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

2 **STATE OF NEW MEXICO,**

Court of Appeals of New Mexico  
Filed 1/30/2024 10:53 AM

3 Plaintiff-Appellee,



Cynthia A. Hernandez-Madrid  
Acting Chief Clerk

4 v.

**No. A-1-CA-40473**

5 **PHILLIP JONES,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

8 **Richard M. Jacquez, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Jonathan D. Gardner, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Thomas J. Lewis, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **DUFFY, Judge.**

20 {1} Defendant was charged with one count of failure to register as a sex offender,

21 contrary to NMSA 1978, Section 29-11A-5 (2007), based on a prior conviction in

22 the State of Louisiana for indecent behavior with juveniles. Defendant filed a motion

23 to dismiss, arguing that the elements of the Louisiana offense are not precisely the

1 same as the elements of any New Mexico sex offense, and the State had not provided  
2 any information concerning the conduct underlying the Louisiana conviction. After  
3 a hearing, the district court denied Defendant’s motion. We reverse based on the  
4 State’s failure to establish that Defendant’s Louisiana conviction is equivalent to an  
5 offense that would require Defendant to register as a sex offender in New Mexico.

6 **BACKGROUND**

7 {2} The circumstances at issue in this case mirror a 2013 New Mexico Supreme  
8 Court case, *State v. Hall*, 2013-NMSC-001, 294 P.3d 1235, and we begin with a  
9 brief discussion of *Hall* as it provides the framework for our review.

10 {3} In *Hall*, the defendant was convicted of a sex crime in California and later  
11 moved to New Mexico, where he was charged with failure to register as a sex  
12 offender under the New Mexico Sex Offender Registration and Notification Act  
13 (SORNA), NMSA 1978, §§ 29-11A-1 to -10 (1995, as amended through 2013).  
14 *Hall*, 2013-NMSC-001, ¶ 1. SORNA requires a person to register as a sex offender  
15 if they have been convicted of “any of twelve enumerated New Mexico offenses or  
16 their equivalents in any other jurisdiction.” *Id.* ¶ 6 (internal quotation marks and  
17 citation omitted); *see* § 29-11A-3(H), (I). At issue in *Hall* was how to determine  
18 what constitutes an equivalent offense in another jurisdiction. 2013-NMSC-001, ¶ 1.  
19 The Court held that “[w]hen the elements of the out-of-state sex offense are precisely  
20 the same elements of a New Mexico sex offense, the inquiry is at an end.” *Id.* ¶ 18.

1 But, “when the elements are dissimilar, courts should consider the defendant’s  
2 underlying conduct to determine whether the defendant’s conduct would have  
3 required registration in New Mexico.” *Id.* To make this determination, New Mexico  
4 courts may consider “facts that were found by a jury beyond a reasonable doubt, or  
5 the equivalent.” *Id.* ¶ 23.

6 {4} Turning to the case at hand, Defendant was previously convicted of the crime  
7 of indecent behavior with juveniles in Louisiana in 2007. In 2021, the State charged  
8 Defendant with one count of failure to register as a sex offender, a fourth degree  
9 felony. *See* § 29-11A-4(P). Defendant filed a motion to dismiss, arguing as a matter  
10 of law that the State had not established that Defendant was previously convicted of  
11 an equivalent offense that would subject him to SORNA’s registration requirements.  
12 *See State v. Foulenfont*, 1995-NMCA-028, ¶ 6, 119 N.M. 788, 895 P.2d 1329  
13 (stating that the district court has authority to decide a purely legal issue raised in a  
14 motion by the defendant before trial). The State’s written response to Defendant’s  
15 motion to dismiss argued only that Defendant had previously pleaded guilty to  
16 another failure to register charge in a 2017 New Mexico case. The State attached as  
17 exhibits to its response Defendant’s guilty plea and the judgment and sentence from  
18 the 2017 case.

19 {5} At the evidentiary hearing on Defendant’s motion, the State presented  
20 testimony from Catherine Garcia, the Special Programs Supervisor with the

1 Department of Public Safety (DPS). Ms. Garcia testified generally regarding her  
2 duties, her training and experience, her familiarity with the process of determining  
3 whether an out-of-state conviction was equivalent in general (a process known as  
4 “translation”), and her work on Defendant’s translation. Ms. Garcia stated that  
5 before charging Defendant with failure to register as a sex offender based on an out-  
6 of-state conviction, DPS first considered whether the out-of-state conviction is  
7 equivalent to any New Mexico crime requiring registration. She testified that when  
8 making Defendant’s translation, she reviewed the judgment and sentence, police  
9 report, and case law from Louisiana, though Ms. Garcia was not questioned about  
10 the substance of those documents, and they were not entered into evidence or made  
11 part of the record. Ms. Garcia also testified that her initial translation of Defendant’s  
12 out-of-state conviction was that it was equivalent to criminal sexual contact of a  
13 minor in the second degree, but later downgraded the translation to criminal sexual  
14 contact in the fourth degree. *See* NMSA 1978, § 30-9-13(B), (D) (2003) (stating  
15 what conduct constitutes criminal sexual contact of a minor in the second and fourth  
16 degrees, respectively).

17 {6} At the conclusion of the hearing, the district court denied Defendant’s motion  
18 to dismiss the case, orally ruling that Defendant’s previous out-of-state conviction  
19 had been properly translated to a violation of New Mexico law. Defendant later

1 entered into a conditional plea agreement that reserved his right to appeal the denial  
2 of his motion to dismiss.

### 3 **DISCUSSION**

4 {7} On appeal, Defendant argues, and the State concedes, that the elements of the  
5 offenses are not the same; therefore, equivalency in this case turns on whether the  
6 conduct underlying Defendant’s Louisiana conviction would constitute a violation  
7 of one of the twelve enumerated SORNA offenses. “What constitutes an equivalent  
8 offense under SORNA involves a question of statutory interpretation,” which is an  
9 issue of law that we review de novo. *State v. Winn*, 2019-NMCA-011, ¶ 10, 435 P.3d  
10 1247 (alteration, internal quotation marks, and citation omitted); *see also* UJI 14-  
11 991 NMRA use note 1 (indicating that threshold questions of law, such as whether  
12 the sex offense was a registerable offense, must be determined before the jury may  
13 be instructed on the elements of failure to register as a sex offender). Because we  
14 cannot state categorically that Defendant’s out-of-state conviction is equivalent to a  
15 registrable offense based on a pure elements analysis, “the State must produce  
16 evidence to demonstrate that the offenses are equivalent.” *See Hall*, 2013-NMSC-  
17 001, ¶ 28.

18 {8} Defendant argues the State failed to produce evidence showing that the  
19 conduct resulting in his out-of-state conviction would have resulted in a registerable  
20 offense in New Mexico, as required by *Hall*. The State responds that the district

1 court “had before it the type of information” our Supreme Court directed trial courts  
2 to consider in *Hall*. The State points to Ms. Garcia’s testimony, noting that “[s]he  
3 testified that the judgment and sentence, Louisiana case law, and a police report  
4 indicated that Defendant had committed an offense that would have been registrable  
5 in New Mexico if it had been committed here.” The State concludes that the  
6 information reviewed by Ms. Garcia “is exactly the type of information *Hall* directs  
7 trial courts to consider.”

8 {9} The problem in this case is that this information was never presented to the  
9 district court. While Ms. Garcia identified the documents she reviewed and gave her  
10 assessment of equivalency, *Hall* requires the district court to make that  
11 determination based on evidence in the record establishing a factual basis for the  
12 out-of-state conviction. *See* 2013-NMSC-001, ¶ 22 (“A New Mexico court should  
13 consider the facts stated in such documents when determining whether the conduct  
14 underlying the [conviction] would have constituted a violation of one of the twelve  
15 enumerated SORNA offenses that require sex offender registration.”). In this case,  
16 the district court was presented with nothing more than an unsubstantiated opinion  
17 regarding equivalency, and this is insufficient under *Hall*. *See Winn*, 2019-NMCA-  
18 011, ¶ 22 (stating that the district court erred in considering inadmissible hearsay  
19 evidence when determining the actual conduct underlying the defendant’s out-of-  
20 state conviction).

1 {10} The State argues that its failure to present evidence in response to Defendant’s  
2 *Foulenfont* motion was not fatal because it needed only to assert that such evidence  
3 is available and produce it at a later stage. The State appears to misunderstand that  
4 the issue of equivalency is a legal issue and that it was the State’s burden to produce  
5 evidence to demonstrate that the offenses are equivalent. *See Hall*, 2013-NMSC-  
6 001, ¶¶ 9, 28. We recognize that in *Hall* and in *State v. Orr*, 2013-NMCA-069, 304  
7 P.3d 449, the appellate courts determined that the record on appeal did not contain  
8 sufficient facts regarding the underlying conduct and remanded to the district court  
9 for further proceedings. *See Hall*, 2013-NMSC-001, ¶¶ 26, 28, 30; *Orr*, 2013-  
10 NMCA-069, ¶ 13. In both of those cases, however, the initial district court decisions  
11 were made before the Supreme Court set forth the framework for determining  
12 equivalency, and the state was given an opportunity on remand to present evidence  
13 based on the standard articulated in *Hall*. After *Hall*, we have held the state to its  
14 burden and have evaluated the district court’s equivalency decision based on the  
15 evidence presented in response to the defendant’s motion to dismiss. *See Winn*,  
16 2019-NMCA-011, ¶¶ 24, 26 (reversing the district court’s determination that the  
17 defendant’s out-of-state conviction required registration pursuant to SORNA  
18 because the state’s evidence failed to show that the defendant’s actual conduct would  
19 have required registration had it occurred in New Mexico). It has been more than a  
20 decade since *Hall* established what is required to show equivalency in response to a

1 defendant's pretrial motion to dismiss. Just as in *Winn*, our evaluation of the district  
2 court's equivalency determination is based on the record before the district court,  
3 and for the reasons set forth above, we conclude the State has not met its burden to  
4 demonstrate the offenses are equivalent.

5 {11} Finally, the State argues that the district court can be affirmed as right for any  
6 reason because Defendant previously pleaded guilty to failure to register as a sex  
7 offender in New Mexico. However, we must reject this argument for largely the  
8 same reason. The documents in the record before us consists of the plea agreement  
9 and the judgment and sentence entered in the 2017 case. Neither of these documents  
10 state what underlying offense Defendant committed that required him to register  
11 under SORNA, and the documents are silent as to the nature of Defendant's conduct  
12 underlying the offense. We cannot assume that the earlier failure to register charge  
13 was based on Defendant's Louisiana conviction, nor can we assume that a prior  
14 failure to register conviction means that Defendant is guilty of failing to register in  
15 this case. As Defendant points out, not all offenses require lifetime registration; some  
16 require registration only for ten years. *See* § 29-11A-4(L)(3). Without additional  
17 details regarding the previous offense, Defendant's 2017 guilty plea is not  
18 conclusive in this case.



1 **CONCLUSION**

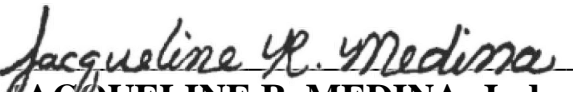
2 {12} The judgment and sentence is reversed, and this case is remanded to the  
3 district court for further proceedings consistent with this opinion.

{13} **IT IS SO ORDERED.**

4   
5 MEGAN P. DUFFY, Judge

6 **WE CONCUR:**

7   
8 KRISTINA BOGARDUS, Judge

9   
10 JACQUELINE R. MEDINA, Judge