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Woman Who Likes Orange by Todd Lenhoff (see page 5)
Happy Holidays
from YOUR Center for Legal Education
Let us host your next video conference

AVAILABLE JANUARY 4, 2010

The State Bar of New Mexico will now offer video conferencing to members

- Reduce travel expenses
- Save valuable time
- Conference sites in Albuquerque, Las Cruces, Roswell
- Member cost – $35 per hour, per location

Recording of depositions will be available at additional charges. Room rental fees apply and after hour fees may apply.

For more information or to schedule your next video conference, contact Tony Horvat at 505.797.6033 or email thorvat@nmbar.org
The Verdict Is In . . .
The State Bar of New Mexico won 7th Place in New Mexico Business Weekly’s “Best Places to Work,” medium sized company category. The top ten standings in small, medium and large companies were honored at an awards ceremony December 3 in Albuquerque. The rankings were determined by Quantum Workplace which created the survey completed by participating employees.

According to Nancy Salem, publisher of the New Mexico Business Weekly, the publication “recognizes the top employers in the state, those who are changing the definition of ‘workplace’ for the better. From bountiful benefits to opportunities for growth and advancement, these companies know how to attract top-notch talent and keep employees happy and committed.”

Congratulations to all staff! This award would not be possible without all of your hard work and team effort.
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Professionalism Tip

With respect to the courts and other tribunals:
I will avoid the appearance of impropriety at all times.

Meetings

December

16 Health Law Section Board of Directors, noon, Trombino’s Restaurant
18 NREEL Section Annual Meeting, noon, State Bar Center
18 Family Law Section Board of Directors, 9 a.m., via teleconference
18 Trial Practice Section Board of Directors, noon, State Bar Center
21 Attorney Support Group, 7:30 a.m., First United Methodist Church

January

16 Law Practice Management Committee, noon, State Bar Center

State Bar Workshops

January

27 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

February

24 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

March

24 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

April

28 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

Cover Artist: Paintings by Todd Lenhoff (tlenhoffartist@aol.com) give an in-depth, vibrant view of his interpretation of people. Through color, line, and shape, he is able to bring character, culture and life to the canvas. He sees his work like that of the subject matter—a continuous evolution. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
### Judicial Records Retention and Disposition Schedules

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit information with the Special Services Division at the numbers shown below.

- Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

<table>
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<tr>
<th>Court</th>
<th>Exhibits</th>
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<th>May be Retrieved Through</th>
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<td>1st Judicial District Court</td>
<td>Exhibits in criminal, civil, domestic cases and Relations, children's court cases</td>
<td>1981–1992</td>
<td>January 1, 2010</td>
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<td>9th Judicial District Court</td>
<td>Evidence and exhibits including poster boards filed in the following case types:</td>
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<td>Competency/Mental Health</td>
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<td>Adoption; Sequestered Incapacitated (SI)</td>
<td>1978–2008</td>
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<td>Tapes filed in criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases</td>
<td>1970–2008</td>
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<td>10th Judicial District Court</td>
<td>Tapes filed in the following case types:</td>
<td>1993–2001</td>
<td>January 25, 2010</td>
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**NOTICES**

**COURT NEWS**

**First Judicial District Court**

**Mass Reassignment of Cases**

Effective Jan. 4, 2010, a mass reassignment of 1st Judicial District Court cases will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule. All of the civil cases previously assigned to the Hon. James A. Hall, Division II, will be reassigned to the Hon. Barbara J. Vigil, Division I. All of the juvenile and neglect and abuse cases previously assigned to the Hon. Barbara J. Vigil, Division I, will be reassigned to the Hon. Michael E. Vigil, Division IV. All of the Rio Arriba domestic relations cases previously assigned to the Hon. Barbara J. Vigil, Division I, the Hon. James A. Hall, Division II, the Hon. Michael E. Vigil, Division IV, and the Hon. Daniel A. Sanchez, Division VII, will be reassigned to the Hon. Sheri A. Raphaelson, Division V. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Jan. 4, 2010 to challenge or excuse the newly assigned judge pursuant to Rule 1-088.1.

**Second Judicial District Court**

**Change in Business Hours**

The New Mexico Supreme Court has authorized the 2nd Judicial District Court Clerk’s Office to change its business hours effective Jan. 4, 2010. The Court Clerk’s Office will be open to the public from 10 a.m. to 4:00 p.m., Monday through Friday.

**Holiday Closures**

The holiday schedule for all offices and divisions of the 2nd Judicial District Court is as follows:

- Dec. 24 Closed noon–5 p.m.
- Dec. 25 Closed
- Dec. 31 Closed noon–5 p.m.
- Jan. 1, 2010 Closed

**Thirteenth Judicial District Court**

**E-Filing Training**

The 13th Judicial District Court will require mandatory e-filing in all civil cases beginning July 1, 2010. Until then, e-filing will be voluntary and free but will require registering with the service provider, WIZNET. E-filing training will be held at noon, Jan. 13, 2010, at the courthouse in Sandoval County. Anyone wishing to utilize e-filing must sign up with WIZNET and become a registered user. As a registered user, the person or firm signs a subscriber agreement and receives a user ID and password to access the e-filing system. Beginning July 1, 2010, the service provider will charge e-filing fees (to be determined by statute) to each registered user when utilizing the system. Go to www.13districtcourt.com and select “E-File” to access the e-filing system, read the user guide, participate in an Internet training session, and register with WIZNET to set up an account. Cibola began e-filing Nov. 17; Sandoval begins e-filing Jan. 25, 2010; and Valencia begins e-filing March 2010. Contact Gregory T. Ireland, CEO for the district court, (505) 865-4291, ext. 2104, for further information.

**Bernalillo County Probate Court**

**Holiday Closures**

The holiday schedule for the Bernalillo County Probate Court is as follows:

- Dec. 24–25 Closed
- Dec. 28–30 Open
- Dec. 31–Jan. 3, 2010 Closed
Anyone who needs to file a probate case during the time the court is closed should contact the 2nd Judicial District Court, (505) 841-7451 or (505) 841-7425, regarding its holiday hours.

**U.S. District Court, District of New Mexico Announcement of Chief U.S. Magistrate Judge**

Chief Judge Martha Vázquez and the Article III judges for the District of New Mexico are pleased to announce that U.S. Magistrate Judge Richard L. Puglisi will serve as chief U.S. magistrate judge for the District of New Mexico effective Dec. 1.

**Annual Federal Bar Dues**

At the recommendation of the Bench and Bar Fund Committee, with the concurrence of the Article III judges for the District of New Mexico, and in accordance with D.N.M.L.R-Civ. 83.2(c), collection of calendar year 2010 attorney bar dues has been ordered at the rate of $25. Dues should be submitted no later than Jan. 31, 2010, to the Clerk of Court, U.S. District Court, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102.

**Holiday Closures**

The U.S. District Court for the District of New Mexico will be closed Dec. 24. Visit the Court’s website at www.nmcourt.fed.us for additional information.

**Service on Court Panel**

Chief Judge Martha Vázquez and the Article III district judges for the District of New Mexico solicit interest from Federal Bar members for service on the Magistrate Judge Merit Selection Panel. This panel is responsible for the selection, appointment, and reappointment of U.S. magistrate judges in the district. To be considered for appointment to the panel, interested Federal Bar members in good standing should reply no later than Jan. 4, 2010, to the Clerk of Court, U.S. District Court, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102; or e-mail bbctcmnt@nmcourt.fed.us.

**STATE BAR NEWS**

**Attorney Support Group**

- Afternoon groups meet regularly on the first Monday of the month:
  - Jan. 4, 2010, 5:30 p.m.
- Morning groups meet regularly on the third Monday of the month:
  - Dec. 21, 7:30 a.m.
Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

**Board of Bar Commissioners Election Results**

The 2009 election of commissioners for the State Bar of New Mexico Board of Bar Commissioners was held Nov. 30. The 1st Bar Commissioner District had a contested election. Following are the results of that election and the uncontested districts. The terms are noted below.

**1st Bar Commissioner District**

(Bernalillo County)

- Danny W. Jarrett (three-year term)
- Raynard Struck (three-year term)
- Hilary A. Noskin (two-year term)
- Michelle Lujan Grisham (one-year term)

**3rd Bar Commissioner District**

(Los Alamos, Sandoval, Santa Fe and Rio Arriba counties)

- Jessica A. Perez (three-year term)

**7th Bar Commissioner District**

(Catron, Dona Ana, Grant, Hidalgo, Sierra, Socorro and Torrance counties)

- Hans Voss (three-year term)
- Roxanna M. Chacon (one-year term)

**Division Representatives**

- Young Lawyers Division Chair: Mary Martha Chicoski
- Paralegal Division Liaison: Deborah R. Tope
- Senior Lawyers Division Delegate: Daniel J. Behles

**Division/Section Elections Results**

The elections have been completed for the Young Lawyers Division and for sections as applicable. Results may be found on the YLD and section home pages at www.nmbar.org.

**International and Immigration Law Section CLE and Annual Meeting**

The International and Immigration Law Section will present How to Represent Immigrants Pro Bono: Considerations for the Multicultural Client (1.0 professionalism CLE credit) Dec. 16 at the State Bar Center. Christina Rosado-Maher, Rebecca Kitson,
and Iris Calderon will be the featured speakers. Register online at www.nmbarcle.org or fax to (505) 797-6071. The section’s annual meeting will immediately follow the CLE.

**NREEL Section**

**Winter CLE Program and Annual Meeting**

The Winter CLE Program of the Natural Resources, Energy and Environmental Law Section is Dec. 18 at the State Bar Center. *Energy Production in New Mexico—Developments, Liability and Damages* (4.5 general, 1.0 ethics, and 1.0 professionalism CLE credits) will address issues such as developments, liability and damages; case law developments, regulatory initiatives and trends; ethics questions facing section members; and going beyond what regulators require. Lunch will be provided during which the NREEL annual business meeting will be conducted. Register online at www.nmbarcle.org or fax to (505) 797-6071.

**Prosecutors Section**

**Annual Awards**

The State Bar Prosecutors Section is soliciting nominations for awards the section will present to five prosecutors at the Association of District Attorneys Spring Conference. March 3–5, 2010, in Ruidoso. The five award categories are as follows:

- **Prosecutor of the Year**—must have five or more years of full-time prosecution experience. The nomination should address the individual’s outstanding characteristics, prosecution history, work with the public and contributions to the quality of prosecution, and the image of prosecutors.
- **Law Enforcement Prosecutor**—this nomination should address the support and assistance the prosecutor has provided to law enforcement agencies and the prosecutor’s commitment of time in assisting law enforcement.
- **Community Service Prosecutor**—this nomination should address the service this prosecutor has provided to the community and the results of those efforts; e.g., volunteering at rape crisis centers, nursing homes, youth mentorship organizations, etc.
- **Legal Impact Prosecutor**—this nomination should address the significant impact that resulted from the prosecutor’s efforts in a criminal prosecution(s) and the significant and positive impact or effect on the law, along with the prosecutor’s outstanding character.
- **Rookie Prosecutor of the Year**—must have been prosecuting for no more than two years. The nomination should address the prosecutor’s dedication to criminal prosecution and commitment to making prosecution a career.

Nominations should be submitted for receipt Feb. 1, 2010, to Janice Burt Schryer, Deputy District Attorney, c/o 9th Judicial District Attorney’s Office, 417 Gidding St., Room 200, Clovis, NM 88101-7560; fax to (575) 769-3198; or e-mail jschryer@da.state.nm.us. The nominees will be presented to a committee for selection.

**2010 State Bar Dues and Licensing Fees**

- The 2010 Dues and Licensing forms have been mailed.
- Licensing fees and dues are payable Jan. 4, 2010, and are late after Feb. 1, 2010.
- Members who have not received the form by mid December should notify the State Bar at (505) 797-6035.
- Fees may also be paid online through secured eCommerce at www.nmbar.org. Click on “Pay Dues,” enter your bar ID number as your username and your last name as your password. If your last name is fewer than six characters, enter a zero(s) following your name to make six characters.
- State Bar, Disciplinary Board, and Client Protection Fund fees are mandatory and must be paid in order to maintain license status.
- Without exception, dues and licensing fees are payable regardless of whether you received your form.

*Late fees may be assessed if payment is not postmarked by Feb. 1, 2010.*

**Other Bar**

**Albuquerque Bar Association Member Luncheon**

The Albuquerque Bar Association’s Member Luncheon will be held at noon, Jan. 5, 2010, at the Embassy Suites Hotel, 1000 Woodward Pl. NE, Albuquerque. The luncheon speaker is Chief Judge Ted Baca of the 2nd Judicial District Court.

The CLE (1.0 general CLE credit) will immediately follow the luncheon from 1:15 to 2:15 p.m. Josh Link of Ambitions Consulting Group will present *Enhancing Efficiency and Profitability Through Technology.*

Lunch only: $25 members/$35 non-members with reservations; lunch and CLE: $55 members/$75 non-members with reservations; CLE only: $30 members/$40 non-members. Register for lunch by noon, Dec. 31. To register:

1. log onto www.abqbar.com;
2. e-mail abqbar@abqbar.com;
3. call (505) 842-1151 or (505) 243-2615;
4. fax (505) 842-0287; or
5. mail to PO Box 40, Albuquerque, NM 87103.
HoLiDa y Sc h eDu l e

Due to the holidays, the deadline for the “Notices” section for the Dec. 28 issue and the Jan. 5, 2010 issue of the Bar Bulletin is Dec. 17.

LaND AU RE COGN IZ ED F O R L E G A L A S S I S T A N CE T O WO M E N

The Committee on Women and the Legal Profession presented its 2009 Justice Pamela B. Minzner Outstanding Advocacy for Women Award to Jennifer Landau at a reception held Dec. 3 in Albuquerque. Landau is an attorney with Diocesan Migrant and Refugee Services and a member of the adjunct faculty at UNM School of Law. She designed a fellowship project to respond to a severe lack of pro bono legal services available to immigrants in removal proceedings in New Mexico. Collaborating with the UNM School of Law, she developed the Immigration Law Practicum to teach immigration law and allow law students to represent low-income immigrants in removal proceedings. Many immigrant detainees represented pro bono by her and her law students are female victims of domestic violence and their children. Remarkably, Landau has undertaken all of these endeavors since her recent graduation from law school in 2006. The award recognizes attorneys who have distinguished themselves during the prior year by providing legal assistance to women who are underrepresented or underserved or by advocating for causes that will ultimately benefit and/or further the rights of women.

Katie Lynch (left) and Jocelyn Castillo (right), representing the Committee on Women and the Legal Profession, present the 2009 Justice Pamela B. Minzner Outstanding Advocacy for Women Award to Jennifer Landau.

OTHER NE W S

Workers’ Compensation Administration Pending Closures

Governor Richardson signed an Executive Order that sets five furlough days for state employees during the remainder of fiscal year 2010. As an executive agency under the direct control of the governor, the WCA is not exempt from this requirement. The closures have been scheduled to minimize disruption to WCA operations and service to the community by scheduling them in conjunction with long weekend holidays. For planning and scheduling purposes, the WCA is tentatively scheduled for closure during the following periods:

- Dec. 24–Dec. 27.

Confirmation of these closures will be made in mid-December with notification of any changes at that time. Direct questions to Van Cravens, (505) 841-6004 or Van.Cravens@state.nm.us.

Are You Considering Running for Judicial Office?

The Fair Judicial Elections Committee of the State Bar was organized to:

- educate judicial candidates on the existence and content of rules applicable to judicial election campaigns;
- assist candidates in understanding and complying with those rules;
- monitor and investigate campaign statements and advertisements for compliance with the rules;
- comment publicly on any campaign statements and advertising that are deemed to violate the standards of the rules; and
- request and encourage candidates, campaign committees, and supporters of candidates to cease and desist from violations.

See the committee page at www.nmbar.org.
DECEMBER

14 An Attorney’s Guide to Good Lawyering for People With Disabilities
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 P
(505) 797-6020
www.nmbarcle.org

14 Fast and Free Online Research for Your Legal Practice
Albuquerque
NBI, Inc.
5.0 G, 1.0 E
1-800-930-6182
www.nbi-sems.com

VR, State Bar Center
Center for Legal Education of NMSBF
3.2 G
(505) 797-6020
www.nmbarcle.org

14 Procurement Code Institute
VR, State Bar Center
Center for Legal Education of NMSBF
3.0 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

14 Tag Team Clydesdales in the Courtroom with Terrence MacCarthy and Dale Cobb
VR, State Bar Center
Center for Legal Education of NMSBF
6.5 G
(505) 797-6020
www.nmbarcle.org

15 Cybersleuth’s Guide to the Internet
VR, State Bar Center
Center for Legal Education of NMSBF
6.0 G
(505) 797-6020
www.nmbarcle.org

15 Ethics of Asset Protection Planning
Teleseminar
Center for Legal Education of NMSBF
1.0 E
(505) 797-6020
www.nmbarcle.org

15 I Was From Venus and My Lawyers Were From Mars
VR, State Bar Center
Center for Legal Education of NMSBF
2.0 E, 1.0 P
(505) 797-6020
www.nmbarcle.org

15 Probate Process From Start to Finish
Albuquerque
NBI, Inc.
5.5 G, 1.0 E
1-800-930-6182
www.nbi-sems.com

15 6th Annual Elder Law Seminar
VR, State Bar Center
Center for Legal Education of NMSBF
2.9 G, 1.0 P
(505) 797-6020
www.nmbarcle.org

16 Forensic Accounting 101
VR, State Bar Center
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbarcle.org

16 How to Represent Immigrants Pro Bono
State Bar Center
Center for Legal Education of NMSBF
1.0 P
(505) 797-6020
www.nmbarcle.org

16 Medicare Set Asides
VR, State Bar Center
Center for Legal Education of NMSBF
2.7 G
(505) 797-6020
www.nmbarcle.org

17 Collection Law and Bankruptcy Law
Las Cruces
NBI, Inc.
6.0 G
1-800-930-6182
www.nbi-sems.com

17 Ethics Workout: Mental Aerobics for Solving Ethics Problems
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

17 “Know-How”: Fundamentals of Protecting Your Client’s Trade Secrets
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

17 The “Write” Way to Write Persuasively (Morning Session)
The Zealous Advocate: Becoming a Powerful Negotiator (Afternoon Session)
State Bar Center
Center for Legal Education of NMSBF
Morning or Afternoon: 3.0 G
Both Sessions: 6.0 G
(505) 797-6020
www.nmbarcle.org

17 Collection Law and Bankruptcy Law
Albuquerque
NBI, Inc.
6.0 G
1-800-930-6182
www.nbi-sems.com
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**Writs of Certiorari**

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective December 14, 2009

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NO. 32,041 State v. Puliti (COA 29,509) 12/7/09
NO. 32,044 State v. Episcopo (COA 29,328) 12/7/09

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(Submission = date of oral argument or briefs-only submission)

Submission Date

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**Slip Opinions for Published Opinions may be read on the Court’s website:**

http://coa.nmcourts.gov/documents/index.htm
**Recent Rule-Making Activity**

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective November 30, 2009

- To view pending proposed rule changes visit the New Mexico Supreme Court's Web site: http://nmsupremecourt.nmcourts.gov/
- To view recently approved rule changes, visit the New Mexico Compilation Commission's Web site: http://www.nmcompcomm.us/

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After determining that Defendant Eloy Trujillo, a child offender under the juvenile system, was not amenable to rehabilitation or treatment as a child, the court sentenced him as an adult after he pleaded guilty to second degree murder. Defendant moved for a new amenability and sentencing hearing on the ground that the court should not conduct an amenability and sentencing hearing at the same time, see State v. Jose S., 2007-NMCA-146, ¶ 17, 142 N.M. 829, 171 P.3d 768, and also moved to recuse the judge because she had previously represented the victim murdered by Defendant. The court denied Defendant’s motion for a new amenability hearing and granted his motion for a new sentencing hearing. Defendant was sentenced to seven and one-half years. A hearing was held on Defendant’s request to recuse the district judge, and the court denied the motion. Defendant appeals, asserting that the court erred in failing to recuse and that the court’s non-amenability determination was not supported by substantial evidence.

We affirm.

BACKGROUND

At age sixteen, Defendant was charged as a serious youthful offender in May 2006 with second degree murder and tampering with evidence. See NMSA 1978, §§ 32A-2-3(H), -20 (2005) (amended 2009). The charges were based on an incident in which Defendant and his companions agreed to meet with Anthony M. (Victim) for a confrontation near Robertson High School in Las Vegas, New Mexico. During the confrontation, Defendant’s cousin, Theodore, and Victim engaged in a fight. The fight ended when Victim released Theodore from a “head lock.” At that point, Victim and Defendant exchanged words, then Defendant opened the trunk of his car and retrieved and loaded a shotgun. It is disputed as to when Defendant shot Victim in the chest. The next day at the hospital, Victim died from the gunshot wound inflicted by Defendant.

1Defendant did not raise in the district court and does not raise on appeal the issue of whether the State was constitutionally required to present the amenability determinations to a jury. See State v. Rudy B., 2009-NMCA-104, ¶ 23, ___ N.M. ___, 216 P.3d 810. We therefore do not discuss that issue.
At the hearing on this motion, Defendant repeated these claims and defense counsel noted his own neglect in not having reviewed the CYFD records before Defendant entered his plea. Judge Aragon noted for the record that she did not personally represent Victim, engage in plea negotiations on his behalf, discuss a plea with him or his parents, or appear before the court on behalf of Victim or his parents, and she stated that she had no direct contact with Victim in the juvenile proceedings. As a result, Judge Aragon denied Defendant’s request for recusal. The judge did, however, grant Defendant’s request to be allowed to submit the CYFD records on which he based his motion as exhibits for the record.

On November 26, 2007, Defendant supplemented the record in this case with those records. The documents included a 2003 order appointing then private attorney Abigail Aragon as the attorney for Victim, in the case styled, In the Matter of Anthony [M.], No. 2003-05-JR. Also included is an affidavit by a private investigator confirming that, upon his review of Victim’s case file, the judge’s former law partner, Michael Aragon, actually appeared at all the hearings in Victim’s case. Defendant also filed a motion to reconsider the order denying the motion to recuse.

In his motion to reconsider, Defendant made the same arguments contained in the first motion. Defendant also attached his own affidavit stating that he was unaware of the judge’s prior representation of Victim and, upon learning about it, had requested his attorney to seek the judge’s recusal. The affidavit was provided to address the court’s finding, as perceived by Defendant, that Defendant or his attorney knew of the judge’s prior representation of Victim at the time of amenability and sentencing hearings. The record of the hearing on Defendant’s initial motion reveals no such finding by the district court. Rather, Judge Aragon found that Defendant’s motion was based only on the unfavorable finding that Defendant was not amenable to treatment as a juvenile.

Also in his motion to reconsider, Defendant addressed the court’s finding that recusal was unnecessary because Judge Aragon’s law partner and not Judge Aragon herself had represented Victim. He argued that the actions of a lawyer are imputed on his or her law partners. The district court did not rule on this second motion and, therefore, it was denied after thirty days by operation of law.

Defendant argues on appeal that the district court erred in denying his request for recusal and that substantial evidence did not exist to support an adult sentence.

DISCUSSION

I. The District Judge Did Not Err in Failing to Recuse Herself

A. Standard of Review and Applicable Legal Standards

We review the denial of a motion to recuse for an abuse of discretion. State v. Ruiz, 2007-NMCA-014, ¶ 13, 141 N.M. 53, 150 P.3d 1003 (filed 2006); State v. Cherryhomes, 114 N.M. 495, 500, 840 P.2d 1261, 1266 (Ct. App. 1992). “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.” State v. Rojo, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (filed 1998) (internal quotation marks and citation omitted).

“In determining whether an objective observer would conclude that a judge’s impartiality was questionable, an appellate court should look to see how the judge arrived at the decision not to recuse and then should review the judge’s actions for bias.” State v. Riordan, 2009-NMSC-022, ¶ 11, 146 N.M. 281, 209 P.3d 773. In Riordan, the fact that no objective evidence of bias on the part of the court was presented indicated that there was no impropriety for the court to remain on the case. Id. ¶ 12.

“[R]ecusal is only required when a judge has become so embroiled in the controversy that he [or she] cannot fairly and objectively hear the case.” Id. ¶ 14 (alteration omitted) (internal quotation marks and citation omitted). “[R]ecusal rests within the discretion of the trial judge, and will only be reversed upon a showing of an abuse of that discretion.” Id. ¶ 6. “In order to require recusal, bias must be of a personal nature against the party seeking recusal.” Ruiz, 2007-NMCA-014, ¶ 15 (internal quotation marks and citation omitted). A claim of bias, including a claim of an appearance of bias, cannot be based on mere speculation. See United Nuclear Corp. v. Gen. Atomic Co., 96 N.M. 155, 246-48, n.156, 629 P.2d 231, 322-24, n.156 (1980) (rejecting speculative claims of bias as insufficient to warrant disqualification of a judge under Article VI, Section 18 of the New Mexico Constitution and Rule 21-300 NMRA (formerly Canon 3(C)(1) of the Code of Judicial Conduct). “Voluntary recusal is reserved for compelling constitutional, statutory, or ethical reasons because a judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified.” State v. Hernandez, 115 N.M. 6, 20, 846 P.2d 312, 326 (1993) (alteration omitted) (emphasis omitted) (internal quotation marks and citation omitted); see also Rule 21-300(B)(1) (“A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.”).

B. The Circumstances Did Not Require Recusal

We see no basis on which to conclude that Judge Aragon erred in failing to recuse herself. She did not actually represent Victim, and she had no knowledge of his case. Defendant has shown no interest or actual bias of Judge Aragon, nor has he shown prejudice. To the extent that an appearance of impropriety might be considered, nothing Defendant has shown indicates an appearance of impropriety, and Judge Aragon sufficiently dispelled any such appearance. See Robertson v. State, 484 S.E.2d 18, 20 (Ga. Ct. App. 1997) (holding that the defendant was not denied a fair trial for failing to recuse where the trial judge’s husband represented the victim in a civil suit and the trial judge only had an indirect interest); Hunter v. State, 684 So. 2d 625, 629-31 (Miss. 1996) (affirming the court’s denial of the defendant’s motion to recuse where the judge’s firm had previously represented the victim but the case was not discussed with the judge and where the defendant never alleged that he was actually prejudiced and only argued that the trial judge’s relation gave an appearance of impartiality); Flores v. State, 79 N.M. 47, 48-49, 439 P.2d 565, 566-67 (Ct. App. 1968) (holding that the defendant was not denied a fair and impartial trial where a trial judge represented the defendant in the past).

II. The Court’s Non-Amenability Finding Was Supported by Substantial Evidence

A. Standard of Review

We review non-amenability findings for substantial evidence or abuse of discretion. State v. Gonzales, 2001-NMCA-025, ¶¶ 33, 40, 130 N.M. 341, 24 P.3d 776, overruled on other grounds by Rudy B., 2009-NMCA-104, ¶ 1, 53. We do not reweigh the evidence or substitute our judgment for that of the district court. Id. ¶ 40. We view the evidence in the light most favorable to the lower court’s
decision, resolve all conflicts and indulge all permissible inferences to uphold that decision, and disregard all evidence and inferences to the contrary. Id.

B. The Question of Amenability
{14} Defendant presented expert opinions and certain evaluation reports. Those opinions favored a finding of amenability. The defense specifically referred the district court to a Juvenile Justice Services Diagnostic/Psychological Evaluation that had been previously received by the court and which found that Defendant was amenable to juvenile sanctions. The defense also specifically referred the court to the CYFD Baseline Assessment prepared for the court in relation to sentencing, which also indicated that Defendant was amenable to juvenile sanctions. The defense discussed a Department of Corrections Sixty-Day Diagnostic Evaluation on Defendant prepared in connection with Defendant’s prior referral to juvenile probation and parole. The defense further presented the testimony of Dr. Susan Cave, a clinical psychologist. Dr. Cave testified that Defendant was amenable to juvenile sanctions, and she recommended that juvenile sanctions be imposed.
{15} The State did not present expert opinion. The prosecution cross-examined Defendant’s expert witness and relied on the circumstances of the offense admitted by Defendant in entering his plea as factors indicating non-amenability. See § 32A-2-20(C) (2005).
{16} The facts that Defendant admitted, and on which he based his plea, were as follows. Victim was a student at Robertson High School. On the day of the shooting, on school grounds, there was verbal confrontation between Victim and Defendant’s brother, with another person present, possibly Defendant. After the verbal confrontation, Victim left the school grounds with several companions. Later, Victim and his companions, who were in one vehicle, met up with Defendant and Defendant’s brother and cousin, who were in another vehicle. The parties agreed to meet in an alley near the school where Victim would fight with Defendant’s cousin. The fight took place as planned and ended when Victim released Defendant’s cousin from a head lock. At that point, words were exchanged and Defendant went to his car, opened the trunk, removed a sawed-off shotgun and loaded it. After comments were made that Defendant would not use the gun, Defendant fired the gun at Victim. At the time he was shot, Victim was facing Defendant with his hands in the air, as indicated by gunshot wounds on the palms of Victim’s hands. Victim died of the gunshot wounds the next day.
{17} The district court considered each of the factors in Section 32A-2-20(C) by reviewing the facts and circumstances of the offense to which Defendant pleaded guilty. In so doing, the court discussed the facts relevant to each factor and concluded that each factor weighed against a finding of amenability to treatment as a juvenile. The court found that (1) the offense of second degree murder was a serious offense; (2) Defendant’s actions in opening the trunk of his car, retrieving an unloaded shotgun, and then loading the gun indicated a degree of premeditation in the commission of the second degree murder; (3) Defendant used a firearm in the commission of the second degree murder; (4) the offense was committed against a person and resulted in personal injury; (5) Defendant exhibited an adult level of sophistication and maturity by getting married; (6) Defendant’s prior criminal history, although minimal, involved a firearm; and (7) with regard to the prospects for adequate protection of the public and the likely prospects of rehabilitation, the court noted that Defendant suffers from post-traumatic stress disorder because of this incident and that he did not suffer from the disorder prior to this incident. As a result of weighing each factor in Section 32A-2-20(C) against a finding of amenability, the court found Defendant non-amenable to treatment and ineligible for commitment for a developmental disability or mental disorder and imposed the maximum adult sentence under the plea agreement—seven and one-half years incarceration. Each of the district court’s determinations under the statutory factors is supported by the record. Moreover, most of these determinations were based on the undisputed facts presented by the prosecutor as the factual basis for Defendant’s plea.
{18} We are aware that the court cannot focus entirely on criminal culpability, but must consider the prospects of amenability to treatment within the juvenile system. Gonzales, 2001-NMCA-025, ¶ 25. This case essentially sets expert opinion against facts and inference drawn by the court from facts surrounding the crime and Defendant’s prior criminal history. “It is the factfinder’s prerogative to weigh the evidence and to judge the credibility of the witnesses.” State v. Ryan, 2006-NMCA-044, ¶ 20, 139 N.M. 354, 132 P.3d 1040. The court was free to disregard expert opinion. State v. Alberico, 116 N.M. 156, 164, 861 P.2d 192, 200 (1993); Gonzales, 2001-NMCA-025, ¶ 40; In re Ernesto M., 1996-NMCA-039, ¶ 14, 121 N.M. 562, 915 P.2d 318. It appears to us that the court adequately and appropriately addressed all concerns.
{19} The question for this Court is not what it would have decided based on the testimony presented below, but whether “any rational fact-finder” could have determined Defendant was not amenable to treatment as a juvenile. Gonzales, 2001-NMCA-025, ¶ 40. Based on the evidence, viewed in the light most favorable to the district court’s decision and disregarding evidence and inference contrary to that decision, we conclude that any rational factfinder could have determined that Defendant was not amenable to treatment as a juvenile. We hold that the evidence was sufficient to support the court’s findings and ultimate determination of non-amenability. Furthermore, there is no basis on which to conclude that the court abused its discretion. We also hold that the court did not err in denying Defendant’s motion to recuse.

CONCLUSION
{20} We affirm the district court.
{21} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
ROBERT E. ROBLES, Judge
OPINION

Roderick T. Kennedy, Judge

This case arises from a third-party petition for custody of an eight-year-old minor girl (Child). The district court found that Petitioner-Appellant, Child’s aunt by marriage (Aunt), lacked standing to bring a custody case. It concluded that Aunt’s petition amounted to nothing more than an assertion of abuse and neglect, and because abuse and neglect proceedings must originate with the Children, Youth and Families Department (CYFD), it dismissed Aunt’s claim on the basis of standing. Later, during proceedings on Aunt’s motion for reconsideration, she expressed an intention to file a motion under NMSA 1978, Section 40-10B-12(A) (2001), of the Kinship Guardianship Act (the Act), and the court disallowed her from doing so. It warned it would consider such a motion contemptuous of its prior order of dismissal.

On appeal, Aunt argues that the district court improperly dismissed her petition.

We disagree and affirm the district court’s order on the issue of standing. However, we reverse to the extent that the court prohibited Aunt from pursuing a claim under the Act, which provides that any person may bring a motion to revoke a kinship guardianship. The district court responded that it would likely view any such action as contempt or, at the very least, an attempt to circumvent and frustrate its ruling on the issue of standing. On appeal, Aunt argues that the district court improperly held that she lacked standing to seek custody of Child. She cites several sources of law in support of her argument, including the Children’s Code, extraordinary circumstances, the domestic relations statutes, and the Act. We consider each below.

II. STANDARD OF REVIEW

Initially, we observe that this case involves a dismissal without prejudice. Generally, an order of dismissal without prejudice is not appealable because it typically requires further proceedings. Ortega v. Transamerica Ins. Co., 91 N.M. 31, 33, 569 P.2d 957, 959 (Ct. App. 1977). Dismissal of a complaint without prejudice is only final and appealable if the order disposes of the case to the fullest extent possible in the court in which it was filed. Sunwest Bank of Albuquerque, N.M. v. Nelson, 1998-NMSC-012, ¶¶ 7-9, 125 N.M. 170, 958 P.2d 740. Here, the district court’s finding on standing negated any further action by Aunt; its order is therefore final and appealable.

“Whether a party has standing to bring a claim is a question of law which we review de novo.” Prot. & Advocacy Sys. v. City of Albuquerque, 2008-NMCA-149, ¶ 17, 145 N.M. 156, 195 P.3d 1. On a motion to dismiss for want of standing, courts accept as true all material allegations in the complaint and affidavits and construe them in favor of the plaintiffs. Id. Moreover, the district court’s order was based on statutory interpretation, and we also review questions of statutory interpretation de novo. Martin v. Middle Rio Grande Conservancy Dist., 2008-NMCA-151, ¶ 3, 145 N.M. 151, 194 P.3d 766.

[1] This case arises from a third-party petition for custody of an eight-year-old minor girl (Child). The district court found that Petitioner-Appellant, Child’s aunt by marriage (Aunt), lacked standing to bring a custody case. It concluded that Aunt’s petition amounted to nothing more than an assertion of abuse and neglect, and because abuse and neglect proceedings must originate with the Children, Youth and Families Department (CYFD), it dismissed Aunt’s claim on the basis of standing. Later, during proceedings on Aunt’s motion, she expressed an intention to file a motion under NMSA 1978, Section 40-10B-12(A) (2001), of the Kinship Guardianship Act (the Act), and the court disallowed her from doing so. It warned it would consider such a motion contemptuous of its prior order of dismissal.

[2] On appeal, Aunt argues that the district court improperly dismissed her petition.

[3] Aunt filed a petition seeking custody and time-sharing of Child. Apparently, paternity has never been established, and the putative father is not involved with Child, nor has he ever been. Child lives with her grandmother (Grandmother), and Child’s mother (Mother) consented to a kinship guardianship of Child to Grandmother.

[4] Aunt is related to Child by prior marriage and claims Child has been subjected to abuse by both Grandmother and Mother. Aunt alleged that Grandmother admitted to abuse by both Grandmother and Mother. According to Aunt, Child has contacted her on several occasions regarding these conditions and requested that Aunt “get [her] out of here.”

[5] Aunt filed a petition for custody and time-sharing alleging abuse and neglect on the part of both Mother and Grandmother. As a result, she asserted, both were unfit. Aunt also alleged a quasi-parental relationship with Child. Although Child currently lives with Grandmother, Aunt has regular contact with Child, and Child has resided with Aunt during past intervals. CYFD was notified of the possible abuse, and it conducted an investigation, but its report found the abuse allegations unsubstantiated.

[6] The district court granted Grandmother’s motion to dismiss, finding that Aunt lacked standing to bring a case for custody because third parties may not initiate custody cases without CYFD first filing an abuse and neglect charge. At a hearing on a motion for reconsideration, Aunt indicated she instead planned to file a motion to terminate the kinship guardianship. The district court responded that it would likely view any such action as contempt or, at the very least, an attempt to circumvent and frustrate its ruling on the issue of standing. On appeal, Aunt argues that the district court improperly held that she lacked standing to seek custody of Child. She cites several sources of law in support of her argument, including the Children’s Code, extraordinary circumstances, the domestic relations statutes, and the Act. We consider each below.

II. STANDARD OF REVIEW

[7] Initially, we observe that this case involves a dismissal without prejudice. Generally, an order of dismissal without prejudice is not appealable because it typically requires further proceedings. Ortega v. Transamerica Ins. Co., 91 N.M. 31, 33, 569 P.2d 957, 959 (Ct. App. 1977). Dismissal of a complaint without prejudice is only final and appealable if the order disposes of the case to the fullest extent possible in the court in which it was filed. Sunwest Bank of Albuquerque, N.M. v. Nelson, 1998-NMSC-012, ¶¶ 7-9, 125 N.M. 170, 958 P.2d 740. Here, the district court’s finding on standing negated any further action by Aunt; its order is therefore final and appealable.

[8] “Whether a party has standing to bring a claim is a question of law which we review de novo.” Prot. & Advocacy Sys. v. City of Albuquerque, 2008-NMCA-149, ¶ 17, 145 N.M. 156, 195 P.3d 1. On a motion to dismiss for want of standing, courts accept as true all material allegations in the complaint and affidavits and construe them in favor of the plaintiffs. Id. Moreover, the district court’s order was based on statutory interpretation, and we also review questions of statutory interpretation de novo. Martin v. Middle Rio Grande Conservancy Dist., 2008-NMCA-151, ¶ 3, 145 N.M. 151, 194 P.3d 766.
III. THE DISTRICT COURT PROPERLY DISMISSED AUNT’S PETITION FOR LACK OF STANDING

A third party may pursue custody of a child in at least five distinct ways. See § 40-10B-12(A); In re Guardianship Petition of Lupe C., 112 N.M. 116, 119, 812 P.2d 365, 368 (Ct. App. 1991). First, the district court, sitting in equity, may consider such a matter when extraordinary circumstances exist and there is no other available or adequate remedy at law. In re Lupe C., 112 N.M. at 119, 812 P.2d at 368. Second, in the event of a dissolution of marriage, on appropriate motion, a court may determine that the child should go to a third party. Id. Third, when a parent or guardian dies, the court may provide for a child’s custody under the Probate Code. Id. at 119-20, 812 P.2d at 368-69. Fourth, where there has been a finding of abuse and neglect, the court may award custody to a third party. Id. at 121, 812 P.2d at 370. And fifth, a third party may assert a claim to terminate guardianship under the Act. Section 40-10B-12(A).

Aunt’s original petition for custody relies almost exclusively upon the fourth method, asserting several instances of abuse and neglect allegedly perpetrated by Grandmother and/or Mother. In its order dismissing her claim, the district court held that “allegations of abuse and neglect are, under [the Children’s] Code, to be pursued by [CYFD], and brought before the [c]ourt if the [d]epartment concludes that abuse and neglect has occurred or that the guardian is unfit. An individual [cannot] bring the abuse and neglect action.” The court’s conclusion is absolutely correct. As a rule, abuse and neglect proceedings are initiated by CYFD on behalf of the affected child. State ex rel. Children, Youth & Families Dep’t v. Jeremy N., 2008-NMCA-145, ¶ 6, 145 N.M. 198, 195 P.3d 365. “The [d]epartment is the only entity authorized to file a petition of abuse or neglect.” Id.; see NMSA 1978, § 32A-4-4(A), (D) (2005) (stating that upon a report of abuse or neglect, the department is responsible for “conduct[ing] an investigation to determine the best interests of the child”); NMSA 1978, § 32A-4-15 (1993) (“A petition alleging neglect or abuse shall not be filed unless the children’s court attorney has determined and endorsed upon the petition that the filing of the petition is in the best interests of the child.”). Thus, Aunt possessed no standing to bring such a petition, and what is more, CYFD had already completed an investigation of Aunt’s allegations and found them unsubstantiated. Upon such facts, we find nothing erroneous with a dismissal on the basis of standing.

In her motion to reconsider the dismissal, Aunt argued that the district court should consider her claim on the basis of extraordinary circumstances, and she renewed that argument on appeal. As stated above, in New Mexico, a district court, sitting in equity, may consider awarding custody to a third party under extraordinary circumstances.

This power, however, is usually exercised when there is no other parent or individual to act for the child. While equity may have the power to take custody away from a parent, it will do so only in extreme circumstances. This inherent power is limited to situations where there is no other available or adequate remedy at law. In re Lupe C., 112 N.M. at 119, 812 P.2d at 368 (emphasis added) (citations omitted). See also In re Adoption of J.B.B., 119 N.M. 638, 652, 894 P.2d 994, 1008 (1995) (stating that “[i]n New Mexico we give great weight to the presumption that, when a family breaks up, custody should go to the natural parent” unless extraordinary circumstances exist). “Where a district court denies equitable relief . . . we review the matter for abuse of discretion.” In re Adoption Petition of Rebecca M., 2008-NMCA-038, ¶ 22, 143 N.M. 554, 178 P.3d 839. In this case, Aunt raised her extraordinary circumstances argument simultaneously with her assertion that the Act allowed her to intervene. Even presuming the existence of such extraordinary circumstances, however, we hold that, in the long run, though it eschewed a valid route for Aunt which leads to our reversal herein, the district court properly refused to consider Aunt’s custody claim because she had an “available or adequate remedy” under the Act. See In re Lupe C., 112 N.M. at 119, 812 P.2d at 368; see also Meiboom v. Watson, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (holding that we may affirm a district court if its holdings was right for any reason). We consider that issue below.

Aunt’s bare assertion that the domestic relations statutes grant her standing to pursue this claim is likewise without merit. Under NMSA 1978, Section 40-4-9.1(K) (1999), during a proceeding for marital dissolution, a non-parent may seek custody of a child. The statute authorizing the court to make an order for the guardianship of a child “gives the district court relatively broad powers with respect to the children of a marriage that is being dissolved.” In re Lupe C., 112 N.M. at 119, 812 P.2d at 368. Although it does provide evidence that a third party may seek custody of a child, the section only applies in the context of marital dissolution. See id. (“[I]n this case there is no dissolution action before the district court.”). We thus reject the domestic relations statutes as a basis to confer standing upon Aunt.

IV. THE COURT IMPROPERLY PROHIBITED AUNT FROM PURSUING A CLAIM UNDER THE ACT

At the conclusion of the hearing on Aunt’s motion for reconsideration, the district court not only reaffirmed its prior decision that Aunt lacked standing to bring her petition, but also cautioned that she would be held in contempt if she went forward with a claim under the Act. Such a prohibition was erroneous. Our goal in statutory interpretation “is to determine and give effect to legislative intent. We do not depart from the plain language of a statute unless we must resolve an ambiguity, correct a mistake or absurdity, or deal with a conflict between different statutory provisions.” N.M. Bd. of Veterinary Med. v. Riegger, 2007-NMSC-044, ¶ 11, 142 N.M. 248, 164 P.3d 947 (citation omitted). Section 40-10B-12(A) of the Act provides: Any person, including a child who has reached his fourteenth birthday, may move for revocation of a guardianship created pursuant to [the Act] . . . . The person requesting revocation shall attach to the motion a transition plan proposed to facilitate the reintegration of the child into the home of a parent or a new guardian. A transition plan shall take into consideration the child’s age, development and any bond with the guardian. The plain language of the statute is clear and unambiguous; any person may bring a motion to revoke a kinship guardianship. We make no statement as to the merits of such a motion on these facts. We hold only that Aunt is a person who may bring such a motion, and the district court erred when it disallowed her from doing so. Threatening her with contempt chilled the exercise of her right to approach the court and, in retrospect, might have been more carefully considered.

CONCLUSION

For the reasons outlined above, we affirm the district court’s order dismissing Aunt’s claim for want of standing but leave open to her any claim she may pursue under the Act.

[15] IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge
CELIA FOY CASTILLO, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2009-NMCA-130

Topic Index:
Appeal and Error: Standard of Review
Constitutional Law: Fourth Amendment
Criminal Law: Controlled Substances
Criminal Procedure: Arrest Warrant; Reasonable Suspicion; Search and Seizure; and Search Incident to Arrest
Evidence: Suppression of Evidence

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
RAY ANTHONY MONTAÑO,
Defendant-Appellant.
No. 28,821 (filed: October 16, 2009)

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
JOHN A. DEAN JR., District Judge

GARY K. KING
Assistant Attorney General
FRANCINE A. CHAVEZ
Assistant Attorney General
Santa Fe, New Mexico
for Appellant

HUGH W. DANGLER
Chief Public Defender
KATHLEEN T. BALDRIDGE
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellee

OPINION

JONATHAN B. SUTIN, Judge

{1} Defendant Ray Anthony Montaño asserts that the district court erred in refusing to suppress drug-related evidence obtained from his person in a search incident to his arrest. Neither the record of the hearing nor the suppression order shows specific grounds for denial. The issue is whether the police officer’s actions in stopping and questioning Defendant, who was on the police officer’s actions in stopping and questioning Defendant, who was on

BACKGROUND

The Testimony and Evidence

{3} Officer Dennis Ronk was the only witness who testified at the suppression hearing. In addition, a portion of a dispatch communication was played along with a video. On June 5, 2007, at approximately 2:50 a.m., Officer Ronk was conducting a routine patrol through the back parking lot of a Super 8 Motel and saw Defendant running directly toward his vehicle. He thought Defendant was trying to flag him down. Defendant did not have a shirt on and his hand appeared to be bleeding. Officer Ronk stopped his vehicle. Defendant stopped running as he approached the officer’s vehicle, and he was almost at a slow walk when he looked at Officer Ronk, but he then kept walking. Officer Ronk drove around the building because he did not know how Defendant had hurt his hand and because he had investigated several fights and domestic disturbances occurring at the local motels. He observed Defendant running across the parking lot of a closed business. Defendant had stopped running before Officer Ronk made contact with him. At the time of contact, Officer Ronk activated his vehicle’s beam lights.

{4} Officer Ronk testified that he may have said something like, “Hey come here, let me talk to you for a minute.” It was obvious to the officer that Defendant’s hand was bleeding to the extent that drops of blood were falling onto the ground. Officer Ronk asked Defendant where he was going. The officer used a flashlight as he approached Defendant for safety purposes and asked Defendant to keep his hands out of his pockets. Defendant gave the name of the street where his sister’s house was located, and Officer Ronk knew the street was in the opposite direction of where Defendant was running. Officer Ronk requested Defendant to provide identification because he did not know if Defendant was intentionally being untruthful as to his destination or if he was incoherent, and the officer wanted to investigate further.

{5} Defendant did not have any identification on him because he did not have a wallet. Officer Ronk asked Defendant for his name and date of birth. The officer testified that he asked Defendant for his identification (1) to see if he was involved in a domestic disturbance or a fight at the Super 8 Motel, and (2) to contact someone to pick him up because he might be under the influence and confused as to his whereabouts. The officer agreed that his purpose “was simple identification” and confirmed that it was common among police officers to identify a person they are dealing with. Officer Ronk requested dispatch to run a “local’s check.” It was at that point when the officer asked Defendant how he had cut his hand, and Defendant stated that he cut it on a light bulb. In Officer Ronk’s experience, people who smoke methamphetamine use light bulbs to ingest the drug.

{6} When the officer initially contacted dispatch, he reported there was a “subject walking around with no shirt.” Dispatch’s response then referred to a “1015” which translates to a “prisoner in custody.” The
officer agreed with defense counsel during his testimony that a “1015” translates to a “prisoner in custody.”

[7] Officer Briseno arrived on the scene a few minutes into the encounter. Officer Ronk did not recall calling for backup and testified that dispatch might have sent backup on their own volition. Dispatch informed Officer Ronk that Defendant had an outstanding warrant for his arrest for failure to pay fines, and Officer Briseno placed Defendant under arrest. Officer Ronk then conducted a search of Defendant’s person. The search yielded a clear, crystal-type substance which later tested positive for methamphetamine and also yielded a tool commonly used to ingest narcotics.

[8] Defendant was charged in count one with possession of a controlled substance (methamphetamine) contrary to NMSA 1978, Section 30-31-23(D) (2005), a fourth degree felony, and was charged in count two with possession of drug paraphernalia, contrary to NMSA 1978, Section 30-31-25.1(A) (2001), a misdemeanor. Defendant filed a motion to suppress all the evidence seized on the ground that there was no reasonable suspicion to conduct an investigatory stop. The State filed a response to the motion and argued that the officer was acting under the community caretaker function.

[9] After a hearing on the suppression motion, the district court denied Defendant’s motion. Defendant entered into a conditional plea reserving his right to appeal the denial of the motion to suppress. Pursuant to the plea agreement, count two was dismissed. Defendant was sentenced on count one.

[10] On appeal, Defendant asserts that he was seized in violation of the Fourth Amendment to the United States Constitution and also in violation of Article II, Section 10 of the New Mexico Constitution because the officer conducted an investigatory stop without reasonable suspicion that Defendant was involved in criminal activity.

DISCUSSION

Standard of Review

[11] “The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party.” State v. Jason L., 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted). This Court must “observe the distinction between factual determinations which are subject to a substantial evidence standard of review and application of law to the facts[,] which is subject to de novo review.” State v. Nieto, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442 (alteration in original) (internal quotation marks and citation omitted). This Court must defer to the district court with respect to findings of historical fact as long as they are supported by substantial evidence. Jason L., 2000-NMSC-018, ¶ 10.

Our review of a district court’s decision regarding a motion to suppress evidence involves mixed questions of fact and law. In reaching our conclusion, we adopt an interpretation of the factual background that is most favorable to the prevailing party, as long as the facts are supported by substantial evidence. Against such a factual backdrop, we evaluate de novo the reasonableness of the conduct of law enforcement officers, considering the totality of the circumstances.


The determination of a seizure has two discrete parts: (1) what were the circumstances surrounding the stop, including whether the officers used a show of authority; and (2) did the circumstances reach such a level of accosting and restraint that a reasonable person would have believed he or she was not free to leave? The first part is a factual inquiry, which we review for substantial evidence. The second part is a legal inquiry, which we review de novo. Jason L., 2000-NMSC-018, ¶ 19.

The Parties’ Positions

[12] The State argues that because the district court made no findings of fact, we are to “indulge in all reasonable presumptions in support of the district court’s ruling.” State v. Gonzales, 1999-NMCA-027, ¶ 15, 126 N.M. 742, 975 P.2d 355 (filed 1998). The State’s primary contention is that the encounter was consensual during a community caretaker function and, therefore, the encounter did not implicate the Fourth Amendment. In support of this justification, the State argues that, under the totality of the circumstances, the encounter was consensual because Defendant was free to decline the officer’s requests and to terminate the encounter and leave. See State v. Morales, 2005-NMCA-027, ¶ 10, 137 N.M. 73, 107 P.3d 513 (filed 2004); State v. Walters, 1997-NMSC-013, ¶ 12, 123 N.M. 88, 934 P.2d 282 (filed 1996). The State also argues that the officer did not convey by physical force or show of authority that Defendant was not free to walk away. See Gutierrez, 2008-NMCA-015, ¶ 9. The State argues further that the mere request for identification and other questioning does not turn a consensual encounter into a seizure. See Walters, 1997-NMSC-013, ¶ 18.

[13] The State’s alternative justifications for the officer’s actions are based on the community caretaker-public service and the emergency aid exceptions to the Fourth Amendment’s warrant requirement. See State v. Rony, 2005-NMSC-005, ¶ 25-26, 137 N.M. 174, 108 P.3d 1032 (setting out “three distinct doctrines under the community caretaker exception [that] have emerged,” two of which are (1) “the community caretaking doctrine, or public servant doctrine,” and (2) “the emergency aid doctrine”). In support of the community caretaker-public service exception, the State argues that Defendant’s privacy interest was considerably less than if he were in a home or vehicle and that in measuring “the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen” the warrantless seizure of Defendant was reasonable. See id. ¶¶ 16, 24-26 (recognizing that warrants and reasonable suspicion are not required where the police are engaged in activities that are unrelated to crime-solving and that “[a]s the privacy expectation increases, the caretaker functions that justify an intrusion by police must be judged by a different standard”) (internal quotation marks and citation omitted).

[14] In support of the emergency aid exception, the State addresses two pertinent elements of a three-part test adopted by our Supreme Court. See id. ¶¶ 29-39 (adopting the three-part test from People v. Mitchell, 347 N.E.2d 607 (N.Y. 1976), abrogated by Brigham City, Utah v. Stuart, 547 U.S. 398 (2006)). One element of the test requires that there exist reasonable grounds to believe there is an emergency and an immediate need for assistance. Rony, 2005-NMSC-005, ¶ 29. The State argues that “[t]ested objectively under the totality of circumstances, Office[r] Ronk had reasonable grounds to believe that Defendant was in need of assistance.” The second element of the test involves the officer’s primary
motivation. See id. The State argues that the officer’s primary motivation “was to determine if Defendant was in need of assistance and to render any assistance that was necessary.” See id. ¶ 29, 36 (adopting the Mitchell primary-motivation standard and discussing what must be demonstrated under the standard). The State attempts to stay within Ryon’s requirement, as quoted by the State from Ryon, 2005-NMSC-005, ¶ 36, that “[t]he protection of human life or property in imminent danger must be the motivation for the [initial decision to enter the home] rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding.” (Emphasis omitted.) (Second alteration in original.) (Internal quotation marks and citation omitted.) Yet, the State pieces together the officer’s concern as to Defendant’s truthfulness and coherence, and his later concern as to substance influence and use, to argue that the circumstances “arouse[d] suspicions of potential criminal conduct [that made it] wholly reasonable for the officer to investigate further.” According to the State, “it was not realistic for officers to completely abandon this investigative function.” See id. (stating “[w]hile we do not believe it is realistic to completely abandon their investigative function, we adopt the ‘primary motivation’ standard set out in Mitchell”).

Defendant asserts that the officer asked Defendant to stop and “immediately began asking him questions designed to determine why he was in the parking lot, specifically where he was going and whether he was involved in a domestic violence incident or using methamphetamine[].” Defendant argues that this constituted a show of force, conveyed that compliance with the requests was required and that, under the totality of circumstances, a reasonable person in Defendant’s position would not feel free to leave. Defendant also argues that the facts show that Officer Ronk did not approach Defendant to engage in community caretaking under either the public service doctrine or the emergency aid doctrine.

With respect to the community caretaker-public service doctrine, Defendant argues that the circumstances showed that the officer “did not approach the situation in a manner that indicated his purpose was anything other than an investigation into possible criminal conduct.” With respect to the emergency aid doctrine, Defendant argues that Officer Ronk did not have a reasonable ground to believe that there was an emergency at hand and an immediate need for his assistance for the protection of life or property. See id. ¶ 29 (stating that under the emergency aid doctrine the prosecution must establish that “the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property” (internal quotation marks and citation omitted)). According to Defendant, the circumstances demonstrated nothing more than that the officer saw Defendant shirtless and running through a parking lot with a bleeding hand in the middle of the night before the officer stopped him. Defendant also argues that the officer did not have a primary motivation to protect one in immediate danger and assist without delay, but rather that the officer’s intent was to detain Defendant and investigate the reasons for his presence in the parking lot. Defendant points out that the officer did not ask Defendant if he was all right or needed medical attention, and at no time did the officer express any interest in Defendant’s welfare as would be expected of an officer acting in a community caretaker role. Thus, Defendant asserts that the officer’s primary motivation was investigation of possible criminal activity and not community caretaking.

**The Circumstances Indicate an Investigative Detention Without Reasonable Suspicion**

Under the circumstances in this case, at least once the officer requested and obtained Defendant’s identification, any consensual encounter that arguably existed ceased. Defendant was not free to leave. See Jason L., 2000-NMSC-018, ¶ 14 (stating that the officer may not “convey a message that compliance with their requests is required” (internal quotation marks and citation omitted)). In regard to the Fourth Amendment detention issue, it is somewhat difficult to parse out the officer’s conduct and motivation. It is not unreasonable to conclude that the officer’s initial thoughts and actions, when he first saw Defendant running and then walking toward the police car, could have been consistent with a view that the officer was concerned about Defendant’s welfare. The circumstances that followed, when the officer followed Defendant and saw him running in the parking lot of a closed business, through the point that the officer caught up with Defendant, got out of his car, and asked Defendant why he was there, where he was going, and whether he had any identification, altogether create an unclear picture as to whether the officer was acting on a reasonable belief that Defendant needed medical assistance.

Defendant’s testimony that he drove around the building because he did not know how Defendant had hurt his hand and the questioning that followed could be construed as an interest in investigating possible criminal conduct. However, viewing those particular circumstances in a light favorable to the district court’s ruling in this case, we conclude that the officer’s actions arguably remained consistent with a view that the officer continued to be primarily concerned about Defendant’s welfare.

It quickly became clear, however, that the officer wanted to determine if Defendant had been involved in a domestic disturbance in the vicinity, a fight at the motel, or some other possibly unlawful activity, when the officer obtained and gave Defendant’s name and date of birth to dispatch. The officer then inquired about where Defendant got the blood on his hand. Defendant’s response that he injured his hand on a light bulb heightened the officer’s suspicions, based on the officer’s knowledge that people who smoke methamphetamine use light bulbs for that purpose. Following this inquiry of Defendant, the officer learned from dispatch that there was an outstanding warrant for Defendant’s arrest for unpaid traffic fines, and the officer arrested Defendant. The State has not demonstrated that, at the time the officer obtained Defendant’s identification, a public need and interest existed for Defendant’s detention that outweighed the intrusion into Defendant’s privacy.

We are struck by the officer’s complete failure during the entire time up to Defendant’s arrest to inquire regarding Defendant’s physical or mental condition or to act in a way that would indicate any concern for Defendant’s welfare including, in particular, if Defendant was in need of medical assistance or assistance from others in getting to a location where he could receive help or otherwise be safe. The sequence of events shows a movement from conduct motivated by a skeptical concern for welfare to conduct motivated by a hunch about criminal activity based on which the officer investigated Defendant through dispatch. At no time was there an emergency requiring the officer’s intrusion into Defendant’s privacy, a fact the State carefully refrains from stating in its answer brief.

We recognize that, as the State points out, in some cases an officer may approach an individual and ask questions...
without the encounter becoming a seizure under the Fourth Amendment. See Gutierrez, 2008-NMCA-015, ¶ 9 (“Law enforcement officers generally need no justification to approach private individuals on the street and ask questions.”). But here, what might at the outset have been a consensual encounter or a community caretaker concern for welfare was transformed into an encounter that was not consensual as well as into one in which the officer demonstrated a primarily, if not solely, criminal investigatory purpose and activity. See Gutierrez, 2008-NMCA-015, ¶ 14 (stating that “[d]espite the officers’ initial intent to merely ask [the d]efendant a few questions, the encounter quickly escalated into an investigatory detention”). We hold that Defendant was unlawfully detained and that the evidence obtained from Defendant after he was arrested should have been suppressed. See State v. Garcia, 2009-NMSC-046, ¶ 1, ___ N.M. ___, ___ P.3d ___ (holding that evidence obtained against the defendant was the fruit of an unreasonable seizure and therefore must be suppressed).

**The State Constitution**

Defendant requests this Court to provide him greater protection against unlawful searches and seizures by providing relief under Article II, Section 10 of the New Mexico Constitution, should we deny relief under the Fourth Amendment. See State v. Gomez, 1997-NMSC-006, ¶¶ 22, 33-40, 122 N.M. 777, 932 P.2d 1 (setting out the proof required to invoke protection under the New Mexico Constitution).

Because we reverse Defendant’s conviction based on a Fourth Amendment violation, we need not address whether we should apply our State Constitution to the circumstances. Were we to do so, however, we doubt that we would have any hesitation in holding that under Article II, Section 10 the detention was unlawful and the evidence should have been suppressed. See Garcia, 2009-NMSC-046, ¶¶ 1, 41, 44, 47 (holding that “[t]he defendant was seized . . . when the officer stopped his patrol car . . . near where [the d]efendant was walking, shone his spotlight on [the d]efendant, and told him to stop” and stating that “[b]ecause there was no reasonable suspicion to support seizing [the d]efendant, the evidence obtained against him was the fruit of an unreasonable seizure under Article II, Section 10 and must be suppressed”).

**CONCLUSION**

We reverse the district court’s denial of Defendant’s motion to suppress.

**IT IS SO ORDERED.**

JONATHAN B. SUTIN, Judge

WE CONCUR:

CELIA FOY CASTILLO, Judge

ROBERT E. ROBLES, Judge
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