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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 **v.**

No. 33,817

5 **FRANCISCO MUNOZ,**

6 Defendant-Appellant.

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

8 **Gary L. Clingman, District Judge**

9 Gary K. King, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Law Offices of the Public Defender

13 Jorge A. Alvarado, Chief Public Defender

14 David Henderson, Assistant Appellate Defender

15 Santa Fe, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **SUTIN, Judge.**

1 {1} Defendant Francisco Munoz appeals from the judgment and sentence convicting
2 him of two counts of second degree murder. [RP 85, 90] Defendant raises one issue
3 on appeal, contending that his sentence, which he acknowledges is the maximum
4 allowed by law [DS 2 (¶ 6)], constitutes cruel and unusual punishment given the
5 mitigating circumstances he presented at sentencing. [DS 1-2 (¶¶ 3-7)]

6 {2} The calendar notice proposed summary dismissal. [CN 1] Defendant has filed
7 a memorandum in opposition that we have duly considered. [MIO] Unpersuaded,
8 however, we dismiss the appeal.

9 **DISCUSSION**

10 {3} In his memorandum in opposition, Defendant continues to argue that this Court
11 has jurisdiction over the cruel and unusual punishment issue on appeal and that it
12 should be decided on the merits. [MIO 3] Defendant recognizes that *State v.*
13 *Chavarria* supports this Court’s reasoning in the calendar notice, but argues that
14 waiver of appeal in the plea agreement does not divest this Court of subject matter
15 jurisdiction, relying on *State v. Rudy B.*, 2010-NMSC-045, ¶ 13, 149 N.M. 22, 243
16 P.3d 726. [MIO 3-4] Defendant also argues this Court’s reliance on *Chavarria*
17 “conflates waiver and jurisdiction concepts” [MIO 5] and suggests that this analysis
18 has no place and “constitutes a remnant of an abandoned doctrine” where fundamental
19 error has occurred. [Id.] Defendant insists that, in any case, he did not waive appeal

1 of an unconstitutional sentence and that his sentence constitutes cruel and unusual
2 punishment given his role in the underlying crimes, assistance to the police, and
3 young age. [MIO 7] We are not persuaded.

4 {4} Contrary to Defendant's assertions in the memorandum in opposition, in the
5 calendar notice, this Court exercised its jurisdiction in order to determine that
6 Defendant did not preserve at sentencing nor reserve in the plea agreement his cruel
7 and unusual punishment issue on appeal. This Court also considered Defendant's
8 claim that, despite lack of preservation and reservation, fundamental error occurred
9 in sentencing Defendant without mitigation. Because Defendant was sentenced to the
10 maximum sentence allowed under the law and in accordance with the plea agreement,
11 we concluded, however, that no fundamental error had occurred. We also pointed out
12 that when a sentence is authorized by statute and complies with the plea agreement,
13 applicable law does not require the sentencing court to mitigate the sentence. Finally,
14 we noted that Defendant did not move to set aside the plea agreement nor has he
15 availed himself of his post-conviction remedies. Under the circumstances, we reject
16 Defendant's request in his memorandum in opposition that we distinguish or overrule
17 *Chavarria*.

18 {5} Thus, as we discussed in the calendar notice, Defendant pled guilty to two
19 counts of second degree murder. [RP 64] The memorandum confirms that Defendant

1 did not raise his cruel and unusual claim below. [MIO 4] Moreover, Defendant did
2 not reserve any issues for appeal in the plea agreement. [RP 64, 65 (¶ 5)] Further,
3 Defendant does not challenge the validity of the guilty plea, and he acknowledges that
4 his sentence is the maximum allowed by statute. [DS 2 (¶ 6)] *See, e.g., State v.*
5 *Gardner*, 2003-NMCA-107, ¶ 42, 134 N.M. 294, 76 P.3d 47 (“Regardless of what
6 mitigating evidence [the d]efendant presented, the statutory scheme does not require
7 the trial court to depart from the basic sentence.”); *see also State v. Vasquez*,
8 2010-NMCA-041, ¶ 41, 148 N.M. 202, 232 P.3d 438 (stating that “there is no abuse
9 of discretion if the sentence imposed is authorized by law”).

10 {6} In *State v. Chavarria*, our Supreme Court noted that “a sentence authorized
11 by statute, but claimed to be cruel and unusual punishment under the state and federal
12 constitutions, does not implicate the jurisdiction of the sentencing court and, therefore,
13 may not be raised for the first time on appeal.” 2009-NMSC-020, ¶ 14; *see also State*
14 *v. Burdex*, 1983-NMCA-087, ¶ 14, 100 N.M. 197, 668 P.2d 313 (holding that a cruel
15 and unusual punishment claim is not jurisdictional and, therefore, may not be raised
16 for the first time on appeal). As in *Chavarria*, in this case, because Defendant’s
17 sentence “was authorized by statute, [his] cruel and unusual punishment claim may
18 not be raised for the first time on appeal.” 2009-NMSC-020, ¶ 14.

1 {7} Moreover, Defendant’s cruel and unusual claim does not constitute fundamental
2 error on direct appeal. As in *Chavarria*, because Defendant did not reserve any issues
3 for appeal in the plea agreement, and he does not challenge the validity of his guilty
4 plea, we conclude that Defendant waived his right to challenge the constitutionality
5 of his sentence on appeal. See 2009-NMSC-020, ¶ 16. As recognized in *Chavarria*,
6 there is no fundamental error necessitating reversal of Defendant’s conviction and
7 sentence, and therefore, we do not reach the merits of Defendant’s cruel and unusual
8 punishment claim. See *id.*

9 {8} In *Chavarria*, we noted that “a defendant can enter a conditional plea of guilty
10 and reserve the right to challenge the constitutionality of his sentence on appeal.” *Id.*
11 ¶ 17 (citing Rule 5-304(A)(2) NMRA). Moreover, a defendant has post-judgment
12 remedies if he considers the sentence to be illegal, or in excess of the maximum
13 allowed by law, or if it was imposed “in violation of the constitution of the United
14 States, or of the constitution or laws of New Mexico.” *Chavarria*, 2009-NMSC-020,
15 ¶ 17 (citing Rule 5-801 NMRA, Rule 5-802(A) NMRA, and NMSA 1978, § 31-11-6
16 (1966)). As in *Chavarria*, in this case, however, Defendant “did not pursue any of
17 these alternative avenues of relief.” *Id.* Therefore, we hold that Defendant “waived
18 his right to challenge the constitutionality of his sentence on appeal.” *Id.* ¶ 18.

19 **CONCLUSION**

1 {9} We dismiss Defendant's appeal.

2 {10} **IT IS SO ORDERED.**

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4

JONATHAN B. SUTIN, Judge

5 **WE CONCUR:**

6

RODERICK T. KENNEDY, Chief Judge

8

CYNTHIA A. FRY, Judge