

1 This memorandum opinion was not selected for publication in the New Mexico Reports. Please see
2 Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions. Please
3 also note that this electronic memorandum opinion may contain computer-generated errors or other
4 deviations from the official paper version filed by the Court of Appeals and does not include the
5 filing date.

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

7 **STEPHEN MONTOYA,**

8 Respondent-Appellee,

9 **v.**

NO. 29,904

10 **NEW MEXICO DEPARTMENT**
11 **OF PUBLIC SAFETY,**

12 Petitioner-Appellant.

13 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**
14 **Sheri A. Raphaelson, District Judge**

15 E. Justin Pennington Law Offices
16 E. Justin Pennington
17 Albuquerque, NM

18 for Appellee

19 Brennan & Sullivan, P.A.
20 James P. Sullivan
21 Gianna M. Mendoza
22 Santa Fe, NM

23 for Appellant

24 **MEMORANDUM OPINION**

1 **BUSTAMANTE, Judge.**

2 The New Mexico Department of Public Safety (DPS) seeks review of the
3 district court’s August 28, 2009, order on administrative appeal. Our notice proposed
4 to dismiss on the basis that DPS’s appeal was not properly before this Court. Our
5 notice further proposed to deny DPS’s “motion to treat notice of appeal/docketing
6 statement as writ of certiorari or, in the alternative, motion to allow filing of writ of
7 certiorari and treat it as timely filed.” DPS filed a timely response to our notice. We
8 remain unpersuaded by DPS’s arguments, and therefore dismiss the appeal and deny
9 DPS’s motion.

10 As acknowledged by DPS, this matter should have been brought before this
11 Court by filing a petition for writ of certiorari pursuant to Rule 12-505 NMRA. *See*
12 NMSA 1978, § 29-2-11 (2006) (setting forth the procedure for appealing the removal,
13 demotion, and suspension of New Mexico police officers); and NMSA 1978, § 39-3-
14 1.1(E) & (G) (1999) (providing that a party to the appeal to district court may seek
15 review of the district court decision by filing a petition for writ of certiorari with the
16 Court of Appeals pursuant to the rules adopted by the Supreme Court). DPS admits
17 that it filed a direct appeal rather than a petition for writ of certiorari due to its
18 attorney’s initial misunderstanding of the applicable law. DPS requests that this Court

1 treat its notice of appeal and/or docketing statement as a petition for writ of certiorari,
2 or alternatively, to allow it an extension to file a petition for writ of certiorari.

3 Case law provides that under some circumstances we are at liberty to construe
4 documents such as notices of appeal and docketing statements as petitions for writ of
5 certiorari. *See generally West Gun Club Neighborhood Ass’n v. Extraterritorial Land*
6 *Use Auth.*, 2001-NMCA-013, ¶ 3, 130 N.M. 195, 22 P.3d 220 (filed 1999) (holding
7 that “[b]ecause the Homeowners’ notice of appeal was filed within twenty days,
8 however, we elect in the exercise of our discretion to treat it as a petition for writ of
9 certiorari to this Court”); *Dixon v. State Taxation & Revenue Dep’t*, 2004-NMCA-
10 044, ¶ 10, 135 N.M. 431, 89 P.3d 680 (stating that “this Court may, at its discretion,
11 elect to treat a notice of appeal as a petition for writ of certiorari if the notice of appeal
12 was filed within twenty days after the district court’s final action”). In the present
13 case, however, we decline to exercise our discretion to grant DPS’s motion. The
14 pleadings submitted by DPS in an effort to invoke our appellate jurisdiction – its
15 notice of appeal and/or docketing statement – were not received by this Court until
16 October 14, 2009, well outside the applicable twenty-day time-frame set forth in Rule
17 12-505. Even if we were to treat the notice of appeal and/or docketing statement as
18 a timely petition for writ of certiorari, they were filed in the wrong tribunal and were
19 not filed in or served on this tribunal until after the requisite twenty-day period had

1 elapsed. Under these circumstances, we do not view these documents as invoking our
2 appellate jurisdiction. *Cf. Lowe v. Bloom*, 110 N.M. 555, 556, 798 P.2d 156, 157
3 (1990) (holding that appellate rules for the time and place of filing a notice of appeal
4 govern the proper invocation of our jurisdiction), *modified on other grounds by*
5 *Govich v. N. Am. Sys., Inc.*, 112 N.M. 226, 230, 814 P.2d 94, 98 (1991); *Marcus v.*
6 *Gomez*, 111 N.M. 14, 15, 801 P.2d 84, 85 (1990) (holding that this Court had
7 jurisdiction over the appeal because, “[u]nlike the appellants in *Lowe*, the Marquezes
8 filed a copy of a docketing statement with the district court clerk within the extension
9 of time allowed by the district court for filing a notice of appeal[;] [t]herefore, any
10 objections to the insufficiency of the filing must go to its content and not, as was the
11 case in *Lowe*, to the place the notice was filed or delivered”); *Singer v. Furr’s, Inc.*,
12 111 N.M. 220, 221, 804 P.2d 411, 412 (Ct. App. 1990) (holding that a workers’
13 compensation claimant’s failure to timely file a notice of appeal in the Court of
14 Appeals deprived this Court of jurisdiction even though the claimant filed a notice of
15 appeal with the WCA within the applicable thirty-day filing period).

16 While we have overlooked procedural deficiencies in a few unusual cases, the
17 attorney’s initial misunderstanding of the now-established law is an insufficient basis
18 upon which to do so. *Cf. Trujillo v. Serrano*, 117 N.M. 273, 278, 871 P.2d 369, 374
19 (1994) (holding that “[o]nly the most unusual circumstances beyond the control of the

1 parties -- such as error on the part of the court -- will warrant overlooking procedural
2 defects”); *Hyden v. N.M. Human Servs. Dep’t*, 2000-NMCA-002, ¶ 17, 128 N.M. 423,
3 993 P.2d 740 (filed 1999) (concluding that “unusual circumstances” warranted “the
4 exercise of our discretion to grant extensions of time in which to file petitions for
5 certiorari” due to the “procedural morass” created by the enactment of Section 39-3-
6 1.1 and the nunc pro tunc publication of Rule 12-505). In this regard, we disagree that
7 the merits of its appeal [MIO 6], its status as a governmental entity [MIO 14-15], or
8 any alleged lack of prejudice to Appellee [MIO 16] are the type of “unusual
9 circumstances” that warrant overlooking the time and place requirements for invoking
10 our jurisdiction.

11 Nor do we agree that the holding in *Bracken v. Yates Petroleum Corporation*,
12 107 N.M. 463, 760 P.2d 155 (1988), dictates that the filing of a notice of appeal in the
13 district court satisfies any jurisdictional requirement such that the twenty-day deadline
14 for filing a petition for writ of certiorari in this Court should have been tolled. [MIO
15 8-10] In *Yates Petroleum*, the Court held that a statute of limitations was tolled by
16 “the diligent filing of the complaint” in an improper venue. *Id.* at 466, 760 P.2d at
17 158. Any comparison between venue requirements and time and place requirements
18 for filing an appeal, however, is unavailing. As emphasized in *Kalosha v. Novick*, 84
19 N.M. 502, 504, 505 P.2d 845, 847 (1973), “[v]enue, in the technical meaning of the

1 term, means the place where a case is to be tried, whereas jurisdiction does not refer
2 to the place of trial, but to the power of the court to hear and determine the case.”
3 (internal quotation marks and citation omitted). Thus, while *Yates Petroleum*, 107
4 N.M. at 465-66, 760 P.2d at 157-58, holds that the filing of an action later dismissed
5 without prejudice for improper venue tolls the statute of limitations applicable to the
6 claim, it does not hold that any failure to satisfy jurisdictional requirements tolls the
7 time for pursuing a timely appeal. *See also State ex rel. Dep't of Pub. Safety v. One*
8 *1986 Peterbilt Tractor*, 1997-NMCA-050, ¶ 23, 123 N.M. 387, 940 P.2d 1182 (stating
9 that “venue is not to be equated with jurisdiction . . . jurisdiction goes to the power of
10 a court to entertain the cause, while venue simply goes to the convenient and proper
11 forum (internal quotation marks and citations omitted)).

12 We recognize further that NMSA 1978, Section 34-5-10 (1966), provides that
13 “[n]o matter on appeal in the supreme court or the court of appeals shall be dismissed
14 for the reason that it should have been docketed in the other court, but it shall be
15 transferred by the court in which it is filed to the proper court.” [MIO 12] DPS’s
16 reliance on Section 34-5-10, as well as to its referenced Colorado case with a
17 comparable transfer statute [MIO 11], is misguided. Section 34-5-10 applies to the
18 transfer of erroneously docketing appeals between this Court and our Supreme Court.
19 The Legislature has not enacted a comparable transfer statute between this Court and

1 the district courts. Similarly, DPS’s reference to the Florida case [MIO 11] is not
2 persuasive. That case involved a constitutional provision and implementing court
3 rules which provided that a notice of appeal or petition for certiorari wrongly filed
4 should be transferred to the appropriate court with the date of filing being the date the
5 document was filed in the wrong court. New Mexico has no such comparable
6 constitutional provision or rules.

7 Lastly, we recognize that Rule 12-505 was amended, effective September 4,
8 2009, such that petitions for writ of certiorari are due within thirty days, rather than
9 the previous twenty days, after entry of final orders. See 48 N.M. Bar Bull. No. 32,
10 at 20 (8/10/09). [MIO 2, fn 1] This amendment, however, does not affect the present
11 case. See *N.M. Mining Comm’n v. United Nuclear Corp.*, 2002-NMCA-108, ¶ 4, 133
12 N.M. 8, 57 P.3d 862 (observing that Art. IV, Section 34 of the New Mexico
13 Constitution precludes revised rules from applying to cases which are pending “in the
14 tribunal that will be affected by the rule change.”). And even if the thirty-day time-
15 frame was applicable, dismissal would still be merited because nothing was filed in
16 this Court within the thirty-day time-frame.

17 **Conclusion.** Based on the foregoing discussion, we dismiss DPS’s appeal and
18 deny its “motion to treat notice of appeal/docketing statement as writ of certiorari or,

1 in the alternative, motion to allow filing of writ of certiorari and treat it as timely
2 filed.”

3 **IT IS SO ORDERED.**

4
5

MICHAEL D. BUSTAMANTE, Judge

6 **WE CONCUR:**

7
8

CELIA FOY CASTILLO, Judge

9
10

LINDA M. VANZI, Judge