

**STATE of New Mexico, Plaintiff-Appellee,
vs.
Alfredo FLORES, Defendant-Appellant**

No. 8499

SUPREME COURT OF NEW MEXICO

1968-NMSC-128, 79 N.M. 384, 444 P.2d 295

August 12, 1968

APPEAL FROM THE DISTRICT COURT OF GUADALUPE COUNTY, ANGEL, Judge

COUNSEL

Leon Karelitz, Las Vegas, for appellant.

Boston E. Witt, Atty. Gen., Gary O'Dowd, Asst. Atty. Gen., Santa Fe, for appellee.

JUDGES

Spiess, Chief Judge, Court of Appeals. Chavez, C. J., and Carmody, J., concur.

AUTHOR: SPIESS

OPINION

{*385} OPINION

{1} Following trial by jury and conviction for unlawful possession and sale of narcotic drugs in violation of § 54-7-14, N.M.S.A.1953, defendant was placed on probation for five years and imposition of sentence was deferred. Some twenty-one days later after a hearing which determined that defendant had violated the terms and conditions of his probation the court entered judgment sentencing him to a term of two to ten years in the Penitentiary of New Mexico.

{2} On July 28, 1966, defendant filed a motion under Rule 93, § 21-1-1(93), N.M.S.A.1953, seeking a vacation of judgment and sentence upon the grounds (1) that the maximum sentence which could be imposed was two to five years, and (2) that defendant was entitled to credit on the sentence imposed for the twenty-one days served on probation.

{3} By order entered June 29, 1967, the trial court denied defendant's motion. Timely notice of appeal was thereafter filed.

{4} The first ground asserted by the motion in the trial court is reasserted here in support of defendant's claim of error in the denial of his motion, the second ground asserted in the motion appears to have been granted by the trial court.

{5} We find no merit to defendant's claim that the maximum sentence which could be imposed was two to five years.

{6} The penalty for conviction of a first offense under § 54-7-14, supra, is prescribed by § 54-7-15, N.M.S.A.1953, as follows:

"Any person violating the foregoing sections [54-7-13, 54-7-14] shall, upon conviction thereof, be punished as follows:

A. For the first offense, upon conviction, he shall be fined not more than two thousand dollars (\$ 2,000) and imprisoned not less than two [2] years nor more than ten [10] years."

{7} We further note that § 41-17-28.1, subd. B, N.M.S.A.1953, specifically provides " * * * If imposition of sentence was deferred, the court may impose any sentence which might originally have been imposed. * * *" It is clear that the sentence of two to ten years imprisonment might originally have been imposed.

{8} The order denying the motion should be and hereby is affirmed.

{9} It is so ordered.