

STATE V. MARTINEZ

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOSEPH P. MARTINEZ,
Defendant-Appellant.

NO. 29,648

COURT OF APPEALS OF NEW MEXICO

December 9, 2009

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, LISA SCHULTZ,
District Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, for Appellee

Hugh W. Dangler, Chief Public Defender, Nancy Hewitt, Appellate Defender, Santa Fe, NM, Steven J. Lucero, Practicing Law Student, Albuquerque, NM, Scott M. Davidson, Adjunct Professor, Albuquerque, NM, Trace L. Rabern, Adjunct Professor, Santa Fe, NM, for Appellant

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: CYNTHIA A. FRY, Chief Judge,
MICHAEL D. BUSTAMANTE, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

Defendant appeals from the revocation of his probation. The notice proposed to affirm. Defendant filed an untimely memorandum in opposition. See Rule 12-210(D)(3) NMRA (setting forth a twenty day period for filing a memorandum in opposition). We request that Defendant's counsel comply with the appropriate filing period in future cases. As provided in the attached order, we grant the request to allow a practicing law student appearance. We remain unpersuaded by Defendant's arguments and therefore affirm.

Defendant continues to argue that the district court erred in denying him credit against his probation for the period from January 20, 2009 (the date of the probation violation) through March 3, 2009 (the date of Defendant's arrest on a warrant) because the State failed to prove fugitive status. **[DS 4; MIO 2-4]** See generally *State v. Neal*, 2007-NMCA-086, ¶ 30, 142 N.M. 487, 167 P.3d 935 (providing that the probationer is entitled to credit for any time on probation unless the state can show that the probationer was a fugitive from justice because the warrant for the return of the probationer could not be served).

In support of his argument, Defendant refers **[MIO 1]** to *State v. Franklin*, 78 N.M. 127, 129, 428 P.2d 982, 984 (1967), and *State v. Boyer*, 103 N.M. 655, 658-60, 712 P.2d 1, 4-6 (Ct. App. 1985). As acknowledged **[MIO 3]** by Defendant, he was given probation credit for this time period. Specifically, the revocation order in relevant part states, "[t]he Defendant shall further receive credit from August 19, 2008, the date the Defendant was placed on probation, through May 7, 2009, the date the Defendant was sentenced on the Petition to Revoke Probation." **[RP 168]** For this reason, we hold that the error about which Defendant complains on appeal did not occur.

For reasons set forth above, we affirm.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

CYNTHIA A. FRY, Chief Judge

MICHAEL D. BUSTAMANTE, Judge