

STATE V. JACKSON

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
SHIRLEY JACKSON,
Defendant-Appellant.

No. 34,852

COURT OF APPEALS OF NEW MEXICO

January 7, 2016

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, Angie K. Schneider,
District Judge

COUNSEL

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Jorge A. Alvarado, Chief Public Defender, Sergio J. Viscoli, Appellate Defender,
Albuquerque, NM, for Appellant

JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge,
RODERICK T. KENNEDY, Judge.

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} Defendant Shirley Jackson appeals following her entry of a guilty plea admitting a probation violation and seeks reversal of the denial of her motion to dismiss the petition for probation revocation. [DS 1; RP 186] Defendant asserts she moved to dismiss the

petition for probation revocation on the ground that the adjudication hearing was not commenced within the time limit prescribed by Rule 5-805 NMRA. [DS 2] In this Court's notice of proposed disposition, we proposed to dismiss for lack of a final order or because Defendant waived her right to appeal. [CN 2] Defendant filed a memorandum in opposition, which we have given due consideration. Remaining unpersuaded, we dismiss.

{2} Defendant asks this Court to construe a plea document and order committing her to jail as a final order. [MIO 2–3] In support of her argument, Defendant points to the plea document containing hand-written language stating, “[Department of Corrections] for nine years from [September] 9, 2014, with credit for pre-sentence confinement and time served.” [MIO 3; RP 186] We note, however, that this language refers to Defendant's understanding of the range of possible sentences for the violation and not a sentence actually imposed. It appears from a review of *Odyssey* that a subsequent commitment order was entered on November 9, 2015, ordering Defendant to complete a sixty-day diagnostic evaluation at the Department of Corrections, but no judgment and sentence has been ordered. We therefore conclude Defendant's probation revocation is non-final and dismiss for lack of a final order. See *State v. Garcia*, 1983-NMCA-017, ¶ 25, 99 N.M. 466, 659 P.2d 918 (holding that, in a criminal case, the final judgment is the judgment and sentence or an order dismissing all the charges against the defendant); see also *Thornton v. Gamble*, 1984-NMCA-093, ¶ 15, 101 N.M. 764, 688 P.2d 1268 (holding that when a final judgment has not been entered, an appellate court lacks jurisdiction and must dismiss).

{3} As we noted in our proposed disposition, even if we concluded Defendant's case was final, which we do not, Defendant waived her right to appeal by entering an unconditional plea. [CN 3] Defendant concedes her plea was unconditional but asks this Court to use its discretion to consider the merits of her argument, because, she argues, the district court lacked jurisdiction to revoke her probation. [MIO 3-4] This Court may consider jurisdictional issues for the first time on appeal following entry of a voluntary guilty plea. See *State v. Chavarria*, 2009-NMSC-020, ¶ 14, 146 N.M. 251, 208 P.3d 896 (recognizing that a voluntary guilty plea ordinarily constitutes a waiver of the defendant's right to appeal his conviction on other than jurisdictional grounds, but that an illegal sentence (such as one not authorized by the applicable statute) may be challenged for the first time on appeal). However, as Defendant acknowledges, dismissal of a probation revocation petition based on violation of time limits is discretionary. See Rule 5-805(L) (“[T]he court *may* dismiss the motion to revoke probation for violating any of the time limits in this rule.” (emphasis added)). [MIO 4] Thus, the district court did not lack jurisdiction to accept Defendant's guilty plea. We therefore conclude Defendant does not raise a jurisdictional issue that can properly be considered for the first time on appeal after an unconditional plea and decline to consider the merits of her motion to dismiss the revocation petition.

{4} Accordingly, for the reasons stated above and this Court's notice of proposed disposition, we dismiss.

{5} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge