

DA 17-0061

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 204

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

CRAIG ALAN BARROWS,

Defendant and Appellant.

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APPEAL FROM: District Court of the Nineteenth Judicial District,  
In and For the County of Lincoln, Cause No. DC 16-35  
Honorable James B. Wheelis, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Alexander H. Pyle (argued), Assistant  
Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy A. Hinderman  
(argued), Assistant Attorney General, Helena, Montana

Marcia Boris, Lincoln County Attorney, Jeffrey Zwang, Deputy County  
Attorney, Libby, Montana

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Argued and Submitted: June 27, 2018

Decided: August 21, 2018

Filed:



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Clerk

Ingrid Gustafson delivered the Opinion of the Court.

¶1 Following jury trial, Appellant Craig Barrows (Barrows) was convicted of three counts of felony assault with a weapon and two counts of felony criminal possession of dangerous drugs and sentenced to serve 30 years at the Montana State Prison. He appeals from the December 27, 2016 Judgment and Sentence of the 19th Judicial District Court, Lincoln County. We reverse in part, affirm in part, and remand for action consistent with this opinion.

¶2 We restate the issues on appeal as follows:

1. *Whether plain error review of the District Court’s mid-trial dismissal of a felony drug charge and subsequent re-instatement of that charge is appropriate in light of Barrows’s right to avoid double jeopardy?*

2. *Whether the District Court violated Barrows’s right to represent himself?*

3. *Whether the District Court’s written judgment conforms with its oral pronouncement and statutory IT and prosecution surcharges?*

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶3 **Double Jeopardy.** Barrows was charged with three counts of felony assault with a weapon and two counts of felony criminal possession of dangerous drugs. One of the drug possession charges involved possession of methamphetamine and the other involved possession of Lorazepam, a benzodiazepine. In the State’s case-in-chief, the investigating officer testified he did not send the Lorazepam he collected to the State Crime Lab. Instead, the officer typed the number located on the pills into “Drugs.com,” to identify the pills as Lorazepam. During a recess conference with the parties before the State rested, the District Court *sua sponte* told Barrows that his defense counsel “has basically made sure that you

are not going to be convicted of Lorazepam possession because I am not going to give that as a charge.” Upon resuming trial, the State rested without putting on any additional evidence. The District Court dismissed that charge, stating “I will dismiss the Lorazepam case. The Lorazepam charge is off.”

¶4 Barrows then presented his defense and testified on his own behalf. The prosecutor asked Barrows whether he knew there was Lorazepam in the vehicle he was driving when he was arrested. Barrows testified that he did.

¶5 When settling jury instructions, the State proposed instructions relating to the Lorazepam charge. The court asked if the defense objected to the State’s proposed instruction stating, “I wasn’t going to give it but since he admitted it.” Defense counsel did not object. The court explained, “And my reasoning for letting that Lorazepam in was I thought there might be some actual evidence but just looking it up on the internet isn’t enough in my opinion.” The jury found Barrows guilty of all charges, including possession of Lorazepam. Barrows was sentenced to twenty years each for the three assault with a weapon charges and five years each for the two criminal possession of dangerous drugs charges. The court ran each felony assault with a weapon sentence concurrently and the felony drug possession sentences consecutively, resulting in a net commitment to the Montana State Prison of 30 years. Barrows contends his Lorazepam possession conviction was improper violating his right to avoid double jeopardy.

¶6 **Self-representation.** On the morning of trial prior to voir dire, Barrows expressed displeasure with the competence of his legal counsel. During inquiry with the court Barrows expressed “I would like to proceed on my own. I would like to speak on my own

behalf.” The District Court initially appeared to grant that request and advised Barrows, “you have to follow the general rules. You don’t get to just talk to the jury. You have to call witnesses, ask questions, make objections, go through voir dire just the way an attorney would.” The State then advised that sometimes when a person represents himself, it “can be a great disadvantage to him.” Thereafter, the District Court questioned whether Barrows really wanted to represent himself versus preferring to be represented by other legal counsel. Barrows admitted he did not know a thing about the way to proceed. After explaining there were complicated issues in a trial, including voir dire, the District Court indicated it did not believe Barrows was at all prepared to represent himself. Barrows did not disagree. The court then retained his legal counsel’s representation. At various later times Barrows reiterated his displeasure with his legal counsel asserting he did not adequately cross examine the State’s witnesses, failed to negotiate a favorable plea agreement, and did not call witnesses. Following presentation of the evidence during settlement of jury instructions, Barrows’s behavior escalated resulting in the need to restrain and remove him. Although he had agreed to sit quietly with counsel upon his return to the courtroom for closing arguments, he instead requested his counsel leave. The District Court denied the request indicating it did not believe Barrows capable of presenting a closing argument. Following closings, Barrows stood up and yelled out to the jury, “There was[sic] other witnesses in this case that they did not let testify on my behalf.” This outburst again resulted in the need to remove Barrows from the courtroom. Thereafter, he participated via videoconferencing and cell phone from a different room in the courthouse. Barrows asserts the District Court violated his right to represent himself.

¶7 **Questioned Elements of the Judgment.** Barrows raised the following issues with the form of the written judgment which need to be amended to conform it to the District Court’s oral pronouncement at sentencing: Strike the sentence on page 2, “If paroled, Defendant shall comply with the following terms and conditions of parole:”; to strike the conditions 1-12 and 19-40 which deal with parole and were not mentioned in the sentencing hearing; Paragraph 13(d) imposes an IT fee per count of \$50 but should impose one per user of \$10 total; Paragraph 13(h) imposes a \$500 fee for the prosecution which may only total \$100. The State concedes the written judgment does not conform to the court’s oral pronouncement of sentence and agrees with the amendment of the written judgment as requested by Barrows.

#### **STANDARD OF REVIEW**

¶8 Unpreserved issues alleging violation of a fundamental constitutional right are reviewable under the common law plain error doctrine. *State v. White*, 2014 MT 335, ¶ 14, 377 Mont. 332, 339 P.3d 1243. Plain error review is appropriate when failure to review the alleged error “may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.” *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 491, 310 P.3d 506.

¶9 Article II, Section 24 of the Montana Constitution provides a defendant the right of self-representation. To determine whether a request for self-representation was unequivocal, we review the record as a whole. *State v. Swan*, 2000 MT 246, ¶ 20, 301 Mont. 439, 10 P.3d 102. The Sixth and Fourteenth Amendments to the U.S. Constitution implicitly guarantee the same. *Faretta v. California*, 422 U.S. 806, 818-19, 95 S. Ct. 2525

(1975). The validity of a *Faretta* waiver is a mixed question of law and fact reviewed de novo. *United States v. Moreland*, 622 F.3d 1147, 1156 (9th Cir. 2010).

## DISCUSSION

¶10 1. *Whether plain error review of the District Court’s mid-trial dismissal of a felony drug charge and subsequent re-instatement of that charge is appropriate in light of Barrows’s right to avoid double jeopardy?*

¶11 We must first decide whether the plain error doctrine is appropriate in this case.

The purpose of the plain error doctrine is to correct an error not objected to at trial that affects the fairness, integrity, and public reputation of judicial proceedings. The plain error doctrine may be used in situations that implicate a defendant’s fundamental constitutional rights, and where failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.

*State v. Lawrence*, 2016 MT 346, ¶ 9, 386 Mont. 86 (internal citations omitted). Here, the issue is directly constitutional. Article II, Section 25 of the Montana Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution protect a defendant from double jeopardy—being tried or convicted of an offense of which the defendant has already been acquitted. *City of Billings ex rel. Huertas v. Billings Mun. Court*, 2017 MT 261, ¶ 17, 389 Mont. 158, 404 P.3d 709. Failure to review this case would result in Barrows serving the five-year Lorazepam drug possession charge portion of his sentence consecutive to all other counts and leave unsettled the fundamental fairness of using Barrows’s admission made at trial after that charge had been dismissed. This case warrants review under the plain error doctrine.

¶12 The State and Barrows agree *Smith v. Massachusetts* sets forth the framework for analysis of double jeopardy claims based on a midtrial dismissal. 543 U.S. 462, 125 S. Ct.

1129 (2005). Barrows asserts *Smith* establishes a double jeopardy violation under the facts of this case. In *Smith*, the Commonwealth of Massachusetts charged Smith with unlawful possession of a firearm in addition to two other charges, and the case proceeded to a jury trial. After the prosecution's case-in-chief, the defendant moved for a required finding of not guilty on the firearm-possession count pursuant to Mass. R. Crim. Proc. 25(a) (2002), which provided:

The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time.

After discussion, the judge granted Smith's motion, finding the prosecution did not provide any evidence proving one of the elements of the firearm-possession charge. *Smith*, 543 U.S. at 465, 125 S. Ct. at 1132. Smith's co-defendant then presented evidence from one witness and both defendants rested. Before closing arguments, the trial judge, at the prosecutor's request, reversed her previous ruling and allowed the firearm-possession charge to go to the jury. *Smith*, 543 U.S. at 465, 125 S. Ct. at 1133. The jury convicted Smith of all three counts. *Smith*, 543 U.S. at 466, 125 S. Ct. at 1133. Smith appealed his conviction, arguing that the court's reconsideration and reversal of its not guilty finding subjected him to double jeopardy.

¶13 The U.S. Supreme Court considered the issue of "whether the Double Jeopardy Clause forbade the judge to reconsider that acquittal later in the trial." *Smith*, 543 U.S. at 464, 125 S. Ct. at 1132. The Court first determined that the judge's initial ruling on Smith's

motion was a judgment of acquittal because the ruling was based on the judge's determination that the prosecution's evidence was legally insufficient to sustain a conviction. *Smith*, 543 U.S. at 468-69, 125 S. Ct. at 1134-35. The Court then determined that the Double Jeopardy Clause prohibited the judge from reconsidering the acquittal, holding:

If, after a facially unqualified midtrial dismissal of one count, the trial has proceeded to the defendant's introduction of evidence, the acquittal must be treated as final, unless the availability of reconsideration has been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence.

*Smith*, 543 U.S. at 473, 125 S. Ct. at 1137. The Court emphasized that the defendant had no reason to doubt the finality of the trial court's ruling. *Smith*, 543 U.S. at 470, 125 S. Ct. at 1135. The Court noted that, "as a general matter state law may prescribe that a judge's midtrial determination of the sufficiency of the State's proof can be reconsidered." *Smith*, 543 U.S. at 470, 125 S. Ct. at 1136. However, at the time of defendant's trial, Massachusetts did not have a nonfinality rule. *Smith*, 543 U.S. at 471, 125 S. Ct. at 1136. The Court reasoned that a defendant may alter the way he presents his defense in reliance on the trial judge's mid-trial final judgment of acquittal, so permitting the trial judge to later reverse a presumptively final decision may cause the defendant prejudice. *Smith*, 543 U.S. at 471-72, 125 S. Ct. at 1136-37.

¶14 Barrows and the State agree the pertinent Montana statutory authority lies in § 46-16-403, MCA (emphasis added):

When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss

the action and discharge the defendant. *However, prior to dismissal, the court may allow the case to be reopened for good cause shown.*

Barrows argues the statute permits a charge dismissed midtrial to be reopened only if the charge is reopened before the midtrial dismissal actually occurs. Thus, Barrows contends that § 46-16-403, MCA, “means a court may not reconsider its decision to dismiss a charge once a midtrial dismissal occurs.” Barrows also argues that his trial represents the very situation *Smith* was explicitly aimed at avoiding as after the Lorazepam charge was dismissed Barrows chose to testify and made statements and admissions that he may not have otherwise made.

¶15 The State argues the plain language of § 46-16-403, MCA, “indicates that unless or until the court has dismissed the action or case and discharged the defendant, a trial court retains the authority to reconsider a determination on the sufficiency of the evidence.” The State asserts the language “action” or “case” means the entire legal proceeding—not a single charge within such a proceeding. The State argues § 46-16-403, MCA, “means a decision acquitting a defendant of a single count in a multi-count information necessarily remains nonfinal and can be reconsidered until the completion of the action or case as a whole.” Thus, the State urges this Court to hold that a judge-directed acquittal is only final and irreversible after the conclusion of the entire proceeding, and prior to that time, the judge retains the authority to reconsider that decision upon a showing of good cause. The State’s argument is not persuasive, is inconsistent with this Court’s interpretation of § 46-16-403, MCA, and is contradictory.

¶16 Dismissal of a charge for insufficiency of the evidence is an acquittal, even if the dismissal is in error. *Evans v. Michigan*, 568 U.S. 313, 320, 133 S. Ct. 1069, 1075 (2013). If § 46-16-403, MCA, were interpreted as the State urges, the statute would not permit midtrial acquittals of less than all the charges in multi-count trials as dismissal of anything less than all the counts would not “dismiss the action and discharge the defendant.” This Court has applied § 46-16-403, MCA, to authorize midtrial dismissals of single counts in multi-count trials. *E.g.*, *State v. Gregori*, 2014 MT 169, ¶¶ 1, 18, 375 Mont. 367, 328 P.3d 1128 (ruling the trial court erred by failing to grant defendant’s motion, at the close of State’s evidence, to dismiss one count in the defendant’s multi-count trial); *State v. Hegg*, 1998 MT 100, ¶¶ 1, 25, 288 Mont. 254, 956 P.2d 754 (same).

¶17 We agree with Barrows that the terms “action” and “case” are dependent on the context. As Barrows correctly notes, § 46-16-403, MCA, addresses the evidence being “insufficient to support a finding or verdict of guilty.” Clearly, such a finding or verdict is made on each particular charge, not the entire proceeding. In the context of midtrial dismissal of less than all counts of a multi-count trial, “action” and “case” refer to whether the defendant committed a particular offense, not the entire proceeding. Under the State’s argument a judicially-directed midtrial acquittal would not become final and irreversible until a finding or verdict is rendered on all counts of a multi-count trial and the entire judicial proceeding is concluded. This is inconsistent with prior holdings of this Court. *E.g.*, *Gregori*, ¶¶ 1, 18; *Hegg*, ¶¶ 1, 24.

¶18 The State asserts Barrows has not met his burden to invoke plain error review, incredibly asserting, “no miscarriage of justice would occur if this conviction were

upheld.” In this case, the District Court’s mid-trial ruling dismissing the Lorazepam drug possession charge or count was a judgment of acquittal. This acquittal must be treated as final unless the availability of reconsideration “has been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence.” *Smith*, 543 U.S. at 473, 125 S. Ct. at 1137. Section 46-16-403, MCA, did not provide the District Court authority to reopen and reconsider its midtrial ruling as its reconsideration occurred after the charge or count was dismissed. As such, the District Court violated Barrows’s right to avoid double jeopardy as he was convicted of an offense of which he had already been acquitted. Barrows is now facing a five-year prison sentence. Punishing Barrows for an unconstitutional conviction is by its nature a manifest miscarriage of justice, is fundamentally unfair and compromises the integrity of the judicial process. We therefore reverse on this issue and remand to the District Court for dismissal of the Lorazepam drug possession charge and vacation of the sentence imposed thereon.

¶19 2. *Whether the District Court violated Barrows’s right to represent himself?*

¶20 A defendant has a right to represent himself in a state criminal trial upon a defendant’s waiver of his Sixth Amendment right to counsel and an unequivocal invocation of the right to self-representation. *Faretta*, 422 U.S. at 835. This is generally referred to as a *Faretta* waiver. To effectuate a *Faretta* waiver the invocation of the right to self-representation must be unequivocal, voluntary, knowing, and intelligent. *State v. Langford*, 267 Mont. 95, 99, 882 P.2d 490, 492 (1994). As noted by the State, this court has previously discussed the basis for the *Faretta* waiver to meet these criteria:

The requirement that a request for self-representation be unequivocal also serves an institutional purpose: It prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation. A defendant who vacillates at trial between wishing to be represented by counsel and wishing to represent himself could place the trial court in a difficult position: If the court appoints counsel, the defendant could, on appeal, rely on his intermittent requests for self-representation in arguing that he had been denied the right to represent himself; if the court permits self-representation the defendant could claim he had been denied the right to counsel. The requirement of unequivocality resolves this dilemma by forcing the defendant to make an explicit choice. If he equivocates, he is presumed to have requested the assistance of counsel.

*Langford*, 267 Mont. at 100, 882 P.2d at 493. Determination of whether the defendant has effectuated an unequivocal, voluntary, knowing, and intelligent request to represent himself is determined by a review of the entire record. *Langford*, 267 Mont. at 99, 101, 882 P.2d at 492, 493. Further, the right to self-representation is not limitless and may be removed if a defendant engages in obstructionist misconduct or “abuse[s] the dignity of the courtroom.” *Faretta*, 422 U.S. at 834 n.46.

¶21 Although Barrows did make one unequivocal request to represent himself, the record on a whole supports the District Court’s determination that Barrows did not really want to represent himself. Instead, Barrows desired not to have his appointed legal counsel represent him. At the time of trial, Barrows repeatedly expressed displeasure with his appointed counsel. After initially expressing a desire to represent himself, Barrows was advised of the perils of doing so and did not again request to represent himself until all evidence was presented and the court and the parties were in the process of settling jury instructions. Thereafter, in an apparent attempt to delay the verdict, Barrows began exhibiting inappropriate and disruptive behaviors, further evidencing it was not appropriate

for him to represent himself. From this behavior, it is clear Barrows was not able or willing to conform his behaviors to abide by rules of the courtroom and was at risk of continuing to abuse the dignity of the courtroom and engage in obstructionist misconduct such that he could not represent himself. The record on a whole demonstrates Barrows's invocation of the right to self-representation was not unequivocal, voluntary, knowing, and intelligent. The District Court's ruling maintaining Barrows's appointed legal counsel was supported by substantial evidence.

¶22 3. *Whether the District Court's written judgment conforms with its oral pronouncement and statutory IT and prosecution surcharges?*

¶23 The oral pronouncement of sentence controls where a conflict exists between the oral and written judgments. *State v. Hammer*, 2013 MT 203, ¶ 27, 371 Mont. 121, 305 P.3d 843. The \$10 IT statutory surcharge may only be imposed once under each separate criminal cause number and may not be imposed on each count. Section 3-1-317, MCA; *State v. Pope*, 2017 MT 12, ¶ 32, 386 Mont. 194, 387 P.3d 870. When the State does not present any evidence of additional recoupable costs, as is the case herein, § 46-18-232, MCA, authorizes the district court to impose one fee of \$100 under each separate felony criminal cause number. The parties agree the written judgment herein does not conform with the District Court's oral pronouncement at sentencing and the statutory IT and prosecutor surcharges. Thus, it is appropriate to remand this matter to the District Court to strike the sentence on page 2, "If paroled, Defendant shall comply with the following terms and conditions of parole:"; to strike conditions 1-12 and 19-40; to amend the total IT

surcharge from \$50 to \$10; and to amend the prosecutor surcharge from \$500 to \$100 to conform the written judgment with its oral pronouncement and Montana law.

### CONCLUSION

¶24 The District Court violated Barrows's right to avoid double jeopardy as he was convicted of an offense of which he had already been acquitted. Punishing Barrows for an unconstitutional conviction is by its nature a manifest miscarriage of justice, fundamentally unfair, and compromises the integrity of the judicial process. Further, the District Court did not err in maintaining Barrows's appointed legal counsel to represent him. Finally, the parties agree and the Court orders that the specified conditions and surcharges of the judgment be stricken and amended as set forth herein to conform the written judgment with its oral pronouncement and Montana law.

¶25 We reverse in part, affirm in part, and remand to the District Court for dismissal of the Lorazepam drug possession charge, vacation of the sentence imposed thereon, and amendment of the judgment consistent with this Opinion.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH  
/S/ LAURIE McKINNON  
/S/ JAMES JEREMIAH SHEA  
/S/ BETH BAKER  
/S/ DIRK M. SANDEFUR  
/S/ JIM RICE