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**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Opinion Number: \_\_\_\_\_

Filing Date: **December 4, 2024**

**No. A-1-CA-41007**

**STATE OF NEW MEXICO,**

Plaintiff-Appellee,

v.

**SHAWN TYLER MORTENSEN,**

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

**Britt Baca-Miller, District Court Judge**

Raúl Torrez, Attorney General

Felicity Strachan, Assistant Solicitor General

Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender

Thomas J. Lewis, Assistant Appellate Defender

Santa Fe, NM

for Appellant

1 **OPINION**

2 **YOHALEM, Judge.**

3 {1} Defendant Shawn Tyler Mortensen entered a guilty plea in the district court,  
4 waiving his right to appeal his conviction and sentence. Defendant was sentenced to  
5 twelve years of incarceration, within the three- to twenty-year range allowed by the  
6 plea agreement. Defendant nevertheless has appealed to this Court. Our Supreme  
7 Court has held that an unconditional plea waives a defendant's right to challenge  
8 their sentence on direct appeal. The sole exception is if the district court lacked  
9 subject matter jurisdiction to impose the sentence. *See State v. Chavarria*, 2009-  
10 NMSC-020, ¶¶ 9, 17, 146 N.M. 251, 208 P.3d 896. Defendant claims that the district  
11 court's mention of race at his sentencing hearing was such an egregious violation of  
12 the Fifth and Fourteenth Amendments to the United States Constitution that it  
13 amounts to jurisdictional error. We do not agree. In New Mexico, only a sentence  
14 that is not authorized by statute implicates the jurisdiction of the sentencing court.  
15 *See id.* ¶ 14. We therefore dismiss this appeal. We note that our decision is not  
16 intended to prevent Defendant from filing a petition for habeas corpus or from  
17 seeking other post-judgment relief.

18 **BACKGROUND**

19 {2} Defendant entered into a plea agreement with the State whereby he agreed to  
20 plead guilty to two counts of criminal sexual contact of a minor (CSCM) (clothed)

1 (child under 13); one count of CSCM (unclothed), contrary to NMSA 1978, Section  
2 30-9-13(A), (B)(1) (2003); and one count of abuse of a child (no death or great  
3 bodily harm), contrary to NMSA 1978, Section 30-6-1(D), (E) (2009). The plea  
4 agreement reflected a significant reduction in the charges against Defendant, which  
5 originally included two counts of criminal sexual penetration of a minor (under age  
6 13) (CSPM), contrary to NMSA 1978, Section 30-9-11(D)(1) (2009), and an  
7 additional count of CSCM (unclothed). The plea agreement provided that Defendant  
8 would serve a total of three to thirty years, with the period of incarceration not to  
9 exceed twenty years at initial sentencing. The agreement also provided that  
10 “Defendant specifically waives Defendant’s right to appeal as long as the court’s  
11 sentence is imposed according to the terms of this agreement.”

12 {3} Following a lengthy sentencing hearing where opposing views were presented  
13 by the witnesses as to the appropriate length of incarceration given the trauma  
14 suffered by the victim, Defendant’s eleven-year old daughter, the district court  
15 sentenced Defendant to fifteen years in prison. Defendant filed a motion to  
16 reconsider his sentence, arguing that some testimony was not reliable, that waiting  
17 to release him from incarceration until the victim was an adult was unreasonable,  
18 and that he had been denied due process and equal protection because there was a  
19 disparity between his sentence and the sentence given to other defendants in  
20 Bernalillo County, New Mexico, who had been convicted of CSCM in the past year.

1 {4} The district court held a hearing on Defendant's motion to reconsider, during  
2 which the judge reflected on the factors she considered in her initial sentencing  
3 determination, before reducing Defendant's term of incarceration from fifteen to  
4 twelve years. Defendant objects to the following statement made by the district court  
5 during the court's explanation of her thinking in imposing the fifteen-year sentence.

6 The district court stated:

7 And while I understand that, you know, it is helpful and, it's something  
8 that I need to consider if someone does have a job and whether they  
9 have life status, if they're able to support themselves when they get out,  
10 it's also something where I can consider if, [Defendant] was, you know,  
11 a homeless man, a person of color who was, staying with his dying wife  
12 and that this happened to his kid[s]. I'm not sure what the sentence  
13 would be in that case.

14 And so this is stuff I was considering at the time [of imposition of the  
15 fifteen-year sentence].

16 {5} Defendant filed this appeal, arguing that the quoted statement by the  
17 sentencing judge violated Defendant's right to due process and equal protection  
18 under the Fifth and Fourteenth Amendments to the United States Constitution.

## 19 **DISCUSSION**

20 {6} Defendant asks this Court to decide the constitutional challenge to his  
21 sentence that he raises on appeal, to vacate his sentence, and to remand for  
22 resentencing by a different judge, claiming that an alleged violation of his  
23 constitutional rights to due process and equal protection is a jurisdictional question.  
24 Defendant argues that his challenge can, therefore, be raised for the first time on

1 appeal, despite the appeal waiver in his plea agreement. We conclude that a sentence  
2 entered in conformity with a plea agreement that waives the right to appeal can be  
3 appealed only if the district court lacked subject matter jurisdiction to impose that  
4 sentence. We do not agree with Defendant that an alleged constitutional violation in  
5 the sentencing procedure deprives the district court of subject matter jurisdiction.  
6 We, therefore, affirm the district court’s judgment and sentence. We note that our  
7 decision does not prevent Defendant from filing a petition for habeas corpus or from  
8 seeking other post-judgment relief.

9 **I. A Valid Plea of Guilty Waives the Right to Appeal All Nonjurisdictional**  
10 **Defects and Errors Not Otherwise Reserved**

11 {7} Our Supreme Court has held that an unconditional plea—a plea that does not  
12 reserve specific issues for appeal—together with a waiver of the right to appeal  
13 waives a defendant’s right to challenge either their conviction or their sentence on  
14 direct appeal. *See Chavarria*, 2009-NMSC-020, ¶¶ 9, 17. “[A] plea of guilty or nolo  
15 contendere, when voluntarily made after advice of counsel and with full  
16 understanding of the consequences, waives objections to prior defects in the  
17 proceedings and also operates as a waiver of statutory or constitutional rights,  
18 including the right to appeal.” *State v. Hodge*, 1994-NMSC-087, ¶ 14, 118 N.M.  
19 410, 882 P.2d 1. “Thus, a voluntary guilty plea ordinarily constitutes a waiver of the  
20 defendant’s right to appeal [their] conviction on other than jurisdictional grounds.

1 *Id.*; see also *State v. Trujillo*, 2007-NMSC-017, ¶ 8, 141 N.M. 451, 157 P.3d 16  
2 (“[A] plea of guilty does not waive jurisdictional errors.”).

3 {8} Defendant does not question the breadth of his waiver of his right to appeal,  
4 or claim that he reserved any issues for appeal, pursuant to Rule 5-304(A)(2) NMRA  
5 (allowing a defendant to enter into a conditional guilty plea, reserving particular  
6 issues for appeal). Defendant also does not claim that his waiver was involuntary or  
7 that he was inadequately informed of its consequences. In other words, he knowingly  
8 and intelligently waived his right to appeal any sentence entered by the district court  
9 and the only condition on that waiver was that the sentence imposed would be  
10 between three and twenty years of incarceration. The sentence imposed by the  
11 district court after the hearing on Defendant’s motion for reconsideration was twelve  
12 years of incarceration, a period significantly less than the twenty-year maximum  
13 agreed to by Defendant. Thus, the appeal waiver in the plea is binding unless the  
14 district court was without jurisdiction to impose the sentence.

## 15 **II. Subject Matter Jurisdiction in Sentencing Decisions**

16 {9} Questions regarding subject matter jurisdiction are questions of law, which  
17 we review de novo. *State v. Montoya*, 2008-NMSC-043, ¶ 9, 144 N.M. 458, 188  
18 P.3d 1209. As already noted, jurisdictional error in sentencing is reviewable for the  
19 first time on appeal, even if the defendant has entered a plea unconditionally waiving  
20 their right to appeal the sentence. Jurisdictional error refers to an action taken by a

1 court that does not have the power to adjudicate the question involved. *See State v.*  
2 *Bailey*, 1994-NMCA-107, ¶ 10, 118 N.M. 466, 882 P.2d 57. The sole question on  
3 appeal, then, is whether the district court had the authority to proceed as it did, even  
4 if its decision was in error or was an abuse of the court’s discretion. “The only  
5 relevant inquiry in determining whether the court has subject matter jurisdiction is  
6 to ask whether [the matter before the court] falls within the general scope of authority  
7 conferred upon such court by the constitution or statute.” *Gonzales v. Surgidev*  
8 *Corp.*, 1995-NMSC-036, ¶ 12, 120 N.M. 133, 899 P.2d 576 (internal quotation  
9 marks and citation omitted).

10 {10} In the arena of criminal sentencing, “[i]t has long been recognized in this state  
11 that it is solely within the province of the Legislature to establish penalties for  
12 criminal behavior.” *State v. Mabry*, 1981-NMSC-067, ¶ 18, 96 N.M. 317, 630 P.2d  
13 269. “A trial court’s power to sentence is derived exclusively from statute.” *State v.*  
14 *Martinez*, 1998-NMSC-023, ¶ 12, 126 N.M. 39, 966 P.2d 747). A sentence that is  
15 not authorized by the sentencing statute is treated by our Supreme Court as  
16 jurisdictional error, which will be reviewed on direct appeal, even though the right  
17 to appeal is not reserved in a plea agreement, or the error is not preserved by an  
18 objection in district court. *See Chavarria*, 2009-NMSC-020, ¶¶ 13-14.

19 {11} In this case, the district court had subject matter jurisdiction. Defendant makes  
20 no claim that the sentence imposed was not authorized by state statute. *See id.* ¶ 14

1 (holding that a sentence alleged to violate the federal or state constitution’s cruel and  
2 unusual punishment clause does not implicate the subject matter jurisdiction of the  
3 sentencing court); *see also State v. Trujillo*, 2002-NMSC-005, ¶ 64 n.4, 131 N.M.  
4 709, 42 P.3d 814 (distinguishing a claim of cruel and unusual punishment under a  
5 state or federal constitution from a sentence that is not authorized by statute).

6 {12} Defendant argues that any mention of race in sentencing is so egregious that  
7 it amounts to jurisdictional error. This argument reflects an outdated understanding  
8 of subject matter jurisdiction. *See Bailey*, 1994-NMCA-107, ¶¶ 10-11 (recognizing  
9 the characterization of egregious judicial acts as “in excess of jurisdiction” is not  
10 consistent with the modern definition of subject matter jurisdiction). Merely alleging  
11 that an error is egregious or violates a constitutional provision other than one  
12 conferring jurisdiction on a court does not establish a challenge to the subject matter  
13 jurisdiction of the court to impose the sentence. Nor do the cases that Defendant cites  
14 address situations involving plea agreement appeal waivers or hold that reference to  
15 race considerations in relation to sentencing deprives the sentencing court of subject  
16 matter jurisdiction.

17 {13} A sentencing court’s discretion may be limited by both statutory and  
18 constitutional provisions. *See Pepper v. United States*, 562 U.S. 476, 489 n.8 (2011).  
19 Where, however, a defendant has knowingly and voluntarily waived their right to  
20 appeal in return for the benefits of a plea agreement, and has agreed to the imposition



1 of a sentence, we do not review the exercise of the district court’s discretion to  
2 impose a sentence within the agreed range—only the district court’s authority to  
3 decide the matter. *See Chavarria*, 2009-NMSC-020, ¶ 14.

4 {14} We note, as did our Supreme Court in *Chavarria*, that there are post-judgment  
5 remedies that may be available to a defendant who claims that their sentence is the  
6 result of an error of law, as relevant here, “a defendant may be eligible to file: . . . a  
7 writ of habeas corpus on the grounds that his sentence is ‘illegal or in excess of the  
8 maximum authorized by law,’” Rule 5-802(A) NMRA, “. . . or a post-conviction  
9 motion on the grounds that ‘the sentence was imposed in violation of the constitution  
10 of the United States, or of the constitution or laws of New Mexico.’” NMSA 1978,  
11 § 31-11-6 (1966).

12 **CONCLUSION**

13 {15} For the reasons stated, we dismiss Defendant’s appeal.

14 {16} **IT IS SO ORDERED.**

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**JANE B. YOHALEM, Judge**

17 **WE CONCUR:**

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**JACQUELINE R. MEDINA, Judge**

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**KATHERINE A. WRAY, Judge**