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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. 34,300

5 **MICHELLE MAURICIO,**

6 Defendant-Appellant.

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

8 **Kevin R. Sweazea, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 Kenneth H. Stalter, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Sergio Viscoli, Appellate Defender

16 David Henderson, Assistant Appellate Defender

17 Santa Fe, NM

18 for Appellant

19 **MEMORANDUM OPINION**

20 **FRENCH, Judge.**

1 {1} Michelle Mauricio (Defendant) pleaded no contest to one count of trafficking
2 crack cocaine, contrary to NMSA 1978, § 30-31-20(B) (2006). The district court
3 sentenced her to nine years imprisonment, the maximum allowable by law for a first
4 conviction for that offense. NMSA 1978, § 31-18-15(A)(7) (2007, amended 2016).
5 Defendant filed a motion to reconsider her sentence in which she argued that she was
6 incompetent to have pleaded or been sentenced because of her intellectual disability.
7 The district court denied Defendant's motion to reconsider her sentence. On appeal,
8 Defendant argues that the district court committed reversible error because the district
9 court: (1) misconstrued Defendant's competency evaluation (CE) report and
10 incorrectly ruled that Defendant was competent when she pleaded and was sentenced;
11 (2) failed to make required written findings about Defendant's competency; and (3)
12 improperly relied for sentencing on information gleaned from Defendant when her
13 attorney was not present. We are not persuaded by Defendant's arguments and
14 therefore affirm the district court.

15 **BACKGROUND**

16 {2} Defendant was charged with six crimes based upon three sales of crack cocaine
17 to an undercover officer during May and June of 2012 for a total of \$650. On
18 February 11, 2013, Defendant pleaded no contest to one count of trafficking by
19 possession with intent to distribute, a second degree felony. The plea and disposition

1 agreement (plea agreement) indicated that Defendant's sentence had not been
2 determined and the discretion to sentence Defendant rested with the district court. The
3 plea agreement also indicated that the State did not oppose a suspended sentence with
4 supervised probation. Pursuant to the plea agreement, Defendant was required to
5 "cooperate fully" in a debriefing interview with the drug enforcement task force. The
6 district court accepted that Defendant understood and consented to the terms of the
7 plea agreement, and that she entered her plea "knowingly, voluntarily, and
8 intelligently."

9 {3} Defendant was debriefed pursuant to the plea agreement. Our factual
10 understanding of the debriefing is limited because we do not have a record of the
11 debriefing nor a copy of the report based on the debriefing. It is not clear whether the
12 debriefing was recorded and, by choice of Defendant's counsel, the debriefing report
13 seems not to have been placed in the record. In any case, the debriefing appears to
14 have been conducted by narcotics task force investigators, Defendant's probation
15 officer, and a district attorney. Defendant's attorney was not present but Defendant
16 verbally agreed to participate in the debriefing without representation.

17 {4} At the sentencing hearing on July 29, 2013, the State again expressed that it did
18 not oppose a suspended sentence with probation for Defendant, and recommended that
19 sentence. Because the probation officer who attended the debriefing was no longer

1 with the probation department, the district court continued the hearing to allow the
2 replacement probation officer an opportunity to render her own sentencing
3 recommendation.

4 {5} A second sentencing hearing was held on October 28, 2013. Counsel for
5 Defendant explained that Defendant did not have any prior criminal history, complied
6 with the terms of her conditions of release but for one failed drug test, did volunteer
7 work while awaiting sentencing, and was the caregiver for some of her grandchildren.
8 Defendant spoke briefly on her own behalf, telling the district court that she was sorry,
9 had tried to get a job, and attempted but failed to obtain a high school equivalency
10 degree. The State remained amenable to a suspended sentence with probation. The
11 probation officer recommended a sentence of nine years, with two years suspended.
12 The district court pointed out that, according to the first pre-sentence report,
13 Defendant “conceded that she had been dealing for five or six years at least” but later,
14 when Defendant spoke with the replacement probation officer, Defendant admitted to
15 trafficking for only “two or three years.” The district court explained that “the
16 traffickers are the scourge of our communities. . . . selling dope into our communities
17 to the kids there.” The district court imposed a sentence of nine years of incarceration,
18 to be followed by two years of parole.

1 {6} On November 27, 2013, a new attorney entered an appearance on behalf of
2 Defendant and, on January 9, 2014, filed a motion requesting that the district court
3 reconsider Defendant's sentence. Counsel made several equitable arguments,
4 including that Defendant was primary caregiver for two of her young grandchildren
5 and the ill health of Defendant's husband. Counsel also raised for the first time the
6 issue of Defendant's mental state or condition. Defendant's counsel informed the
7 district court that Defendant was "unable to remember and understand what is told to
8 her simply and repeatedly" and that, "[u]pon information and belief, there is
9 something biological occurring which impedes [Defendant's] ability to fully
10 comprehend matters." In response, the State chose not to oppose the motion to
11 reconsider Defendant's sentence.

12 {7} Defendant's motion to reconsider her sentence was heard on March 31, 2014.
13 The district court ordered a diagnostic examination (DE) and continued the hearing.
14 The DE revealed that Defendant had an IQ test score of 72, which is in the third
15 percentile for her age group, and generally performed on intellectual skills tests at an
16 upper elementary school level.

17 {8} On June 30, 2014, the district court held another hearing on the motion to
18 reconsider the sentence, but again did not decide the merits. Because the results of the
19 DE suggested that competency was an issue and the State raised the matter, the district

1 court issued a written order for an expedited CE “to determine the Defendant’s
2 competency to proceed to trial.”

3 {9} The psychologist who performed the CE, Dr. Dusty L. Humes, initially did not
4 understand that Defendant had already pleaded and been sentenced in this case, and
5 accordingly, interviewed Defendant to determine whether Defendant was at that time
6 competent to stand trial. That misunderstanding interfered with Dr. Humes’
7 administration of the test to determine competency because Dr. Humes “was asking
8 [Defendant] questions that were not applicable to her situation.” Also, Dr. Humes “did
9 not examine [Defendant’s] understanding of a plea bargain because, at that time, it
10 seemed clear that [Defendant] did not even know the roles of the courtroom personnel
11 nor her rights in the justice system.”

12 {10} Between the time Dr. Humes interviewed Defendant and drafted the CE report,
13 Dr. Humes learned the correct posture of the case, and, in her report, acknowledged
14 the initial misunderstanding. Dr. Humes concluded that Defendant was “currently
15 incompetent to stand trial or enter a plea, and that this is a function of her intellectual
16 disability.” On the critical issue of whether Defendant was competent to have pleaded,
17 Dr. Humes wrote the following:

18 It was this examiner’s impression that [Defendant] did not have the
19 rudimentary knowledge necessary to be able to understand the benefits
20 and costs of making a plea agreement. However, it was not possible to
21 determine in this interview whether her lack of knowledge about her

1 legal situation was present at the time that she entered a plea of no
2 contest to her pending charges. However, it seems unlikely that her level
3 of intellectual functioning and the associated deficits would have been
4 substantially different at an earlier time.

5 {11} On September 15, 2014, the district court heard the merits of Defendant's
6 motion to reconsider her sentence. Prior to argument, the district court stated that "the
7 [CE] report didn't opine concerning competency at the time the plea was entered, or
8 even at the time of the previous sentencing." Counsel for Defendant argued for a
9 different interpretation: "[W]hat I took from [the relevant part of the CE report] was
10 she's not competent now, and based on the degree of her mental functioning, she
11 would not have been competent, or her mental capacity would have been any
12 different, any better, at the time she entered her plea." The State argued that the
13 competency of Defendant was not an issue before the district court. The district court
14 found that in the absence of "a doctor's opinion that [Defendant] was incompetent
15 when the plea was entered," the district court was "[without] legal ground to set aside
16 the plea." The district court explained its reasoning:

17 [I]n connection with the plea; or in connection with the
18 sentencing; I very honestly never was concerned that [Defendant] didn't
19 know what she was doing or that she wasn't competent. I was very
20 honestly surprised to find -- or to see the opinion most recently that was
21 given after the sentencing that you obtained, that she is not presently
22 competent, because up to that time, I did not have an indication that
23 clued me in that she was not.

1 [A]s I read the report, the low IQ or low intellectual functioning
2 alone does not fall to the level that would give rise to an opinion that that
3 alone makes one incompetent. That’s the way I’m reading that report.

4 So, it is my impression that the incompetence that is opined
5 presently is more as a result of [Defendant’s] present circumstance where
6 she is disappointed about her sentence, and despondent about her loss of
7 her husband, and the rest of her circumstances.

8

9 So, what I look at then is what the circumstances are. [Defendant]
10 is a drug trafficker. She admitted she was trafficking for years. That’s
11 what caused her to be investigated. So, that is the sentence that I imposed
12 because of that, and I am not going to change it.

13 Noting additionally that the result would have been “remarkably different” if the CE
14 report had stated Defendant was “incompetent from prior to the plea,” the district
15 court denied Defendant’s motion to reconsider her sentence.

16 {12} Defendant timely appealed.

17 **COMPETENCY**

18 {13} An incompetent criminal defendant may not plead guilty. *Godinez v. Moran*,
19 509 U.S. 389, 396 (1993); *see United States v. Masters*, 539 F.2d 721, 725 (D.C. Cir.
20 1976) (“It is axiomatic that an accused must be competent to enter a valid guilty
21 plea[.]”). “A plea of guilty is more than a confession which admits that the accused
22 did various acts; it is itself a conviction[.]” *Boykin v. Alabama*, 395 U.S. 238, 242
23 (1969); *see also* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal*

1 *Defendants*, 53 Geo. Wash. L. Rev. 414, 461 (1985) (“[A] guilty plea has the effect
2 of waiving all of the defendant’s constitutional rights in the adjudicative process and
3 is the full equivalent of a conviction.”). It is a violation of due process for a court to
4 accept a guilty plea or sentence a defendant who is incompetent. *Cf. State v. Mendoza*,
5 1989-NMSC-032, ¶ 8, 108 N.M. 446, 774 P.2d 440 (“The law is clear that conviction
6 of a legally incompetent accused violates due process.”); *see also State v. Montoya*,
7 2010-NMCA-067, ¶ 23, 148 N.M. 495, 238 P.3d 369 (“The sentencing of an
8 incompetent defendant violates due process of law.” (alterations, internal quotation
9 marks, and citation omitted)).

10 {14} To meet the legal standard for competency, “a defendant must (1) understand
11 the nature and significance of the proceedings, (2) have a factual understanding of the
12 charges, and (3) be able to assist in his [or her] own defense.” *State v. Gutierrez*,
13 2015-NMCA-082, ¶ 9, 355 P.3d 93. The competency requirements are the same for
14 the entry of a plea as to stand trial. *State v. Herrera*, 2001-NMCA-073, ¶ 31, 131
15 N.M. 22, 33 P.3d 22. “[T]he defendant in a criminal case bears the initial burden of
16 proving . . . incompetence by a preponderance of the evidence standard.” *State v.*
17 *Chavez*, 2008-NMSC-001, ¶ 11, 143 N.M. 205, 174 P.3d 988.

18 {15} Defendant contends that the district court committed reversible error when it
19 found that Defendant did not demonstrate incompetence at the time she pleaded or

1 was sentenced. We review for abuse of discretion the decision of the district court that
2 a defendant is competent to take a plea or be sentenced. *Cf. State v. Rael*, 2008-
3 NMCA-067, ¶ 16, 144 N.M. 170, 184 P.3d 1064 (reviewing the finding for an abuse
4 of discretion that a defendant was competent to stand trial).

5 {16} Defendant argues that the district court misinterpreted the CE report when it
6 found that Defendant was incompetent at the time of the CE report but not earlier.
7 Defendant argues that although the district court accepted the psychologist’s finding
8 that Defendant was incompetent, the district court misconstrued the reasons for
9 Defendant’s incompetence. Defendant specifically contends that the district court
10 incorrectly grounded Defendant’s incompetency in her emotional state—i.e., her
11 “disappoint[ment] about her sentence, and desponden[ce] about her loss of her
12 husband, and the rest of her circumstances”—more than Defendant’s intellectual
13 functioning, whereas the CE report states clearly that Defendant’s incompetence was
14 “a function of her intellectual disability.” Defendant’s contention, even if correct, is
15 unavailing. Defendant’s competency at the time of the CE is not at issue, regardless
16 of the district court’s justification for its finding.

17 {17} The issue facing this Court is whether the district court abused its discretion by
18 finding that Defendant did not meet her burden to demonstrate that she was
19 incompetent at the time she pleaded or was sentenced. Defendant’s main argument on

1 that point is syllogistic: Defendant was found to be incompetent, and the reason for
2 Defendant’s incompetence—her intellectual disability—was static. Therefore, by
3 inescapable inference, Defendant was incompetent not only when the competency
4 evaluation was performed but also earlier. Defendant thus argues that she
5 demonstrated her incompetence in a manner that indicated its presence by a
6 preponderance of the evidence not just at the time of her evaluation, but by extension
7 to the prior plea and sentencing proceedings.

8 {18} Because the psychologist who performed the CE was not called to testify, we
9 are left to analyze the language in the CE report, as was the district court. The CE
10 report reflects the misunderstandings that existed at the time the psychologist
11 interviewed Defendant. First, Dr. Humes was unaware when she interviewed
12 Defendant that the relevant task was to determine Defendant’s competency not in the
13 then-present but at an earlier time. Also, Dr. Humes was mistaken about the posture
14 of the case. In sum, her interview was not directed at the true issue: whether an
15 incompetent defendant pleaded away her adjudicative constitutional rights or received
16 punishment. Although Dr. Humes concluded in her report that Defendant was not
17 competent because of Defendant’s intellectual disability and that “it seem[ed]
18 unlikely” that Defendant’s “level of intellectual functioning and the associated deficits
19 would have been substantially different at an earlier time[,]” Dr. Humes stopped short

1 of concluding that Defendant was incompetent at an earlier time. Instead, Dr. Humes
2 specifically declined to draw any conclusion: “[I]t was not possible to determine in
3 her interview whether her lack of knowledge about her legal situation was present at
4 the time that she entered a plea of no contest to her pending charges.” The explicit
5 failure of Dr. Humes to conclude that Defendant was incompetent at any time other
6 than the time of the CE provided the latitude for the district court to find Defendant
7 competent at the times she pleaded and was sentenced. We therefore decline to hold
8 that the finding of the district court was clearly untenable or contrary to logic and
9 reason. Thus, the district court did not abuse its discretion. *See Miller v. Bank of Am.*,
10 *N.A.*, 2015-NMSC-022, ¶ 8, 352 P.3d 1162 (“An abuse of discretion will be found
11 when the trial court’s decision is clearly untenable or contrary to logic and reason.”
12 (internal quotation marks and citation omitted)).

13 {19} Before concluding this section, we pause to take the unusual step of noting
14 arguments not brought before this Court, but which, on the record before us, could
15 have been made. First, Defendant did not argue ineffective assistance of counsel. Only
16 after Defendant entered a plea, received her sentence, and changed counsel, was the
17 district court alerted to the issue of Defendant’s competence. It is considerably more
18 difficult to address competency issues retrospectively than in the present. *See Pate v.*
19 *Robinson*, 383 U.S. 375, 387 (1966) (“[W]e have previously emphasized the difficulty

1 of retrospectively determining an accused's competence.”). Our holding does not
2 forestall the possibility of collateral review based on ineffective assistance of counsel.
3 Moreover, because of a combination of inadvertent misguidance by the district court
4 and the psychologist's misunderstanding, the CE was directed at the then-present
5 instead of the past. This leaves us with an as yet unasked question: Were Defendant's
6 due process rights protected by a CE that did not squarely address Defendant's
7 competence when she pleaded and was sentenced?

8 **WRITTEN FINDINGS**

9 {20} Defendant argues that the district court committed reversible error because it
10 did not make written findings that addressed the competency factors, which are
11 required in order to make clear the evidence and reasoning relied upon by the district
12 court. *See Gutierrez*, 2015-NMCA-082, ¶ 10 (stating that a competency hearing
13 requires “a written statement from the fact finder clarifying the evidence relied upon
14 and reasons for the decision” (citing *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980))).
15 Defendant is correct that no findings on this issue are in the record. However, the
16 district court explicitly offered Defendant the opportunity “to include findings in the
17 order [denying the motion to reconsider the sentence] so that [Defendant would] have
18 a means to have [the decision] reviewed.” Defendant apparently failed to take this
19 opportunity, and on appeal, offers no explanation for that choice. Moreover, the

1 district court verbally articulated its reasoning for finding that Defendant was
2 competent when she pleaded and was sentenced: the CE report did not conclude
3 otherwise, and therefore, Defendant did not meet her burden. Under those
4 circumstances, we decline to hold that the district court committed reversible error on
5 the basis of its failure to submit written findings of facts and conclusions of law.

6 **DEFENDANT’S DEBRIEFING**

7 {21} Defendant argues that she had an unmet right to counsel during her required
8 debriefing with the drug task force and the district court committed reversible error
9 by considering information obtained in the debriefing when determining Defendant’s
10 sentence. Defendant concedes that she voiced a waiver of her right to counsel at the
11 debriefing but argues on appeal that her incompetence rendered that waiver invalid.

12 {22} We agree that Defendant had a right to counsel at the debriefing. *See State v.*
13 *Padilla*, 2002-NMSC-016, ¶ 11, 132 N.M. 247, 46 P.3d 1247 (“[A] criminal
14 defendant charged with a felony has a constitutional right . . . to have the assistance
15 of an attorney at all critical stages of a trial.”); *State v. Robinson*, 1983-NMSC-040,
16 ¶ 12, 99 N.M. 674, 662 P.2d 1341 (“[A critical] stage is reached when a defendant is
17 faced with the prosecutorial forces of organized society, and immersed in the
18 intricacies of substantive and procedural criminal law.” (internal quotation marks and
19 citation omitted)); *United States v. Leonti*, 326 F.3d 1111, 1118 (9th Cir. 2003)

1 (stating in the context of federal law that “attempted cooperation [is] a critical stage
2 of [a criminal] proceeding”). However, because the district court found that Defendant
3 demonstrated incompetence only at the time of the CE, and we have upheld that
4 finding against Defendant’s challenge, Defendant’s concession that she vocalized a
5 waiver of her right to counsel at the debriefing is fatal to her argument on this point.

6 **CONCLUSION**

7 {23} For the reasons stated, we affirm the district court’s denial of Defendant’s
8 motion to reconsider her sentence. We reiterate that our holding does not forestall
9 Defendant from seeking collateral review on the basis of ineffective assistance of
10 counsel. *See State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61
11 (stating that an ineffective assistance of counsel claim is more properly brought
12 through a petition for habeas corpus when a full determination would require facts not
13 in the record).

14 {24} **IT IS SO ORDERED.**

15 _____
16 **STEPHEN G. FRENCH, Judge**

17 **WE CONCUR:**

1 **JAMES J. WECHSLER, Judge**

2

3 **J. MILES HANISEE, Judge**