

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0394

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PERRY L. BURNETT, JR.,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-Second Judicial District Court,
Carbon County, The Honorable Blair Jones, Presiding

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STATEMENT OF THE ISSUE

Whether this Court construes Appellant's district court pleading as a motion to withdraw his guilty plea to the underlying crime or as a petition for postconviction relief challenging the revocation of his suspended sentence, did the district court properly deny Appellant postconviction relief?

STATEMENT OF THE CASE AND FACTS¹

On November 13, 2014, Tera Reynolds, a realtor in Red Lodge, Montana, called the Carbon County Sheriff's Office to report a sexual offender who had recently moved to Red Lodge but had not registered as a sexual offender. (D.C. Doc. 2 at 2.) Reynolds had shown rental properties to Appellant Burnett who had been staying with friends in Red Lodge. Reynolds had then conducted a Google search of Burnett and discovered he was a registered sexual offender in Florida. Burnett had not been truthful on his rental application. Reynolds reported this matter because she was uncertain of the time requirement for a sexual offender to register when moving to a new community. (*Id.*)

Dispatcher Liz Westhaeffer determined Burnett had previously registered as a sexual offender in Florida and possibly in Michigan. Westhaeffer passed this

¹ Since Burnett pled guilty to Failure to Register as a Sexual Offender, the State has relied upon the facts within the Affidavit in support of the State's motion seeking leave to file an Information.

information on to Carbon County Sheriff's Deputy Thompson who oversees the registration of sexual and violent offenders in Carbon County. In carrying out his duties, Deputy Thompson works with the statewide Sexual and Violent Offender Registry (SVOR). (*Id.*) Deputy Thompson shared information about Burnett with the Red Lodge Police Department. Local law enforcement confirmed through Martha Young, the owner of Café Regis, that Burnett had been employed at Café Regis since October 25, 2014. (*Id.*)

On November 14, 2014, Burnett went to the Carbon County Sheriff's Office and registered as a sexual offender. Burnett stated that he had been in Red Lodge for 27 days prior to registering with the sheriff's office. (*Id.*) Red Lodge Police Officer Grieshop had initiated a traffic stop on October 17, 2014. Burnett was a passenger in the vehicle involved in the traffic stop. (*Id.* at 1.) Burnett's criminal history showed, among other things, that he had previously been convicted of Rape in Missouri and Failure to Register as a Sexual Offender, Third Degree, in Florida. (*Id.* at 2.)

On November 21, 2014, the State charged Burnett with one count of Failure to Register as a Sexual Offender, a felony, in violation of Mont. Code Ann. §§ 46-23-504 and -507 because Burnett moved to Carbon County with the purpose of residing there but failed to timely register as a sexual offender. (D.C. Doc. 4.)

Attorney Gregory Paskell of the Office of the State Public Defender represented Burnett in his criminal case. (D.C. Doc. 11.)

On January 21, 2015, Burnett filed an Acknowledgment of Waiver of Rights by Plea of Guilty (Plea Agreement). (D.C. Doc. 14, attached as App. A.) Burnett indicated that he was voluntarily entering into the agreement, and that the agreement was not the result of force, threats, or any promises. (App. A at 1.) Burnett acknowledged that his attorney had reviewed the Plea Agreement with him and acknowledged all of the rights he would be waiving by entering a guilty plea. (App. A at 1-3.) The Plea Agreement further provided:

9. a) There is a plea agreement under § 46-12-211, subsection (1)(c), MCA which is incorporated herewith. Having fully discussed the terms of the plea agreement with my Attorney, it is my express and voluntary decision to enter into this plea agreement with the State. I understand that the Court may not participate in the making of a plea agreement and is not bound by the terms and conditions thereof. I further understand that, under a § 46-12-211(1)(c) plea agreement, the Court is free to impose any lawful sentence which may be imposed for the offense to which I have pled guilty, and if the Court imposes a sentence greater than that recommended in the plea agreement, I would *not* be allowed to withdraw my guilty plea as a matter of law.

b) **Plea agreement:** It is my understanding that in exchange for my plea of guilty to the sole count of the Information the State will join me in recommending the following sentences:

Count One: For the offense of Failure to Register as a Sexual Offender, felony, the parties jointly recommend a five (5) year commitment to the Montana Department of Corrections with all five years suspended, a \$1000 fine, and the applicable statutory surcharges.

I understand and acknowledge that the Department of Corrections will recommend a number of conditions of probation which I must comply with during supervision, and the Court will

likely impose most or all of those conditions. I have the right to challenge those conditions at the time of my sentencing.

10. I have discussed the consequences of pleading guilty with my Attorney and I understand and acknowledge that certain consequences may result from my plea of guilty

11. I acknowledge and represent to the Court that I am not suffering from any emotional or mental disability from any cause including mental defect or impairment or the taking of drugs, alcohol, or prescription medicine. I am not physically nor mentally ill and I fully understand what I am doing.

12. At this time, I voluntarily plead guilty to the offenses listed above. The following are the facts which cause me to plead guilty to these offenses. I believe I am guilty of these offenses because I did the following:

On or about October 17, 2014, in Red Lodge, Carbon County, Montana, I knowingly failed to register, verify registration, and keep my registration as a sexual offender current. After moving my residence to Carbon County, I failed to register as a sexual offender within three days of moving to Carbon County. I properly have a duty to register as a sexual offender after being convicted of rape in Missouri.

13. I acknowledge that I have no communication problems whatever with my Attorney. I am satisfied with my Attorney's services and advice.

(App. A at 3-4, emphasis in original.)

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On January 21, 2015, Burnett appeared with his defense counsel and pled guilty to Failure to Register as a Sexual Offender. (D.C. Doc. 16, attached as App. B.)² The district court's minute entry notes:

The defendant, through counsel, makes a motion to withdraw his former plea. The defendant's Acknowledgement of Waiver of Rights by Plea of Guilty and Plea Agreement is submitted to the

² Burnett has failed to provide a transcript of the Change-of-Plea Hearing.

Court. The defendant states his plea is being voluntarily made with a knowledgeable understanding and waiver of his constitutional rights. After due inquiry, the Court grants the defendant's motion to withdraw his plea. The defendant now pleads GUILTY to the offense charged, COUNT ONE: Failure to Register as a Sexual Offender, a felony.

The defendant, Perry Leonard Burnett Jr., is sworn and testified. Defendant states that he is satisfied with his counsel. The Court accepts the defendant's plea of GUILTY for the offense as charged.

(App. B.)

Burnett admitted to the probation officer who completed the Presentence Investigation Report (PSI) that he did not timely register when he moved to Red Lodge because he did not know the location of the police station. (D.C. Doc. 19 at 4.)

The district court held a sentencing hearing on April 8, 2015. The court sentenced Burnett to the Department of Corrections for five years, all suspended.

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(D.C. Doc. 21 at 2, attached as App. C.) Relevant to this appeal, the district court imposed the following conditions on Burnett's suspended sentence:

2. The Defendant must obtain prior approval from his supervising officer before taking up residence in any location. The Defendant shall not change his place of residence without first obtaining written permission from his supervising officer or the officer's designee. The Defendant must make the residence open and available to an officer for a home visit or for a search upon reasonable suspicion. . . .

3. The Defendant must obtain permission from his supervising officer or the officer's designee before leaving his assigned district.

4. The Defendant must seek and maintain employment or maintain a program approved by the Board of Pardons and Parole or the supervising officer. . . .

5. Unless otherwise directed, the Defendant must submit written monthly reports to his supervising officer on forms provided by the probation and parole bureau. The Defendant must personally contact his supervising officer or designee when directed by the officer.

(App. C at 3.) Burnett did not appeal the judgment.

On September 2, 2015, the State filed a Petition for Revocation of Burnett's suspended sentence alleging Burnett had violated the conditions of his suspended sentence to the Department of Corrections. (D.C. Doc. 22, attached as App. D.) In the affidavit supporting the revocation petition, Probation Officer Price explained that Burnett had informed him on July 27, 2015, that he was living at the Bourbon Street Motel and had been living there since July 25, 2015. On August 20, 2015, Officer Price called the Bourbon Street Motel to confirm that Burnett was still there. Officer Price learned that on July 26, 2015, Burnett was given a no trespass order because of his abusive behavior toward staff. Thus, on July 27, 2015, Burnett had lied to Officer Price about where he was residing. (App. D, Violation Report at 1.) Officer Price also learned that Burnett had traveled to Phoenix, Arizona, without prior approval. (*Id.*)

In a July 27, 2015 voice mail message, Burnett told Officer Price that he was employed at the Bayou Restaurant in Billings. When Officer Price called to confirm Burnett's employment status, he learned that the restaurant had shut down for business. Thus, it was impossible for Burnett to be employed at the restaurant. (App. D, Report of Violation at 2.) Burnett was scheduled to personally report to Officer Price on August 17, 2015, but failed to do so. At the time Officer Price prepared the Report of Violation, he had not heard from Burnett. (*Id.*) The district court set an initial appearance on the revocation petition for September 16, 2015. (D.C. Doc. 23.) At the time of the hearing, the State had still not located Burnett. Consequently, the district court issued a warrant for Burnett's arrest. (D.C. Docs. 25-26.)

It appears that Burnett was not arrested until April 2016. (D.C. Docs. 27, 29.) The court scheduled a hearing on the revocation petition for May 25, 2016. (D.C. Doc. 28.) Burnett appeared for the hearing with his attorney and admitted to violating some of the conditions of his suspended sentence. (D.C. Docs. 31-32, attached as Apps. E-F.) The district court revoked Burnett's suspended sentence and sentenced him to the Department of Corrections for the full five years. (*Id.*)

On April 26, 2018, Burnett filed a pro se motion to withdraw his guilty plea. (D.C. Doc. 39, attached as App. G.) Although Burnett referenced Mont. Code Ann. § 46-16-105, it appears that Burnett was not asking to withdraw his guilty plea

entered to the offense of Failure to Register as a Sexual Offender. Rather, he was asking to withdraw his admissions to his probation violations. (App. G at 2-9.) Burnett alleged that he received ineffective assistance of counsel at the revocation hearing because, his counsel: (1) did not look into supplied paperwork of the allegations; (2) failed to advocate in a meaningful way; and (3) failed to raise the case of *State v. Letasky*, 2007 MT 51 ¶ 18, 336 Mont. 178, 152 P.3d 1288. (App. G at 5.)

Burnett further alleged that the State tried to prove a State of Tennessee violation “with no jurisdiction” and failed to establish elements of a crime in the revocation proceeding. (*Id.* at 5-6.)

The State responded that in the event Burnett was attempting to withdraw his guilty plea, entered pursuant to the charge of Failure to Register as a Sexual Offender, his motion to withdraw his guilty plea was untimely pursuant to Mont. Code Ann. § 45-16-105(2) (D.C. Doc. 40 at 2-3.) Further, to the extent that Burnett argued that he had involuntarily admitted to violations of the conditions of his suspended sentence through a postconviction petition, his petition was likewise untimely pursuant to Mont. Code Ann. § 46-21-102(2). (*Id.* at 4.)

The district court interpreted Burnett’s pleading as a motion to withdraw his guilty plea to Failure to Register as a Sexual Offender and entered an order concluding that Burnett’s motion to withdraw his guilty plea was time barred

pursuant to Mont. Code Ann. § 46-16-105(2). (D.C. Doc. 42.) Notably, the same rationale the Court used to reach this conclusion is equally applicable when considering Burnett's motion as a petition for postconviction relief pursuant to Mont. Code Ann. §§ 46-21-101 and -102.

Burnett appeals the district court's order denying him relief.

SUMMARY OF THE ARGUMENT

Based upon the discrepancies in the pleadings Burnett filed in district court and his opening brief, it is difficult to discern whether Burnett is alleging that his guilty plea to Failure to Register as a Sexual Offender was involuntarily entered due to ineffective assistance of counsel, or if Burnett is alleging that he received ineffective assistance of counsel during the revocation proceeding. But, whether Burnett is seeking withdrawal of his original guilty plea or postconviction relief based upon claimed ineffective assistance of counsel during the proceeding, the result is the same. Burnett is time barred and/or procedurally barred from relief under Mont. Code Ann. §§ 46-16-105 or 46-21-101 and -102. The district court properly denied Burnett's request for relief.

For the first time on appeal, Burnett also argues that the district court judge who considered the revocation petition should have recused himself from the case because the judge was biased since he had also signed the order granting the State

leave to file the Information charging him with Failure to Register as a Sexual Offender. This Court should conclude that this issue is procedurally barred, both because Burnett could have raised this issue on direct appeal, and because Burnett did not raise the issue in the district court.

ARGUMENT

I. The standard of review

This Court reviews a district court's ruling on a motion to withdraw a guilty plea to determine whether the plea was voluntary. *State v. Muhammad*, 2005 MT 234, ¶ 12, 328 Mont. 397, 121 P.3d 521. Determining the voluntariness of a plea is a mixed question of law and fact, which this Court reviews de novo. *State v. Warner*, 2015 MT 230, ¶ 9, 380 Mont. 273, 354 P.3d 620.

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II. The district court properly denied Burnett relief

A. Burnett's motion to withdraw his guilty plea is untimely.

Upon a showing of good cause, a district court may allow a defendant to withdraw a guilty plea before judgment or within one year after judgment of conviction becomes final. Mont. Code Ann. § 46-16-105(2). A guilty plea is valid

if made knowingly, voluntarily, and intelligently. *State v. Keys*, 1999 MT 10, ¶ 12, 292 Mont. 81, 973 P.2d 812. Involuntariness constitutes good cause for withdrawing a guilty plea. *State v. McFarlane*, 2008 MT 18, ¶ 11, 341 Mont. 166, 176 P.3d 1057. In determining the voluntariness of a guilty plea, this Court applies the United States Supreme Court’s standard from *Brady v. United States*, 397 U.S. 742 (1970), and it will not overturn a district court’s denial of a motion to withdraw a guilty plea “if the defendant was aware of the direct consequences of such a plea, and if his plea was not induced by threats, misrepresentation, or an improper promise such as a bribe.” *State v. Warclub*, 2005 MT 149, ¶ 32, 327 Mont. 352, 114 P.3d 254, citing *Brady*, 397 U.S. at 755.

A motion to withdraw a guilty plea must be filed within one year after the judgment becomes final. Mont. Code Ann. § 46-16-105(2). A judgment becomes final “when the time of appeal to the Montana Supreme Court expires. . . .” Mont. Code Ann. § 46-16-105(2)(a). An appeal of a criminal judgment “must be taken within 60 days after entry of the judgment from which the appeal is taken.” Mont. R. App. P. 4(5)(b)(i). A narrow exception applies to the one-year time limit when a convicted person raises a claim of actual innocence supported by evidence, which would result in a fundamental miscarriage of justice were he not allowed to withdraw his guilty plea. Mont. Code Ann. § 46-16-105(2); *see also State v.*

Montgomery, 2010 MT 193, ¶¶ 17-18, 357 Mont. 348, 239 P.3d 929. The burden is on the convicted person to make a showing of innocence. Mont. Code Ann. § 46-16-105(2); *Montgomery*, ¶¶ 17-18.

Here, the district court entered its written sentence and judgment on April 29, 2015. (App. C.) The time for Burnett to appeal the judgment expired on June 28, 2015, which is when his judgment became final. The time for Burnett to file a motion to withdraw his guilty plea expired one year later on June 27, 2016. If Burnett's district court pleading is construed as a motion to withdraw his guilty plea to the charge of Failure to Register as a Sexual Offender, the district court correctly concluded that the motion was untimely because Burnett did not file the motion until April 28, 2018.

Further, Burnett failed to claim, or offer any evidence, that he was actually innocent of Failure to Register as a Sexual Offender. Thus, the exception to the one-year time limitation is not applicable.

Finally, if Burnett is attempting to challenge the admissions to violations that he made during the revocation proceeding, then Mont. Code Ann. § 46-16-105(2) is inapplicable, and his motion to withdraw his guilty plea is more properly treated as a petition for postconviction relief.

B. Burnett's motion for postconviction relief is untimely.

Montana Code Annotated § 46-21-101(1) provides:

A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was imposed in violation of the constitution or the laws of this state or the constitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was improperly revoked . . . may petition the court that imposed the sentence to vacate, set aside, or correct the sentence or revocation order.

Montana Code Annotated § 46-21-102(1) provides that a postconviction petition may be filed at any time within one year of the date that the conviction becomes final. A conviction becomes final for purposes of the postconviction relief statute, and the circumstances of this case, when the time for appeal to the Montana Supreme Court expires. Mont. Code Ann. § 46-21-102(1)(a).

The district court entered the written judgment and sentence revoking Burnett's five-year suspended commitment and sentenced him to the Department of Corrections for five years on June 16, 2016. Burnett's time to appeal the district court's revocation judgment expired on August 15, 2016, without Burnett appealing the revocation order. Burnett's one-year time period for filing a petition for postconviction relief expired on August 15, 2017. Thus, any attack on his revocation proceeding through the postconviction relief statute is untimely. Moreover, Burnett does not allege newly discovered evidence that calls into question the validity of the violations of probation which, ultimately, he admitted. This Court can affirm the district court's order denying Burnett relief if that court

reached the right result even though it employed the wrong reasoning. *State v. S.T.M.*, 2008 MT 221, ¶ 15, 317 Mont. 159, 75 P.3d 1257.

Moreover, even though Burnett's petition is untimely, it is worth noting that even if Burnett had not admitted his probation violations, the State could have easily proved the violations in the revocation proceeding since Burnett demonstrably lied about where he was living, where he was working, and absconded from probation. And, despite Burnett's claim to the contrary, the circumstances of his case are readily distinguishable from those in *Letasky*.

In *Letasky*, the municipal court revoked Letasky's suspended sentence for Partner or Family Member Assault after Letasky violated the condition that he have no contact with the victim. *Id.* ¶ 6. Afterward, the City charged Letasky with misdemeanor criminal contempt for violation of the municipal court's sentencing order that Letasky have no contact with the victim. *Id.* ¶ 7. On appeal, this Court concluded that a condition of a suspended sentence is not an independent mandate of the court for purposes of Mont. Code Ann. § 45-7-309(1)(c). *Id.* ¶¶ 14-15. The Court recognized, though, that there are circumstances where an offender may be prosecuted for a separate crime for the offender's noncompliance with a condition of his suspended sentence, provided that the noncompliance also establishes the elements of a crime. In Burnett's case, the State only moved to revoke his

suspended sentence. The State did not attempt to charge Burnett with a crime for failing to comply with the conditions of his suspended sentence.

III. This Court should not consider any issue that Burnett raises for the first time on appeal.

For the first time on appeal, Burnett argues that the district court violated his right to due process because the district court was biased. Burnett alleges that the judicial bias arose because the same district court judge who permitted the State to file an Information charging him with Failure to Register as a Sexual Offender also considered the merits of the State's revocation petition. Burnett could have raised this issue in an appeal of his revocation proceeding but failed to do so. Mont. Code Ann. § 46-21-105(2). Thus, he is procedurally barred from raising the issue now. *Ellenburg v. Chase*, 2004 MT 66, ¶ 19, 320 Mont. 315, 87 P.3d 473.

Moreover, since Burnett did not raise this issue in the district court, this Court should decline to consider the issue on appeal. *Ellenburg*, ¶ 14.

CONCLUSION

Whether Burnett's request for relief is construed as a motion to withdraw his guilty plea to the charge of Failure to Register as a Sexual Offender, or as a petition for postconviction relief alleging that his sentence was improperly revoked, it is time barred. Burnett has not alleged or offered newly discovered evidence of his actual innocence in either the underlying offense or his probation

violations. This Court should affirm the district court's order denying Burnett's request for relief because the district court reached the right result.

Respectfully submitted this 7th day of February, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4128 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

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