IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

Court of Appeals No. 33,312

STATE OF NEW MEXICO,

Plaintiff/Appellant(Cross-Appellee),

vs.

BRADFORD JAMES,

Defendant/Appellee(Cross-Appellant).

CRIMINAL APPEAL
ELEVENTH JUDICIAL DISTRICT
COUNTY OF MCKINLEY

District Court No. D-1113-LR-201300007
The Honorable Robert Aragon

ANSWER BRIEF

Submitted by:

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF TRANSCRIPT CITATION FORMAT

The transcript of the pre-trial hearings were electronically recorded and appear with citation to the date of the hearing and general time in the hearing when relevant testimony was given, corresponding to the official logs.

STATEMENT OF PAGE/WORD COUNT COMPLIANCE:

This Brief contains fewer than the permitted 35 pages. Counsel used NeoOffice for iMac with a proportionally spaced Times New Roman typeface in 14 point font. The body of the document consists of 6,229 words total.

TABLE OF AUTHORITIES

New Mexico Case Law Authority

New Mexico Rules and Statutory Authority

Authority from Other Jurisdictions

Nature of the Case:

This consolidated appeal arises from the Plaintiff-Appellant State of New Mexico's appeal of the District Court's order granting Defendant-Appellee Bradford James' Motion to Suppress ([RP 138] Court of Appeals No. 33,312), and the District Court's order denying Mr. James' Motion to Dismiss for violation of Rule 6-506 NMRA ([RP 149] Court of Appeals No. 33,701).

Relevant Facts:

On November 3, 2012, Mr. James was driving his vehicle southbound on Highway 608 in McKinley County, New Mexico. [RP 87-93] McKinley County Sheriff Deputy Merlin Benally was on patrol, recognized Mr. James from previous encounters, and recalled that Mr. James' license was suspended or revoked. [Tr. 10/1/13 03:50:00 – 4:04] Without verifying his suspicion regarding Mr. James' licensure status, Deputy Benally turned his vehicle around and began following Mr. James. [*Id.*]

Eventually, Deputy Benally allegedly saw Mr. James' vehicle cross a white edge line, and he thought that a passenger in Mr. James' vehicle was unbelted. Deputy Benally stopped Mr. James vehicle, smelled an odor of alcohol, and saw Mr. James had bloodshot, watery eyes. [*Id.*] Field sobriety tests were administered, which Mr. James failed. [RP 90] Mr. James was arrested for driving on a revoked or suspended license and for failing to show proof of insurance. [RP 87] At the detention center, Mr. James submitted to a "blood and or breath test" and the

results were 0.18/0.17. [RP 87] Mr. James was charged with driving while under the influence (third offense), driving on a revoked or suspended license, failing to carry evidence of financial responsibility, and failure to maintain a traffic lane. [RP 84]

Additional relevant facts are discussed as relevant below.

Summary of Proceedings:

Proceedings Before the Magistrate Court:

In November 2012, Mr. James was charged by criminal complaint in McKinley County Magistrate Court before Magistrate Judge Soland. [RP 84] Mr. James was arraigned on November 5, pleaded not guilty, and demanded a jury trial. [RP 79-80] He filed a "Motion to Suppress – Illegal Stop" on December 7, 2012, [RP 55] contending that Deputy Benally had no reasonable suspicion to follow Mr. James and that the subsequent stop of Mr. James for failure to maintain a traffic lane and failure to wear a safety belt was pretextual.

Judicial Assignments and Excusal:

The case was reassigned from Judge Soland to Judge Hodo in January 2013. [RP 50] Mr. James excused Judge Hodo. [RP 47] Although the State argued below that Mr. James' excusal was untimely, the State on appeal concedes that Mr. James timely excused Judge Hodo. [RP 47; *see* BIC 4 FN 1] The case was reassigned to Judge King on February 13, 2013. [RP 46] Mr. James' Motion to Suppress was scheduled for hearing April 2, 2013. [RP 44] A Notice of Jury Trial was

issued for May 3, 2013, and subsequently rescheduled for May 9, 2013. [RP 43; 42]

Motion to Dismiss for Violation of Rule 6-506 NMRA [RP 40]:

On May 7, 2013, Mr. James filed a Motion to Dismiss for violation of the time limits prescribed by Rule 6-506 NMRA, calculated as 182 days from Mr. James' arraignment on November 5, 2012. [RP 40] Mr. James' Motion to Dismiss demonstrated that the time limit to commence trial expired on May 6, 2013. [RP 40]

The State responded on May 8, 2013 with a Motion for Extension of Time for Commencement of Trial, conceding the time had expired but arguing Mr. James had contributed to the delay by failing to appear on March 5, 2013. [RP 38] It later transpired that Mr. James' absence was due to a family emergency that was reported to Defense Counsel and the Court. [RP 40; 110] The State also complained that Mr. James' exercise of his right to excuse Judge Hodo was untimely and contributed to the delay. [RP 38-9] On appeal, the State concedes the excusal was timely. [BIC 4 FN 1]

Motion to Supress – Illegal Stop [RP 55]:

On December 7, 2012, Mr. James filed a "Motion to Suppress – Illegal Stop" [RP 55] setting out the substance and law surrounding Mr. James' contention that Deputy Benally's stop was without reasonable suspicion or a "legally sufficient basis" at its inception. [RP 55]

Disposition by the Magistrate Court:

Judge King granted the State's Motion for Extension of Time on May 9, 2013. [RP 37] No findings of fact or conclusions of law were entered showing analysis of any exceptional or extenuating circumstances justifying either (1) the late request for extension (Rule 6-506(D)) or the extension itself (Rule 6-506(C)). Mr. James entered into a conditional plea agreement [RP 5], reserving his right to appeal two issues to the District Court:

1. the constitutionality of the traffic stop; and

2. the expiration of the time limits established by Rule 6-506 NMRA.

[RP 4-5]

Proceedings Before the District Court:

In the District Court on de novo appeal [RP 1], Mr. James filed a June 20, 2013 "Motion to Suppress – Illegal Stop," [RP 14], followed by a "Motion to Dismiss for Violation of Rule 6-506" on August 8, 2013 [RP 95]. Both matters were heard October 1, 2013. [Tr. 10/1/2013]

Motion to Dismiss for Violation of Rule 6-506 NMRA:

Mr. James argued the time limit to commence trial ran on May 6, 2013, and that no motion to extend the time limits or cite exceptional circumstances was filed by the State prior to May 6. [Tr. 10/1/13 3:17:30 – 22:00] The State's Motion for Extension of Time was ineffective because it was filed after the time provided by

Rule 6-506 had already expired. [*Id.*] Additionally, the State's untimely Motion failed to cite exceptional circumstances to support its motion. [*Id.*]

The State's response included the argument – conceded by the State on appeal – that Mr. James' excusal of Judge Hodo was untimely. [Tr. 10/1/13 3:27:28 – 42:15; BIC 4 FN 1] Counsel for the State then essentially testified to matters not of record, *to wit*, that after orally denying Mr. James' motion to suppress, Magistrate Judge King had explained he was unable to conduct a jury trial before May 9, 2013, and thus would expand the time limit. [*Id.*] No order or document appears in the record to support such a determination by Magistrate Judge King. *See State v. Vaughn*, 2005–NMCA–076, ¶ 15, 137 N.M. 674, 114 P.3d 354 (where no written order is filed, generally an oral ruling by a district court is not final or binding); *State v. Muzio*, 1987-NMCA-006, 105 N.M. 352, 732 P.2d 879 (only a written order or judgment signed and filed by the court is legally effective to implement the court's ruling).

Motion to Suppress – Illegal Stop:

Regarding Mr. James' Motion to Suppress the evidence and testimony of Deputy Benally, the deputy testified he observed Mr. James driving on November 3, 2012, recognized Mr. James, and recalled that Mr. James' license was suspended or revoked. [Tr. 10/1/13 3:52:30 – 4:02:00] Other contacts with Mr. James described by the deputy had confirmed his belief that Mr. James' license was suspended or revoked. [Id.] The deputy presented hearsay testimony of a stop approxim-

ately three weeks before November 3, 2012 in which the deputy heard the dispatch center confirm to another officer that Mr. James' license was suspended or revoked. Deputy Benally conceded he did not run Mr. James through dispatch to confirm that Mr. James' license was suspended or revoked before he pursued and then stopped Mr. James. *See State v. Herrera*, 2010-NMCA-006, ¶ 8, 147 N.M. 441, 224 P.3d 668 (holding a license plate check is neither a search nor a seizure because an individual has no expectation of privacy in a plate number).

After recognizing Mr. James, but prior to witnessing any moving violations, Deputy Benally turned his patrol car around, caught up with Mr. James' vehicle, and began to follow the vehicle. [*Id.*] The deputy testified he intended to pull Mr. James over before he observed any traffic (moving) violations. [*Id.*]

Once he was following Mr. James, but prior to stopping the vehicle, the deputy observed Mr. James' vehicle to cross the solid white "edge line" of the road, onto the shoulder, and then drift back toward the centerline. [*Id.*] The deputy then thought he noticed one of the passengers in the vehicle was not wearing a safety belt. [*Id.*] Deputy Benally testified he waited to find a safe place to stop Mr. James' vehicle and stopped him shortly after observing the alleged failure to maintain a lane and the safety-belt violation. [*Id.*]

Disposition by the District Court:

On the Rule 6-506 NMRA violation, the District Court opined:

> I am going to find that there was an exceptional circumstance. As to the particulars, whether Judge King had to attend a funeral, had to appear for a critical doctor's appointment, or just damn well didn't feel like showing up, I think it constitutes an exception. Whether there's a reason for it, or its just willful disregard for his duty, I don't think matters. It is an exception, and I think the State is entitled to the consequence of my finding an exception there. So, I'm going to deny your motion for dismissal based on the time violation.

[Tr. 10/1/13 3:47:30 – 3:48:30] The District Court declined to reach Mr. James' arguments regarding the State's failure to show exceptional circumstances for its late filing of its motion to extend the time, stating Mr. James had failed to raise the issue in his brief. [Tr. 10/1/13 3:47:30 – 3:48:30; *but see* RP 99-101]

Regarding Mr. James' Motion to Suppress Deputy Benally's testimony, the District Court expressly found Deputy Benally to be credible. [Tr. 10/1/13 4:48:00 – 4:51:00] Specifically, the District Court found credible Deputy Benally's testimony that he fully intended to stop Mr. James' vehicle immediately upon recognizing him. [*Id.*] The District Court found that the delay between Deputy Benally's beginning his pursuit of Mr. James and making the stop was to get to a place to safely effectuate the stop, not to investigate other activity. [*Id.*] The District Court noted Deputy Benally failed to contact dispatch during the interim to determine Mr. James' licensure status prior to the stop. [*Id.*] Even though Deputy Benally had information regarding Mr. James' licensure status from approximately three weeks earlier and from his own prior experience with Mr. James, it was not reason-

able for Deputy Benally to suspect on that basis – without more - that Mr. James was breaking the law when Deputy Benally began to pursue him. [*Id.*] Thus, the stop was unreasonable and the observation of the other alleged traffic offenses played no part in the decision to stop Mr. James. [*Id.*]

The District Court had orally stated it found no pretext, but its written order suppressing evidence derived from the traffic stop included a conclusion of law that the traffic violations Deputy Benally testified he saw after he formed his intent to stop Mr. James were, in fact, pretextual. [RP 138-139] The State on appeal characterizes this as an error [BIC 8] but concedes the order was approved by the prosecutor and signed by the District Court; it thus reflects the Court's decision. *State v. Reyes–Arreola*, 1999–NMCA–086, ¶ 10, 127 N.M. 528, 984 P.2d 775 (it is well settled that an oral ruling is merely evidence of what a judge intends to do, it is not binding, and it can be changed at any time before a written order is filed); *State v. Diaz*, 1983-NMSC-090, ¶ 4, 100 N.M. 524, 673 P.2d 501 (an oral pronouncement of sentence by a judge in a criminal case is not a final judgment); *Peace Found., Inc. v. City of Albuquerque*, 1966-NMSC-195, 76 N.M. 757, 758, 418 P.2d 535 (court's oral remarks were not a decision contemplated by the rule).

Denial of Mr. James' Motion to Dismiss is a Final Order:

Mr. James agrees with the State's position that the District Court's order [RP 149] denying Mr. James' Motion to Dismiss for violation of Rule 6-506 is a final, appealable order under the circumstances. [BIC v-vi, *citing State v. Celusniak*,

2004-NMCA-070, ¶¶ 10, 14, 135 N.M. 728] *See* Rule 12-201(C) NMRA (providing an appellee may, without taking a cross-appeal or filing a docketing statement or statement of the issues, raise issues on appeal for the purpose of enabling the appellate court to affirm, or raise issues for determination only if the appellate court should reverse, in whole or in part, the judgment or order appealed from).

Because Mr. James' Motion to Suppress was granted, the charges against him were dismissed [RP 138-9], and his appeal is in the nature of a conditional cross appeal. If the District Court's suppression decision is upheld on appeal, Mr. James' appeal of the denial of his Motion to Dismiss for violation of Rule 6-506 NMRA is moot. If, however, the Court of Appeals reverses the District Court's suppression order, then the Court should consider Mr. James' appeal of the denial of his Motion to Dismiss for violation of Rule 6-506 NMRA. *See Rodeo, Inc. v. Columbia Cas. Co.*, 2007-NMCA-013, ¶ 10, 141 N.M. 32, 150 P.3d 982 (having affirmed the district court's ruling that led to the Defendant's interlocutory appeal, the Court of Appeals did not address the merits of the cross-appeal); *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, ¶ 96, 276 P.3d 252 (considering Cimarron's conditional cross-appeal because the Court of Appeals reversed in part the orders of the district court), *rev'd on other grounds sub nom. Starko, Inc. v. New Mexico Human Services Dept.*, 2014-NMSC-033, 333 P.3d 947.

ARGUMENT AND AUTHORITY:

ISSUE 1: The District Court Erred in Denying Mr. James' Motion to Dismiss for the State's Violation of Rule 6-506 NMRA.

Standard of Review:

This Court reviews *de novo* questions of law concerning the interpretation of Supreme Court rules and the district court's application of the law to the facts of the case. *State v. Carreon*, 2006–NMCA–145, ¶ 5, 140 N.M. 779, 149 P.3d 95 ("We review a district court's application of Rule 6–506 de novo."), *abrogated on other grounds by State v. Savedra*, 2010–NMSC–025, 148 N.M. 301, 236 P.3d 20; *State v. Sharp*, 2012-NMCA-042, ¶ 5, 276 P.3d 969, *citing State v. Foster,* 2003–NMCA–099, ¶ 6, 134 N.M. 224, 75 P.3d 824.

Preservation:

Mr. James raised, briefed and preserved his arguments that the time established by Rule 6-506 to commence his trial had elapsed, requiring dismissal, in his Motions to the Magistrate and District Courts [RP 40-41; 95-105] and in oral arguments to the District Court on October 1, 2013. [Transcript]

Argument and Authority:

Mr. James was arrested and charged on November 3, 2012, and arraigned on charges in the Gallup Magistrate Court on November 5, 2012. Barring other triggering events, Rule 6-506 NMRA required the State to commence Mr. James' trial within 182 days of his arraignment – May 6, 2013. No triggering events occurred during these 182 days. Though several hearings were scheduled, Mr. James' trial

had not commenced by May 6, 2013, and on May 7, 2013, counsel for Mr. James filed a Motion to Dismiss for Violation of Rule 6-506 NMRA in the Magistrate Court. The State did not file a Motion for Extension of Time for Commencement of Trial until May 8, 2013, two days after the time under Rule 6-506 had elapsed.

The Magistrate Court found exceptional circumstances justified granting an extension of time for commencement of trial, but nowhere determined the State's failure to file for an extension within the 182 days was justified by exceptional circumstances. Mr. James entered into a conditional plea and appealed.

The appeal of a magistrate court decision to a district court is de novo. Rule 6–703(J) NMRA. In hearing a de novo appeal, "the district court is not in any way bound by the proceedings in the lower court." *State v. Hicks*, 105 N.M. 286, 287, 731 P.2d 982, 983 (Ct.App.1986). Rather, the district court must independently determine whether the requirements of the magistrate court were correctly applied. *See id.* (stating that, in a de novo appeal from a metropolitan court decision, the district court was to independently determine whether the metropolitan court rule had been followed).

I. The District Court Erred in Failing to Independently Determine Whether the Magistrate Court Followed Rule 6-506(D).

Rule 6–506(B)(1) applies to this case and provides: "[t]he trial of a criminal citation or complaint shall be commenced within one hundred eighty-two (182) days after . . .the date of arraignment or the filing of a waiver of arraignment of the defendant[.]"

Rule 6-506(C)(5) allows the magistrate court to extend the 182 day period upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the time period, provided that the aggregate of all extensions granted under this subparagraph may not exceed sixty (60) days)

Rule 6-506(D) specifically requires that any motion to extend the time period for commencement of trial under Paragraph (C) may be filed at any time **within the applicable time limits** (that is, the 182 days), "or upon exceptional circumstances shown within ten (10) days after the expiration of the time period." *Duran v. Eichwald*, 2009-NMSC-030, ¶ 2, 146 N.M. 341, 210 P.3d 238 ("If it becomes apparent that trial cannot commence within the six-month time period, the district court, for good cause shown, may extend the time for commencing trial up to an aggregate of six additional months.")

The record reflects that the State's Motion for Extension of Time for Commencement of Trial was filed within this ten (10) day period, and examination of the Motion shows the State argued for exceptional circumstances to support an extension of time for commencement of the trial, (albeit the State now concedes at least one of the grounds asserted was meritless). [RP 112-113] However, the State's motion nowhere reflects argument, authority, factual averments, or any rationale for any finding that exceptional circumstances excused the State from filing

its motion for extension of time outside the 182 days, but within the ten (10) day period allowed by Rule 6-506(D).

In other words, even assuming the District Court properly determined that exceptional circumstances justified the State's failure to bring Mr. James to trial within the 182 days allowed, there was no argument – much less evidence – to support a finding that the State's Motion for extension of time for commencement of trial was timely under Rule 6-506(D). Rule 6-506(E)(1) gives the Magistrate Court discretion to grant or deny an untimely motion for extension of time, but requires that the Magistrate Court first acknowledge the untimeliness of the State's motion and make a ruling on the exceptional circumstances justifying the untimely filing. The State made no showing of exceptional circumstances justifying its untimely filing of the Motion, and the District Court flatly refused to consider Mr. James' argument. [Tr. 10/1/13 3:47:00 – 3:51:15] A failure to exercise discretion conferred by law is, of itself, an abuse of discretion. *See Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 12, 125 N.M. 292, 960 P.2d 834 (discussing District Court's failure to rule on the defendant's motion for remittitur; holding the District Court's failure to exercise discretion was, in itself, reversible error).

No circumstance explains nor justifies why it was beyond the State's control to at least request an extension of time from the Magistrate Court in a timely manner. *See Duran v. Eichwald,* 2009-NMSC-030, ¶ 7, *citing State v. Sandoval*, 2003–NMSC–027, ¶ 3, 134 N.M. 453, 78 P.3d 907 (recognizing that a timely petition is

required under Rule 5–604 " [a]bsent exceptional circumstances beyond the control of the State or the trial court"); *State v. Dominguez*, 2007–NMCA–132, ¶ 11, 142 N.M. 631, 168 P.3d 761 (noting that the prosecutor's inability to reach defense counsel to obtain and state the defendant's position with respect to a petition for extension of time, did not prevent the prosecutor from timely filing the petition).

During the October 1, 2013 hearing before the District Court, the State sought to rely on the existence of an unrecorded, purported statement on the record by Magistrate Judge King, which is nowhere reflected in the Magistrate Court Record Proper. Inadvertence is not an exceptional circumstance. *Duran v. Eichwald,* 2009-NMSC-030, ¶ 8. Prosecutorial neglect cannot be permitted to swallow the requirement of Rule 6-506 requiring commencement of trial within 182 days absent exceptional circumstances beyond the control of the parties or court. By definition, neglect or inadvertence simply are not matters beyond the control of the prosecution. *Duran v. Eichwald,* 2009-NMSC-030, ¶ 8; *Dominguez*, 2007–NMCA–132, ¶ 11 (rejecting prosecutorial inadvertence due to a heavy caseload as an exceptional circumstance justifying the late filing of a petition for extension of time).

"[T]here must be a point at which lawyers are conclusively presumed to know what is proper and what is not." *State v. McClaugherty,* 2007-NMCA-041, ¶ 80, 141 N.M. 468, 157 P.3d 33. Similarly, there must be a point at which prosecutors are conclusively presumed to be responsible for the timely filing of motions

and responses, and for the advancement of necessary pretrial events, to accomplish the timely administration of justice "consistent with due process".

Having failed even to argue for exceptional circumstances justifying the untimeliness of the State's motion for an extension of time for commencement of trial, and having thus failed to invoke a ruling by either the Magistrate Court or the District Court, the State is bound by Rule 6-506(E)(2): "In the event the trial of any person does not commence within the time limits provided in this rule, including any court-ordered extensions, the case **shall be** dismissed with prejudice." (Emphasis added); *Duran v. Eichwald,* 2009-NMSC-030, ¶ 9 ("Given the State's complete failure to establish exceptional circumstances justifying its untimely petition, and given that the petition was nonetheless filed beyond the ten-day grace period in Rule 5–604(E), dismissal of the charges with prejudice is mandatory."). The District Court erred in holding otherwise and should be reversed.

II. The District Court Erred in Determining That Exceptional Circumstances Justified the Magistrate Court's Post Hoc Grant of the State's Untimely Motion for Extension of Time.

As noted above, the State failed to request an extension of time to commence trial until two days after the expiration of the 182 period provided by Rule 6-506. Even though the State's motion was filed within the ten-day grace period, the State failed to establish exceptional circumstances to justify its untimely request for an additional extension of time.

"A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker v. Wingo*, 407 U.S. 514, 527 (1972). New Mexico has adopted the six-month rules in order to effectuate a criminal defendant's right to a speedy trial and to "assure prompt disposition of criminal cases." *State v. Savedra*, 2010-NMSC-025, ¶ 5, 148 N.M. 301, 236 P.3d 20, *citing State v. Garza,* 2009–NMSC–038, ¶ 43, 146 N.M. 499, 212 P.3d 387 ("As a case management tool, the six-month rule accounts for the amount of delay considered reasonable in bringing cases to trial."). Thus, the right protected by the six-month rules belongs to a **criminal defendant**, not the State, the courts, or any other party. *State v. Savedra*, 2010-NMSC-025, ¶¶ 5, 8 (emphasis in original ¶ 5).

Given this articulated clarification by our Supreme Court, the District Court's decision that the Magistrate Judge's resetting of the trial outside the 182 day period was justifiable for any reason or no reason cannot stand. A judge's unwillingness or failure to perform his duties does not constitute an exceptional circumstance that overrides a defendant's speedy trial rights. The District Court's basis for approving the Magistrate Court's unspecified grant of an untimely request for extension was the District Court stated belief that:

> [W]hether Judge King had to attend a funeral, had to appear for a critical doctor's appointment, or just damn well didn't feel like showing up, I think it constitutes an exception. Whether there's a reason for it, or its just willful disregard for his duty, I don't think matters.

[Tr. 10/1/13 3:47:30 – 3:48:30] This is contrary to the Supreme Court's clear directive in *Savedra* that analyzes six-month rules as expressing rights held by the accused, and no other. *Savedra*, 2010-NMSC-025, ¶ 5 (the six-month rules effectuate a criminal defendant's right to a speedy trial . . . the right protected by the six-month rules belongs to a criminal defendant, not the State, the courts, or any other party).

This Court must reject the District Court's decision to let the Magistrate Court's unspecified unwillingness or failure to proceed within the time prescribed by Rule 6-506, and the State's tardiness in requesting an extension, to trump Mr. James' rights. The State had obtained a definite trial setting within the 182 days from the Magistrate Court, but the Magistrate Court vacated the setting that day after denying Mr. James' Motion to Suppress [RP 43], and reset the trial outside the 182 period, without objection from the State. [RP 42] No document or properly constituted evidence in the Magistrate Court record reflects any finding, agreement, or decision by the magistrate court regarding the merits of the State's untimely request for extension. *State v. Hall*, 2013-NMSC-001, ¶ 28, 294 P.3d 1235 ("The mere assertions and arguments of counsel are not evidence.")

There must be some adverse consequence for the State's failure to properly attend to its duties under either the six-month rule, *Savedra*, 2010-NMSC-025, ¶ 5, and the rule governing the timeliness of requests for extension, *Duran v. Eichwald*, 2009-NMSC-030, ¶ 10. No less drastic remedy than dismissal is available under

Rule 6-506, where the State has failed to make a timely record of the substance of a motion for extension of the six-month rule. Assuming the Magistrate Court became aware of the failure to timely file, and the need for an extension, the Court failed to make a record of its exercise of discretion under Rule 6-506(F). *But see State v. Sharp*, 2012-NMCA-042, ¶ 11, 276 P.3d 969 (stating in dicta that no rule or case law required the magistrate court to create a record of what were the exceptional circumstances that led to its decision). The District Court's subsequent de novo oral analysis that the rights established by Rule 6-506 somehow inure to the benefit of the magistrate judge is contrary to New Mexico's established "speedy trial" jurisprudence. *Savedra*, 2010-NMSC-025, ¶¶ 5, 8. The District Court further erred in basing its decision on the lack of a record before the Magistrate Court, rather than engaging in a proper, independent analysis of the requirements of the Rule 6-506. *Sharp*, 2012-NMCA-042, ¶ 11. The charges against Mr. James must be dismissed with prejudice.

ISSUE 2: The District Court Properly Determined Deputy Benally Lacked Reasonable Suspicion to Follow and Stop Mr. James.

Standard of Review:

When reviewing the trial court's ruling on a motion to suppress, this Court determines whether the law was correctly applied to the facts, viewing the facts in the light most favorable to the prevailing party. *State v. Joe*, 2003–NMCA–071, ¶ 6, 133 N.M. 741, 69 P.3d 251. "As a general rule, this Court will indulge in all reasonable presumptions in support of the [trial] court's ruling." *Id., quoting State v. Gonzales*, 1999–NMCA–027, ¶ 15, 126 N.M. 742, 975 P.2d 355. The evidence is examined in the light most favorable to the District Court's decision, and the Court indulges inferences drawn by the District Court even though, with similar facts, another District Court may have drawn different inferences. *State v. Joe*, 2003–NMCA–071, ¶ 6.

Preservation:

Mr. James raised, briefed and preserved his arguments that Deputy Benally's stop was made without reasonable suspicion in his motions to the Magistrate and District Courts [RP 55-57, 14-16] and in oral arguments to the District Court on October 1, 2013. [Transcript]

Argument and Authority:

The State argues that Deputy Benally's testimony demonstrates he had a reasonable suspicion of a traffic violation, and therefore the District Court erred in its application of the law to the facts in granting the motion to suppress.

I. Deputy Benally Lacked Reasonable Suspicion to Stop Mr. James.

A police officer may stop a vehicle if the officer has a reasonable suspicion, based on articulable facts, that the law has been or is being violated. *State v. Munoz*, 1998–NMCA–140, ¶ 8, 125 N.M. 765, 965 P.2d 349. Where there is conflicting evidence regarding the factual issue of reasonable suspicion, this Court cannot weigh the evidence or substitute its judgment for that of the fact finder as long as there is sufficient evidence to support the trial court's ruling. *State v. Mora,* 1997–NMSC–060, ¶ 27, 124 N.M. 346, 950 P.2d 789. The findings of the District Court must be construed to uphold a judgment rather than to reverse it. *State v. McClaugherty*, 2008-NMSC-044, ¶ 48.

A seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away." *State v. Rivas*, 2007-NMCA-020, ¶ 7, 141 N.M. 87, 90, 150 P.3d 1037. Investigatory detention is permissible when there is a reasonable and articulable suspicion that the law is being or has been broken. *Id.* A reasonable suspicion is a particularized suspicion, based on all the circumstances that the particular individual detained is breaking or has broken, the law. *Id.* Unsupported intuition and inarticulate hunches are not sufficient. *Id.*, *citing State v. Jason L.*, 2000–NMSC–018, ¶ 20, 129 N.M. 119, 2 P.3d 856.

"[I]nvestigatory detentions need only be supported by reasonable suspicion of criminal activity[.]" *State v. Patterson*, 2006–NMCA–037, ¶ 15, 139 N.M. 322, 131 P.3d 1286. Individual rights are violated when an officer detains an individual

with no more than a generalized suspicion, or unarticulated hunch or suspicion, because the government's interest in crime prevention will not outweigh the intrusion into the individual's privacy. *Id.* at ¶ 16. The detention must also be reasonably related to the circumstances that initially justified the stop, and the scope of the investigation may expand only when the officer has reasonable and articulable suspicion of other criminal activity. *Id.*

Deputy Benally testified that on previous occasions, Mr. James had been stopped while driving with a suspended or revoked license, the suspension or revocation due to previous DUI events. Deputy Benally made the decision to stop Mr. James solely on the basis of the fact that he recognized Mr. James and believed based on the prior encounters that Mr. James' license was revoked. The District Court, after hearing Deputy Benally's testimony at the hearing on the motion to suppress, found Deputy Benally credible, and credited Deputy Benally's statements that he intended to pull Mr. James over because of his recognition of Mr. James and uncorroborated belief that Mr. James was driving on a revoked license.

The District Court found Deputy Benally's suspicion that Mr. James was driving on a revoked license was unreasonable, since it was based on prior, temporally remote, information or encounters, and Deputy Benally failed to confirm that Mr. James' license was revoked at the time Deputy Benally turned his patrol car around and began to follow Mr. James. The District Court held there was in-

sufficient recent evidence to allow Deputy Benally to proceed on his hunch that Mr. James was still driving with a suspended or revoked license.

Viewing the District Court's determination of facts in the light most favorable to upholding its decision, Deputy Benally lacked reasonable suspicion to stop Mr. James. *State v. Lopez*, 2005-NMSC-018, ¶ 21, 138 N.M. 9, 116 P.3d 80 (explicit findings are not required and that the reviewing court indulges in all reasonable presumptions in favor of the trial court's ruling). While driving on a revoked license is a criminal offense, Deputy Benally did not have sufficient information to form a reasonable suspicion that Mr. James was violating NMSA 1978, Section 66-5-39(A) at the time Deputy Benally stopped Mr. James. All Deputy Benally had to do was run the license plate of Mr. James' vehicle and the deputy would have had his answer. Instead, Deputy Benally chose to proceed on a hunch, based on stale, hearsay information from three weeks previously, and his own encounters prior to that. [Tr. 10/1/13 4:00:00 – 4:33:30] The easily accomplished act of checking the MVD status of the vehicle owner would have transformed Deputy Benally's impermissible subjective hunch into a particularized suspicion that Mr. James was violating the law by driving on a suspended or revoked license. *State v. Hicks*, 2013-NMCA-056, ¶ (learning the license of the registered owner of the vehicle had been revoked transformed officer's subjective hunch that Defendant was breaking the law to a particularized suspicion that Defendant was breaking the law by driving with a revoked license).

Mr. James was not speeding or engaged in any activity other than being identifiably himself at the time Deputy Benally formed the intent to stop Mr. James' vehicle. *Compare and contrast State v. Candelaria*, 2011-NMCA-001, ¶ 11, 149 N.M. 125, 245 P.3d 69 (officers who observed car speeding away when they pulled into parking lot, and who were informed that car was registered to an owner whose license had been suspended, had reasonable belief that owner was the driver, and therefore had reasonable suspicion to initiate traffic stop). Mr. James was doing nothing more than going about business that would have been perfectly ordinary in the absence of Deputy Benally's speculation that Mr. James' license was still revoked. *State v. Rivas*, 2007-NMCA-020, ¶ 9, 141 N.M. 87, 91, 150 P.3d 1037. "Individualized, particularized suspicion is a prerequisite to a finding of reasonable suspicion, and the district court did not err in concluding that the State had not established individualized, particularized suspicion that [the d]efendant had committed or was about to commit a crime." *Jason L.*, 2000–NMSC–018, ¶ 22, 129 N.M. 119, 2 P.3d 856.

2. Deputy Benally's Stop Was Pretextual.

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable, subject only to well-delineated exceptions." *State v. Rowell*, 2008–NMSC–041, ¶ 10, 144 N.M. 371, 188 P.3d 95 (internal quotation marks and citation omitted). "Warrantless seizures are presumed to be unreasonable and the State bears the burden of proving reasonableness." *Id.* (in-

ternal quotation marks and citation omitted). The purpose of requiring objectively reasonable suspicion based on the circumstances "is to prevent and invalidate police conduct based on 'hunches,' which are, by definition, subjective." *State v. Neal*, 2007–NMSC–043, ¶¶ 21, 28, 142 N.M. 176, 164 P.3d 57. 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, ¶ 20, 146 N.M. 32, 41, 206 P.3d 143, 152 . Pretextual traffic stops are not constitutionally reasonable in New Mexico. *Id.* at ¶ 38.

The District Court's order, which was approved by the prosecutor and duly signed by the District Court judge, demonstrates the District Court's findings and conclusions that Deputy Benally formed the intent to stop Mr. James immediately upon seeing him, and followed Mr. James intending to stop him at the first safe opportunity. [Tr. 10/1/13 4:00:00 – 4:33:30; RP 138] Thus, the inclusion of facts that Mr. James failed precisely to maintain a traffic lane, and concern about violation of seatbelt law, is irrelevant and cannot retroactively provide a "reasonable suspicion" for the eventual stop. The District Court's statement on the record at the suppression hearing that he did not find evidence of pretext does not save the State. *State v. Diaz*, 1983-NMSC-090, ¶ 4, 100 N.M. 524, 673 P.2d 501 (an oral pronouncement of sentence by a judge in a criminal case is not a final judgment).

The alleged facts that Deputy Benally observed Mr. James to veer and cross a white edge line, and thought a passenger was unbelted, were irrelevant, by Deputy Benally's own testimony, because Deputy Benally formed the intent to stop Mr. James immediately upon seeing him driving, and would have stopped Mr. James even if the deputy had observed no infractions. [Tr. 10/1/13 4:00:00 – 4:33:30] The Court's findings and conclusions were based on Deputy Benally's testimony and are supported by substantial evidence. The District Court's suppression decision was proper, supported by the law and evidence, and should be affirmed.

ORAL ARGUMENT IS REQUESTED.

In light of the standard of review and the unusual procedural posture of the case, the Court of Appeals may find oral argument helpful in resolving the issues presented.

CONCLUSION:

For the foregoing reasons, the District Court's decision suppressing the evidential fruits of Deputy Benally's illegal stop of Mr. James' vehicle should be affirmed. The District Court's suppression order resulted in dismissal of the charges, and a decision to affirm would render Mr. James' appeal issue moot. However, as an alternative ground, the District Court's denial of Mr. James' Motion to Dismiss under Rule 6-506 NMRA should be reversed and the matter remanded with instructions to dismiss the charges against Mr. James.

Respectfully submitted,

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I certify that a true copy of the foregoing was mailed via first class mail, postage prepaid, this 26th day of October 2015, to Anne Kelly, Deputy Attorney General, Appellate Division.

L. Helen Bennett