

**STATE OF NEW MEXICO, Plaintiff-Appellee
vs.
THOMAS JEFFERSON CHILDERS, Defendant-Appellant**

No. 51

COURT OF APPEALS OF NEW MEXICO

1967-NMCA-014, 78 N.M. 355, 431 P.2d 497

August 25, 1967

Appeal from the District Court of Eddy County, Neal, Judge

COUNSEL

BOSTON E. WITT, Attorney General, TOM OVERSTREET, Assistant Attorney General, EDWARD R. PEARSON, Assistant Attorney General, Santa Fe, New Mexico Attorneys for Plaintiff-Appellee.

M. ROSENBERG, ROSENBERG & BLENDEN, Carlsbad, New Mexico, Attorney for Defendant-Appellant.

JUDGES

HENSLEY, WOOD, SPIESS.

AUTHOR: HENSLEY

OPINION

{*355} HENSLEY, Jr., Chief Judge.

{1} The appellant, Thomas Jefferson Childers, was found guilty of four counts of cattle theft. From the judgments and sentences an appeal to this court has been perfected.

{2} The appellant here asserts that the trial court erred in overruling his motion for a change of venue. The statute relating to change of venue appears as § 21-5-3, N.M.S.A. 1953. The record discloses that the application for a change of venue was timely filed. It is admitted that the district attorney did not controvert the allegations contained in the appellant's verified motion. No hearing was had on the motion which stated that the defendant believed that he could not obtain a fair trial in Eddy County and that an impartial jury could not there be obtained. Neither this court nor the trial

court may indulge in speculation as to the presence or absence of prejudice in the minds of the inhabitants of any county. Where a motion for change of venue is timely filed in the form and substance required by our statute, the trial court may require a hearing thereon. Section 21-5-4, N.M.S.A. 1953. If no hearing is held, then a denial of the motion is reversible error. See {*356} State v. Alaniz, 55 N.M. 312, 232 P.2d 982; State v. Fernandez, 56 N.M. 689, 248 P.2d 679; Schultz v. Young, 37 N.M. 427, 24 P.2d 276.

{3} We have considered the additional challenges made by the appellant. In view of our disposition of the case, they will not be discussed.

{4} The judgments of conviction will be reversed and the cause remanded with directions to vacate the sentences, set aside the verdicts, grant the motion for a change of venue, and proceed with a new trial.

{5} IT IS SO ORDERED.

WE CONCUR:

Joe W. Wood, J., Waldo Spiess, J.