

CITY OF GALLUP V. ARVISO

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**CITY OF GALLUP,
Plaintiff-Appellee,
v.
MICHAEL C. ARVISO,
Defendant-Appellant.**

No. 35,142

COURT OF APPEALS OF NEW MEXICO

May 11, 2016

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY, Robert A. Aragon,
District Judge

COUNSEL

Mason & Isaacson, Joshua M. Montagnini, Gallup, NM, for Appellee

The Kassakhian Firm, PC, Harutiu Kassakhian, Irvine, CA, L. Helen Bennett PC, Linda Helen Bennett, Albuquerque, NM, for Appellant

JUDGES

MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: TIMOTHY L. GARCIA, Judge, M. MONICA ZAMORA, Judge

AUTHOR: MICHAEL D. BUSTAMANTE

MEMORANDUM OPINION

BUSTAMANTE, Judge.

{1} Defendant appeals from the district court's judgment and sentence, entered after a de novo trial, convicting him for aggravated DWI (refused chemical testing) and open container, both under the Gallup City Code. Unpersuaded that Defendant demonstrated

error, we issued a notice of proposed summary disposition, proposing to affirm. Defendant has responded to our notice with a memorandum in opposition. We remain unpersuaded and affirm.

{2} On appeal, Defendant argues that the district court erred by imposing a much harsher sentence than that imposed by the magistrate court without permitting Defendant an opportunity to speak in mitigation of his actions for a reduced sentence or to request a treatment option instead of jail time. [DS 5; MIO 1] Defendant concedes that the matter was not preserved below and pursues the issue under the demands of *State v. Franklin*, 1967-NMSC-151, ¶ 9, 78 N.M. 127, 428 P.2d 982; and *State v. Boyer*, 1985-NMCA-029, ¶ 24, 103 N.M. 655, 712 P.2d 1. [DS 5-6; MIO 1-2]

{3} Our notice observed that the common law right of allocution in New Mexico is extended only to noncapital felonies. See NMSA 1978, §§ 31-18-15(A) (2007) and 31-18-15.1(A) (2009); *State v. Setser*, 1997-NMSC-004, ¶ 20, 122 N.M. 794, 932 P.2d 484. We also noted our case law holds that “in the absence of a statute or rule requiring allocution in misdemeanor cases, it was not error for the trial court to fail to offer defendant an opportunity to speak before sentencing.” *State v. Stenz*, 1990-NMCA-005, ¶ 17, 109 N.M. 536, 787 P.2d 455. Defendant acknowledges that he was not charged with a felony and that the law does not support his position. [DS 4; MIO 1-3] He expresses numerous public policy concerns with denying the right to allocution in misdemeanor cases and the harsh consequences of incarceration. [MIO 2-3] Defendant articulates important concerns that should have been raised to the court that sentenced him and are more appropriate for discussion in the political process than in this Court.

{4} On the basis of our statute and case law, we cannot find error in this unpreserved issue. For the reasons stated in this opinion and in our notice, we affirm.

{5} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

M. MONICA ZAMORA, Judge