STATE V. GARZA

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

NO. 27,731

COURT OF APPEALS OF NEW MEXICO

April 14, 2010

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Stephen Bridgforth, District Judge

COUNSEL

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

The Pickett Law Firm, Mollie C. McGraw, Mark L. Pickett, Las Cruces, NM, for Appellant

JUDGES

MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: CELIA FOY CASTILLO, Judge, LINDA M. VANZI, Judge

AUTHOR: MICHAEL D. BUSTAMANTE

MEMORANDUM OPINION

BUSTAMANTE, Judge.

This case came back to this Court on remand from the New Mexico Supreme Court to address the following issue that was not reached in our earlier memorandum opinion: whether the district court erred in denying Defendant's motion to dismiss based on a

violation of the time limits for bringing his case to trial under Rule 6-506 NMRA. [DS 5] We proposed to reverse on this issue. The State has responded with a memorandum in opposition. We reverse.

"Rule 6-506 requires a defendant's trial to commence within one-hundred eighty-two days of a triggering event, absent permissible extensions." *See State v. Carreon*, 2006-NMCA-145, ¶ 6, 140 N.M. 779, 149 P.3d 95, *cert. quashed*, 2007-NMCERT-008, 142 N.M. 436, 166 P.3d 1090. The State may obtain an extension by a motion filed within ten days of the expiration of the applicable time limits; however, the State must show exceptional circumstances beyond the control of the State or the trial court. *See State v. Dominguez*, 2007-NMCA-132, ¶ 7, 142 N.M. 631, 168 P.3d 761 (discussing extensions for the district court's six-month rule as provided in Rule 5-604(E) NMRA). The district court's application of the six-month rule is an issue we review de novo. *Id.* ¶ 8.

In this case, Defendant was arraigned in magistrate court on July 6, 2006. [DS 1] The State filed a notice of dismissal and re-filed the charges in district court in November 2006. [DS 2] On the day of trial, May 4, 2007, Defendant moved to dismiss the charges, arguing that the six-month rule should run from the applicable magistrate court date, instead of being triggered by events in the district court. [DS 4] The district court denied Defendant's motion. [DS 4]

Defendant's issue is governed by this Court's decision in *State v. Yates*, 2008-NMCA-129, 144 N.M. 859, 192 P.3d 1236, *cert. granted by State v. Savedra*, 2008-NMCERT-009, 145 N.M. 258, 196 P.3d 489. In *Yates*, this Court adhered to a previous conclusion in *Carreon* that "the mere existence of the prosecutorial policy of dismissing every magistrate court case that is not settled before the six-month deadline is insufficient to sustain the State's burden" to overcome a presumption that re-filed charges are a continuation of the original magistrate court prosecutions for purposes of the six-month rule. *Id.* ¶ 11 (internal quotation marks and citation omitted). The circumstances in this case appear to be similar to those in *Yates*. *Id.* (noting procedural history). As such, the six-month rule in this case commenced from the date of arraignment in magistrate court, requiring dismissal. Rule 6-506(C) permits extensions of time to avoid dismissal. However, there is no indication that the State timely sought an extension and made the requisite showing. *See* Rule 6-506(D) NMRA. Accordingly, our calendar notice proposed to reverse.

In its memorandum in opposition, the State argues that *Yates* was incorrectly decided. [MIO 2] However, *Yates* is the latest pronouncement from this Court, and although certiorari has been granted, the Supreme Court has not reversed or overruled this Court's decision in *Yates*. Until the Supreme Court does so, *Yates* remains controlling precedent on which our courts are entitled to rely. *See Arco Materials v. TRD*, 118 N.M. 12, 14, 878 P.2d 330, 332 (Ct. App. 1994), *rev'd on other grounds by Blaze Constr. Co., Inc. v. Taxation & Revenue Dep't*, 118 N.M. 647, 884 P.2d 803 (Ct. App. 1994).

The State also argues that Defendant failed to preserve the issue. [DS 3] We disagree. As indicated above, Defendant argued that the magistrate date should control the six-

month time frame. [DS 4] Next, the State argues that Defendant waived the issue by participating in hearings after the rule would have run. [MIO 6] However, parties are not mandated to pursue interlocutory relief when they believe the trial court has erred. Finally, the State argues that *Yates* should not be applied retroactively. [MIO 8] "An appellate court's consideration of whether a rule should be retroactively or prospectively applied is invoked only when the rule at issue is in fact a "'new rule'." *State v. Mascarenas*, 2000-NMSC-017, ¶ 24, 129 N.M. 230, 4 P.3d 1221. As we stated in *Yates*, we believe that the position taken by the State on the merits departs from established case law and the language of the rule. 2008-NMCA-129, ¶¶ 12-15.

For the reasons set forth above, we reverse.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

CELIA FOY CASTILLO, Judge

LINDA M. VANZI, Judge