

STATE V. COSTELON

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
FRANK COSTELON,
Defendant-Appellant.

No. 32,890

COURT OF APPEALS OF NEW MEXICO

November 25, 2013

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Fernando R.
Macias, District Judge

COUNSEL

Gary K. King, Attorney General, Yvonne M. Chicoine, Assistant Attorney General, Santa Fe, NM, for Appellee

Frank Costelon, U.S. Penitentiary, Leavenworth, KS, Pro Se Appellant

JUDGES

MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: LINDA M. VANZI, Judge, M.
MONICA ZAMORA, Judge

AUTHOR: MICHAEL D. BUSTAMANTE

MEMORANDUM OPINION

BUSTAMANTE, Judge.

{1} Defendant appeals the district court's summary dismissal of his Rule 1-060(B) NMRA motion to set aside his 2003 judgment and conviction for distributing marijuana. The Supreme Court transferred Defendant's case to this Court after determining that it

did not fall within the purview of its jurisdiction over habeas corpus proceedings, given that Defendant was no longer being held on those charges. This Court issued a calendar notice proposing to reverse on two grounds. First, we proposed to hold that to the extent the district court concluded that Defendant had waived his right to challenge whether his guilty plea was knowing and voluntary by entering a guilty plea in the underlying proceedings, this was an improper basis for the district court to summarily dismiss Defendant's motion. Second, we proposed to conclude that to the extent the district court's motion could be construed as a decision on the merits of Defendant's Rule 1-060(B) motion, that Defendant had made a prima facie showing of ineffective assistance of counsel sufficient to trigger an evidentiary hearing. [CN 3]

{2} The State has responded by asserting that Defendant has not made a prima facie showing of ineffective assistance of counsel. The State did not respond to this Court's proposal that the district court's reliance on waiver in summarily dismissing Defendant's motion was improper. Instead, the State asserts that where the allegations in the motion are contradicted by the record or information within the judge's personal knowledge, a judge may exercise his or her discretion and refuse to hold an evidentiary hearing. [MIO 4 (citing *State v. Guerro*, 1999-NMCA-026, ¶ 26, 126 N.M. 699, 974 P.2d 669)] However, based on the order entered by the district court in the present case, the district court does not appear to have exercised its discretion in this manner. [RP 109-10] We therefore conclude that it is not proper for this Court to affirm on the basis advocated by the State. See *State v. Wilson*, 1998-NMCA-084, ¶ 17, 125 N.M. 390, 962 P.2d 636 ("Defendant correctly notes that an appellate court can uphold the trial court's decision if it is right for any reason. We believe fairness, however, tempers this precept. Appellate courts usually apply the right for any reason basis for affirmance to strictly legal questions.") (citations omitted)).

{3} This Court proposed to conclude that the district court improperly relied on waiver as a basis for summarily dismissing Defendant's motion. The State has not challenged that proposition. See *State v. Sisneros*, 1982-NMSC-068, ¶ 7, 98 N.M. 201, 647 P.2d 403 ("The opposing party to summary disposition must come forward and specifically point out errors in fact and in law."). Accordingly, we reverse and remand to the district court for further proceedings on Defendant's Rule 1-060(B) motion.

{4} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

LINDA M. VANZI, Judge

M. MONICA ZAMORA, Judge