

# ALBUQUERQUE CRIMINAL LAWYER BLOG

PUBLISHED BY  
**COLLINS & COLLINS, P.C.**  
ATTORNEYS AT LAW

October 8, 2010

## **Judge Shopping by Prosecutor Not Allowed in New Mexico**

The New Mexico Court of Appeals addressed the issue of judge shopping by the prosecutor in *State v. Cornelius White*.

Mr. White was charged with felony DWI and battery on a police officer. The prosecutor took the case before a Magistrate Court judge on a preliminary hearing. The judge found that there was no probable cause and dismissed the case.

The prosecutor then filed a criminal complaint in district court on the same facts. The district court remanded the case to magistrate court for a preliminary hearing. The case landed back before the original magistrate. The state then recused the judge on a peremptory excusal.

The case was then sent to another magistrate court judge. The new magistrate judge simply listened to the transcript of the original magistrate court preliminary hearing. Upon the very same facts and testimony presented at the first preliminary hearing, the new judge found probable cause and bound the case over to district court on the felony charges.

Mr. White entered a conditional plea preserving his appeal on the legality of the prosecutor's tactics. Mr. White argued that the State was barred by collateral estoppels from presenting identical allegations and evidence following the original dismissal at the preliminary hearing. He further argued that the original magistrate court judge was improperly recused. He argued finally that his rights to a speedy trial under the 6th Amendment had been violated.

The New Mexico Court of Appeals agreed with Mr. White that the subsequent criminal complaint was barred by collateral estoppel and that the original judge was improperly recused. This was sufficient for reversal of Mr. White's conviction and it was unnecessary to address the speedy trial issue.

On the issue of collateral estoppel, the general rule is that a finding that there is no probable cause by a magistrate court judge at preliminary hearing is binding. It is binding both on the judge that made the ruling and any other

**Main Office:  
400 Gold Ave. SW  
Suite 500  
Albuquerque, NM 87102  
(505) 242-5958**

<http://www.albuquerquecriminallawyerblog.com/>

magistrate court judge. In order to re-file the charges, the prosecutor must produce additional evidence in support of the allegations. The prosecutor in *White* simply re-filed the same complaint with the same supporting evidence.

This brings us to the second portion of the ruling regarding peremptory recusal. Once the prosecutor or any other lawyer calls upon the court for a ruling of any kind, that judge may not later be recused. This rule is designed to prevent the judge shopping that occurred here.

The rules apply to all cases, and both sides of the case. However, it is easy to see why it is so important in the case of criminal matters where a prosecutor might simply re-file the same case with the same evidence with the expectation of a different outcome before a friendlier judge.

**Main Office:  
400 Gold Ave. SW  
Suite 500  
Albuquerque, NM 87102  
(505) 242-5958**

<http://www.albuquerquecriminallawyerblog.com/>