IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 52N

CITY OF BILLINGS,

       Plaintiff and Appellee,

  v.

CLINTON ROSS GILHAM,

       Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 17-1283
Honorable Rod Souza, Presiding Judge

COUNSEL OF RECORD:

      For Appellant:

      Robert L. Stephens, Jr., Southside Law Center, Billings, Montana

      For Appellee:

      Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant
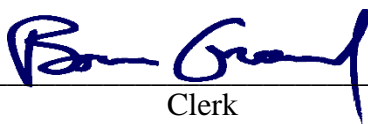Attorney General, Helena, Montana

      Benjamin Halverson, Assistant City Attorney, Billings, Montana

Submitted on Briefs: January 23, 2019

Decided: March 5, 2019

Filed:

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Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Clinton Ross Gilham appeals the order from the Thirteenth Judicial District Court, Yellowstone County, affirming the City of Billings Municipal Court's denial of his motion to withdraw guilty pleas. We affirm.

¶3 On February 10, 2016, Gilham pleaded guilty before the City of Billings Municipal Court to two counts of Privacy in Communications and one count of Stalking in relation to repeated harassing and offensive telephone calls that he had made to A.G. The Municipal Court sentenced Gilham that same day. Gilham did not appeal. On September 12, 2017, Gilham moved to withdraw his guilty pleas, citing ineffective assistance of counsel. Affidavits from Gilham and his parents attached to the motion stated that he would not have accepted the plea deal, but for the deficient advice of counsel. The Municipal Court held a hearing on the motion on October 30, 2017. At the hearing, Gilham's counsel proffered that Gilham and his parents would provide additional testimony that Gilham would not have accepted the plea deal but for the ineffective assistance of his trial counsel. The Municipal Court declined to hear the additional testimony, explaining that the motion was untimely. The Municipal Court issued an order, denying the motion as time-barred by

the one-year statute of limitations for withdrawing guilty pleas under § 46-16-105(2), MCA. Gilham appealed to the District Court, which affirmed the Municipal Court's order on May 18, 2018.

¶4   On appeal to this Court, Gilham argues that he was denied due process of law because the Municipal Court should have held an evidentiary hearing on his motion. Additionally, he argues that the Municipal and District Courts applied § 46-16-105(2), MCA, incorrectly to his motion. He argues that the exception to the one-year statute of limitations of § 46-16-105(2), MCA, is disjunctive and applies when there is a claim of actual innocence *or* a fundamental miscarriage of justice would result.

¶5   We review a trial court's denial of a motion to withdraw a guilty plea de novo. *State v. Montgomery*, 2010 MT 193, ¶ 6, 357 Mont. 348, 239 P.3d 929. Section 46-16-105(2), MCA, requires defendants to file a motion to withdraw a guilty plea within one year of a judgment becoming final, "except when a claim of innocence is supported by evidence of a fundamental miscarriage of justice." In interpreting statutes, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA.

¶6   The plain language of § 46-16-105(2), MCA, provides only one exception to the one-year statute of limitations: a claim of innocence *supported by* evidence of a fundamental miscarriage of justice. The words of the statute do not support a reading that the Legislature intended to provide two separate and independent exceptions to the statute of limitations. Further, "fundamental miscarriage of justice" is a legal term of art and

"is concerned with actual and not legal innocence." *See State v. Redcrow*, 1999 MT 95, ¶ 33, 294 Mont. 252, 980 P.2d 622. "Actual innocence 'does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty.'" *Redcrow*, ¶ 33 (quoting *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995)). As we explained in *Montgomery*, meeting the exception to the one-year statute of limitations is a "steep hurdle." *Montgomery*, ¶ 17.

¶7   Gilham's judgment became final on February 25, 2016, ten days—not counting weekends and holidays—after the Municipal Court entered judgment and sentenced Gilham. *See* U.M.C.R. App. 5(b)(3), 20(a). Gilham filed his motion to withdraw his guilty pleas more than one year later. Neither the affidavits attached to Gilham's motion, nor his counsel's proffer of the testimony that Gilham and his parents would give, alleged evidence of actual innocence. The Municipal Court and District Court correctly held that Gilham failed to meet his heavy burden to provide evidence of actual innocence to overcome the one-year statute of limitations under § 46-16-105(2), MCA. For the same reasons, the Municipal Court did not deny Gilham due process of law when it declined to allow further testimony that would not provide evidence to support the sole exception to the statute of limitations.

¶8   We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of

applicable standards of review. The District Court's interpretation and application of the

law were correct. Its order is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JAMES JEREMIAH SHEA