STATE V. MILLER

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANDREW MILLER,
Defendant-Appellant.

NO. 29,244

COURT OF APPEALS OF NEW MEXICO

March 12, 2014

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Kenneth H. Martinez, District Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, Ralph E. Trujillo, Assistant Attorney General, Albuquerque, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Carlos Ruiz de la Torre, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, J. MILES HANISEE, Judge

AUTHOR: MICHAEL D. BUSTAMANTE

MEMORANDUM OPINION

BUSTAMANTE, Judge.

{1} Defendant appealed his sentence of forty-two years of imprisonment for fraud, embezzlement, and forgery, arguing that the sentence violated his plea agreement, that

the State violated his right to be free from double jeopardy, and that the district court erred in calculating the amount of restitution and pre-sentence confinement. Defendant's arguments as to the propriety of the forty-two year sentence were considered by this Court and then the New Mexico Supreme Court, which ordered that Defendant be re-sentenced and remanded to this Court for review of Defendant's other arguments. We conclude that there are insufficient facts in the record to consider whether Defendant's double jeopardy rights were violated and remand to the district court for development of this issue. Because Defendant's other arguments are either not preserved or inadequately developed for appeal, we decline to review them.

BACKGROUND

{2} Since this is a memorandum opinion and the second from this Court pertaining to this case, we summarize the facts only briefly. *See State v. Miller*, 2012-NMCA-051, 278 P.3d 561, *cert. granted*, 2012-NMCERT-005, 294 P.3d 446 and *aff'd in part, rev'd in part*, *State v. Miller (Miller II)*, 2013-NMSC-048, 314 P.3d 655. The present matter pertains to two consolidated cases in which Defendant was indicted on sixty- six counts involving fraud, embezzlement, and forgery contrary to NMSA 1978, § 30- 42-1 to -6 (1980, as amended through 2009) (the Racketeering Act). *See Miller*, 2012- NMCA-051, ¶ 2. Pursuant to a plea agreement, all but six of the counts were dismissed. *Id.* ¶ 3.

{3} After the plea agreement was accepted but before sentencing, Defendant moved to withdraw the plea. *Id.* ¶ 4. The district court denied the motion to withdraw the plea and sentenced Defendant to forty-two years of imprisonment followed by two years of parole and five years of probation. *Id.* ¶ 5. Defendant appealed, arguing that the district court erred in denying the motion to withdraw because the sentence was not in accordance with the plea agreement, among other arguments. *Id.* ¶ 8. This Court agreed, vacated the sentence, and remanded for withdrawal of the plea or resentencing. *Id.* ¶¶ 28, 31. We did not reach Defendant's other issues. *Id.* ¶¶ 30, 31.

{4} On writ of certiorari, the Supreme Court reversed. *See Miller II*, 2013-NMSC-048, ¶ 1. Although it agreed that the sentence violated the plea agreement, the Supreme Court disagreed that Defendant should be permitted to withdraw the plea. It "reverse[d] the Court of Appeals' remand order that [gave] Defendant the option to either withdraw his guilty and no contest pleas or to be sentenced according to his understanding of the [plea agreement] terms if the State agrees." *Id.* ¶ 31. Instead, it ordered the district court to "inform Defendant that it will embody in the judgment and sentence the disposition provided for in the . . . plea agreement [as it was interpreted by the Supreme Court]." *Id.* It remanded the matter to this Court for consideration of the remainder of Defendant's arguments on appeal. *Id.* ¶ 40. Additional facts are included as pertinent to our discussion of Defendant's arguments.

DISCUSSION

{5} Defendant's remaining arguments are that (1) his double jeopardy rights were violated by the State's sale of seized vehicles before he entered a plea and (2) the

district court erred in calculating restitution amounts and pre-sentence confinement credit. We address these arguments in the order presented.

Double Jeopardy

{6} Defendant argues that the sale of one or more of his vehicles prior to sentencing precludes the State from imposing any further punishment on him and that his subsequent conviction therefore violated his right to be free from double jeopardy under the New Mexico Constitution. *See* N.M. Const. art. II, § 15. The legal basis of this argument is found in *State v. Nunez*, in which the Supreme Court held that "the New Mexico [d]ouble [j]eopardy [c]lause forbids bringing criminal charges and civil forfeiture petitions for the same crime in separate proceedings." 2000-NMSC-013, ¶ 117, 129 N.M. 63, 2 P.3d 264. We interpret Defendant's argument to be that (1) jeopardy attached upon the sale of the cars; and (2) because forfeiture of the cars was punitive, any further punishment constituted double jeopardy for the same conduct. *See State v. Tijerino*, 2004-NMCA-039, ¶¶ 12, 135 N.M. 313, 87 P.3d 1095 (stating that jeopardy attached when "[t]he practical effect of [an] agreement [between the state and a secured party] and the . . . dismissal was that [d]efendants' property interest in the vehicle was altered once [the secured party] took possession."); *Nunez*, 2000-NMSC-013, ¶¶ 55-57, 61, 94, 104 (applying a three-pronged test to determine whether (1) the forfeiture action and criminal prosecution were conducted in the same proceedings, (2) "the conduct at issue consists of one or more than one offense[,]" and (3) "both proceedings impose punishment" and concluding that double jeopardy was violated where the forfeiture action was punitive and did not occur in the same proceeding as the criminal prosecution." *See State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, 120 N.M. 619, 904 P.2d 1044). Essentially, Defendant invites us to conduct a *Nunez*-like analysis of these factors as they apply to him.

{7} But Defendant has provided no factual basis for his legal arguments. Although Defendant agreed to forfeit "[a]ll vehicles purchased using money obtained using [the victim's] money[]" as well as real property and computers in the plea agreement, the record is silent as to what property was seized and when, whether any property was sold and when, and whether Defendant acquired the property with money fraudulently obtained. Defendant admits that "the record with respect to this issue may need to be further developed" and acknowledges that double jeopardy implications arise only "*[i]f* the prosecutor did indeed subject [Defendant's] property to forfeiture prior to convicting [him]" (emphasis added). Although a double jeopardy claim may be raised for the first time on appeal, Defendant bore the burden of providing an adequate record for review. *See State v. Sanchez*, 1996-NMCA-089, ¶ 11, 122 N.M. 280, 923 P.2d 1165 ("We place the burden on the defendant, the party raising the double jeopardy challenge, to provide a sufficient record for the court to . . . complete the remainder of the double jeopardy analysis."); *State v. Wood*, 1994-NMCA-060, ¶ 19, 117 N.M. 682, 875 P.2d 1113 ("Although... a double jeopardy defense can be raised at any time, either before or after judgment, a factual basis must appear in the record in order to support such claim."). Since the facts regarding the disposition of the cars are not in the record, any analysis of Defendant's legal arguments would be akin to an advisory opinion. We therefore

decline to review this argument any further. *See Santa Fe S. Ry., Inc. v. Baucis Ltd. Liab. Co.*, 1998-NMCA-002, ¶ 24, 124 N.M. 430, 952 P.2d 31 ("Our concern with issuing advisory opinions stems from the waste of judicial resources used to resolve hypothetical situations which may or may not arise.").

{8} Defendant may, however, raise this issue and accompanying evidence in the district court on remand. In *State v. Antillon*, the defendant appealed his criminal conviction on the ground that the forfeiture of his truck prior to conviction violated his double jeopardy rights. *See* 2000-NMSC-014, ¶¶ 4-5, 129 N.M. 114, 2 P.3d 315. His motion to perfect the record with the forfeiture complaint and forfeiture order was denied by the district court based on its conclusion that the appeal was untimely. *See id.* ¶ 8. On writ of certiorari from this Court, the Supreme Court declined to consider the double jeopardy argument because there were insufficient facts in the record. *See id.* ¶ 6. However, it remanded to the district court to permit the defendant to supplement the record, concluding that, because double jeopardy claims may be raised at any time, the district court erred in denying the defendant's motion to perfect. *See id.* ¶ 10; *see* NMSA 1978, § 30-1-10 (1963) ("The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment.").

{9} Here, the issue of which cars were forfeitable first arose at the plea hearing. The State agreed that a car Defendant owned prior to obtaining the victim's money would not be forfeited, and defense counsel agreed to provide documentation of ownership of that car to the State. There is no record of any further transaction regarding that vehicle. At the sentencing hearing on Defendant's motion to withdraw the plea three months later, Defendant argued that the State had sold the vehicles—including one that was not forfeitable. The district court denied the motion to withdraw the plea, but told Defendant that he would have to file a motion as to disposition of the cars and that "certainly if a motion is filed [the district court would] entertain it." Defendant did so, but not until after the sentence had already been appealed to this Court and then remanded to the district court for findings of fact as to the calculation of the sentence.

{10} At the hearing on remand, Defendant argued that sale of his vehicles before he was sentenced violated his right to be free from double jeopardy and also that the funds from the sale of the cars was "not accounted for." The district court declined to consider these arguments, stating that "that's something you have to handle on a habeas or something." The motion is not in the record. We interpret Defendant's motion as an effort to introduce facts regarding the vehicles into the record and conclude that, like in *Antillon*, Defendant's efforts to raise his double jeopardy arguments before the district court were thwarted. "Because it is in the interest of justice to allow the parties to properly present their claims on appeal," Defendant may raise and seek to introduce evidence pertinent to this claim on remand. *Antillon*, 2000-NMSC-014, ¶ 12.

{11} Defendant also argues that "the record does not contain a complaint of forfeiture[] as required by [law], and the parties apparently did not follow the provisions of the Racketeering Act when they stipulated to forfeiture of [the property obtained using

the victim's money]." *See* NMSA 1978, §§ 31-27-1 to -8 (2002) (the Forfeiture Act) (stating that "[w]ithin thirty days of making a seizure, the state shall file a complaint of forfeiture"); § 31-27-5(A); §§ 30-42-1 to -6. Although he styles this failure as implicating double jeopardy principles, Defendant does not cite to any cases or make any argument as to how his right to be free from double jeopardy was violated by the State's failure to comply with the procedural requirements of the Forfeiture or Racketeering Acts. Furthermore, although we are troubled by the fact that there is no evidence of a complaint for forfeiture and no findings of forfeitability by the district court as required by the Forfeiture Act, *see Albin v. Baka*s, 2007-NMCA-076, ¶ 29, 141 N.M. 742, 160 P.3d 923 (holding that "when property is seized by state police officers for forfeiture, compliance with the Forfeiture Act is required"), Defendant's agreement to forfeit precludes this argument on appeal. Defendant negotiated the terms of the plea agreement—including forfeiture of real property, vehicles, and computers gained through or used in his fraudulent activities. In fact, Defendant stated that he accepted the stipulated forfeiture and signed a stipulated order to forfeit. In addition, he agreed that he would "give[] up all motions, defenses, objections, or requests which [he] has made or could make concerning the [c]ourt's entry of judgment against [him] if that judgment is consistent with [the plea] agreement." He "specifically waive[d] [his] right to appeal [a sentence consistent with the plea]." Having received the benefit of the bargain in the plea agreement, Defendant cannot now argue that the forfeiture term is infirm. *See State v. Trujillo*, 1994-NMSC-066, ¶ 14, 117 N.M. 769, 877 P.2d 575 ("[B]oth parties to a plea bargain make various concessions and gain certain advantages during plea negotiations. Consequently, a criminal defendant, having availed himself of the advantages of a plea agreement, cannot welch on his part of the bargain." (internal quotation marks and citations omitted)); *State v. Santillanes*, 1982-NMCA-118, ¶ 14, 98 N.M. 448, 649 P.2d 516 ("Plea agreements, absent constitutional or statutory invalidity, are binding upon both parties, and [a] defendant may not accept parts of the agreement and reject others.").

{12} We conclude that Defendant's double jeopardy argument is not reviewable because there are insufficient facts in the record, but that Defendant may raise and seek to introduce evidence on this issue on remand to the district court. We are unpersuaded that the State's alleged failure to comply with the procedures of the Forfeiture Act violates Defendant's double jeopardy rights or otherwise requires reversal because Defendant negotiated for and agreed to the terms of the plea agreement, including the forfeiture term.

Restitution

{13} Defendant argues that the district court improperly calculated the amount of restitution. The district court ordered restitution in the amount of $733,570. Defendant maintains that "[t]he restitution imposed in the judgment and sentence was [(1)] contrary to the amount testified to by the State's expert at sentencing[] and [(2)] failed to account for property disposed of by the district attorney." We review the order for restitution for an abuse of discretion. *See State v. Steele*, 1983-NMCA-078, ¶ 6, 100 N.M. 492, 672 P.2d 665 ("The restitution statute, NMSA 1978, § 31-17-1 [(2005)] ... provides that

restitution ordered should be in the amount defendant is "reasonably able" to pay; that denotes discretion to be exercised by the [district] court.").

{14} First, Defendant contends that the State's expert testified that the amount of restitution should have been $605,836.07 and that, therefore, the district court erred in ordering restitution of $733,570. Because Defendant did not raise this issue below, however, it is not preserved for appeal. "At time of sentencing, where restitution is ordered it is incumbent upon [a] defendant to specify whether he contests any amount of actual damages claimed by a victim and to advise the court whether he believes he will be able to make restitution." *State v. Lack*, 1982-NMCA-111, ¶ 14, 98 N.M. 500, 650 P.2d 22. The State presented testimony from detectives and a certified public accountant and fraud examiner as to the amount of damages, among other evidence. Defendant did not cross-examine these witnesses, argue that their calculations were incorrect, or present testimony to the contrary. *See id.* ¶ 16 (stating that, "in [hearings on the amount of restitution] a defendant is free to cross-examine witnesses and contradict them with other evidence." (internal quotation marks and citation omitted)). On appeal, the reviewing court will not consider issues not raised in the trial court unless the issues involve matters of jurisdictional or fundamental error. *See In re Aaron L.*, 2000-NMCA-024, ¶ 10, 128 N.M. 641, 996 P.2d 431.

{15} Although Defendant did not contest the amount of restitution below, he did preserve his second contention, i.e., that the district court "failed to apply the proceeds of [his] forfeited property to the amount of restitution." Defendant argued in the sentencing hearing that his vehicles had been sold by the State before he was convicted and that their value was not applied to the restitution amount. The factual basis of this argument is the same as that underpinning Defendant's double jeopardy argument:whether the seized vehicles were sold. Like that issue, therefore, we are unable to review this contention on appeal. *See State v. Gutierrez*, 2012-NMCA-013, ¶ 33, 269 P.3d 905 ("[The d]efendant fails to cite to any facts in the record or other authority in support of this contention, and we decline to review [the d]efendant's undeveloped argument on appeal.").

Pre-Sentence Confinement

{16} Defendant argues that the district court erred in granting him pre-sentence confinement credit for the period between his arrest in this matter and his sentence in an unrelated case, rather than between his arrest and sentence in this matter. We understand Defendant's argument to be that "although [Defendant's] confinement after [he was sentenced in the unrelated case] was not related exclusively to the charges in this case, he should still receive pre-[sentence] confinement credit [for that period]" because he "may have been subject to a more severe level of confinement . . . due to the continuing hold on these charges than he would otherwise have been[.]" But Defendant points to no facts indicating that he was subject to differential treatment as a result of the charges in this matter and in fact acknowledges the speculative nature of his argument by stating that he "may" have been subject to a "more severe level of confinement" and that "both cases taken together *potentially* exposed him to a more

severe level of confinement" (emphasis added). He cites the Department of Corrections' inmate risk assessment and central office classification policies but does not explain how the Department's policies relate specifically to his confinement. *See generally* New Mexico Corrections Department, Institutional Classification, Inmate Risk Assessment and Central Office Classification (revised 12/09/13) http://corrections.state.nm.us/policies/docs/CD-080100.pdf. "[T]his Court has no duty to review an argument that is not adequately developed." *State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M. 226, 247 P.3d 1111.

CONCLUSION

{17} We remand to the district court for re-sentencing consistent with the Supreme Court's decision in *Miller II*, 2013-NMSC-048, ¶ 38. On remand, Defendant may raise and introduce evidence pertaining to whether his right to be free from double jeopardy was violated by sale of the seized vehicles. We affirm the district court as to the restitution amount and credit for pre-sentence confinement.

{18} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

J. MILES HANISEE, Judge

ORDER ON MOTION FOR REHEARING

{19} Defendant has filed a multifaceted motion for rehearing. After due consideration we have determined to deny the motion. However, certain aspects of the motion require extended discussions. Rather than revise the Opinion, we have opted to respond in this separate published Order appended to the Opinion.

{20} Defendant's motion for rehearing raises five major issues that are the subject of this order. First, he argues that he should be permitted to withdraw the plea because, although the district court agreed to issue an order to the effect that Defendant's girlfriend and son would be permitted to visit him in the correctional facility, the district court did not have the power to compel the Department of Corrections (DOC) to comply with this order. Second, he argues that withdrawal of the plea is appropriate because the State did not comply with the Racketeering Act when it forfeited Defendant's property. Third, Defendant argues that he adequately preserved a challenge to the district court's order of restitution and, therefore, this Court should review the order or remand for an evidentiary hearing on the restitution amount. Finally, Defendant makes several requests for modification of the Opinion. *State v. Miller (Miller I)*, 2012-NMCA-

051, 278 P.3d 561. In addition to these issues, Defendant asks this Court to take judicial notice of the findings from two related civil cases. We address each issue in turn.

Withdrawal of the Plea Agreement

{21} We address Defendant's two arguments related to withdrawal from the plea agreement together, applying an abuse of discretion standard. *See State v. Hunter*, 2005-NMCA-089, ¶ 20, 138 N.M. 96, 117 P.3d 254, *aff'd*, 2006-NMSC-043, 140 N.M. 406, 143 P.3d 168. "A court abuses its discretion when it is shown to have acted unfairly, arbitrarily, or committed manifest error." *State v. Soutar*, 2012-NMCA-024, ¶ 16, 272 P.3d 154 (internal quotation marks and citation omitted). Promises made in the course of plea negotiations must be performed if they were material to the agreement and relied on by the defendant. *See Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); *cf. State v. Lozano*, 1996-NMCA-075, ¶ 18, 122 N.M. 120, 921 P.2d 316 ("If a defendant is not adequately notified of the material consequences of his or her plea, and such information is relevant to [the] defendant's decision to enter into such plea, and thereafter [the] defendant seeks to withdraw his or her plea, he or she should be allowed to do so.").

{22} Defendant first argues that the district court lacked the authority to order the DOC to allow his girlfriend and son to visit him in the penitentiary, and, therefore, he should be permitted to withdraw the plea because the district court's agreement to do so was a material term of the plea agreement on which he relied. The parties agree that the district court does not have the authority to order visitation. *See* NMSA 1978, § 33-2-10 (1977) (stating that the DOC "shall make such rules and regulations for the government, discipline and police of the penitentiary, and for the punishment of the prisoners confined therein, not inconsistent with the law, as it may deem expedient" and that "[t]he . . . [DOC] shall exercise a general superintendence and control over the government and discipline of the penitentiary"); *see also Turner v. Safley*, 482 U.S. 78, 85 (1987) ("Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint."); 72 C.J.S. *Prisons* § 100 (2014) ("[I]t is for the prison administrators, in their discretion, to make decisions regarding the limitations and restrictions that will be placed on inmate visitation and the manner in which such visitation privilege is exercised[.]" (footnote omitted)).

{23} Defendant likens the district court's unfulfillable promise to issue the order to an illegal sentence and points to *State v. Miller* (*Miller II*), in which our Supreme Court discussed sentences not authorized by law. *See* 2013-NMSC-048, ¶¶ 35-37, 314 P.3d 655; *State v. Jimenez*, 2003-NMCA-026, ¶ 20, 133 N.M. 349, 62 P.3d 1231 ("An illegal sentence is one that is not authorized by statute and not within the [district] court's competency to act."), *rev'd on other grounds*, 2004-NMSC-012, 135 N.M. 442, 90 P.3d 461. In that discussion, the Supreme Court stated, "If the sentence in an accepted plea agreement is illegal, and therefore cannot be imposed by a court, then the court must

give the defendant the opportunity to withdraw the plea." *Miller II*, 2013-NMSC-048, ¶ 36. We disagree that the concept of illegality discussed in *Miller II* pertains to the type of plea agreement terms now challenged by Defendant for two reasons.

{24} First, a "sentence" is "the punishment imposed on a criminal wrongdoer." *Black's Law Dictionary* 1485 (9th ed. 2009); *see* Michael Zachary, *Interpretation of Problematic Federal Criminal Appeal Waivers*, 28 Vt. L. Rev. 149, 172 n.38 (2003) (collecting definitions of "sentence" that agree that the term relates to the punishment imposed). This definition is reflected in the fact that the judgment and sentence includes only the penalties imposed by the court, and does not mention the terms of the plea agreement not related to punishment. Second, the *Miller II* opinion was limited to the question of whether the period of incarceration imposed by the district court conformed to the plea agreement and, if not, whether withdrawal of the plea was the correct remedy. 2013-NMSC-048, ¶ 1. It did not address any other terms of the plea agreement. In this context, then, the term "sentence" refers to the period of incarceration. In addition, the passages in *Miller II* to which Defendant refers pertain specifically to the "sentencing laws" within which the district court must operate. *See id.* ¶ 35 (stating that this Court's holding that "it was the plea agreement, not the sentencing statutes, which the district court was bound to enforce" was incorrect and that "a sentencing court must ensure that a sentence complies with both the terms of an accepted plea agreement and our sentencing laws"). Even *State v. Sisneros*, on which the *Miller II* court relied, had to do with a sentence of probation, rather than other terms in the plea agreement. *Sisneros*, 1982-NMSC-068, ¶ 8, 98 N.M. 201, 647 P.2d 403. Hence, the district court's agreement to order the DOC to permit visitation by Defendant's girlfriend and son did not render the sentence illegal such that the plea agreement would have to be withdrawn under *Miller II*.

{25} We nevertheless conclude that, on remand, the district court should consider whether Defendant should be permitted to withdraw his plea based on the district court's inability to order visitation. When Defendant moved to withdraw his plea at the sentencing hearing, his girlfriend had not yet been sentenced in a related case and had not yet requested permission to visit. The district court denied the motion. Relying on the State's representation that it would not oppose a conditional discharge for Defendant's girlfriend and that a conditional sentence would not prevent her from being a visitor, the district court concluded that, therefore, "the agreement or request that was made within the judgment and sentence, that she be allowed to visit with you at the [DOC,] can be realized in this matter." Thus, the denial was based on the possibility that the visitation might still occur, rather than on whether the promise to issue an order was a material term of the plea agreement that induced Defendant to accept it, but which could not be fulfilled. *Cf. Santobello*, 404 U.S. at 263 (stating that when a defendant relies on a promise by a prosecutor that is not fulfilled, a defendant is entitled to either specific performance of the promise or withdrawal of the plea).

{26} Since the district court did not rule on the facts necessary to address the latter inquiry, remand is appropriate. "As an appellate court, we will not originally determine the questions of fact." *Guidry v. Petty Concrete Co.*, 1967-NMSC-048, ¶13, 77 N.M.

531, 424 P.2d 806. On remand, the district court should determine (1) whether the DOC has permitted visitation despite the lack of an order, (2) whether the agreement by the court to enter an order for visitation was a material part of the agreement, and (3) whether Defendant relied on that term of the agreement in deciding to enter the plea. We also note that the record is ambiguous as to whether the critical issue was visitation by Defendant's son or visitation by Defendant's girlfriend. Hence, the district court should consider this question as well.

{27} We recognize that *Santobello* and its progeny in New Mexico refer to promises made by the prosecutor. *See, e.g.*, *Santobello*, 404 U.S. at 263; *State v. Pieri*, 2009-NMSC-019, ¶ 9, 146 N.M. 155, 207 P.3d 1132. Here, the prosecutor agreed only to not oppose visitation by Defendant's girlfriend and "defer[red] to the [c]ourt" as to visitation. However, it appears that, at the time of the hearing, the district court and both parties believed that the district court had the authority to order DOC to allow visitation. Thus we perceive no reason why the holdings of those cases should not apply here.

{28} Defendant's second argument for withdrawal of the plea is that the State failed to comply with the Racketeering and Forfeiture Acts. *See* NMSA 1978, §§ 30-42-1 to -6 (1980, as amended through 2009) (the Racketeering Act); NMSA 1978, §§ 31-27-1 to -8 (2002) (the Forfeiture Act). He maintains that, "because [Defendant's] expectation to have property forfeited pursuant to the Racketeering Act, which was a significant and material aspect of his plea agreement[was not fulfilled, Defendant] should be permitted to withdraw his plea." Because this argument relies on facts not in the record, we decline to address it on appeal. As stated in *Miller I*, "the record is silent as to what property was seized and when, whether any property was sold and when, and whether Defendant acquired the property with money fraudulently obtained." 2012-NMCA-051, ¶ 7. On remand, the district court should consider whether the State's compliance with the Racketeering and Forfeiture Acts was a material condition of the plea agreement on which Defendant relied and the extent to which the condition was fulfilled, subject to the arguments waived by Defendant as discussed below.

Restitution Amount

{29} Defendant argued in his brief in chief that the district court miscalculated the amount of restitution. In *Miller I*, we concluded that Defendant did not preserve this contention. *See id.* ¶ 14. In his motion for rehearing, Defendant argues that he adequately preserved this issue for appeal by (1) raising a general objection to the judgment and sentence and requesting a presentment hearing, which the district court never scheduled, and (2) raising the issue in his docketing statement to this Court. He maintains that he "would have raised any objections that he had to the judgment and sentence" at the presentment hearing. Both arguments are unavailing. In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon. *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280. Since no such objection or ruling was made, we decline to reconsider this issue.

Requests for Modification of the Opinion

{30} Miller requests several modifications to the Opinion, including (1) a statement that the district court should consider how forfeiture proceeds should be applied to restitution; (2) a statement that he may raise his objections to the calculation of presentence confinement credit in a habeas corpus proceeding; (3) removal of certain language addressing preservation of his double jeopardy arguments. We decline to modify the Opinion. Nevertheless, to the extent it is necessary, we agree that on remand the district court should hear evidence and consider whether funds from any sale of Defendant's property were or should be applied to reduce the restitution amount pursuant to the Forfeiture Act. *See* § 31-27-7(A)(2) (stating that funds from the sale of forfeited property "shall" be applied to the balance owed in restitution). As the guidelines for habeas corpus proceedings are set out in Rule 5-802 NMRA, any statement as to Defendant's right to proceed in that manner is unnecessary.

{31} Finally, contrary to Defendant's assertion, the Opinion does not state that Defendant waived his double jeopardy argument—it expressly states that he attempted to raise it below and, based on that attempt, provides him with another opportunity to litigate the issue. *See Miller I*, 2012-NMCA-051, ¶¶ 8-10 ("We interpret Defendant's motion as an effort to introduce facts regarding the vehicles into the record and conclude that . . . Defendant's efforts to raise his double jeopardy arguments before the district court were thwarted."); *see* NMSA 1978, § 30-1-10 (1963) ("The defense of double jeopardy may not be waived[.]"). What the Opinion does note is that Defendant's briefing failed to explain how certain procedural violations of the Forfeiture Act and Racketeering Act violated double jeopardy principles. *See Miller I*, 2012-NMCA-051, ¶ 11. Given the dearth of authority, we reviewed the record to determine whether Defendant had preserved the argument. Because it appears that Defendant was aware that no forfeiture complaint had been filed and that there were no findings of forfeitability by the district court when he signed the plea agreement and forfeiture agreement, these two specific allegations of error were waived. *See id.*; *see also* § 31-27-6(E) (relating to determinations by the district court); § 31-27-5(A) ("Within thirty days of making a seizure, the state shall file a complaint of forfeiture or return the property to the person from whom it was seized."). But the Opinion does not say that Defendant had no double jeopardy arguments as such. Thus, we deny Defendant's request to remove language in the Opinion "that suggest[s] that [Defendant] may have waived [the double jeopardy] issue" because there is no such language.

{32} Defendant also asserts that the State failed to comply with Racketeering or Forfeiture Act provisions pertaining to the timing of the sale of vehicles, property not subject to forfeiture was sold and that the values received for the property was inadequate. These issues were adequately preserved through Defendant's efforts to introduce evidence, as discussed above, and are pertinent to Defendant's arguments regarding double jeopardy and application of funds to the restitution amount. *See, e.g.*, § 31-27-6(E) (stating that the state must prove that the property owner was convicted and that the property is subject to forfeiture before an order for forfeiture may be entered); § 31-27-8(B) (stating the conditions under which the state must keep seized

property); § 30-42-4(E) (listing the property subject to forfeiture). They may, therefore, be raised on remand in those contexts.

Judicial Notice

{33} Defendant asks this Court to take judicial notice of the findings of the federal district court in two civil cases related to the State's alleged failure to properly dispose of his property. "Judicial notice is reserved for obvious facts, universally accepted as true." *State v. Valdez*, 2013-NMCA-016, ¶ 20, 293 P.3d 909, *cert. denied*, 2012-NMCERT-012, 299 P.3d 422 (N.M. 2012). Facts determined in a different court addressing a different issue are not such facts. Further, because these records were not before the district court, we deny the motion. *See In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 24, 140 N.M. 879, 149 P.3d 976 (declining "to consider evidence that was not before the court below"); *Gonzales v. Gonzales*, 1993-NMCA-159, ¶ 2, 116 N.M. 838, 867 P.2d 1220 (same). We note that the federal court decision may have a preclusive factual collateral estoppel effects, but we leave the determination to be made by the district court in the first instance.

{34} In sum, we deny Defendant's motion for rehearing either because his arguments were adequately addressed in the Opinion or because this Court is not the appropriate venue in which to determine factual issues not presented to the district court. Defendant's motion to supplement the appellate record and for judicial notice is also denied. We remand to the district court for further proceedings consistent with the Opinion and this Order.

{35} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

J. MILES HANISEE, Judge