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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. 35,373

5 **ESTEBAN ORTEGA a/k/a**

6 **FRANCISCO MANUEL LOPEZ,**

7 Defendant-Appellant.

8 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

9 **Briana H. Zamora District Judge**

10 Hector H. Balderas, Attorney General

11 Santa Fe, NM

12 for Appellee

13 Law Office of Thomas Spaniolo

14 Thomas Spaniolo

15 Albuquerque, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **VIGIL, Chief Judge.**

1 {1} Defendant Esteban Ortega a/k/a Francisco Manuel Lopez appeals from the
2 district court’s “Order Denying Petition Under Rules 5-304 and 1-060,” entered on
3 December 21, 2015. [DS 2; RP 185] We issued a notice of proposed summary
4 disposition proposing to affirm. Defendant has filed a memorandum in opposition,
5 which we have duly considered. Remaining unpersuaded, we affirm.

6 {2} **Issues 2 through 7:** In our notice of proposed summary disposition, we
7 considered Defendant’s argument that the district court improperly weighed the
8 evidence before it when it denied his petition to vacate and set aside his convictions.
9 [CN 2-5] As we stated in our notice of proposed disposition, “[a] motion to withdraw
10 a guilty plea is addressed to the sound discretion of the trial court, and we review the
11 trial court’s denial of such a motion only for abuse of discretion.” *State v. Paredes*,
12 2004-NMSC-036, ¶ 5, 136 N.M. 533, 101 P.3d 799 (internal quotation marks and
13 citation omitted). [CN 2] We further stated that we will not re-weigh the evidence on
14 appeal. [CN 5] *See State v. Slade*, 2014-NMCA-088, ¶ 13, 331 P.3d 930 (“The
15 appellate courts do not search for inferences supporting a contrary [ruling] or re-weigh
16 the evidence because this type of analysis would substitute an appellate court’s
17 judgment for that of the [fact finder].” (internal quotation marks and citation
18 omitted)); *State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482
19 (recognizing that it is for the fact finder to resolve any conflict in the testimony of the

1 witnesses and to determine where the weight and credibility lay); *State v. Griffin*,
2 1993-NMSC-071, ¶ 17, 116 N.M. 689, 866 P.2d 1156 (“This court does not weigh the
3 evidence and may not substitute its judgment for that of the fact finder so long as
4 there is sufficient evidence to support the verdict.” (internal quotation marks and
5 citation omitted)).

6 {3} As discussed in our calendar notice, during the evidentiary hearing, attorney
7 Karlos Ulibarri testified that he had explained to Defendant the potential immigration
8 consequences of pleading guilty to a controlled substance violation. [CN 3; *see also*
9 DS 4-5] Having considered the evidence before it, the district court found, in relevant
10 part, that Ulibarri communicated with Defendant in Spanish; Defendant reviewed the
11 plea agreement with Defendant; Ulibarri advised Defendant “that he would be
12 deported upon pleading guilty”; Ulibarri read the plea agreement to Defendant,
13 including the paragraph stating that “I have read and understand that being convicted
14 may affect my immigration or naturalization status”; during the plea colloquy,
15 Ulibarri advised the district court that he had discussed the immigration consequences
16 with Defendant; and, during the plea colloquy, the district court confirmed with
17 Defendant that he understood the potential immigration consequences. [CN 3-4; *see*
18 *also* RP 161-70, 186-88 FOF 20-33] Following the hearing, the district court

1 concluded that Defendant failed to establish that Ulibarri rendered ineffective
2 assistance of counsel, and the district court entered a detailed order denying
3 Defendant’s petition. [CN 4; *see also* RP 185-92] We proposed to conclude that the
4 district court did not err in denying Defendant’s petition to vacate and set aside his
5 convictions. [CN 4-5]

6 {4} In his memorandum in opposition, Defendant does not point to any specific
7 errors in fact or in law in our calendar notice. *See Hennessy v. Duryea*,
8 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our courts have repeatedly
9 held that, in summary calendar cases, the burden is on the party opposing the proposed
10 disposition to clearly point out errors in fact or law.”). Instead, he continues to argue
11 that the district court judge abused her discretion by believing “the rather specious
12 assertions made by Ulibarri[.]” [MIO 6-7] He claims that it is “[a]mazing” that
13 Ulibarri remembered Defendant’s case from 2006 where there was no trial, but instead
14 a plea agreement, and it is “[e]ven more amazing . . . that . . . Defendant agreed to
15 enter a plea that would not only guarantee his deportation but would also be a
16 permanent bar to ever re-entering the United States legally.” [MIO 7] Given the
17 “Draconian consequences of the plea agreement[.]” Defendant asserts that common
18 sense dictates that Ulibarri’s testimony is not credible, and Defendant asks this Court
19 “to evaluate the trial court’s holding in light of Ulibarri’s non-credible testimony.”

1 [MIO 7-8] As readily acknowledged by Defendant [MIO 6], however, we will not re-
2 weigh the evidence on appeal. *See Slade*, 2014-NMCA-088, ¶ 13; *Salas*, 1999-
3 NMCA-099, ¶ 13; *Griffin*, 1993-NMSC-071, ¶ 17. We therefore conclude that the
4 district court did not err in denying Defendant’s petition to vacate and set aside his
5 convictions.

6 {5} **Issue 1:** In his docketing statement, Defendant argued that the district court
7 erred by following Rule 5-304 NMRA, governing pleas, and Rule 1-060 NMRA,
8 which provides the procedure for seeking relief from a judgment or order. [DS 7] He
9 asserted that the district court should have followed newly-enacted Rule 5-803
10 NMRA, which sets forth the procedure for petitions for post-sentence relief. [DS 7-8]
11 In our notice of proposed disposition, we noted that Rule 5-803 was “[a]dopted by
12 Supreme Court Order No. 14-8300-014” and is “effective for all cases filed on or after
13 December 31, 2014.” Rule 5-803 comm. cmt. [CN 6] We further stated that, because
14 the present case was filed before December 31, 2014, we were not persuaded that the
15 district court erred by failing to comply with this newly enacted rule that was not
16 applicable to the present case. [CN 6] Defendant did not respond to this issue in his
17 memorandum in opposition. Therefore, this issue is deemed abandoned. *See State v.*
18 *Johnson*, 1988-NMCA-029, ¶ 8, 107 N.M. 356, 758 P.2d 306 (stating that when a case
19 is decided on the summary calendar, an issue is deemed abandoned where a party fails

1 to respond to the proposed disposition of the issue).

2 {6} Accordingly, for the reasons stated here and in our notice of proposed summary
3 disposition, we affirm.

4 {7} **IT IS SO ORDERED.**

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6

MICHAEL E. VIGIL, Chief Judge

7 **WE CONCUR:**

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LINDA M. VANZI, Judge

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J. MILES HANISEE, Judge