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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. 34,444

5 **JOEY FLORES,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY**

8 **Matthew J. Sandoval, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Jorge A. Alvarado, Chief Public Defender

13 Will O'Connell, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **GARCIA, Judge.**

18 {1} Defendant has appealed following his conviction for DWI (6th offense). We

1 previously issued a notice of proposed summary disposition in which we proposed to
2 dismiss. Defendant has filed a memorandum in opposition, which we have duly
3 considered. Because we remain unpersuaded, we dismiss the appeal.

4 {2} As we previously observed, Defendant pled guilty. On appeal, he seeks to
5 challenge the denial of a motion which preceded the entry of the plea. However,
6 Defendant failed to reserve the right to appeal the district court's determination.
7 Under the circumstances, his guilty plea operates as a waiver of the right to appeal,
8 *State v. Hodge*, 1994-NMSC-087, ¶ 14, 118 N.M. 410, 882 P.2d 1, such that dismissal
9 is in order. *See State v. Chavarria*, 2009-NMSC-020, ¶¶ 9-10, 18, 146 N.M. 251, 208
10 P.3d 896 (dismissing an appeal following the entry of an unconditional plea).

11 {3} In his memorandum in opposition Defendant appears to suggest that *Chavarria*
12 is inapplicable, insofar as it presented a preservation problem. [MIO 2] However,
13 *Chavarria* clearly invoked and applied the principles articulated in *Hodge*: insofar as
14 the defendant entered an unconditional plea of guilty and waived the right to appeal,
15 where in the Supreme Court then concluded that the appeal was subject to dismissal.
16 2009-NMSC-020, ¶¶ 9-10, 18. The instant case is not meaningfully distinguishable.

17 {4} We understand Defendant to suggest that trial counsel's intent to enter a
18 conditional plea should alter the result. [MIO 1] However, conditional pleas may only
19 be entered upon the State's consent and the district court's approval. *See Rule*

1 5-304(A)(2) NMRA (“With the approval of the court and the consent of the state, a
2 defendant may enter a conditional plea of guilty or no contest, reserving in writing the
3 right, on appeal from the judgment, to review of the adverse determination of any
4 specified pre-trial motion.”); *Hodge*, 1994-NMSC-087, ¶ 20 (“Entry of a conditional
5 plea is contingent upon approval of the court and consent of the prosecution.”); *State*
6 *v. Padilla*, 2006-NMCA-070, ¶ 12, 139 N.M. 700, 137 P.3d 640 (“Rule 5-304(A)(2)
7 contemplates the consent to a conditional plea by the State and approval by the district
8 court.”). Although an appellate court can pardon certain informalities, the record must
9 demonstrate that the defendant expressed an intention to preserve a particular pretrial
10 issue for appeal and that neither the State nor the district court opposed such a plea.
11 *Id.* In this case, the record does not so demonstrate. To the contrary, it reflects that
12 trial counsel indicated that no appeal was contemplated. [RP 102] Under the
13 circumstances, trial counsel’s unilateral and apparently unexpressed intent lacks
14 efficacy.

15 {5} Alternatively, Defendant suggests that his failure to enter a conditional plea
16 should be ascribed to ineffective assistance of counsel, on which basis he urges the
17 Court to consider the merits. [MIO 3-5] To establish a prima facie case of effective
18 assistance of counsel, Defendant must show: (1) that the attorney’s conduct fell an
19 objective standard of reasonableness; and (2) were it not for his attorney’s

1 unreasonable course of action, he would not have made the plea. *See State v. Tran*,
2 2009-NMCA-010, ¶ 20, 145 N.M. 487, 200 P.3d 537; *see also Patterson v. LeMaster*,
3 2001-NMSC-013, ¶ 18, 130 N.M. 179, 21 P.3d 1032 (“[I]n the plea bargain context
4 a defendant must establish that his counsel’s performance was objectively
5 unreasonable and that but for counsel’s errors, he would not have pleaded guilty and
6 instead gone to trial.” (internal quotation marks and citation omitted)). Defendant has
7 failed to make any showing or advance any claim in satisfaction of the second
8 requirement, and we find no support for it in the record. [MIO 4; RP 102-03] As a
9 consequence, we reject Defendant’s argument. *Cf. State v. Martinez*,
10 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31 (expressing a preference for
11 habeas corpus proceeding over remand when the record on appeal does not establish
12 a prima facie case of ineffective assistance of counsel).

13 {6} Accordingly, for the reasons stated in our notice of proposed summary
14 disposition and above, we dismiss.

15 {7} **IT IS SO ORDERED.**

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17

TIMOTHY L. GARCIA, Judge

18 **WE CONCUR:**

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JONATHAN B. SUTIN, Judge

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2 **J. MILES HANISEE, Judge**