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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. 33,485

5 **LUIS ABEYTA,**

6 Defendant-Appellant,

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

8 **J.C. Robinson, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Jorge A. Alvarado, Chief Public Defender

13 Nicole S. Murray, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **ZAMORA, Judge.**

18 {1} Defendant appeals from a district court judgment and sentence entered after he

19 was found guilty of three counts of aggravated assault (deadly weapon), and one count

20 of unlawful carrying of a deadly weapon. We issued a second calendar notice

1 proposing to affirm. Defendant has responded with a memorandum in opposition. We
2 affirm.

3 {2} **Issue 1:** Defendant’s original docketing statement raised the issue of whether
4 the district court improperly imposed fees as a part of his sentence, because the court
5 did not take into account Defendant’s indigency. [DS 2] The judgment states that the
6 payment of these fees is to be directed by Defendant’s parole officer. [RP 161]
7 Pursuant to NMSA 1978, Section 31-12-3(C) (1993), when a defendant is called upon
8 to pay these fees, they may at that time raise the inability to pay as a defense - the
9 failure to pay must be wilful. As such, the issue is not ripe, because there is no
10 indication that a demand for payment of these fees has been made, or that Defendant
11 will not be excused of his obligation in whole or in part as a result of his indigency,
12 or that Defendant will be given the opportunity to participate in community service
13 in lieu of the payments. *See* NMSA 1978, § 31-12-3(A) (1993); *New Energy*
14 *Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 18, 149 N.M. 42, 243 P.3d 746
15 (“The mere possibility or even probability that a person may be adversely affected in
16 the future by official acts fails to satisfy the actual controversy requirement.”
17 (alteration, internal quotation marks, and citation omitted)).

18 {3} **Issue 2:** Defendant’s supplemental docketing statement challenged the district
19 court’s ruling denying his motion to reduce sentence. [SDS 3] Defendant’s motion

1 argued that his post-arrest conduct weighed in favor of a reduced sentence, including
2 running his sentences concurrently instead of consecutively. [SDS 2-3] We review the
3 district court's sentencing for abuse of discretion. *See State v. Bonilla*, 2000-NMSC-
4 037, ¶ 6, 130 N.M. 1, 15 P.3d 491. “Judicial discretion is abused if the action taken
5 by the trial court is arbitrary or capricious. . . . Such abuse of discretion will not be
6 presumed; it must be affirmatively established.” *Id.* (internal quotation marks and
7 citation omitted). Because the decision to reduce a sentence is a matter within the
8 sound discretion of the district court, and there are no legal defects here such as failure
9 to award pre-sentence confinement credit or double jeopardy concerns, we defer to the
10 district court’s discretion. *See State v. Follis*, 1970-NMCA-083, ¶ 8, 81 N.M. 690, 472
11 P.2d 655 (“The suspension or deferment of a sentence is not a matter of right but is
12 an act of clemency within the [district] court’s discretion.”); *see also State v. Allen*,
13 2000-NMSC-002, ¶ 91, 128 N.M. 482, 994 P.2d 728 (stating that “whether multiple
14 sentences for multiple offenses run concurrently or consecutively is a matter resting
15 in the sound discretion of the trial court”).

16 {3} For the reasons discussed above, we affirm.

17 {4} **IT IS SO ORDERED.**

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M. MONICA ZAMORA, Judge

1 **WE CONCUR:**

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3 **MICHAEL D. BUSTAMANTE, Judge**

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5 **CYNTHIA A. FRY, Judge**