

**STATE V. LOPEZ, 1976-NMSC-012, 89 N.M. 82, 547 P.2d 565 (S. Ct. 1976)**

**STATE of New Mexico, Plaintiff-Appellee,  
vs.  
Amado LOPEZ, Defendant-Appellant.**

No. 10451

SUPREME COURT OF NEW MEXICO

1976-NMSC-012, 89 N.M. 82, 547 P.2d 565

April 01, 1976

**COUNSEL**

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, App. Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Louis Eloy Valencia, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

**JUDGES**

McMANUS, J., wrote the opinion. MONTROYA and STEPHENSON, JJ., concur.

**AUTHOR:** MCMANUS

**OPINION**

{\*83} McMANUS, Justice.

{1} This is a direct appeal from defendant's conviction and sentence upon trial by jury as a habitual criminal pursuant to §§ 40A-29-5 to -7, N.M.S.A. 1953 (2nd Repl. Vol. 6, 1972). The case was tried in the District Court of Bernalillo County.

{2} Defendant Lopez was convicted of a fourth felony on the 20th day of October, 1972. On November 29, 1972, in Bernalillo County cause no. 21973, an information was filed against the defendant stating that he was the same person that had been convicted of four prior felonies, described in detail, and that therefore he should be punished in accordance with § 40A-29-5, supra. In early October, 1973, the defendant filed a motion to dismiss the supplemental information in cause no. 21973 because more than six months had elapsed since it was filed, in violation of rule of criminal procedure 37. Before the hearing on the motion, the state, on October 11, 1973, filed a nolle prosequi

in cause no. 21973 and then filed an identical supplemental information in Bernalillo County cause no. 24090, the subject of the case at bar.

{3} More than six months had passed since the filing of the original supplemental information. We hold that the six-month rule (37) is applicable to a habitual criminal proceeding, and that the state violated this rule under the facts stated above. We reverse and remand for the trial court to dismiss the information with prejudice, in accordance with rule 37(d). However, this decision shall **only** preclude the state from filing another information pursuant to § 40A-29-5(C) N.M.S.A. 1953 (2nd Repl. Vol. 6, 1972) grounded upon all four of those felonies which were the basis for the supplemental information in cause no. 21973. Under the circumstances herein, this cause is reversed without prejudice to a new trial.

{4} IT IS SO ORDERED.

MONTOYA and STEPHENSON, JJ., concur.