

**STATE V. ABEYTA**

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**STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
LUIS ABEYTA,  
Defendant-Appellant,**

NO. 33,485

COURT OF APPEALS OF NEW MEXICO

October 27, 2015

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY, J.C. Robinson, District  
Judge

**COUNSEL**

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Nicole S. Murray, Assistant Appellate  
Defender, Santa Fe, NM, for Appellant

**JUDGES**

M. MONICA ZAMORA, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge,  
CYNTHIA A. FRY, Judge

**AUTHOR:** M. MONICA ZAMORA

**MEMORANDUM OPINION**

**ZAMORA, Judge.**

{1} Defendant appeals from a district court judgment and sentence entered after he was found guilty of three counts of aggravated assault (deadly weapon), and one count

of unlawful carrying of a deadly weapon. We issued a second calendar notice proposing to affirm. Defendant has responded with a memorandum in opposition. We affirm.

{2} **Issue 1:** Defendant's original docketing statement raised the issue of whether the district court improperly imposed fees as a part of his sentence, because the court did not take into account Defendant's indigency. [DS 2] The judgment states that the payment of these fees is to be directed by Defendant's parole officer. [RP 161] Pursuant to NMSA 1978, Section 31-12-3(C) (1993), when a defendant is called upon to pay these fees, they may at that time raise the inability to pay as a defense - the failure to pay must be wilful. As such, the issue is not ripe, because there is no indication that a demand for payment of these fees has been made, or that Defendant will not be excused of his obligation in whole or in part as a result of his indigency, or that Defendant will be given the opportunity to participate in community service in lieu of the payments. See NMSA 1978, § 31-12-3(A) (1993); *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 18, 149 N.M. 42, 243 P.3d 746 ("The mere possibility or even probability that a person may be adversely affected in the future by official acts fails to satisfy the actual controversy requirement." (alteration, internal quotation marks, and citation omitted)).

{3} **Issue 2:** Defendant's supplemental docketing statement challenged the district court's ruling denying his motion to reduce sentence. [SDS 3] Defendant's motion argued that his post-arrest conduct weighed in favor of a reduced sentence, including running his sentences concurrently instead of consecutively. [SDS 2-3] We review the district court's sentencing for abuse of discretion. See *State v. Bonilla*, 2000-NMSC-037, ¶ 6, 130 N.M. 1, 15 P.3d 491. "Judicial discretion is abused if the action taken by the trial court is arbitrary or capricious. . . . Such abuse of discretion will not be presumed; it must be affirmatively established." *Id.* (internal quotation marks and citation omitted). Because the decision to reduce a sentence is a matter within the sound discretion of the district court, and there are no legal defects here such as failure to award pre-sentence confinement credit or double jeopardy concerns, we defer to the district court's discretion. See *State v. Follis*, 1970-NMCA-083, ¶ 8, 81 N.M. 690, 472 P.2d 655 ("The suspension or deferment of a sentence is not a matter of right but is an act of clemency within the [district] court's discretion."); see also *State v. Allen*, 2000-NMSC-002, ¶ 91, 128 N.M. 482, 994 P.2d 728 (stating that "whether multiple sentences for multiple offenses run concurrently or consecutively is a matter resting in the sound discretion of the trial court").

{3} For the reasons discussed above, we affirm.

{4} **IT IS SO ORDERED.**

**M. MONICA ZAMORA, Judge**

**WE CONCUR:**

**MICHAEL D. BUSTAMANTE, Judge**

**CYNTHIA A. FRY, Judge**