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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. A-1-CA-40414

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

SELITO J. DOS SANTOS,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY
Abigail Aragon, District Judge

Hector H. Balderas, Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Santa Fe, NM
Mark A. Peralta-Silva, Assistant Appellate Defender
Albuquerque, NM

for Appellant

MEMORANDUM OPINION

DUFFY, Judge.

{1} Defendant appeals a judgment and sentence entered following a bench trial. Defendant's docketing statement asserted three separate appellate issues. [DS 6-7] This Court issued a notice of proposed summary disposition in which we proposed that no reversible error within the jurisdiction of this Court occurred. [1 CN 6] Defendant filed a responsive memorandum that included a motion to amend his docketing statement in order to assert a violation of the constitutional prohibition against double jeopardy. [MIO 1-2] Finding good cause for the amendment sought, we granted Defendant's motion

and issued a second notice proposing to reverse one of Defendant's convictions and to remand this case to the district court with instructions to vacate that conviction. [2 CN 5]

{2} In response to our second notice, the State informs us that it does not intend to oppose our proposed disposition. Defendant has filed a second memorandum, supporting our proposal to vacate one of his convictions, and relying upon his prior argument with regard to the other three issues raised in this appeal. With regard to those three issues, and as more fully explained in our notices of proposed disposition, we remain unpersuaded that any error within the jurisdiction of this Court occurred. With regard to the issues involving Defendant's waiver of a jury trial and the performance of trial counsel, we continue to conclude that, to the extent Defendant believes he could develop those issues if given the opportunity to establish relevant facts, habeas proceedings pursuant to Rule 5-802 NMRA provide the appropriate avenue for doing so. With regard to the district court's decision to deny Defendant's habeas petition pending the resolution of this appeal, we remain without jurisdiction to review the denial of a habeas petition. Rule 5-802(N)(2) (giving the New Mexico Supreme Court exclusive appellate jurisdiction over the denial of habeas relief). Accordingly, an order transferring Defendant's appeal of that denial will be entered contemporaneously with this opinion.

{3} Thus, for the reasons stated in our notices of proposed summary disposition, we reverse Defendant's conviction with regard to Count 3, we remand this case to the district court with instructions to vacate that conviction, and we affirm the judgment and sentence of the district court with regard to Defendant's remaining convictions.

{4} IT IS SO ORDERED.

MEGAN P. DUFFY, Judge

WE CONCUR:

J. MILES HANISEE, Chief Judge

JENNIFER L. ATTREP, Judge