STATE V. LUNDVALL

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
SAMUEL LUNDVALL,
Defendant-Appellant.

No. 34,715

COURT OF APPEALS OF NEW MEXICO

December 30, 2015

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Angela J. Jewell, District Judge

COUNSEL

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

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, JONATHAN B. SUTIN, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE, Judge.

{1} Defendant challenges the enhancement of his sentence by four years based on his habitual offender status following the revocation of his probation. [RP 191, 316] Our

notice proposed to affirm, and Defendant filed a memorandum in opposition. We remain unpersuaded by Defendant's arguments, and therefore affirm.

{2} As a basis for his challenge, Defendant argues that the district court's enhancement of his sentence as attached to count 3 of CR-2006-3899 was illegal based on his assertion that he had already served that portion of his sentence. [MIO 2] We disagree, and as a framework for our analysis consider the following. This case is the result of two consolidated cases below, CR-2006-03899 and CR-2007-03690, culminating with a plea agreement in which Defendant pled to six felonies and to having three prior felony convictions for enhancement purposes. [RP 95-96, 99] The plea agreement provided that if Defendant violated the law or his probation before he served his sentence, he would be subject to additional habitual offender proceedings based on his admitted prior felony convictions. [RP 96] Pursuant to the plea, Defendant was sentenced to a total sentence of thirteen years, with the judge suspending five years, for eight years prison time and five years probation. [RP 163] Subsequently, shortly after serving his prison time but prior to completing his probation, Defendant admitted to violating his probation [RP 176-77, 183, 191], resulting in an enhancement of his imposed prison sentence for four years based on his habitual offender status, as well as five years probation. [RP 191]

{3} As noted, Defendant's plea agreement provides that he is subject to additional habitual offender enhancement in the event he violates his probation. [RP 96] *See State v. Freed*, 1996-NMCA-044, ¶ 3, 121 N.M. 569, 915 P.2d 325 (discussing and enforcing a plea agreement in which the defendant admitted to being a habitual offender and was subject to a habitual offender enhancement if he violated any of the conditions of his probation or parole). And here, after Defendant had served his prison time, but before he had completed his probation, Defendant admitted to violating his probation terms. [RP 176, 183, 191] In such instance, the district court, as contemplated by the plea, was authorized to enhance Defendant's sentence based on his habitual offender status. *See State v. Trujillo*, 2007-NMSC-017, ¶ 12, 141 N.M. 451, 157 P.3d 16 (recognizing that the State may seek habitual offender status at any time before the defendant finishes serving the term of incarceration *and any parole or probation that may follow that term* (emphasis added)).

{4} Defendant's argument that the district court's enhancement of his sentence as extended to count 3 of CR-2006-3899 was illegal because he had already "served" that portion of his sentence is misguided. [MIO 2] Defendant refers to *State v. Lovato*, 2007-NMCA-049, ¶ 10, 141 N.M. 508, for the proposition that he had an expectation of finality in his completion of CR-2006-3899, such that the district court lacked authority to enhance that portion of his sentence. [MIO 4] In *Lovato*, Defendant was convicted of two felonies and had completed service of his sentence on the first felony (both the incarceration and the parole term) at the time of the habitual offender hearing on the supplemental information. *Id.* ¶ 3. This Court held that because the defendant had completed serving his sentence on the first felony, he had a reasonable expectation of finality on that sentence such that it was not subject to being enhanced under the

habitual offender statute, even though he remained incarcerated on the second felony. *Id.* ¶¶ 1-3.

{5} As contrasted to *Lovato*, in the present case, Defendant was subject to a plea agreement which specifically provided that he would be subject to additional habitual offender proceedings if he violated his probation and, at the time the district court imposed the additional habitual offender proceedings, Defendant had not completely served his sentence because he was still subject to probation. Given this, Defendant did not have a reasonable expectation of finality in his sentence. *See Freed*, 1996-NMCA-044, ¶ 11 (rejecting the defendant's argument that he had a reasonable expectation of finality in a sentence where "[h]e signed a plea agreement that specifically and clearly informed him that if he violated the conditions of his probation, he would be subject to [additional enhancements]"); *State v. Villalobos*, 1998-NMSC-036, ¶ 12, 126 N.M. 255, 968 P.2d 766 (providing that a defendant does not have a reasonable expectation of finality in a sentence while serving probation for the underlying conviction). And to the extent Defendant essentially argues that portions of his probationary term could become fragmented and attach to specific underlying convictions such that count 3 of CR-2006-3899 could become fully served before Defendant completed the full probationary term, neither his plea agreement nor the judgment and sentence provided for such an outcome [RP 96, 163], as Defendant was granted a single probationary term and agreed that any violation of his probation could result in additional habitual offender proceedings. *Cf. Lovato*, 2007-NMCA-049, ¶ 10 ("[A] defendant's reasonable expectation of finality in a sentence for double jeopardy purposes encompasses not only its length, but the manner in which the sentence is structured."). And lastly, Defendant's reliance on *State v. Utley*, 2008-NMCA-008, 144 N.M. 275, 186 P.3d 904 [MIO 2] is similarly unpersuasive, as that case addresses the order for which consecutive felony sentences are served for purposes of assessing the maximum allowable parole period, and does not involve circumstances like the present where Defendant was still subject to probation at the time the district court imposed the additional habitual offender proceedings as contemplated by the plea.

{6} For the reasons provided in our notice and discussed above, we affirm.

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

J. MILES HANISEE, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge