

**STATE V. MORRISETTE**

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**STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
AARON MORRISETTE,  
Defendant-Appellant.**

No. A-1-CA-36328

COURT OF APPEALS OF NEW MEXICO

December 27, 2017

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, Matthew E. Chandler,  
District Judge

**COUNSEL**

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

Robert E. Tangora, L.L.C., Robert E. Tangora, Santa Fe, NM, for Appellant

**JUDGES**

JONATHAN B. SUTIN, Judge. WE CONCUR: J. MILES HANISEE, Judge, EMIL J. KIEHNE, Judge

**AUTHOR:** JONATHAN B. SUTIN

**MEMORANDUM OPINION**

**SUTIN, Judge.**

{1} Pursuant to a plea agreement, Defendant Aaron Morrisette was convicted of one count of armed robbery, a second degree felony, contrary to NMSA 1978, Section 30-16-2 (1973); one count of aggravated battery against a household member (deadly weapon), a third degree felony, contrary to NMSA 1978, Section 30-3-16(C) (2008); one

count of assault with intent to commit a violent felony against a household member, a third degree felony, contrary to NMSA 1978, Section 30-3-14 (1995); one count of unlawful taking of a motor vehicle, a fourth degree felony, contrary to NMSA 1978, Section 30-16D-1(A)(1) (2009); and one count of tampering with evidence, a third degree felony, contrary to NMSA 1978, Section 30-22-5(B)(1) (2003). [DS 2; 1 RP 1-3, 224-25] Defendant was given the maximum sentence for each crime, including an eight-year habitual offender enhancement for each crime, for a total of 59 years and 6 months of incarceration with no time deferred or suspended. [DS 2-3; 2 RP 262-66] Defendant appeals from his sentence and asserts that he received ineffective assistance of counsel. In this Court's notice of proposed disposition, we proposed to summarily affirm. Defendant filed a memorandum in opposition that we have duly considered. Remaining unpersuaded, we affirm.

**{2} Issue A:** Defendant continues to argue that his sentence constitutes cruel and unusual punishment. [MIO 3-5 (now identified as Issue 1); see also DS 2-3; 2 RP 265] In our notice of proposed disposition, we proposed to conclude that Defendant waived his right to challenge the constitutionality of his sentence on appeal. [CN 2-4] See *State v. Chavarria*, 2009-NMSC-020, ¶¶ 9-10, 146 N.M. 251, 208 P.3d 896 (holding that the entry of an unconditional plea of guilty operates as a waiver of the right to raise a cruel and unusual punishment claim on appeal); see also *State v. Trujillo*, 2002-NMSC-005, ¶ 64 n.4, 131 N.M. 709, 42 P.3d 814 (holding that a sentence authorized by statute, but claimed to be cruel and unusual punishment under the State and Federal Constitutions, does not implicate the jurisdiction of the sentencing court and may not be raised for the first time on appeal); *State v. Burdax*, 1983-NMCA-087, ¶ 14, 100 N.M. 197, 668 P.2d 313 (holding that a cruel and unusual punishment claim is not jurisdictional and may not be raised for the first time on appeal). We also proposed to conclude that Defendant was sentenced in accordance with the law. [CN 4] See *State v. Vasquez*, 2010-NMCA-041, ¶ 41, 148 N.M. 202, 232 P.3d 438 (“[T]here is no abuse of discretion if the sentence imposed is authorized by law.”). Accordingly, we proposed to affirm. [CN 4]

**{3}** Defendant's memorandum in opposition does not provide new facts or authorities that persuade us that our proposed summary disposition was in error. “Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law.” *Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683. Instead, Defendant makes irrelevant arguments pertaining to juvenile and mentally ill offenders. [MIO 3-5]

**{4}** Thus, for the reasons stated here and in our notice of proposed summary disposition, Defendant's claim of cruel and unusual punishment is not properly before us.

**{5} Issue B:** Defendant maintains that his enhanced sentence was illegal because each conviction was enhanced by eight years. [MIO 7-8 (now identified as Issue 3); see also DS 3]

{6} As discussed in our notice of proposed disposition, the habitual offender enhancement statute “provides that the sentence for *each* current [felony] conviction is to be enhanced on the basis of prior felony convictions.” [CN 5 (quoting *State v. Harris*, 1984-NMCA-003, ¶ 47, 101 N.M. 12, 677 P.2d 625 (emphasis added))] See also *State v. Howard*, 1989-NMCA-029, ¶ 5, 108 N.M. 560, 775 P.2d 762 (holding that where a statute attaches an enhancement to a defendant’s “basic sentence,” that statute “requires that the sentence for each of defendant’s current multiple felonies be enhanced on the basis of the prior felony conviction”). Therefore, we proposed to conclude that the district court acted in accordance with the law by enhancing each of Defendant’s five convictions by eight years. [CN 5]

{7} In response, Defendant asserts no facts, law, or arguments that are not otherwise addressed by this Court’s notice of proposed disposition. See *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that a party responding to a summary calendar notice must come forward and specifically point out errors of law and fact, and the repetition of earlier arguments does not fulfill this requirement), *superseded by statute on other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374. We therefore refer Defendant to our analysis therein.

{8} **Issue C:** Without reciting any facts to support such a claim in his docketing statement, Defendant asserted that he received ineffective assistance of counsel and counsel should have withdrawn from his case. [DS 3] We suggested that his ineffective assistance of counsel claim is more appropriately addressed through habeas proceedings. [CN 5-6] In response, Defendant asserts that “counsel told him by signing the plea, he would get only (19) years in prison” and trial counsel’s failure to deliver the 19-year sentence demonstrates ineffective assistance of counsel. [MIO 6 (now identified as Issue 2)] We note that the record before this Court does not support Defendant’s assertions. [See, e.g., 1 RP 224] Accordingly, Defendant has not established a prima facie case of ineffective assistance of counsel. See *State v. Herrera*, 2001-NMCA-073, ¶ 36, 131 N.M. 22, 33 P.3d 22 (setting out the factors for a prima facie case of ineffective assistance).

{9} For the reasons stated in our notice of proposed disposition and herein, we affirm.

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

**JONATHAN B. SUTIN, Judge**

**WE CONCUR:**

**J. MILES HANISEE, Judge**

**EMIL J. KIEHNE, Judge**