

**STATE V. LOPEZ**

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**STATE OF NEW MEXICO,**  
Plaintiff-Appellee,  
v.  
**NICHOLAS RAY LOPEZ,**  
Defendant-Appellant.

No. 34,455

COURT OF APPEALS OF NEW MEXICO

June 9, 2015

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY, William G.W. Shoobridge,  
District Judge

**COUNSEL**

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Sergio Viscoli, Assistant Appellate Defender,  
Santa Fe, NM, for Appellant

**JUDGES**

TIMOTHY L. GARCIA, Judge. WE CONCUR: MICHAEL E. VIGIL, Chief Judge, J.  
MILES HANISEE, Judge

**AUTHOR:** TIMOTHY L. GARCIA

**MEMORANDUM OPINION**

**GARCIA, Judge.**

{1} Appellant Nicholas Ray Lopez (Defendant) appeals from the district court's denial of his motion to withdraw his guilty plea. [DS 1; RP 114–17, 192] In this Court's notice of proposed disposition, we proposed to affirm the district court's denial of Defendant's

motion. [CN 1] Defendant filed a memorandum in opposition. We have given due consideration to the memorandum in opposition, and, remaining unpersuaded, we affirm.

{2} Defendant continues to argue he should have been allowed to withdraw his plea on the basis that he received ineffective assistance of counsel. [DS 5; MIO 7] In this Court's notice of proposed disposition, we noted that in order to make a prima facie case of ineffective assistance of counsel warranting withdrawal of a plea, Defendant must show that counsel's performance was deficient, and the deficient performance prejudiced his defense. See *State v. Aker*, 2005-NMCA-063, ¶ 34, 137 N.M. 561, 113 P.3d 384. [CN 2-3] In his memorandum in opposition, Defendant again responds by asserting facts that are not of record to show ineffective assistance of counsel. [CN 2-4] Though the district court held a hearing on Defendant's motion and took argument from counsel and statements from Defendant [MIO 6; RP 193], Defendant does not present facts from the hearing to support his argument. [MIO 6] We note that "[f]or this Court to remand to the trial court on this issue, the defendant must present a prima facie case of ineffective assistance of counsel. Without such prima facie evidence, the Court presumes that defense counsel's performance fell within the range of reasonable representation." *State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517 (citation omitted). Because Defendant's assertions are based on facts not of record [MIO 2-4; RP 192-93], they do not provide a basis for relief on direct appeal and may be more appropriately addressed in habeas corpus proceedings, where he may develop a record with respect to these issues. See *State v. Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31; *State v. Arrendondo*, 2012-NMSC-013, ¶ 43.

{3} Consequently, for the reasons stated above and in this Court's notice of proposed disposition, we affirm.

**{4} IT IS SO ORDERED.**

**TIMOTHY L. GARCIA, Judge**

**WE CONCUR:**

**MICHAEL E. VIGIL, Chief Judge**

**J. MILES HANISEE, Judge**