

ORIGINAL

FILED

04/30/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 18-0394

DA 18-0394

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 102N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PERRY L. BURNETT, JR.,

Defendant and Appellant.

FILED

APR 30 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPEAL FROM: District Court of the Twenty-Second Judicial District,
In and For the County of Carbon, Cause No. DC 14-48
Honorable Blair Jones, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Perry Leonard Burnett, Jr., Self-Represented, Deer Lodge, Montana

For Appellee:

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

Alex R. Nixon, Carbon County Attorney, Red Lodge, Montana

Submitted on Briefs: April 17, 2019

Decided: April 30, 2019

Filed:


Clerk

Justice James Jeremiah Shea 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 Perry L. Burnett, Jr. appeals the Order of the Twenty-Second Judicial District Court, Carbon County, denying his Motion to Withdraw Guilty Plea. We affirm.

¶3 On January 21, 2015, Burnett pled guilty to felony Failure to Register as a Sexual Offender, in violation of §§ 46-23-504, -507, MCA. On April 8, 2015, the District Court sentenced Burnett to five years, all suspended. On April 29, 2015, the District Court entered its written judgment. On September 2, 2015, the State filed a Petition for Revocation after Burnett absconded from probation. On May 25, 2016, the District Court held a revocation hearing, revoked Burnett's suspended sentence, sentenced him to five years, and restricted parole for the entirety of the sentence. On June 16, 2016, the District Court entered its written judgment on Burnett's revoked sentence.

¶4 On April 26, 2018, Burnett moved, pro se, to withdraw his guilty plea, arguing that he received ineffective assistance of counsel (IAC) during his revocation proceedings. Burnett alleged his defense counsel: (1) failed to review paperwork of the revocation allegations; (2) failed to advocate in a meaningful way; and (3) failed to raise applicable case law. On June 8, 2018, the District Court treated Burnett's pleading as a motion to withdraw his guilty plea but determined that Burnett's Motion was time barred regardless

of whether it was construed as a motion to withdraw his guilty plea or as a postconviction relief (PCR) petition. Burnett appeals.

¶5 This Court reviews a district court's ruling on a motion to withdraw a plea to determine whether the plea was voluntary. *State v. Muhammad*, 2005 MT 234, ¶ 12, 328 Mont. 397, 121 P.3d 521 (citations omitted). 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 (citations omitted). We review a district court's denial of a PCR petition to determine whether its findings of fact are clearly erroneous and its conclusions of law are correct. *Wilkes v. State*, 2015 MT 243, ¶ 9, 380 Mont. 388, 355 P.3d 755 (citation omitted). IAC claims present mixed questions of law and fact that we review de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861 (citation omitted).

¶6 An appeal of a criminal judgment "must be taken within 60 days after entry of the judgment from which the appeal is taken." M. R. App. P. 4(5)(b)(i). 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 a conviction becomes final. Section 46-16-105(2), MCA. A judgment becomes final when the time to appeal to this Court expires. Section 46-16-105(2)(a), MCA. A narrow exception applies when a defendant raises a claim of actual innocence, supported by evidence, which would result in a fundamental miscarriage of justice were the defendant not allowed to withdraw a guilty plea. Section 46-16-105(2), MCA; see *State v. Montgomery*, 2010 MT 193, ¶¶ 17-18,

357 Mont. 348, 239 P.3d 929. The defendant bears the burden of demonstrating actual innocence. Section 46-16-105(2), MCA; *Montgomery*, ¶¶ 17-18.

¶7 A PCR petition may be filed at any time within one year of the date that the conviction becomes final. Section 46-21-102(1), MCA. A conviction becomes final for purposes of PCR when the time for appeal to this Court expires. Section 46-21-102(1)(a), MCA.

¶8 Burnett argues that this Court should consider the IAC claims contained in his Motion. Burnett also argues that the District Court judge should have recused himself because he granted the State leave to file the Information charging him with failure to register as a sexual offender.¹ The State responds that whether Burnett is seeking to withdraw his original guilty plea, or seeking PCR based upon IAC during his revocation proceeding, Burnett's claim is time barred. We agree.

¶9 The District Court entered its written judgment on Burnett's conviction on April 29, 2015. The District Court's judgment thus became final on June 28, 2015, when Burnett's time to file a direct appeal on his conviction expired. *See* M. R. App. P. 4(5)(b)(i); § 46-16-105(2)(a), MCA. The District Court entered its written judgment on Burnett's revoked sentence on June 16, 2016. The District Court's judgment thus became final on

¹ Burnett failed to raise this issue on direct appeal of his original conviction or raise it below in the present appeal. We will not review issues that reasonably could have been raised on direct appeal or were not preserved for appeal. *Ellenburg v. Chase*, 2004 MT 66, ¶¶ 14, 19, 320 Mont. 315, 87 P.3d 473 (citations omitted). Therefore, this issue is waived. *See Ellenburg*, ¶¶ 14, 19.

August 15, 2016, when Burnett’s time to file a direct appeal on his revoked sentence expired. *See* M. R. App. P. 4(5)(b)(i); § 46-16-105(2)(a), MCA.

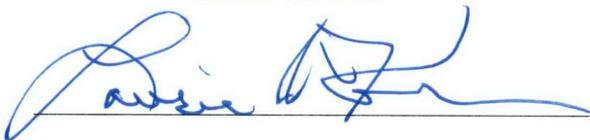
¶10 Burnett did not file his motion to withdraw his guilty plea until April 28, 2018—nearly two years after his time to withdraw his guilty plea expired on June 27, 2016. *See* § 46-16-105(2), MCA. Burnett fails to offer any substantial evidence that he was actually innocent to trigger the exception to the one-year time limitation on withdrawal of a guilty plea. *See* § 46-16-105(2), MCA; *Montgomery*, ¶¶ 17-18. Even if we construe Burnett’s Motion as a PCR petition, Burnett’s Motion is untimely because Burnett failed to file his motion prior to August 15, 2017. *See* § 46-21-102(1), MCA. The District Court did not err in denying Burnett’s Motion. *See* § 46-16-105(2), MCA; § 46-21-102(1), MCA; *see also Warner*, ¶ 9; *Wilkes*, ¶ 9.

¶11 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. We affirm.


Justice

We concur:


Chief Justice



Justice

Original Staff

Justices