STATE V. SANDERS, 1970-NMSC-123, 82 N.M. 61, 475 P.2d 327 (S. Ct. 1970)

STATE OF NEW MEXICO, Plaintiff-Appellee,
vs.
ROBERT SANDERS, JR., Defendant-Appellant

No. 9043

SUPREME COURT OF NEW MEXICO

1970-NMSC-123, 82 N.M. 61, 475 P.2d 327

October 05, 1970

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY, NASH, Judge

COUNSEL

JAMES A. MALONEY, Attorney General, FRANK N. CHAVEZ, Assistant Attorney General, Santa Fe, New Mexico, Attorneys for Appellee.

LOWELL STOUT, Hobbs, New Mexico, Attorney for Appellant.

JUDGES

TACKETT, Justice, wrote the opinion.

WE CONCUR:

J. C. Compton, C.J., Thomas F. McKenna, J.

AUTHOR: TACKETT

OPINION

*{*62}* TACKETT, Justice.

{1} Robert Sanders, Jr., filed motions on October 29, 1969, in the District Court of Lea County, New Mexico, under Rule 93, Rules of Civil Procedure (§ 21-1-1(93), N.M.S.A. 1953 Comp., 1967 Pocket Supp.), to set aside sentences and judgments on charges of unarmed robbery, kidnapping and unlawfully and carnally knowing and abusing a female minor under the age of ten years. The motions were consolidated and denied by order of the court on November 3, 1969, without a hearing.

{2} Sanders has sought relief in the Federal Court, as well as three times in this court. Sanders v. Cox, 74 N.M. 524, 395 P.2d 353 (1964); State v. Sanders, 79 N.M. 587, 446 P.2d 639 (1968).

{3} Sanders contends that the trial court erred in overruling his motion to vacate the judgments and sentences imposed on him.

{4} The only pertinent issue presented in the petition before us, which has not heretofore been passed upon by this court, is the contention that he was not indicted by a grand jury and, therefore, his constitutional rights have been violated. This contention is without merit as it is not supported by anything other than his previous motions to vacate judgment and sentences.

{5} Article II, § 14, New Mexico Constitution, provides for presentment or indictment by a grand jury or information filed by the district attorney or attorney general.

{6} Sanders also contends that his constitutional rights were violated because the motions for post conviction relief were denied without a hearing. The record before us does not warrant relief, therefore, the denial without a hearing was proper. Where the motions, files and records of the case show conclusively (as in the present case) that defendant is not entitled to relief, a hearing is not required. See, State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct. App. 1968), with which we agree.

{7} Finding no error, the judgment of the lower court is affirmed.

{8} IT IS SO ORDERED.

WE CONCUR:

J. C. Compton, C.J., Thomas F. McKenna, J.