

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

Court of Appeals of New Mexico
Filed 4/27/2026 7:10 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

No. A-1-CA-42319

5 **COBY CUNNINGHAM,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**

8 **Mark Terrence Sanchez, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Sarah M. Karni, Assistant Solicitor General

12 Albuquerque, NM

13 for Appellee

14 Bennet J. Baur, Chief Public Defender

15 Mary Barket, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **WRAY, Judge.**

20 {1} This matter was submitted to the Court on Defendant's brief in chief pursuant

21 to the Administrative Order for Appeals in Criminal Cases from the Second,

22 Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project for Criminal*

23 *Appeals*, No. 2022-002, effective November 1, 2022. Following consideration of the

1 brief in chief, the Court assigned this matter to Track 2 for additional briefing. Now
2 having considered the brief in chief, answer brief, and reply brief, we reverse and
3 remand for resentencing.

4 {2} Defendant appeals from the district court’s order revoking probation, arguing
5 that the district court erred in finding Defendant a fugitive and, therefore, denying
6 Defendant credit for time served on probation. [BIC 1-2; RP 259-65] *See* NMSA
7 1978, § 31-21-15(C) (2016) (stating that a defendant is a “fugitive from justice” if
8 “a warrant for the return of a probationer cannot be served”). “A defendant is entitled
9 to credit for any time on probation, unless the [s]tate can show either (1) it
10 unsuccessfully attempted to serve the warrant on the defendant *or* (2) any attempt to
11 serve the defendant would have been futile.” *State v. Jimenez*, 2004-NMSC-012, ¶ 8,
12 135 N.M. 442, 90 P.3d 461. “Under this test, the [s]tate must demonstrate that it was
13 diligent in attempting to bring the probationer before the court.” *State v. Sosa*, 2014-
14 NMCA-091, ¶ 15, 335 P.3d 764; *see Jimenez*, 2004-NMSC-012, ¶ 8 (explaining that
15 the state is required “to act with due diligence in prosecuting defendants who violate
16 the terms of their probation”). We review a district court’s fugitive status
17 determination for substantial evidence, where we must “resolve all disputed facts in
18 favor of the trial court’s decision, indulge all reasonable inferences in support of that
19 decision, and disregard all inferences to the contrary.” *Jimenez*, 2004-NMSC-012,
20 ¶ 14 (internal quotation marks and citation omitted).

1 {3} The instant proceedings were initiated upon the State’s fourth petition to
2 revoke Defendant’s probation. [RP 88; 147; 193; 230] The State filed its fourth
3 petition in October 2021, alleging that Defendant violated the terms of his probation
4 by failing to report, failing to obtain permission before leaving the county, and
5 failing to pay various fees as part of his probation terms. [RP 230-232, ¶¶ 1-6] The
6 State additionally alleged that Defendant had “absconded as of September 7, 2021,”
7 and probation officers were unsuccessful in contacting Defendant, including a field
8 visit to his last known residence. [RP 231, ¶ 7; RP 234-36] The district court issued
9 a bench warrant on October 6, 2021 [RP 240-242], but Defendant was not served
10 with the warrant until July 1, 2024. [RP 243-44]

11 {4} At the probation violation hearing on August 19, 2024, Defendant admitted to
12 violating probation as alleged in the State’s petition. [RP 257-58; 260; 8-19-2024
13 CD 11:48:30-50:00] Adult Probation and Parole Officer Velasquez stated at the
14 hearing that Defendant had been absconded for a significant period of time, October
15 2021 to July 2024. [8-19-2024 CD 2024 11:52:05-53:55] The State requested that
16 the district court find that Defendant was a fugitive—claiming that the bench warrant
17 was entered into the National Crime Information Center (NCIC) the same day it was
18 issued—and acknowledged that Defendant had been incarcerated elsewhere during
19 the time he had absconded. [*Id.* 11:53:55-54:30] Now on appeal, the parties agree
20 that while the record is unclear as to when Defendant absconded to Texas, Defendant

1 was placed in Texas custody on December 17, 2021, for other charges, until he was
2 released on July 1, 2024. [BIC 4; AB 1] No testimony or other evidence was
3 presented at the hearing about what attempts were made to serve the warrant or
4 locate Defendant while he was incarcerated in Texas. [8-19-2024 CD 11:47:30-
5 11:57:30] Similarly, the record proper on appeal does not contain any information
6 between the issued bench warrant on October 2021 and the served warrant on July
7 2024. [RP 240-44]

8 {5} The district court granted the State’s petition to revoke Defendant’s probation.
9 [RP 259-65] The district court found that “Defendant was a fugitive and absconder
10 from October 15, 2021 through June 30, 2024.” [RP 260] Accordingly, the district
11 court denied Defendant credit for this period now at issue on appeal. [RP 264]

12 {6} Defendant argues that the district court’s finding that Defendant was a fugitive
13 was not supported by substantial evidence. [BIC 5-13; RB 1-13] Specifically,
14 Defendant contends that the State “failed to present any evidence related to its
15 awareness of or efforts to obtain custody of [Defendant] during his incarceration in
16 Texas” [BIC 6, 9; RB 7-11] to establish that the State “unsuccessfully attempted to
17 serve the warrant on [D]efendant *or* (2) any attempt to serve [D]efendant would have
18 been futile.” *See Jimenez*, 2004-NMSC-012, ¶ 8.

19 {7} The State answers that it did present substantial evidence to support the district
20 court’s finding—citing to its comment at the district court about entry of the warrant

1 into NCIC, Defendant’s arrest on July 1, 2024, and Defendant’s previous arrests.

2 [AB 12-15] The State contends that the district court could infer that the State was

3 aware Defendant was in Texas custody and therefore the warrant could not be

4 served. [AB 13] The State also cites to Defendant’s admission to absconding for

5 support. [AB 15-17] The State further argues that whether it presented sufficient

6 evidence “is irrelevant” because “the warrant could not have been served on

7 Defendant because he was incarcerated in another jurisdiction,” “the district court

8 knew this to be true,” and, therefore, any attempt to serve would have been futile.

9 [AB 4-9] The State cites to this Court’s opinion in *State v. McDonald*, for support.

10 *See* 1991-NMCA-132, ¶ 16, 113 N.M. 305, 825 P.2d 238 (affirming the district

11 court’s finding that the defendant was a fugitive for purposes of Section 31-21-15(C)

12 when “it [was] undisputed in this appeal that [the] defendant could not be taken into

13 custody under authority of the warrant because he was incarcerated in Arizona”).

14 [AB 9-12]

15 {8} We agree with Defendant that the district court’s finding was not supported

16 by substantial evidence. The State is required to show at least some evidence of the

17 State’s attempt to serve or locate a defendant to support a finding of fugitive status.

18 *See State v. Neal*, 2007-NMCA-086, ¶ 34, 142 N.M. 487, 167 P.3d 935; *Jimenez*,

19 2004-NMSC-012, ¶ 8; *State v. Thomas*, 1991-NMCA-131, ¶ 10, 113 N.M. 298, 825

20 P.2d 231, *overruled on other grounds by Jimenez*, 2004-NMSC-012, ¶ 11. Here, the

1 State made no showing that it attempted to serve Defendant with a warrant for this
2 probation revocation proceeding, or that any attempt to serve Defendant would have
3 been futile, beyond the State’s comment that it believed the bench warrant was
4 entered into NCIC. Even assuming the bench warrant was entered into NCIC, this
5 Court has declined to hold that “the mere issuance of a warrant, coupled with a lack
6 of service, for whatever reason, raises a reasonable inference that the warrant could
7 not be served with reasonable diligence.” *Thomas*, 1991-NMCA-131, ¶ 16. And
8 while the State cites to service of Defendant’s previous warrants, it is not a
9 reasonable inference to assume that the State attempted to serve *this* warrant on
10 Defendant when the record indicates that the State failed to make any showing of its
11 efforts. *See id.* ¶¶ 16-17 (holding that the record on appeal was insufficient to
12 establish that any attempt to serve the defendant would have been futile because the
13 state failed to make “any showing whatsoever concerning its efforts to serve the
14 arrest warrant on,” or otherwise locate, the defendant). Similarly, Defendant’s
15 admission to absconding is not an admission to being a fugitive or sufficient to
16 reasonably infer that Defendant was a fugitive. *See Jimenez*, 2004-NMSC-012, ¶ 10
17 (stating that there is a difference between “absconder” and “fugitive” for Section 31-
18 21-15(C)).

19 {9} The State’s reliance on *McDonald* to argue that its efforts are irrelevant
20 because Defendant could not have been served during his incarceration in Texas is

1 also unpersuasive. *See* 1991-NMCA-132, ¶¶ 14-18. Since publishing this Court’s
2 opinion in *McDonald*, both our Supreme Court and this Court have clarified that the
3 State must still show reasonable efforts to serve a warrant, regardless of the futility
4 of doing so. *See Jimenez*, 2004-NMSC-012, ¶ 8; *see also State v. Hinojos*, 2014-
5 NMCA-067, ¶ 12, 327 P.3d 1120 (“While it may be true that a warrant for [the
6 d]efendant could not have been served while he was incarcerated in Colorado, the
7 record below and the briefing on appeal fail to identify any reasonable efforts taken
8 on the part of the [s]tate to locate [the d]efendant and issue such a warrant.”). Further,
9 “[e]ven if service of a warrant would have been futile due to his out of state
10 incarceration, [the d]efendant could not be found to be a fugitive when no reasonable
11 efforts were made to discover his location before or after a warrant was issued.”
12 *Hinojos*, 2014-NMCA-067, ¶ 12.

13 {10} The State is required to establish that it made reasonable attempts to locate
14 and serve Defendant, and a lack of evidence, or insufficient record, of the State’s
15 attempt cannot support a conclusion of reasonable effort and a district court’s finding
16 of fugitive status. *See Jimenez*, 2004-NMSC-012, ¶ 15; *Thomas*, 1991-NMCA-131,
17 ¶ 9; *Neal*, 2007-NMCA-086, ¶¶ 32-34; *Hinojos*, 2014-NMCA-067, ¶ 12. We
18 therefore conclude that the State did not satisfy its burden to establish that Defendant
19 was a fugitive for purposes of denying credit under Section 31-21-15(C).

20 {11} Based on the foregoing, we reverse and remand for resentencing.

1 {12} IT IS SO ORDERED.

2 *Katherine A. Wray*
3 _____
4 **KATHERINE A. WRAY, Judge**

4 **WE CONCUR:**

5 *Megan P. Duffy*
6 _____
7 **MEGAN P. DUFFY, Judge**

7 
8 _____
9 **ZACHARY A. IVES, Judge**