

<b>STATE V. DIXON</b>
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**STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
MICHAEL DIXON,  
Defendant-Appellant.**

No. 31,519

COURT OF APPEALS OF NEW MEXICO

January 10, 2012

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, James Waylon Counts,  
District Judge

**COUNSEL**

Gary K. King, Attorney General, Santa Fe, NM, for Appellee

Jacqueline Cooper, Chief Public Defender, Kathleen T. Baldrige, Assistant Appellate  
Defender, Santa Fe, NM, for Appellant

**JUDGES**

MICHAEL D. BUSTAMANTE, Judge. CONCUR: CELIA FOY CASTILLO, Chief Judge,  
TIMOTHY L. GARCIA, Judge

**AUTHOR:** MICHAEL D. BUSTAMANTE

**MEMORANDUM OPINION**

**BUSTAMANTE, Judge.**

Defendant appeals from his conviction for trafficking a controlled substance  
(methadone) in violation of NMSA 1978, Section 30-31-20(A)(2) (2006). This Court

issued a calendar notice proposing to affirm. Defendant has filed a memorandum in opposition, which we have duly considered. Unpersuaded, we affirm.

### **Untimely Arraignment**

Defendant contends that the district court erred in not dismissing the charges against him where he was arraigned two days after the time requirement contained in Rule 5-604 NMRA. In this Court's calendar notice, we noted that *State v. Budau*, 86 N.M. 21, 25, 518 P.2d 1225, 1229 (Ct. App. 1973), requires that a defendant demonstrate prejudice in order for dismissal to be required. In response, Defendant does not contend that he was prejudiced; rather, Defendant contends that *Budau* was wrongly decided and that our courts should hold the State to the time requirements contained in the rules. To the extent Defendant requests this Court to overrule our decision in *Budau*, we decline to do so. See *Arco Materials, Inc. v. N.M. Taxation & Revenue Dep't*, 118 N.M. 12, 14, 878 P.2d 330, 332 (Ct. App. 1994), *rev'd on other grounds by Blaze Constr. Co. v. Taxation & Revenue Dep't*, 118 N.M. 647, 884 P.2d 803 (1994) (providing that a formal Court of Appeals opinion is controlling authority in this Court). Moreover, as Defendant concedes in his memorandum in opposition, *Budau's* requirement that a defendant show prejudice is consistent with our requirement that a defendant show actual prejudice to establish a speedy trial violation. [MIO 7 (citing *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 287)] Thus, based on our current case law, we conclude that the district court did not err in denying Defendant's motion to dismiss.

### **Confidential Informant**

Defendant contends that the district court erred in not dismissing the charges against him when the State refused to identify the confidential informant used in the drug transaction leading to Defendant's arrest. In this Court's calendar notice, we noted that under Rule 11-501(A) NMRA the State has the privilege of refusing to disclose the identity of a confidential informant unless the defendant demonstrates that the confidential informant can provide testimony relevant to the defense or determinative of the defendant's guilt or innocence. [CN 2] If the district court determines that there is a reasonable probability that the confidential informant could supply such testimony, and the State refuses to produce the informant, then the district court can dismiss the charge related to the informant's testimony. [CN 2] We proposed to conclude that Defendant failed to demonstrate an abuse of discretion where Defendant did not indicate how the confidential informant's testimony would have been helpful to his defense.

In his memorandum in opposition, Defendant contends that the confidential informant's testimony would be helpful in establishing an entrapment defense. Defendant points out that to establish an entrapment defense he would have to show that police conduct exceeded the standards of proper investigation or created a substantial risk that an ordinary person not predisposed to commit a particular crime would have been caused to commit the crime. [MIO 11] Defendant contends that he wanted to question the confidential informant about his actions during the transaction, specifically regarding

whether some type of sexual enticement was involved. [Id.] In support of this argument, Defendant relies on the recording of the interaction between him and the confidential informant, where the confidential informant, who was male, asked whether “she” could call Defendant. [Id.] According to Defendant, “this signified that there was something more going on here than a mere drug buy.” [Id.]

It was Defendant’s burden to establish the necessity for an in camera review by the district court. See *State v. Lovato*, 117 N.M. 68, 70, 868 P.2d 1293, 1295 (Ct. App. 1993). Here, where Defendant points to nothing more than the use of the female pronoun to establish that sexual enticement was involved, especially given that the agent for whom the confidential informant was arranging the transaction was female [RP 134-36], we conclude that the district court did not abuse its discretion in concluding that Defendant had failed to meet his burden of establishing a reasonable probability that the informant’s testimony would be relevant to the defense of entrapment. See Rule 11-510(C)(2) NMRA.

For the reasons stated above and in this Court’s notice of proposed disposition, we affirm.

**IT IS SO ORDERED.**

**MICHAEL D. BUSTAMANTE, Judge**

**CONCUR:**

**CELIA FOY CASTILLO, Chief Judge**

**TIMOTHY L. GARCIA, Judge**