

STATE V. GARCIA, 1967-NMSC-230, 78 N.M. 578, 434 P.2d 697 (S. Ct. 1967)

CASE HISTORY ALERT: see [15](#) - affects 1951-NMSC-065

**STATE OF NEW MEXICO, Plaintiff-Appellee,
vs.
PAUL GARCIA, Defendant-Appellant**

No. 8283

SUPREME COURT OF NEW MEXICO

1967-NMSC-230, 78 N.M. 578, 434 P.2d 697

October 09, 1967

Appeal from the District Court of Bernalillo County, Larrazolo, Judge.

COUNSEL

BOSTON E. WITT, Attorney General, EDWARD R. PEARSON, TOM OVERSTREET,
Assistant Attorneys General, Santa Fe, New Mexico, Attorneys for Appellee.

HANNA & MERCER, Albuquerque, New Mexico, Attorneys for Appellant.

JUDGES

CARMODY, Justice, wrote the opinion.

WE CONCUR:

M. E. Noble, J., Irwin S. Moise, J.

AUTHOR: CARMODY

OPINION

{*579} CARMODY, Justice.

{1} This in an appeal from the denial, without a hearing, of appellant's motion to vacate his sentence, filed under Rule 93 (§ 21-1-1 (93, N.M.S.A. 1953, 1967 Pocket Supp.).

{2} Appellant, by informal petition, claimed that his original conviction in 1952, which was affirmed by us in State v. Garcia, 1953, 57 N.M. 665, 262 P.2d 233, was a denial of due process, upon several grounds.

{3} The trial court did not appoint counsel and found that, according to the files and records of the case, it was conclusively shown that appellant was entitled to no relief, generally upon the theory that appellant, by going to trial and subsequently appealing, had effectively waived the rights there asserted.

{4} We do not reach a decision with respect to the waiver of any of such rights, because, in our opinion, the facts alleged in the petition coupled with the state of the record are sufficient to warrant a hearing under the rule. *State v. Moser*, 1967, 78 N.M. 212, 430 P.2d 106; and *State v. Franklin*, 1967, 78 N.M. 127, 428 P.2d 982. In making this determination, we take note of the fact that our unreported decision in HC No. 457, *Garcia v. Cox*, was not called to the attention of the trial judge prior to his denial of appellant's motion. It was not a part of the record before him, and is not considered by us at this time. Upon reconsideration of the motion by the trial court, our decision in HC No. 457 may be helpful in disposing of at least some of appellant's claims.

{5} It follows the case must be reversed and remanded to the trial court with direction to vacate the judgment appealed from and grant to the appellant a hearing upon his allegations in accordance with the rule. IT IS SO ORDERED.

WE CONCUR:

M. E. Noble, J., Irwin S. Moise, J.