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

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellant,

9 v.

NO. 29,471

10 **OSCAR H.,**

11 Child-Appellee.

12 **APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**

13 **Robert S. Orlik, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 for Appellant

17 Hugh W. Dangler, Chief Public Defender

18 Nancy Hewitt, Appellate Defender

19 Santa Fe, NM

20 Scott M. Davidson

21 Albuquerque, NM

22 Trace L. Rabern

23 Santa Fe, NM

1 Derek Garcia, UNM Practicing Law Student
2 Albuquerque, NM

3 for Appellee

4 **MEMORANDUM OPINION**

5 **WECHSLER, Judge.**

6 The State has appealed from the dismissal of its petition with prejudice. We
7 issued a notice of proposed summary disposition, proposing to reverse. Child has
8 filed a memorandum in opposition, which we have duly considered. Because we
9 remain unpersuaded by Child's arguments, we reverse and remand for further
10 proceedings.

11 Below, the district court dismissed the State's petition on grounds that the State
12 had failed to comply with numerous rule-based deadlines. [RP 40-41] We briefly
13 summarize the pertinent events as follows.

14 Child was in custody on a number of completely separate matters when, in late
15 November 2008, he allegedly assaulted and battered a number of peace officers,
16 possessed a deadly weapon, and committed criminal damage to property. [DS 1; MIO
17 2; RP 1-4] A delinquency petition relating to the incident was filed on January 5,
18 2009. [RP 1] Arraignment occurred on January 30, 2009, [RP 5-6] at which time the
19 State and the judge appear to have clearly agreed that Child was not being detained
20 in relation to the underlying petition. [DS 1; RP 9] An order reflecting this state of

1 affairs was subsequently issued. [RP 15-16]

2 On February 6, 2009, Child filed a motion to dismiss, alleging that the State had
3 failed to meet a number of applicable deadlines. [MIO 3; RP 19-23] Most of these
4 arguments were premised on the assertion that abbreviated scheduling was required
5 because Child was in detention. In this regard, Child argued that: (1) the State failed
6 to file the petition within two days, in violation of Rule 10-204© NMRA 2008; (2) the
7 detention hearing was not held within 24 hours of the filing of the petition, in
8 violation of Rule 10-211(A)(1) NMRA 2008; and (3) the adjudicatory hearing was not
9 held within 30 days after the filing of the petition, in violation of Rule 10-226(A)(1)
10 NMRA 2008. [MIO 3-5] Child also argued that two additional rules had been violated,
11 specifically Rule 10-205(A) NMRA 2008 (providing for advisement to the public
12 defender within five days after a petition is filed) and Rule 10-213(A) NMRA 2008
13 (providing for discovery within ten days of the filing of the petition). [MIO 4-5]

14 The district court ultimately concluded that the State had violated Rule 10-204,
15 Rule 10-211, and Rule 10-226, “and others in this matter.” [RP 40] It therefore
16 granted Child’s motion to dismiss with prejudice. [RP 41]

17 On appeal, the State argues that the district court erred in concluding that Rule
18 10-204, Rule 10-211, and Rule 10-226 were violated because Child was not detained
19 in relation to the underlying petition. [DS 1-4] We agree.

1 As mentioned above, both the docketing statement and the record proper reflect
2 that although Child was in detention, his detention related to entirely separate
3 proceedings. [DS 1-2; RP 9, 15-16] As we have recognized, “the fact that a child is
4 in detention in one case does not ordinarily affect the time schedule of another
5 different case.” *In re Dominick Q.*, 113 N.M. 353, 355, 826 P.2d 574, 576 (Ct. App.
6 1992). As a result, Child’s detention in relation to other charges should not have
7 accelerated the proceedings in relation to the underlying petition. To the extent that
8 the accelerated deadlines set forth in Rule 10-204, Rule 10-211, or Rule 10-226
9 should not have applied, the order of dismissal was unfounded. [RP 40-41]

10 Child suggests that it is not clear whether he was being detained on separate
11 charges or on the charges associated with the underlying petition. [MIO 8-9]
12 However, we perceive no ambiguity. The tape log associated with Child’s
13 arraignment clearly and repeatedly reflects that Child was being detained on separate
14 charges. [RP 9, 16]

15 Child also contends that he could theoretically have been detained on more than
16 one set of charges at any given time, and, as such, he suggests that we should presume
17 that he was being detained on both separate charges and on the charges associated
18 with the underlying petition. [MIO 8-10] Although we do not take issue with the
19 theoretical aspect of Child’s argument, we disagree with its applicability. As

1 previously stated, the record very clearly reflects that Child was held specifically and
2 exclusively on the separate charges predating the filing of the underlying petition. [RP
3 9, 15-16] We therefore reject Child’s suggestion that the detention should be
4 presumed to be related to the petition.

5 Child also argues that the issuance of an arrest warrant establishes that his
6 detention related to the underlying petition. [MIO 9] However, as we previously
7 explained in the notice of proposed summary disposition, our authorities illustrate that
8 the issuance of a warrant does not necessarily have any bearing on the basis for
9 detention. *See, e.g., State v. Isaiah A.*, 1997-NMCA-116, ¶¶ 2-6, 8-10, 124 N.M. 237,
10 947 P.2d 1057 (illustrating that actual arrest and detention in relation to a specific
11 petition, rather than mere issuance of a warrant, are controlling in this context).

12 We understand Child to further argue that the order authorizing his release is
13 somehow inconsistent with the premise that he had been detained in association with
14 separate charges. [MIO 10] However, we perceive no inconsistency. As we have
15 previously stated, the tape log of the hearing that preceded the issuance of that order
16 clearly reflects the mutual agreement of counsel and the district court judge that
17 Child’s detention was related exclusively to separate charges. [RP 9, 15-16] It seems
18 evident that *because* Child was being detained on separate charges, [RP 9] and in light
19 of the “time issues” that stem from this state of affairs, [RP 9] the release order was

1 issued *to clearly reflect* that Child’s continuing detention was not related to the
2 underlying petition. [RP 15-16]

3 Because Child was not detained in association with the underlying petition, but
4 was instead detained on separate preexisting charges, the accelerated scheduling
5 deadlines set forth in Rule 10-204, Rule 10-211, and Rule 10-226 do not apply. *See*
6 *In re Dominick Q.*, 113 N.M. at 355, 826 P.2d at 576 (“[T]he fact that a child is in
7 detention in one case does not ordinarily affect the time schedule of another different
8 case.”). Insofar as the State could not be said to have violated these deadlines, the
9 dismissal of the petition was unwarranted.

10 In his memorandum in opposition, Child argues that violations of other rules,
11 specifically Rule 10-205(A) and Rule 10-213, could support the dismissal of the
12 petition. [MIO 12-17] However, as we observed in the notice of proposed summary
13 disposition, and as Child has acknowledged, [MIO 13, 16] neither of these rules
14 provides that dismissal is a mandatory remedy.

15 As Child observes, [MIO 16] the courts have discretion to fashion appropriate
16 remedies for rule violations. However, that discretion is not unbounded. Rule 10-117
17 NMRA 2008 provides that rule violations are not generally grounds for dismissal,
18 “unless refusal to take any such action appears to the court inconsistent with
19 substantial justice or unless these rules expressly provide otherwise.” Although Child

1 asserts that the dismissal of the underlying petition was consistent with “substantial
2 justice,” [MIO16-17] we disagree. The record reflects that counsel was duly
3 appointed, [RP 13-14] and Child’s assertions of prejudice [MIO 13-14, 16] are too
4 speculative and abstract to have persuasive value. *Cf. State v. McDaniel*,
5 2004-NMCA-022, ¶ 6, 135 N.M. 84, 84 P.3d 701 (“[P]rejudice [resulting from a
6 discovery violation] must be more than speculative.”); *In re Ernesto M., Jr.*,
7 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 (“An assertion of prejudice is
8 not a showing of prejudice.”).

9 Accordingly, for the reasons stated, we conclude that the underlying petition
10 was improperly dismissed. We therefore reverse and remand for further proceedings.

11 **IT IS SO ORDERED.**

12 _____
13 **JAMES J. WECHSLER, Judge**

14 **WE CONCUR:**

15 _____
16 **CELIA FOY CASTILLO, Judge**

17 _____
18 **LINDA M. VANZI, Judge**