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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
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STATE OF NEW MEXICO,

Plaintiff/Appellee,

vs. Ct. App. No. 33, 041

LUIS MADRIGAL,

Defendant/Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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

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TRANSCRIPT OF PROCEEDINGS

The pertinent proceedings in this case consist of a pre-trial hearing on September 4, 2012 and a jury trial on October 3, 2012. Counsel cites to the CD recording as **[CD DATE, TIME]** and to the transcript as **[Tr.___]**. References to the record proper are cited as **[RP ___]**. References to the State's Answer Brief are cited as **[AB___]**.

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I. REPLY ARGUMENT

Defendant-Appellant, Luis Madrigal, relies on his Brief-in-Chief for any and all facts and arguments not discussed herein. He takes this opportunity to highlight a few points in response to the Plaintiff-Appellee's Answer Brief.

REPLY POINT A: MR. MADRIGAL'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS VIOLATED WHEN HE WAS TRIED IN A SEPARATE PROCEEDING SUBSEQUENT TO THE FORFEITURE OF HIS PROPERTY.

The State "concedes that the [default] judgment was procured in violation of provisions of the Forfeiture Act and should be vacated." **[AB 4]** However, the State then argues that "this concession is not related to the issue of double jeopardy." **[AB 9]** In the State's assessment, made without citation to authority for the proposition, if the forfeiture is vacated, "then the double jeopardy issue is moot." **[AB 9]** The State also asserts that "[Mr. Madrigal] argues that the forfeiture proceeding was contrary to the statutory requirements of the Forfeiture Act in several ways. However, [Mr. Madrigal] does not seek reversal on these grounds and argues only that double jeopardy was violated." **[AB 6]** Contrary to the State's assertion, Mr. Madrigal did seek reversal on these grounds in his brief-in-chief. *See* **[BIC 12-13]** (requesting "that this Court vacate the default judgment entered on the forfeiture complaint against him, as it did not comply with the statute.....").

In ***State v. Nunez***, 2000-NMSC-013, ¶¶ 30, 36, 129 N.M. 63, 2 P.3d 264, the Supreme Court evaluated both the multiple punishments and multiple prosecution prongs of the state constitutional double jeopardy protections. ***Nunez*** makes clear that "civil forfeiture complaints and criminal charges for the same crime under the Controlled Substances Act may both be brought only in a single, bifurcated proceeding." 2000-NMSC-013, ¶ 119. Required under ***Nunez*** is that "both the property and the criminal actions will take place in a single trial." 2000-NMSC-013, ¶ 104. However, in this case, the civil forfeiture was obtained through a default judgment in front of a different fact-finder *years* before Mr. Madrigal was convicted at his criminal jury trial. The State has misstated the facts of this case in asserting that "in compliance with ***Nunez***, [the proceedings] were consolidated into one proceeding with one judge." **[AB 13]** The State asserts, despite the fact that the default judgment was entered by Judge Bridegforth years before the criminal jury trial in front of Judge Macias, that this was still a "single proceeding presided over by a single judge." **[AB 13]** The State's analysis based on this erroneous factual premise is therefore inherently flawed.

The state cannot have punishment through both mechanisms when obtained in this successive procedural manner. The state elected to obtain the default judgment first, therefore Mr. Madrigal should not have been subjected to a criminal jury trial in this matter. *See* ***Nunez***, 2000-NMSC-013, ¶ 31 ("if the civil

forfeiture is pursued first, resulting in either a trial or a default judgment, the double-jeopardy defense would arise upon the subsequent initiation of a criminal proceeding."). The fact that the default judgment was improperly obtained does not change this fact. The State cannot escape the double jeopardy problem by conceding the default judgment should be vacated. This concession does not moot the double jeopardy issue.

The question is not simply whether both forms of punishment are ultimately imposed (the concern of multiple punishment double jeopardy), but whether the State was authorized to proceed with the jury trial at all (the concern of successive prosecutions). ***Nunez*** allows for both punishments if a particular procedure is followed. ***Nunez*** also focuses on procedure: once forfeiture has occurred, a separate, subsequent criminal trial is unconstitutional. The appropriate constitutional remedy mandated by the Supreme Court is to vacate the criminal conviction. *See* ***Nunez***, 2000-NMSC-013, ¶ 30 ("[t]he New Mexico Constitution bars whichever action placed the defendant in jeopardy a second time for the same offense."). Because, as a separate matter, the default judgment was improperly granted, it too should be reversed on statutory grounds. *See* **NMSA 1978, § 31-27-6 (2002)**.

REPLY POINT B: MR. MADRIGAL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO FILE NECESSARY MOTIONS.

A. Motion to Suppress Traffic Stop

The State argues that "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." **[AB 21]** The two facts the State relies on are: 1) Officer DiMatteo's grand jury testimony that within twenty-four hours of the stop, he had used a confidential informant to conduct a controlled buy with Mr. Madrigal and then he saw Mr. Madrigal and Mr. Chipres-Chavez leave the residence later that day; 2) defense counsel was aware of the drug buy and surveillance.

On the contrary, Mr. Madrigal continues to argue that police did not have reasonable suspicion to initiate a traffic stop at that moment to investigate drug activity, particularly when the controlled buy was conducted many hours prior to the stop, so that a motion to suppress was indeed viable, even under the facts cited by the State. *See* ***United States v. Hensley***, 469 U.S. 221, 228-29 (1985) (discussing the propriety of an investigative stop after a crime has been completed and noting that exigent circumstances, such as were the case in ***Terry***, are more persuasive when the police step in *before* a crime is committed or completed).

B. Motion To Dismiss For Speedy Trial Violation

Mr. Madrigal was arrested on June 30, 2009, and did not go to trial until October 3, 2013. He spent an exorbitant three years, three months, and three days in custody awaiting trial, which the State agrees was "long." **[AB 23]** The State's primary argument is that Mr. Madrigal caused the majority of the delay because he changed attorneys a number of times. **[AB 26]** However, this does not excuse the fact that the State and the court failed to move this case along. *See **State v. Spearman***, 2012–NMSC–023, ¶ 25, 283 P.3d 272 (holding negligent or administrative delay is weighed against the prosecution because "the ultimate responsibility for such circumstances ... rest[s] with the government rather than with the defendant[.]") (internal quotation marks and citation omitted).

C. Motion to Suppress Statement

The State notes that a citation to the record in the brief-in-chief is incorrect. **[AB 27]** Undersigned counsel apologizes for this error. The correct citation – related to trial counsel's surprise upon discovering that Mr. Madrigal had made a statement to police – is located at **[Tr. 179]**. During a bench conference, the State informed the court that he expected Agent Flores to testify about admissions Mr. Madrigal apparently made to him. Defense counsel admitted: "I didn't see them in discovery." **[Tr. 179]** Mr. Madrigal continues to argue that his attorney was ineffective for failing to challenge the statement given to police, as the jury's

consideration of this evidence should have been informed by UJI 14-5040 NMRA. Defense counsel's failure to challenge the statement took away the voluntariness consideration from both the judge and the jury. This resulted in prejudice given the facts of this case.

D. Habeas as an Alternative

Undersigned counsel continues to request that if this Court does not find that appellant's claim on this point warrants reversible error, that it note in any decision that this issue may be raised, if there appears to be a factual basis, in a collateral post-conviction proceeding.

REPLY POINT C: THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTIONS.

The State argues that it presented sufficient evidence of Mr. Madrigal's possession over both the cocaine in the car and the items found in the apartment. **[AB 30]** The State relies primarily on Mr. Madrigal's statements he apparently made to officers about his involvement in drug trafficking, the fact that Mr. Madrigal was seen leaving the apartment with Mr. Chipres-Chavez with the cocaine, and the fact that Mr. Madrigal admitted he stayed at the apartment from time to time. **[AB 30]** However, Mr. Madrigal continues to argue that these facts are not sufficient to establish constructive possession over the cocaine found under Mr. Chipres-Chavez's seat or the items found at Mr. Chipres-Chavez's apartment.

See ***State v. Maes***, 2007–NMCA–089, ¶ 14, 142 N.M. 276, 164 P.3d 975 (observing that in light of the evidence showing that the defendant did not have exclusive access to the house where the methamphetamine was seized, "the [prosecution] could not rely solely on [the d]efendant's access to the house to support an inference that [she] was in constructive possession of the methamphetamine" found therein); ***State v. Becerra***, 1991-NMCA- 090, ¶ 13, 112 N.M. 604, 817 P.2d 1246 ("Constructive possession requires evidence of knowledge and control[.]").

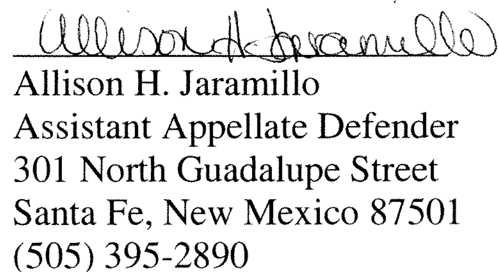
The State also argues that it presented sufficient evidence of conspiracy because "the facts and circumstances showed that [Mr. Madrigal] and Chipres both occupied the apartment which the agent described as a stash house." **[AB 31]** The State also relies on the fact that the apartment was not a living space and that both men were seen leaving the apartment in Chipres' car with a large amount of cocaine, which Mr. Madrigal admitted was being delivered. **[AB 31]** The State reaches the conclusion that "[a]n agreement between the two can be inferred under such facts." However, Mr. Chipres-Chavez did not testify against Mr. Madrigal and mere presence at a crime scene is not enough to establish a conspiracy. *See* ***State v. Dressel***, 1973-NMCA-113, ¶ 6, 85 N.M. 450, 513 P.2d 187 (stating mere presence at the scene of the crime is insufficient to sustain conspiracy conviction). Mr. Madrigal continues to argue that the State failed to prove this charge.

II. CONCLUSION

For the reasons stated herein and in his Brief-in-Chief, Mr. Luis Madrigal respectfully requests that this Court reverse his convictions.

Respectfully submitted,

JORGE A. ALVARADO
Chief Public Defender



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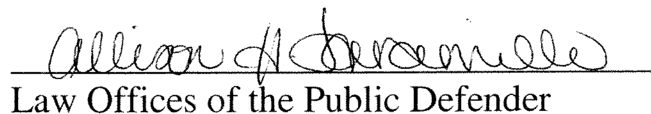
I hereby certify that a copy of this pleading was served by hand delivery to the Attorney General's Box in the Court of Appeals this 7th day of January, 2015.



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