STATE V. MONTANO

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHRISTOPHER MONTANO,
Defendant-Appellant.

No. A-1-CA-35535

COURT OF APPEALS OF NEW MEXICO

December 13, 2017

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY, Daniel Viramontes, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Tania Shahani, Assistant Appellate Defender, Santa Fe, NM, Appellant

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, STEPHEN G. FRENCH, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE, Judge.

{1} Defendant appeals from his conviction for aggravated battery with a deadly weapon, contrary to NMSA 1978, Section 30-3-5(C) (1969). Defendant raised two issues on appeal: (1) “[w]hether [t]rial [c]ounsel and [the district c]ourt adequately

explained the consequences of accepting a plea and as a consequence Defendant's plea was not entered into knowing[ly], intelligently[,] and voluntarily," and (2) "[w]hether as a result of [Defendant's] plea he was denied his opportunity to assert 'self-defense' at trial which would have resulted in an acquittal if successful." [DS 5] Based on this statement of Defendant's issues, we construed Defendant as raising concerns regarding the effectiveness of his counsel and whether the district court ensured that Defendant's plea was voluntary, and we proposed to affirm.

{2} In response, Defendant has filed a memorandum in opposition and motion to amend the docketing statement. Defendant seeks to amend his docketing statement to raise the issue that "[t]he district court failed to properly review the terms of the plea [agreement]." [MIO 1] Specifically, Defendant contends that the district court failed to ensure that Defendant's plea was knowing by failing to get an accounting of the facts underlying his plea. [MIO 17-18] Having considered the arguments put forth by Defendant, we deny Defendant's motion to amend his docketing statement and affirm Defendant's conviction.

Ineffective Assistance of Counsel

{3} Defendant maintains that trial counsel was ineffective in failing to adequately explain the consequences of his plea, and that his plea resulted in the inability to assert "self-defense" at trial. [DS 5; CN 2] In this Court's notice of proposed disposition, we noted that Defendant had not moved to withdraw his plea below and that there did not appear to be any evidence regarding this matter in the record. [CN 3] We therefore proposed to conclude that Defendant could not establish a prima facie showing of ineffective assistance of counsel on appeal, requiring Defendant to seek relief, if he chooses to pursue his claim of ineffective assistance of counsel, in a collateral proceeding. *See State v. Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31 (stating that "[t]his Court has expressed its preference for habeas corpus proceedings over remand when the record on appeal does not establish a prima facie case of ineffective assistance of counsel"); *see also State v. Baca*, 1997-NMSC-059, ¶ 25, 124 N.M. 333, 950 P.2d 776 ("A record on appeal that provides a basis for remanding to the trial court for an evidentiary hearing on ineffective assitance of counsel is rare. Ordinarily, such claims are heard on petition for writ of habeas corpus.").

{4} Defendant does not contest this Court's assertion that there is no evidence of record on this issue in his memorandum in opposition. Rather, Defendant acknowledges that he did not file a motion below, but asserts that ineffective assistance of counsel can be raised for the first time on appeal. [MIO 6] While Defendant is correct in asserting that ineffective assistance of counsel claims can be raised for the first time on appeal, we maintain that there exists an insufficient record for appellate review. Defendant contends that his counsel did not properly advise him as to his plea, or properly investigate the availability of certain defenses. [MIO 8-9] However, Defendant does not direct this Court to any evidence in the record that would support Defendant's contentions. As a result, this case is more appropriately resolved via collateral proceedings. *See State v. Telles*, 1999-NMCA-013, ¶ 25, 126 N.M. 593, 973 P.2d 845.

Motion to Amend Docketing Statement

{5} In cases assigned to the summary calendar, this Court will grant a motion to amend the docketing statement to include additional issues if the motion (1) is timely, (2) states all facts material to a consideration of the new issues sought to be raised, (3) explains how the issues were properly preserved or why they may be raised for the first time on appeal, (4) demonstrates just cause by explaining why the issues were not originally raised in the docketing statement, and (5) complies in other respects with the appellate rules. *See State v. Rael*, 1983-NMCA-081, ¶¶ 7-8, 10-11, 14-17, 100 N.M. 193, 668 P.2d 309. This Court will deny motions to amend that raise issues that are not viable, even if they allege fundamental or jurisdictional error. *See State v. Moore*, 1989-NMCA-073, ¶¶ 36-51, 109 N.M. 119, 782 P.2d 91, *superceded by rule on other grounds as recognized in State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730. We deny Defendant's motion to amend on two grounds. First, in this Court's calendar notice, we construed Defendant's docketing statement as raising the issue of whether the district court had ensured Defendant's plea agreement was knowing and voluntary; therefore, amendment is unnecessary. [CN 2, 4] Second, to the extent Defendant's docketing statement could be construed as not raising the issue now raised in the memorandum in opposition, we deny the motion to amend because, for the reasons discussed below, the issue raised is not viable.

{6} Defendant contends that the district court failed to satisfy its obligation to ensure that Defendant's plea was knowing and voluntary. In this Court's notice of proposed disposition, we noted that Rule 5-303 NMRA "sets forth the procedures required for the district court to accept a plea of guilty," and that "[t]hese procedures are designed to ensure a guilty plea is made knowing and voluntarily." *State v. Edwards*, 2007-NMCA-043, ¶ 18, 141 N.M. 491, 157 P.3d 56 (internal quotation marks and citation omitted). We observed that the district court appeared to have complied with the requirements of Rule 5-303 by conducting a plea colloquy prior to accepting Defendant's plea. [CN 4; RP 122] Thus, we proposed to conclude that the district court had met its obligation.

{7} Defendant contends that "absent an accounting of the facts underlying the plea, it is impossible to conclude that [Defendant] understood the elements required to establish the crime of aggravated battery." [MIO 18] Defendant relies on *State v. Garcia*, 1996-NMSC-013, ¶ 19, 121 N.M. 544, 915 P.2d 300, for the proposition that a district court's failure to set forth a defendant's understanding of the elements of the charge on the record constituted error. While we note that *Garcia* provides that "the court must . . . ensure a showing *on the record* that the defendant had the necessary information," it also provides that a due process violation only exists "if the defendant was actually unaware of the nature of the charge." *Id.* ¶ 17 (internal quotation marks and citation omitted). In the present case, Defendant and his counsel stipulated to the facts underlying the plea [RP 123], and because Defendant did not move to withdraw his plea below, there is no testimony or other evidence in the record demonstrating that Defendant's plea was not knowingly entered or that Defendant was actually unaware of the nature of the charges. As a result, we conclude that this is not a viable appellate issue.

{8} Accordingly, for the reasons set forth above, we deny Defendant's motion to amend the docketing statement and affirm his conviction.

{9} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

STEPHEN G. FRENCH, Judge