderete*, the officers had specific reason to suspect Defendant and he was not just stopped because he was in company with someone the officers were investigating. The facts present on this record support a finding of reasonable suspicion and a competent attorney would have realized that and not found a motion to suppress the stop to be necessary. This Court has defined reasonable suspicion in the following way:

> "Reasonable suspicion" is judged by an objective standard: would the facts and inferences available to the officer warrant the officer, as a person of reasonable caution, to believe the action taken was appropriate. The officer must be able to articulate specific facts and reasonable inferences from those facts.

State v. Lyon, 1985-NMCA-082, ¶ 7, 103 N.M. 305. The level of suspicion needed to make a stop is "considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). *See also State v. Leyva*, 2011-NMSC-009, ¶ 23, 149 N.M. 435 (holding that the reviewing court defers to "the training and experience of the officer when determining whether

particularized and objective indicia of criminal activity existed.") (internal quotation marks and citation omitted).

On this record, it cannot be said with confidence that a motion to suppress was supported or that it would have succeeded. The officers had clear, recent, and specific information to suspect Defendant of drug trafficking. The stop was conducted for that purpose. If Defendant believes there are more facts outside this record that would support a claim of incompetence, then a Rule 5-802 proceeding would be his appropriate remedy.

C. Failure to File a Speedy Trial Motion Was Not Prima Facie Ineffective Assistance of Counsel

Defendant also claims that his attorney was ineffective in failing to file a motion to dismiss for a speedy trial violation. Again, the record does not support such a motion and a reasonably competent attorney would not have pursued such a motion. However, Defendant can pursue the claim under Rule 5-802 if he believes there is material outside of the current appellate record to support his claim.

As the United States Supreme Court found in *Barker v. Wingo*, 407 U.S. 514 (1972), the right to a speedy trial is "generically different" from any other constitutional rights designed to protect the accused because there is a "societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Id.* at 519. The right is also different

because "deprivation of the right may work to the accused's advantage" in that "[d]elay is not an uncommon defense tactic" because the State's case may deteriorate over time as witnesses become unavailable or their memories fade. *Id.* at 521. Lastly, the right is different because there is no fixed point in time at which the right has clearly been denied. Each case must be considered in light of its particular circumstances. *Id.* at 522; *State v. Garza*, 2009-NMSC-038, ¶ 11, 146 N.M. 499.

Defendant correctly notes that the delay in this case was long, over three years, and that the district judge expressed concern over the amount of time Defendant was in custody. [BIC 21-22]. Other than that, Defendant argues only that there were no hearings on the case in 2011, that the delay was long, and that although he waived his right to speedy trial in one motion, "a later motion merely waived his speedy trial rights for the time involved in the continuance." [BIC 23]. Based on this, Defendant contends that a motion to dismiss for a speedy trial violation would have been successful and he was therefore prejudiced by his attorney's failure to do so.

The current record does not support the notion that such a motion should have been made and would have succeeded. The delay was primarily caused by Defendant and his repeated desire to change his attorneys. The indictment was filed on July 16, 2009, and Mr. Pedro Pineda entered his appearance for Defendant

on August 10, 2009. [RP 13-14; 33]. The State filed its opening pleadings in October of 2009, including a witness list, and trial was set for November 30, 2009. [RP 36-47].

Five days before trial, Mr. Pineda moved to withdraw in a motion that was opposed by the State. Mr. Pineda asserted that Defendant accused him of working for the State and that their attorney-client relationship had deteriorated beyond repair. [RP 53-54]. A hearing was held on the matter on November 25, 2009, and the State said it was ready for trial and had extended a plea offer to Defendant in October. [11-25-09 CD 2:23:20 to 2:24:35]. The court granted the motion and stated that the resulting delay would be attributable to Defendant. [*Id.* 2:26:15 to 2:26:40; RP 55].

Two months later, Mr. Santiago Hernandez entered his appearance for Defendant, on January 23, 2010. [RP 58]. Mr. Peter Giovannini subsequently entered his appearance five days later. [RP 66]. The State filed a motion to determine counsel on February 10, 2010. [RP 73]. Trial was set for March 19, 2010, and defense counsel filed a motion to continue the trial on March 12, 2010, stating that "Defendant waives his right to a speedy trial. . ." [RP 76; 77-78]. Trial was set for April 16, 2010, and Defendant again moved to continue that date. [RP 80-85]. On May 28, 2010, Mr. Hernandez filed a motion to withdraw as counsel due to "discord of conflict of personalities." [RP 86].

The State filed motions to determine counsel on August 24, 2010, and February 15, 2011. [RP 90; 94-95]. Trial was set for August 2, 2011. The case was reassigned from Judge Murphy to Judge Macias on July 29, 2011, and trial was set for December 9, 2011. [RP 99-101].

On November 7, 2011, the State filed a motion to disqualify defense counsel Mr. Giovannini on the grounds that his investigator had been formerly employed by the drug task force and "had access to confidential information" that would have been shared with Mr. Giovannini. [RP 102-104]. The jury trial was reset for March 14, 2012. [RP 110]. A hearing was held on the matter on February 15, 2012, and Mr. Giovannini was allowed to withdraw from the case. [2-15-12 CD 2:34:30 to 2:49:25].

On February 21, 2012, Mr. Pineda took over representation of Defendant for the second time. [RP 114]. On March 12, 2012, Mr. Pineda moved to continue the March trial date noting that "through oversight, [he] entered into a case in which he already withdrew from based on conflict" and specifically noted that "any delay resulting from this continuance will be attributed to the defendant for purposes of speedy trial analysis." [RP 116]. The motions to withdraw and continue were granted and trial set for June 29, 2012. [RP 116-123].

The State filed a third motion to determine counsel on April 15, 2012, and a request to hold an immediate hearing on the matter. [RP 124-126]. A hearing was

set for May 14, 2012, but the record contains no hearing from that date. [RP 127]. On May 2, 2012, Mr. Gerald Montrose took over Defendant's representation and filed a motion to continue the June 29, 2012, trial stating that he would "waive his speedy trial rights for any time involved in this continuance." [RP 128; 130-131]. Trial was set for October 3, 2012, and commenced on that date. [RP 134].

As demonstrated by these dates, the delay in this case was largely caused by Defendant's consistent changing of attorneys. The State was diligent in filing pleadings and seeking hearings, including several trial dates, but Defendant's actions in changing attorneys, who then needed to seek trial continuances, caused the vast majority of the delay. *In re Darcy S.*, 1997-NMCA-026, ¶ 28, 123 N.M. 206 (explaining that "delays attributable to the defense are not charged against the State"). Defendant cannot both cause the delay and then complain of it. As this Court recently held in case with similar facts:

> However, we decline to hold that the district court violated Defendant's speedy trial rights when, in the interest of ensuring that Defendant was given every opportunity to obtain the counsel of his choice and ensuring that his chosen counsel had adequate time to prepare for trial, the court granted Defendant significant leeway and every opportunity to prepare an adequate defense.

State v. Fierro, 2012-NMCA-054, ¶ 62, 278 P.3d 541.

It does not appear that Defendant ever made any real assertion of the right to a speedy trial and Defendant identifies none in his brief. [BIC 22]. Nor has Defendant asserted any prejudice that would weigh that factor in his favor. On this

record, failure to pursue a speedy trial claim cannot be considered constitutionally ineffective.

D. Failure to Challenge the Admissibility of Defendant's Statement to Police Was Not Prima Facie Ineffective Assistance of Counsel

Defendant also claims that his attorney was ineffective for failing to suppress his statements to police. [BIC 23-25]. Defendant claims his attorney was "surprised" to learn he had made a statement and thus did not adequately investigate the case. [BIC 24]. Defendant cites to page 170 of the trial transcript as support for this assertion of surprise but this page does not contain anything relating to Defendant's statement and is instead a discussion of photographs of drug paraphernalia in the apartment.[2]

From this record, it cannot be said that failure to move to suppress the statements was ineffective assistance of counsel. The officers were not asked about the circumstances of the statement, whether Defendant was subject to custodial interrogation, and whether *Miranda* warnings were given or required. *See e.g. State v. Juarez*, 1995-NMCA-085, ¶ 8, 120 N.M. 499 (*Miranda* warnings are required when one is subject to custodial interrogation). The record does not contain sufficient facts to make such a determination and this claim would be

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[2] Counsel for the State is not aware of a discussion on the record indicating defense counsel was surprised to learn that Defendant gave a statement. However, defense counsel cross-examined the agents on their failure to include specifics of Defendant's statement in their reports and the agents explained the information was omitted to protect Defendant. [Tr 190-191; 239].

better pursued in a habeas proceeding. It is not clear if Defendant is claiming a *Miranda* violation or that his statement was coerced. *See e.g. State v. Fekete*, 1995-NMSC-049, ¶ 33, 120 N.M. 290 (a claim that police coerced a statement entails a different analysis from a claim that a suspect voluntarily waived his *Miranda* rights); *State v. Adame*, 2006-NMCA-100, ¶ 12, 140 N.M. 258 (noting the analytical difference between statements that are given without *Miranda* warnings and statements that are involuntary due to police coercion). Either way, the paucity of facts from the current record makes it difficult to determine if such a motion should have been pursued.

E. Defendant Can Pursue These Claims Under Rule 5-802

Defendant is not without an adequate remedy for his claim of ineffective assistance of counsel. Any claim of ineffective assistance of counsel may be raised and addressed in a state habeas corpus proceeding. Rule 5-802 NMRA; *State v. Paredez*, 2004-NMSC-036, ¶ 23; 136 N.M. 533. *See also State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657 (commenting that an ineffective assistance of counsel claim is more properly brought on collateral review); *State v. Powers*, 1990-NMCA-108, ¶ 5, 111 N.M. 10 (record did not contain essential factual basis for claim of ineffective assistance of counsel and case was more appropriate for a post-conviction proceeding).

III. DEFENDANT'S CONVICTIONS WERE SUPPORTED BY SUFFICIENT EVIDENCE

A. Standard of Review

"This Court does not weigh the evidence and may not substitute its judgment for that of the fact finder so long as there is sufficient evidence to support the verdict." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126. The appellate court is to view the evidence in the light most favorable to the state and indulge all permissible inferences in support of the verdict. *Id.* The court is to make a legal determination as to whether the evidence viewed in this light "could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *State v. Sanders*, 1994-NMSC-043, ¶ 11, 117 N.M. 452. "An appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence." *State v. Graham*, 2005-NMSC-004, ¶ 13, 137 N.M. 197.

"Because an appellate tribunal does not enjoy the same exposure to the evidence and witnesses as the jury at trial, our review for sufficiency of the evidence is deferential to the jury's findings." *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185.

B. The Evidence Showed Defendant Was Guilty of Trafficking by Possession with Intent to Distribute, Conspiracy to Do the Same, and Possession of Drug Paraphernalia

Viewed in the light most favorable to the jury's verdict, the evidence was sufficient to support all three convictions.

Defendant argues that his presence in the car where the large amount cocaine was found is not sufficient to show his possession of it. Defendant makes the same argument for the items of paraphernalia found in the apartment, arguing that the apartment and the car belonged to Chipres. Defendant claims that the only evidence that he stayed in that apartment was a hearsay statement from Chipres. [BIC 27-28].

This view of the evidence does not take into account the following relevant facts: (1) Defendant's admissions to the agents about his involvement in a drug trafficking organization and specifically that he was delivering the cocaine [Tr 182-183; 190-191; 223]; (2) Defendant and Chipres were seen leaving the apartment together with the cocaine [TR 217]; and (3) Defendant admitted that he stayed at the apartment from time to time. [Tr 225]. These facts are sufficient for a rational jury to find Defendant was in possession of the large amount of the cocaine in the car and intended to distribute it and that he was in possession of the paraphernalia used to package and distribute the cocaine in the apartment.

Defendant also claims that the conspiracy charge was not supported by sufficient evidence as there was no evidence of an actual agreement between him and Chipres. [BIC 29]. "The gist of a conspiracy under the statute is an agreement between two or more persons to commit a felony." *State v. Deaton*, 1964-NMSC-062, ¶ 5, 74 N.M. 87. "A conspiracy may be established by circumstantial

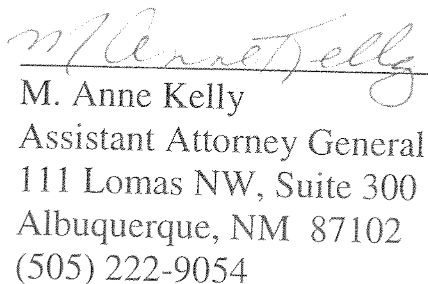
evidence. Generally, the agreement is a matter of inference from the facts and circumstances." *State v. Ross*, 1974-NMCA-028, ¶ 13, 86 N.M. 212. Here, the facts and circumstances showed that Defendant and Chipres both occupied the apartment which the agent described as a stash house. It was not a living space so much as a warehouse for packaging drugs. They were seen leaving the apartment together, in Chipres' car, with a large quantity of cocaine which Defendant admitted was being delivered. An agreement between the two can be inferred under such facts. They were acting in concert.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to reverse the district court and remand the case for trial.

Respectfully submitted,

GARY K. KING
Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by first class mail on:

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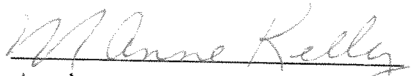
on this 23rd day of December, 2014.



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