

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

2 Opinion Number: _____

3 Filing Date: September 3, 2015

4 **NO. 33,396**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellant,

7 v.

8 **ADRIA LEFTHAND,**

9 Defendant-Appellee.

10 **APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY**

11 **Sarah C. Backus, District Judge**

12 Hector H. Balderas, Attorney General

13 Santa Fe, NM

14 Jacqueline R. Medina, Assistant Attorney General

15 Albuquerque, NM

16 for Appellant

17 Jorge A. Alvarado, Chief Public Defender

18 Nina Lalevic, Assistant Public Defender

19 Santa Fe, NM

20 for Appellee

1 **OPINION**

2 **KENNEDY, Judge.**

3 {1} The State appeals from dismissal of an indictment against Defendant on one
4 count of custodial interference for improper venue. We reverse the district court,
5 holding that the place where a person, with a right of custody, was deprived of that
6 right by the wrongful actions of another establishes a proper venue for the trial of the
7 crime. In this case, the person with whose custody Defendant interfered resided in and
8 has the right to custody of the child in Taos County. This is sufficient to confer venue
9 on the district court in Taos County. The case is remanded with an order to reinstate
10 the indictment against Defendant in the Taos County district court.

11 **FACTS AND PROCEDURAL BACKGROUND**

12 {2} Defendant and Gilbert Martinez lived in Taos, New Mexico, and have a son
13 who was born in Taos. As the result of Defendant's petition to determine paternity,
14 custody, and support, the Taos County district court entered a stipulated order in 2007
15 governing support and custody and granting Gilbert Martinez visitation with his
16 child.

17 {3} After the order was entered, Defendant moved to Albuquerque, while Martinez
18 remained in Taos. After problems with Defendant's compliance with ordered time
19 sharing, Martinez requested the Taos County district court to modify the prior order;

1 the district court found that Martinez had made a good faith effort to maintain time-
2 sharing with his child, and Defendant had thwarted those efforts. The district court
3 entered an order containing a new time-sharing plan to begin on August 10, 2010.

4 {4} Martinez was unable to exercise his rights to custody under the time-sharing
5 plan from August 2012 through January 2013 because Defendant did not abide by the
6 new plan. Orders to show cause elicited no response from Defendant. Subsequently,
7 Defendant was indicted by a Taos County grand jury for custodial interference.
8 Defendant moved to dismiss the indictment for improper venue, maintaining that
9 since she had failed to deliver the child to Martinez in Santa Fe, where the August
10 2012 order directed the exchange of custody to take place, venue was not proper in
11 Taos County.

12 {5} The district court agreed with Defendant and dismissed the indictment. Its
13 order of dismissal found that “the only connection to Taos County in the above styled
14 case is that the parenting plan was entered into in Taos County and the alleged victim
15 resides in Taos County”. It further found that “none of the material elements of the
16 crime were alleged to have been committed in Taos County, and thus venue is
17 improper in Taos County.” The State appealed.

1 **DISCUSSION**

2 {6} We review de novo questions involving the statutory interpretation of the
3 essential elements that must be proven to constitute a criminal offense. *State v.*
4 *Roybal*, 2006-NMCA-043, ¶ 25, 139 N.M. 341, 132 P.3d 598. Questions involving
5 the statutory interpretation of what essential elements must be proven to constitute
6 a criminal offense are likewise reviewed de novo. *State v. Rivera*, 2004-NMSC-001,
7 ¶ 9, 134 N.M. 768 82 P.3d 939. When construing a statute, we first refer to the
8 statute’s plain meaning, avoiding constructions that would produce an absurd result;
9 if absurdity would result, we construe the statute according to its obvious spirit or
10 reason. *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 19, 117 N.M. 346, 871
11 P.2d 1352. Venue is not an element of an offense and does not relate to the guilt or
12 innocence of the defendant; as a result, “it may be established by a mere
13 preponderance of the evidence.” *Roybal*, 2006-NMCA-043, ¶ 19.

14 {7} Defendant does not dispute that Martinez has custody rights from the court
15 order setting time sharing with their son, that all acts alleged in the case occurred in
16 New Mexico, or that the child was present within New Mexico at all relevant times.
17 Defendant states that “[t]he alleged acts or omissions in this case took place in either
18 Santa Fe or Bernalillo County.” According to Defendant, Bernalillo County would

1 be a proper venue in which to try the allegation that she detained the child by refusing
2 to leave her home there, and Santa Fe County would have venue over the allegation
3 that she did not turn the child over to Martinez in that county as ordered by the Taos
4 County district court, possibly satisfying the “failing to return” element. This focus
5 on the various methods of committing the crime begs question of what constitutes the
6 elements of custodial interference, in order to determine where Defendant
7 transgressed any that might be essential.

8 **A. Constitutional and Statutory Provisions Governing This Case**

9 **1. Custodial Interference**

10 Custodial interference consists of any person, having a right to custody
11 of a child, maliciously taking, detaining, concealing or enticing away or
12 failing to return that child without good cause and with the intent to
13 deprive permanently or for a protracted time another person also having
14 a right to custody of that child of his right to custody. Whoever commits
15 custodial interference is guilty of a fourth degree felony.

16 NMSA 1978, § 30-4-4(B) (1989).

17 “ ‘[R]ight to custody’ ” means the right to physical custody or visitation of a
18 child arising from:

19 (a) a parent-child relationship between the child and a natural or
20 adoptive parent absent a custody determination; or

21 (b) a custody determination.

22 § 30-4-4(A)(5)(a)(b).

1 **2. Constitutional and Statutory Provisions Regarding Venue**

2 All trials of crime shall be had in the county in which they were
3 committed. In the event elements of the crime were committed in
4 different counties, the trial may be had in any county in which a material
5 element of the crime was committed.

6 NM Const., art. II, § 14.

7 In all criminal prosecutions, the accused shall have the right to appear
8 and defend himself in person . . . [and] to have . . . a speedy public trial
9 by an impartial jury of the county or district in which the offense is
10 alleged to have been committed.

11 NMSA 1978, § 30-1-14 (1963).

12 **B. Nature of the Custodial Interference Offense**

13 **1. Defendant’s Arguments and the District Court’s Order**

14 {8} Defendant asserts that the *actus reus*—the wrongful deed—is solely the act of
15 detaining or failing to deliver the child. She insists that the elements of the crime are
16 limited to “the alleged actions of the accused, not the effect those actions have on
17 other people.” Defendant asserted to the district court that her failure to deliver the
18 child to his father in Santa Fe was the only alleged element or act of custodial
19 interference. She has expanded this view on appeal to include detaining the child in
20 Bernalillo County where she resides, but insists that because none of the things she

1 allegedly did to transgress the elements of the crime “took place in Taos County[,]”
2 venue in Taos County was improper.

3 {9} The district court appears to have agreed with Defendant’s arguments in
4 dismissing the indictment. The district court set out the *actus reus* elements as
5 “taking, detaining, concealing, enticing away or failing to return [a] child,” and the
6 *mens rea* as doing the acts maliciously “with the intent to deprive permanently or for
7 a protracted period of time another person having a right of custody of that child of
8 his right of custody.” It found that Defendant failed to turn over the child to his father
9 in Santa Fe County and that “none of the material elements of the crime were alleged
10 to have been committed in Taos County[.]” The State asserts that this is not the sum
11 of the essential elements. We must determine what the elements of the offense are.

12 **2. Deprivation of Custodial Rights is the Gravamen of the Offense and a**
13 **Necessary Element of Custodial Interference**

14 {10} The ultimate goal in statutory construction “is to ascertain and give effect to
15 the intent of the Legislature.” *State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240,
16 980 P.2d 23. The title of a statute is frequently useful to directing its construction.
17 *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039,
18 ¶ 18, 289 P.3d 1232. Here, the statute is entitled “[C]ustodial [I]nterference,” and it
19 “is intended to prevent persons with custodial rights from disrupting another person's

1 right to custody.” *State v. Munoz*, 2006-NMSC-005, ¶ 16, 139 N.M. 106, 129 P.3d
2 142. The gravamen of a criminal offense is the “burden or gist of a charge; the
3 grievance or injury specially complained of.” *Black’s Law Dictionary* 547 (2d ed.
4 1910). We still emphasize the “wrong or evil the statute is designed to remedy.” *State*
5 *v. Hernandez*, 2001-NMCA-057 ¶ 18, 130 N.M. 698, 30 P.3d 387. The gist of this
6 offense is to punish the intentional disruption or deprivation of the established
7 custody rights of another.

8 {11} The elements cited by the Taos County district court, such as taking, detaining,
9 concealing, or enticing away, are no more than various *means* of accomplishing the
10 gravamen of the offense, which is an unlawful deprivation of, or interference with,
11 the right of custody. *See State v. Sung*, 2000-NMCA-031, ¶ 9, 128 N.M. 786, 999
12 P.2d 430 (describing “detaining” and “failing to return” a child as “forms of custodial
13 interference” (internal quotation marks and citation omitted)); *cf. State v. Swick*,
14 2012-NMSC-018, ¶ 40, 279 P.3d 747 (holding that additional elements aggravating
15 the crime of burglary only modified the crime[,] but “do not change the gravamen of
16 the crime,” which was unlawful entry (internal quotation marks omitted)).

17 {12} In *Munoz*, our Supreme Court determined that interference with the right to
18 custody may be accomplished either by “taking interference,” or “failing to return

1 interference.” 2006-NMSC-005, ¶ 14. Both types of interference “require malice and
2 the intent to deprive permanently or for a protracted time another person of his or her
3 custodial rights.” *Id.* ¶ 15. Commission of the crime requires malice and the specific
4 intent to deprive the custodial parent of his or her right to custody. Section 30-4-4(B).
5 Congruence between the required intent and the stated subject matter of the crime
6 “demand[s] the inclusion of intent as an element of the crime.” *State v. Lawson*,
7 1955-NMSC-069 ¶ 10, 59 N.M. 482, 286 P.2d 1076.

8 **a. The Crime Is Not Completed Until the Intended Result is Achieved**

9 {13} Where the indictment alleges that Defendant “did maliciously take, detain,
10 conceal or entice[] away or fail[] to return said child” with the requisite intent, and
11 those elements are found by the district court to have occurred elsewhere than Taos
12 County, our inquiry cannot end if there is another essential element to the crime that
13 was not considered. Prohibited acts, like detaining and failing to return the child, do
14 not complete the crime. The crime of custodial interference is only complete once the
15 person who has the right to custody suffers the malicious and intended harm the
16 custodial interference statute seeks to prevent. Thus, when Defendant concedes the
17 State’s argument “that an essential element of the crime is deprivation of the lawful

1 right to custody of a child[,]” but insists that it is the acts, not the result accomplished,
2 that are the elements of the offense, Defendant paints an incomplete picture.

3 {14} In the context of custodial interference, most other states that have considered
4 the elements of custodial interference hold that it is deprivation of the custodial
5 right—the “prohibited result, rather than the proscribed conduct *per se*, that is the
6 gravamen of the offense”. *Wheat v. State*, 734 P.2d 1007, 1010 (Alaska Ct. App.
7 1987); *see Foster-Zahid v. Comm.*, 477 S.E.2d 759, 762, (Va. Ct. App. 1996)
8 (pointing out that the act of withholding is the gravamen of the offense; doing so
9 outside the commonwealth is the element elevating a misdemeanor to a felony); *State*
10 *v. Spina*, 99 S.W.3d 596, 598 (Tenn. Crim. App. 2002) (“[T]he gravamen of the
11 State’s prosecution is that the Defendant knowingly detained the child “ ‘from the
12 vicinity where the child . . . is found’ ”). Idaho included deprivation of custody as
13 something accomplished by one who “[t]akes, entices away, keeps or withholds any
14 minor child from a parent or other person . . . having . . . visitation or other parental
15 rights[.]” *State v. Doyle*, 828 P.2d 1316, 1320 (Idaho 1996) (emphasis omitted).
16 Arizona, whose statute forbids a person knowingly taking, enticing, or keeping for
17 lawful custody any child, likewise recognizes the prohibited result of the crime as
18 “the deprivation of ‘lawful custody.’ ” *State v. Aussie*, 854 P.2d 158, 160 (Ariz. Ct.

1 App. 1993). In New Mexico, when a defendant maliciously acts with requisite
2 specific intent “to deprive permanently or for a protracted time another person also
3 having a right to custody of that child of his right to custody[,]” deprivation of a
4 person’s right to custody is an intended harmful result of committing the crime.
5 *Munoz*, 2006-NMSC-005, ¶ 14. It follows that deprivation is an essential element of
6 the offense; emphasizing actions like enticing, withholding, detaining, or failing to
7 return a child to their custodial parent highlights the means to the end.

8 {15} In short, the *actus reus*—Defendant’s conduct—and its intended result are both
9 separate and complementary material elements of the crime. “Where, however, a
10 statute, in addition to prohibiting conduct, includes within its definition of the offense
11 a specific result, then the crime is not completed until that result occurs. And if the
12 prohibited result occurs in a place other than the conduct which occasioned it, the
13 location of the result may fairly be deemed the place where the crime is
14 ‘consummated.’ ” *Trindle v. State*, 602 A.2d 1232, 1236 (Md. 1992) (quoting *Wheat*
15 *v. State*, 734 P.2d 1007, 1009), *abrogated on other grounds by Surland v. State*, 895
16 A.2d 1034 (Md. 2006). Acting in certain ways with the intent to deprive a person of
17 custody of a child is only complete when the victim custodial parent’s right to
18 custody has suffered the interference. *See* 51 C.J.S. *Kidnapping* § 31 (2015)

1 (“Deprivation of custodial rights is a requisite element of the offense of custodial
2 interference.”).¹

3 {16} In light of our Supreme Court’s holding in *Munoz* that the purpose of the
4 statute is to prevent interference with a person’s custody, we hold that interfering with
5 or depriving a custodial parent of their right to custody is an essential element of the
6 crime of custodial interference. Thus, we regard the district court’s order as
7 erroneously leaving from its consideration the necessary element of Defendant’s
8 deprivation of Martinez’s right of custody with his son. Instead, the court
9 concentrated on the places where the methods were employed by which the
10 interference or deprivation was accomplished. The venue statute is clear: “In the
11 event elements of the crime were committed in different counties, the trial may be had
12 in any county in which a material element of the crime was committed.” Section 30-1-
13 14. Because deprivation is an element, where it occurred is critical for a determination
14 of venue.

15 **3. Determining Where Deprivation of Custody Rights Occurred**

16 {17} The fact that some elements of the offense may have occurred elsewhere does
17 not defeat venue as long as *any* material element of the crime was committed in the

18 ¹ We note that the elements stated in this section of the C.J.S. are nearly
19 identical to those in Section 30-4-4.

1 county in which the defendant is charged. Section 30-1-14; *State v. Smith*,
2 1979-NMSC-020, ¶ 11, 92 N.M. 533, 591 P.2d 664. We now join the majority of
3 states that have concluded that deprivation of custody is an element of custodial
4 interference and held venue to be proper in the county in which the custodial parent
5 who suffered the deprivation resides. In Virginia, the gravamen of the offense is not
6 the taking or abduction but the “withholding the child from the child’s custodial
7 parent[,]” and venue is proper in the county where the harm resulted from the criminal
8 act, namely, where the parent entitled to custody resided when deprived of it by the
9 defendant. *Foster-Zahid*, 477 S.E. 2d at 762; see *State v. Young*, 2007 MT 323, ¶ 29,
10 340 Mont. 153, 174 P.3d 460 (holding venue proper where deprivation occurred);
11 *Spina*, 99 S.W.3d at 599 (holding that the trial court of the county in which the
12 custodial parent resides has venue). In Idaho, “the duty to return the child to the
13 custodial parent follows the custodial parent.” See *Doyle*, 828 P.2d at 1321.

14 {18} Defendant conceded the necessary element of deprivation of custody in the
15 crime of which she is accused. She cites to no contrary authority from any state that,
16 having recognized the element, has failed to establish venue in the county where the
17 deprivation occurred. We therefore hold that deprivation of custodial rights is an
18 essential element of the crime of custodial interference and that the element is

1 satisfied in the county where the result of the defendant’s actions is felt by the person
2 so deprived.

3 {19} We are not persuaded by Defendant’s attempts at distinguishing various cases
4 we have cited, including *Aussie*, *Foster-Zahid*, and *Wheat*. Suffice it to say that the
5 specifics of those cases that purportedly distinguished them from the present case are
6 not relevant in light of the holdings in those cases, which firmly establish that
7 deprivation of custody is the gravamen of the offense and that venue may be found
8 in the county where the element of deprivation occurs. The right to custody enjoyed
9 by the person injured by the crime in this case must be established by proving the
10 existence of a court order. Section 30-4-4(A)(5)(b), (B) (requiring that a custody
11 order establish a right to custody or visitation in the person whose rights have been
12 transgressed). Martinez was given custody by an order of the district court in Taos
13 County, and he resides in Taos County.

14 {20} We conclude that his right to custody was thwarted by Defendant in Taos
15 County. His “right to custody” is based on an order issued by a Taos county district
16 court, and Defendant violated that court order by depriving Martinez of that right. *See*
17 *Sung*, 2000-NMCA-031, ¶ 12 (accepting that custodial interference “essentially
18 amounts to violating a duty that arises in this state”). Given that Martinez’s right to

1 custody was based on a court order from Taos County, Section 30-4-4(A)(5), and was
2 denied by Defendant's actions, venue will lie in Taos County district court, and
3 Defendant violated that court order by depriving Martinez of that right. *See, e.g.,*
4 *People v. Caruso*, 519 N.E.2d 440, 442-43 (Ill. 1987) (rejecting the argument that the
5 crime is committed where the children were concealed and establishing venue in the
6 county in which the detrimental effects of the actions are felt); *Trindle*, 602 A.2d at
7 1236 (holding that venue lies in the county in which the custodial parent was
8 deprived of custody and the court's authority was flouted). The locus of the legal
9 right to custody suggests another well-recognized reason to recognize venue in the
10 Taos County district court. If the violation of the right imposed by a court order is
11 part of the offense, then venue should certainly lie in the court whose order was
12 violated. *Dugie*, 1999-NMSC-002, ¶ 6.

13 **4. Venue Is Proper In Taos County**

14 {21} Because venue must be supported by no more than a preponderance of the
15 evidence, *see Roybal* 2006-NMCA-043, ¶ 19, we conclude that burden is amply met
16 here. The source of Martinez's custody right and its deprivation are both essential
17 elements, proof of which is to be found in Taos County. Martinez's right of custody
18 of the child exists with him in his county of residence, the county in which he was
19 given custody, and, most importantly, the county in which he was deprived of the

1 custody of his son by the Defendant. The custody order, to the extent it might have
2 sought to facilitate matters of exchange by providing that the exchange itself would
3 occur in Santa Fe County or by allowing Defendant to reside in Bernalillo County
4 with their child, does not change these facts. We hold that under our statute
5 criminalizing custodial interference, a person may be charged in the place where the
6 harm sought to be prevented by the statute results—even if the actions that started the
7 events causing the harm occurred elsewhere. We hold that venue is proper in the Taos
8 County district court.

9 **CONCLUSION**

10 {22} We reverse the district court, and remand with instructions to reinstate the
11 indictment against the Defendant on the Taos County district court’s trial docket.

12 {23} **IT IS SO ORDERED.**

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RODERICK T. KENNEDY, Judge

1 **WE CONCUR:**

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3 **CYNTHIA A. FRY, Judge**

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5 _____
5 **TIMOTHY L. GARCIA, Judge**