STATE V. JARAMILLO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
RUBEN JARAMILLO,
Defendant-Appellant.

A-1-CA-34758

COURT OF APPEALS OF NEW MEXICO

December 27, 2018

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Charles W. Brown, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Laurie Blevins, Assistant Attorney General, Albuquerque, NM, for Appellee

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

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: M. MONICA ZAMORA, Judge, EMIL J. KIEHNE, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Ruben Jaramillo (Defendant) appeals from the district court's orders revoking his probation and imposing a term of incarceration to be followed by a term of probation,

and the district court's order denying his motion for reconsideration of his sentence. Defendant makes six arguments on appeal: (1) the district court erred in failing to calculate and include in its probation revocation and remand orders the amount of credit to which he is entitled to receive toward his sentence based on the time he served (a) on probation, or alternatively, (b) in presentence confinement; (2) the district court erred in denying his motion for reconsideration without a hearing; (3) the district court violated Defendant's right to equal protection by ordering him to serve consecutive sentences when other similarly situated defendants have been permitted to serve concurrent sentences; (4) the judgment and sentence failed to comply with mandatory requirements of NMSA 1978, Section 31-20-6 (2007); (5) the sentence imposed at the probation violation hearing was contrary to law because it increased Defendant's sentence; and (6) Defendant's sentence to eighteen years' imprisonment after his probation violation was excessive and constitutes cruel and unusual punishment. We affirm Defendant's sentence, but remand for the district court to calculate and correct its orders to include the credit toward his sentence to which he is entitled under the statute governing revocation of probation. Because this is a memorandum opinion and the parties are familiar with the facts and procedural posture of the case, we set forth only such facts and law as are necessary to decide the merits.

BACKGROUND

{2} On June 12, 2013, the district court approved a plea and disposition agreement in which Defendant agreed to plead guilty to one count of trafficking methamphetamine, one count of trafficking anabolic steroids, and one count of conspiracy to commit trafficking in methamphetamine. On August 7, 2013, the district court sentenced Defendant to nine years for each of the two trafficking convictions and three years for the conspiracy conviction. The district court further ruled that Defendant's sentences were to run consecutively, but suspended the sentences and placed Defendant on supervised probation for five years.

{3} As a special condition of Defendant's probation, the district court ordered a zero tolerance for illegal drugs and substances. This condition was reiterated in the order of probation, in which Defendant agreed "I will not buy, sell, consume, possess or distribute any controlled substances or illegal synthetic substances except those legally prescribed for my use by a State Certified Medical Doctor. I will also provide urine or breath test specimens for laboratory analysis upon request of the Probation or Parole division." Defendant further agreed "I shall not possess, use or consume any alcoholic beverages and will not at any time enter what is commonly known as a bar or lounge where alcoholic beverages are served or sold for consumption on the premises."

{4} Approximately eight months into his term of probation, on April 4, 2014, Defendant tested positive for alcohol. However, rather than revoking Defendant's probation, the district court ordered that Defendant be placed on random drug testing and complete three days of community service. The district court made it clear to Defendant that he was being given a chance, but would not be given a second chance in the event of another probation violation in the future.

{5} On October 2, 2014, the State filed a motion to revoke probation, alleging multiple violations of Defendant's conditions of probation. The State attached to its motion a probation violation report, stating that on September 22, 2014, the United States Postal Inspection Office contacted law enforcement with information that its inspectors had intercepted a shipment of illegal anabolic steroids addressed to Defendant. The report further states that on September 23, 2014, Homeland Security and Postal Inspectors conducted a controlled delivery of the intercepted anabolic steroids which Defendant picked up, and that in a subsequent search, pursuant to a search warrant, executed at Defendant's home, law enforcement discovered and seized "numerous vials of [a]nabolic steroids (over 100)." Defendant was charged with new counts of trafficking controlled substances, and Defendant was subsequently arrested, although the record is unclear as to the exact date of the arrest.

{6} At the evidentiary hearing on Defendant's alleged probation violations, Defendant admitted to violating the zero tolerance condition of probation for illegal drugs or substances, which the district court accepted. A sentencing hearing was held on December 18, 2014, in which the district court revoked Defendant's probation and reinstated his entire twenty-one year sentence, imposing incarceration for eighteen years and suspending the remaining three. The district court further ordered that Defendant serve five years of probation after the expiration of his incarceration and that Defendant receive probationary credit "for all time served on the original probation." These rulings were memorialized in the district court's written remand order and order revoking probation.

{7} Defendant filed a motion to reconsider the sentence, which the district court denied without a hearing. Defendant appeals.

DISCUSSION

I. Credit for Time Served on Probation

{8} Defendant argues, and the State agrees, that the district court erred in failing to calculate and credit Defendant for the days he served on probation prior to the order revoking probation. We agree.

{9} The district court's "power to sentence is derived exclusively from statute." *State v. Chavarria*, 2009-NMSC-020, ¶ 12, 208 P.3d 896 (internal quotation marks and citation omitted). "Statutory interpretation presents a question of law that we review de novo." *State v. Jackson*, 2018-NMCA-066, ¶ 4, 429 P.3d 674 (internal quotation marks and citation omitted), *cert. denied* 2018-NMCERT-___ (No, S-1-SC-37267, Oct. 15, 2018). "When interpreting statutes, we seek to give effect to the intent of the legislature." *Id.* (internal quotation marks and citation omitted). "The first indicator of the Legislature's intent is the plain language of the statute." *Id.*

{10} NMSA 1978, Section 31-21-15(B) (2016), governing probation revocation, provides that if it is established that a probationer has committed a probation violation,

"the court may continue the original probation or revoke the probation and either order a new probation . . . or require the probationer to serve the balance of the sentence imposed or any lesser sentence. If imposition of sentence was deferred, the court may impose any sentence that might originally have been imposed, but credit shall be given for time served on probation." *See State v. Ordunez*, 2012-NMSC-024, ¶ 7, 283 P.3d 282 (interpreting Section 31-21-15(B) "to mean that where a court decides to revoke probation based on a probation violation, the court must give credit against the defendant's sentence for time previously served on probation"). Further, upon revocation of a probationer's probation, "the trial court is to make a judicial determination of the proper credit to be allowed." *State v. Murray*, 1970-NMCA-045, ¶ 13, 81 N.M. 445, 468 P.2d 416.

{11} Under the foregoing authority, we conclude that Defendant is entitled to credit toward his sentence for the time he served on probation prior to the district court's order of revocation. Defendant was sentenced, in pertinent part, to a five year term of probation on August 7, 2013. After finding that Defendant violated the zero tolerance condition of probation for illegal drugs or substances, the district court revoked Defendant's probation on December 18, 2014 and reinstated his original sentence with a partial suspension. The district court further stated in the order revoking Defendant's probation that Defendant was entitled to receive probationary credit "for all time served on the original probation." However, as the parties assert in their briefs, the district court failed to calculate the actual number of days of credit that Defendant is entitled to receive. Therefore, we remand to the district court to correct its order revoking probation and remand order to reflect the actual number of days Defendant served on probation before his probation was revoked—i.e., between August 7, 2013 and December 18, 2014.

{12} Because we conclude that Defendant is entitled to credit for the time he served on probation, we need not address Defendant's alternative argument that he is entitled to presentence confinement credit for the time he spent incarcerated after he was arrested for the probation violation to the time he was sentenced for that violation.

II. Denial of Defendant's Motion for Reconsideration

{13} Defendant argues that the district court erred in denying his motion for reconsideration without a hearing. We review the district court's denial of Defendant's motion for reconsideration of his sentence for an abuse of discretion. *State v. Herbstman*, 1999-NMCA-014, ¶ 8, 126 N.M. 683, 974 P.2d 177 (stating that "it is within the trial court's discretion whether to modify a valid sentence"). The district court abuses its discretion when its decision "is clearly against the logic and effect of the facts and circumstances of the case." *State v. Nehemiah G.*, 2018-NMCA-034, ¶ 42, 417 P.3d 1175 (internal quotation marks and citation omitted), *cert. denied*, 2018-NMCERT-___ (No. S-1-SC-36974, Apr. 26, 2018).

{14} Defendant was afforded a full evidentiary hearing on the merits of his probation violation. Defendant was also given the opportunity at the December 18, 2014

sentencing hearing, though he declined, to give an allocution with regard to his sentence. Defendant's motion for reconsideration offered two reasons for reducing his sentence: (1) aside from the charges underlying his probation violation, Defendant had been compliant with his probation; and (2) Defendant's dependents were struggling financially as a result of his incarceration. However, Defendant cited no legal basis in support of his stated reasons for reducing his sentence. As the State asserts in its brief, "[n]o reason existed for the [district] court to hold an additional hearing in which Defendant would have presented evidence as to the facts already known to the [district] court[.]" We agree; and under these circumstances, Defendant stated no valid basis for the relief sought. *See State v. Kenney*, 1970-NMCA-038, ¶ 2, 81 N.M. 368, 467 P.2d 34 (stating that in order to be entitled to an evidentiary hearing on a motion for post-conviction relief, the defendant must allege factual basis for the relief "which cannot be conclusively determined from the files and records, and those claims must be such, that if true, provide a legal basis for the relief sought"; "vague conclusional charges are insufficient"); *see also State v. Tafoya*, 1970-NMCA-088, ¶ 1, 81 N.M. 686, 472 P.2d 651 (stating that the district court did not abuse its discretion in denying the defendant's motion for post-conviction relief without a hearing, where the defendant's motion stated no valid basis for relief). We conclude, therefore, that the district court's decision to deny Defendant's motion for reconsideration without a hearing was not an abuse of discretion.

III. Constitutionality of Imposition of Consecutive Sentences

{15} Defendant argues that the district court violated his right to equal protection under the law by ordering him to serve consecutive sentences when other defendants similarly situated have been permitted to serve concurrent sentences.

{16} However, as the State asserts, Defendant "neglected to preserve the alleged error . . . at the probation sentencing." *See* Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.") Nor did Defendant raise the issue of the constitutionality of the district court's imposition of consecutive sentences in his motion for reconsideration. *Id.* Therefore, failing to preserve an equal protection claim with regard to his sentencing, Defendant has waived all but a claim of fundamental error, which we determine did not occur because his claim lacks merit as a matter of law.

{17} "The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633. We have stated that "alleged inequality in sentences for the same offense, if true, does not provide a basis for post-conviction relief. The equal protection of the law provisions of the United States and New Mexico [c]onstitutions do not require uniform enforcement of the law and do not protect a defendant from the consequences of [their] crime." *State v. Sharp*, 1968-NMCA-073, ¶ 2, 79 N.M. 498, 445 P.2d 101 (internal quotation marks and citation omitted). It follows that notwithstanding Defendant's claim that similarly-situated defendants have been permitted to serve concurrent sentences, the district court did not err in imposing consecutive sentences

as a matter of law. *Cf. State v. Baldonado*, 1968-NMCA-025, ¶¶ 8-19, 79 N.M. 175, 441 P.2d 215 (determining that the defendant's equal protection rights were not violated by the district court's decision to sentence him under the habitual offender criminal statute as a result of a prior conviction in New Mexico, where the defendant asserted that the habitual offender statute was not enforced by the district attorney's office with respect to persons whose former convictions occurred outside of New Mexico).

IV. Validity of the Initial Judgment and Sentence

{18} Defendant argues that his initial sentence was invalid because the district court failed to attach to its order suspending his sentence reasonable probation conditions to ensure that he would observe the law as required by Section 31-20-6. This argument is without merit; the district court attached the required written conditions for Defendant's probation to the initial judgment and sentence.

{19} Further, while unclear from his brief, to the extent that Defendant's argument is that the district court's conditions of probation were not reasonable, we disagree. The district court may require a defendant to satisfy any conditions of probation "reasonably related to his rehabilitation." *State v. Baca*, 2004-NMCA-049, ¶ 18, 135 N.M. 490, 90 P.3d 509 (internal quotation marks and citation omitted). "To be reasonably related, the probation condition must be relevant to the offense for which probation was granted." *Id.* (internal quotation marks and citation omitted) Defendant pled guilty to trafficking methamphetamine and steroids, as well as conspiracy to commit trafficking in methamphetamine. The district court imposed conditions of probation including that Defendant was required to complete an alcohol and substance abuse treatment program, prohibited from using alcohol or illegal drugs, would be subject to random urinalysis, and that there would be zero tolerance for illegal drugs and substances. Given the nature of Defendant's offenses, the district court's conditions of probation were reasonable.

V. Defendant's Claim That the District Court's Order Revoking Probation Increased Defendant's Sentence Contrary to Law

{20} Defendant argues the sentence imposed by the district court of eighteen years of incarceration upon revocation of his probation increased his sentence in violation of his right to be free from double jeopardy, citing *State v. Allen*, 1971-NMSC-026, ¶ 4, 82 N.M. 373, 482 P.2d 237 (stating that "[i]ncreasing a sentence, after a defendant has commenced to serve it is a violation of the constitutional guarantee against double jeopardy"). The State responds that Defendant's argument ignores the plain meaning of Section 31-21-15(B) (stating that upon revocation of a probationer's probation, the district court may "require the probationer to serve the balance of the sentence imposed or any lesser sentence[,] . . . but credit shall be given for time served on probation"), which "in this instance means the remainder of [Defendant's] entire [twenty-one]-year sentence not already served on probation." We agree and conclude that because in sentencing Defendant after his probation violation the district court ordered a period of

incarceration no longer than Defendant's original sentence, the district court did not increase Defendant's sentence in violation of the prohibition against double jeopardy.

{21} Defendant also argues that "[t]he district court's imposition of another five year probationary term after [he] completes his eighteen year sentence was error as it exceeds the court's jurisdiction of his case." We disagree. As we have already stated, when the district court revoked Defendant's probation, it reinstated Defendant's original twenty one year sentence, but suspended the final three years. As a result, when Defendant is released, there will be time remaining to serve on his sentence. The district court is permitted under these circumstances, in the context of a suspended sentence pursuant to Section 31-20-6(C), to place Defendant "on probation . . . for a term not to exceed five years." *See also State v. Baca*, 2005-NMCA-001, ¶ 15, 136 N.M. 667, 103 P.3d 533 ("The sentencing court retains jurisdiction to revoke a suspended sentence for good cause shown at any time subsequent to entry of judgment and prior to the expiration of the sentence" (internal quotation marks and citation omitted)). It follows that the district court did not err or exceed its jurisdiction in reinstating Defendant's original sentence, suspending the sentence in part, and ordering Defendant's incarceration to be followed by probation for a period not exceeding five years. *See id.* ¶¶ 14-15 (holding that after the defendants violated the conditions of their probation, the district court did not err in reinstating the defendants' original sentences, suspending them in part, and imposing a period of probation not exceeding five years).

VI. Defendant's Claim That the Sentence Constitutes Cruel and Unusual Punishment

{22} Defendant's final argument is that the district court's "sentence of eighteen years imposed after the probation violation was excessive and constitutes cruel and unusual punishment" in violation of his constitutional rights. As we stated above, Defendant's sentence, after the district court revoked his probation, was authorized by statute pursuant to Section 31-21-15(B) and Section 31-20-6(C). Defendant failed to raise the issue of cruel and unusual punishment at any time to the district court. It follows that Defendant failed to preserve a claim that his sentence constitutes cruel and unusual punishment and will not be permitted to raise the issue for the first time on appeal. *See Chavarria*, 2009-NMSC-020, ¶ 14 (holding that because the defendant failed to claim to the district court that his sentence violated the prohibition against cruel and unusual punishment and his sentence was authorized by statute, the defendant's cruel and unusual punishment claim could not be raised for the first time on appeal).

{23} Further, we conclude that the district court's sentence of eighteen years for Defendant's two trafficking convictions did not constitute fundamental error. As we have already stated, "[t]he doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice." *Barber*, 2004-NMSC-019, ¶ 8. Defendant asserts that his "eighteen-year sentence for non-violent offenses offends contemporary standards of decency, given that harsh sentences for non-violent drug offenses are increasingly viewed with disfavor as unnecessarily contributing to America's ballooning prison population while doing nothing to undermine the use of

illegal drugs." However, because there is no dispute that Defendant's sentence was in accordance with the law, *see* NMSA 1978, § 30-31-20(A),(B) (2006) (stating that a person who commits trafficking of a controlled substances is "guilty of a second degree felony and shall be sentenced pursuant to" NMSA 1978, Section 31-18-15 (2016)). Section 31-18-15(A)(7) provides that a person who is convicted of a second degree felony may be sentenced to a term of imprisonment of nine years. It follows that the district court did not err, or otherwise abuse its discretion, in imposing two nine-year sentences for Defendant's two trafficking convictions for a total amount of eighteen-years of incarceration. *See State v. Clah*, 1997-NMCA-091, ¶ 19, 124 N.M. 6, 210, 946 P.2d 210 (stating that "courts may only impose sentences authorized by statutes. . . . but "[w]ithin the limitations of the provision prescribing the punishment for a particular offense, the [district] court has discretion to structure the sentence to best fit the defendant and the crime").

CONCLUSION

{24} Defendant's sentence is affirmed. We remand for further proceedings in accordance with this opinion.

{25} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

EMIL J. KIEHNE, Judge