IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0093

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NOAH JOSEPH CHALUPA,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Gregory R. Todd, Presiding

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STATEMENT OF THE ISSUES

1. Whether revocation of Chalupa's suspended sentence violated his right to due process.

2. The State concedes that only one $10 user surcharge should have been imposed in DC 15-0169.

STATEMENT OF THE CASE AND FACTS

Appellant Noah Joseph Chalupa pleaded guilty in Cause No. DC 15-0169 to two counts of intimidation. (DC 15-0169 Doc. 23, available at Appellee's App. A.) That conviction was based on Chalupa threatening a principle and an assistant principle with a knife after they encountered Chalupa outside of a school with the knife. (DC 15-0169 Doc. 22 at 3-5.)

While that case was pending, Chalupa broke windows at a Billings business. (*Id*.) He pleaded guilty to criminal mischief in Cause No. DC 15-0858 as a result of that offense. (DC 15-0858 Doc. 12, available at Appellee's App. B.)

In December 2015, the district court sentenced Chalupa in DC 15-0169 to the commitment of the Department of Corrections for five years with three years suspended on each count, with both counts running concurrently to each other. (Appellee's App. A; DC 15-0169 Doc. 46, Def's Ex. 2 at 14.) The court gave Chalupa credit for time he had served between February 11, 2015 and July 2, 2015

in DC 15-0169. The court sentenced him during the same hearing in DC 15-0858 and deferred the imposition of sentence for three years. (Appellee's App. B; DC 15-0169 Doc. 46, Def's Ex. 2 at 14.) The court imposed that sentence concurrent to Chalupa's sentence in DC 15-0169. (Appellee's App. B.)

Before the sentencing hearing, a probation officer prepared a presentence investigation report (PSI), which listed 34 conditions that were "recommended for any suspended time imposed by the court." (DC 15-0169 Doc. 22 at 8-11.) When orally pronouncing the sentence, the court stated, "[a]s a condition of your sentence, I will incorporate Conditions 1 through 34, I will also add the additional condition of no contact with any public schools." (DC 15-0169 Doc. 46, Def's Ex. 2 at 15.) The judgments in both cases include 35 conditions preceded by the statements that the following conditions will apply "for any period of community supervision." (Appellee's Apps. A, B.)

On July 7, 2017, the State filed a Petition for Revocation of Sentence and Affidavit in Support. (DC 15-0169 Doc. 26.) A Report of Violation was attached to the petition. It alleged that Chalupa violated condition 9, which required him to comply with all laws and to "conduct himself/herself as a good citizen." (DC 15-0169 Doc. 26, Ex. A.) The report alleged that he had committed 104 major infractions while incarcerated at the Montana State Prison (MSP) and that criminal charges were pending against him for felony assault on a peace officer

and possession of a deadly weapon by a prisoner. (*Id*.) The report indicated that Chalupa was scheduled to discharge to suspended time on July 21, 2017. (*Id*. at 8.)

Chalupa filed a Motion to Dismiss the State's Petition to Revoke the Defendant's Deferred and Suspended Sentences arguing that the Petition to Revoke did not allege a violation of Chalupa's suspended sentence because Chalupa had not begun serving his suspended sentence. (DC 15-0169 Doc. 32 at 3.) Chalupa acknowledged that a petition to revoke may be filed before the period of suspension has begun, but he argued that the petition was not appropriate if the judgment only imposed conditions on the period of community supervision and the defendant had not yet been released to community supervision. (*Id*. at 3-7.)

In response, the State argued that Mont. Code Ann. § 46-18-203 and *State v. Graves*, 2015 MT 262, 381 Mont. 37, 355 P.3d 769, allowed the revocation of Chalupa's suspended and deferred sentences to be filed before he was released to serve his period of community supervision. (DC 15-0169 Doc. 35 at 2.) The State also argued that barring the revocation of a defendant based on the defendant's conduct while incarcerated "flies in the face of what the purpose of probation is." (*Id*. at 3.) An inmate who has demonstrated that he is not rehabilitated and cannot comply with rules should not be released into the community. (*Id*. at 3-4.)

In September 2017, the State filed an Amended Petition and Notice for Revocation of Sentence and Affidavit in Support. (DC 15-0169 Doc. 37.) The Amended Petition stated that Chalupa had signed the rules of probation on July 21, 2017, and had been held in the Yellowstone County Detention Facility (YCDF). (D.C. Doc. 37, Report of Violation-Addendum.) The amended report alleged that Chalupa had committed 32 disciplinary infractions since he had been transferred to the YCDF on July 20, 2017, he had created housing and safety issues, and he was not appropriate for community supervision. (*Id*. at 4.)

On November 1, 2017, the court held a hearing on the petition to revoke Chalupa's probation. (11/1/17 Tr. at 3.) A probation officer assigned to the prison testified that Chalupa's "level of defiance and misbehavior" in prison was "kind of unprecedented." (*Id*. at 5.) He testified that Chalupa had been found guilty of 104 major infractions and two felony charges were pending against him. (*Id*. at 5-6.) Witnesses testified that one charge in Powell County was based on Chalupa intentionally scratching the wrist of a correctional officer, causing the officer's arm to bleed. (*Id*. at 12-16.) The other charge was based on Chalupa possessing a sharp piece of plastic that could be used as a weapon while he was in MSP. (*Id*. at 22-24.) An investigator at MSP also testified that Chalupa made threats detailing how he planned to kill prison staff members after his release. (*Id*. at 17-18, 25.) Officers from the YCDF testified that Chalupa had a "very

threatening" demeanor, he had broken a sprinkler head, he had an incident nearly every other day, and he was charged with an offense after he spit on an officer. (*Id*. at 30-39.)

After the hearing, the court issued findings of fact, conclusions of law, and an order denying Chalupa's motion to dismiss. The court found that its oral pronouncement, which controls, imposed the conditions as conditions of Chalupa's sentence, not just the suspended portion. (DC 15-169 Doc. 52 at 3-4, available at Appellant's App. A.) The court found that "[b]ased on the statute's plain language and the oral pronouncement, the Defendant's sentence may be revoked for violations occurring before community supervision." (*Id*. at 4.) The court concluded that the State had proven by a preponderance of the evidence that Chalupa violated Condition 9 by committing new criminal offenses of assault on a peace officer, possession of a deadly weapon by a prisoner, assault with a bodily fluid, and criminal mischief while incarcerated in MSP and the YCDF. (*Id*. at 7.) The court denied Chalupa's motion to dismiss and found that he violated the conditions of his sentence. (*Id*.)

At the dispositional hearing, the court provided an additional reason for the denial of Chalupa's motion to dismiss. The Court found that Chalupa signed the rules of probation on July 21, 2017, so the violations that occurred while he was in the YCDF after that date were committed during his period of community

supervision, even though he was being held in jail due to the pending revocation proceeding. (11/7/17 Tr. at 28-29.) The court found "that even accepting Mr. Chalupa's arguments, he technically was on the community supervision portion and was signed to the rules at the time of the violations at the jail which I found were not compliance violations." (*Id*. at 29.) Based on those violations, the court revoked Chalupa's sentences in both cases. (*Id*.) The court imposed a three-year commitment to the Department of Corrections in both cases, with the sentences running concurrently to each other. (*Id*. at 32; DC 15-0169 Doc. 56, available at Appellant's App. B.)

SUMMARY OF THE ARGUMENT

The district court properly exercised its authority to revoke Chalupa's suspended and deferred sentences based on the new criminal offenses that Chalupa committed while he was incarcerated in MSP and the YCDF. The court's revocation of his sentences should be affirmed.

The due process claim Chalupa raises on appeal was not raised in the district court and should not be reviewed under the plain error doctrine. If this Court reviews the claim, the revocation of his sentences should be affirmed for three reasons. First, Chalupa committed two noncompliance violations in the YCDF after he began serving his suspended sentence in DC 15-0169 and his deferred

sentence in DC 15-0858. Those violations provided a basis for the court to revoke Chalupa's probationary sentences without relying on violations he committed while he was serving the prison portion of his sentence in DC 15-0169. His right to due process was not violated by the revocation of his sentences based on his new offenses he committed in the YCDF.

Further, the oral judgment, which controls, provided that Chalupa's entire sentence was conditioned on the conditions listed in the PSI, including the condition requiring him to comply with all laws. And Mont. Code Ann. § 46-18-203(2) and this Court's case law permit the revocation of a probationary sentence before it has begun based on the defendant's violation of conditions of the probationary sentence. Montana statutes therefore permitted the revocation of Chalupa's sentences, and he failed to demonstrate that the revocation violated his right to due process.

Finally, even if this Court rejects the arguments above, Chalupa was serving his deferred sentence in DC 15-0858 when he committed all the violations, and the revocation of his deferred sentence was proper.

The State acknowledges that this case should be remanded to the district court to correct Condition 12(d) in DC 15-0169 because only one $10 user surcharge should be imposed in the case.

ARGUMENT

I. Chalupa has not met his burden to demonstrate that his claim alleging that the revocation violated his right to due process should be reviewed under the plain error doctrine.

A. Standard of review

This Court has consistently held that it will not consider issues raised for the first time on appeal. *See, e.g.*, *State v. Reim*, 2014 MT 108, ¶ 38, 374 Mont. 487, 323 P.3d 880; *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79. But this Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine where the defendant invokes the Court's inherent authority and establishes failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *Taylor*, ¶¶ 12-13. An error is plain only if it leaves one "firmly convinced" that some aspect of the trial, if not addressed, would result in one of the consequences listed above. *Taylor*, ¶ 17. This Court invokes plain error review "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127.

B. Chalupa is not entitled to plain error review.

In the district court, Chalupa argued that the revocation proceeding should be dismissed because the court did not have the statutory authority to revoke his probation. (D.C. Doc. 52.) He did not raise a constitutional claim. (*Id*.) Chalupa raises a constitutional claim for the first time on appeal, arguing that his right to due process was violated when the court revoked his probation for violating conditions that did not yet apply to him. (Appellant's Br. at 7-13.) Chalupa's constitutional claim is fundamentally different than his statutory claim, and Chalupa waived the claim by failing to raise it in the district court.

Chalupa can only obtain review of this claim by demonstrating that this is a rare case in which this Court should exercise plain error review. He has failed to meet that burden. At the dispositional hearing, the court amended its earlier findings and made it clear that even if it could not rely on the violations Chalupa committed before he began serving his probationary sentence, the court would revoke his sentences based on the violations that he committed while he was in the YCDF after he signed the rules of probation. (11/7/17 Tr. at 28-29.) Given that the court revoked Chalupa's sentence based on violations that occurred while he was serving the probationary portion of his sentence, he has not demonstrated that he is entitled to plain error review of his due process claim. Therefore, this claim should be denied without review.

II. If this Court reviews Chalupa's due process claim, the claim should be rejected because the revocation of Chalupa's sentences did not violate his right to due process.

A. Standard of review

This Court generally reviews a district court's revocation of probation for an abuse of discretion. *State v. Graves*, 2015 MT 262, ¶ 12, 381 Mont. 37, 355 P.3d 769. But whether the district court had the authority to take a specific action is a question of law that this Court reviews de novo. *Id*.

This Court reviews de novo whether a district court violated a defendant's constitutional rights at sentencing. *State v. Brooks*, 2012 MT 263, ¶ 7, 367 Mont. 59, 289 P.3d 105. This Court presumes that all statutes are constitutional. *Id*. A defendant challenging a statute's constitutionality bears the burden of proving it unconstitutional beyond a reasonable doubt. *Id*.

B. Chalupa was serving the probationary portion of his sentences when he committed two of the violations, so it is unnecessary to address his argument regarding the revocation of his sentences based on violations that occurred earlier.

Chalupa's argument is based on an incorrect factual premise. He argues that the district court improperly revoked his probation based on his violation of conditions that did not yet apply to him. But he began serving his suspended sentence in DC 15-0169 on July 21, 2017, even though he remained incarcerated in the YCDF based on his pending revocation proceeding, and he was already serving

his deferred sentence in DC 15-0858. The district court found that Chalupa committed assault with a bodily fluid and criminal mischief, which occurred while he was in the YCDF after he began serving the probationary portion of his sentences. (Appellant's App. A at 7; 11/7/17 Tr. at 28-29.) The court explained that even if Chalupa's argument about the violations committed before July 21, 2017 was correct, the court would still revoke Chalupa's probationary sentences. (11/7/17 Tr. at 29.)

A court may revoke a suspended or deferred sentence if the court finds by a preponderance of the evidence that the defendant has violated the terms and conditions of his suspended or deferred sentence and the violation is not a compliance violation. Mont. Code Ann. §§ 46-18-203(6)(a)(i), (7)(a)(iii). A compliance violation includes a violation of the conditions of supervision that is not a new criminal offense. Mont. Code Ann. § 46-18-203(11)(b). Although the Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes procedural and substantive limits on the revocation of conditional liberty created by probation or parole, *State v. Cook*, 2012 MT 34, ¶ 23, 364 Mont. 161, 272 P.3d 50, the Due Process Clause was not violated by the court's revocation of Chalupa's sentences based on new criminal offenses. Procedural requirements were satisfied here where the court held a hearing and the court explained in writing and orally the evidence relied on in revoking the

probationary sentences. *See State v. Sebastian*, 2013 MT 347, ¶¶ 21-25, 372 Mont. 522, 313 P.3d 198 (discussing minimum due process requirements); *State v. Baird*, 2006 MT 266, ¶ 27, 334 Mont. 185, 145 P.3d 995 (discussing the record that is required to comply with due process guarantees when revoking a sentence). And there is no substantive due process bar on revoking probation when the court determines by a preponderance of the evidence that the defendant has committed new offenses. *See Sebastian*, ¶ 25 (due process not violated when a preponderance of the evidence supported the court's determination the defendant violated the conditions and the undisclosed evidence was unnecessary to that determination). Chalupa's right to due process was therefore not violated by the revocation of his probationary sentences.

C. Additionally, Chalupa's right to due process was not violated by the revocation of his probationary sentences because the oral pronouncement of his sentence conditioned his entire sentence on the conditions listed.

In a criminal case, the sentence that is orally pronounced "in the presence of the defendant is the legally effective sentence and valid, final judgment." *State v. Claassen*, 2012 MT 313, ¶ 16, 367 Mont. 478, 291 P.3d 1176 (quoting *State v. Lane*, 1998 MT 76, ¶ 40, 288 Mont. 286, 957 P.2d 9). If the oral pronouncement and the written judgment conflict, the oral judgment controls. *Claassen*, ¶ 16.

During the sentencing hearing, the district court stated that it was incorporating Conditions 1 through 34 from the PSI "[a]s a condition of

[Chalupa's] sentence." (D.C. Doc. 46, Def's Ex. 2 at 15.) Because the oral judgment, which controls, imposed the conditions as a condition of his sentence, the conditions applied to him while he was serving the entire sentence, including the period of incarceration. The new criminal offenses that Chalupa committed at MSP and the YCDF violated the conditions of his sentence and were noncompliance violations. The court therefore did not violate his right to due process when the court revoked his probationary sentences.

D. A court can revoke a suspended sentence based on the violation of a condition of a suspended or deferred sentence before the period of suspension or deferral has begun.

Even if the conditions did not apply to the portion of Chalupa's sentences that was not deferred or suspended and this Court rejected the argument that he was serving the probationary portion of his sentences when he committed new criminal offenses in the YCDF, the revocation of Chalupa's sentences did not violate his right to due process because Mont. Code Ann. § 46-18-203(2) and this Court's case law permit the revocation. In 2011, Mont. Code Ann. § 46-18-203(2) was amended to clarify that a petition for revocation may be filed "before the period of suspension or deferral has begun," or may be filed during the period of suspension or deferral. Mont. Code Ann. § 46-18-203(2) (2011); 2011 Mont. Laws, Ch. 230, § 1; *Graves*, ¶ 14.

Referring to the amended version of Mont. Code Ann. § 46-18-203(2), this Court stated in *Graves* that "[t]he statute thus allows for a suspended sentence to be revoked for violations of the conditions of suspension before the period of suspension has begun." *Graves*, ¶ 15. The procedural history in *Graves* is more complex because Graves escaped from jail before he was transferred to MSP. *Graves*, ¶ 4. The State did not extradite Graves for 14 years even though the State could have located him sooner. *Graves*, ¶¶ 4-5. The State eventually extradited Graves and filed a petition to revoke his suspended sentence. *Graves*, ¶ 6. He argued in response that he did not know he was on probation in Montana because he had never signed rules of probation or met a probation officer. *Graves*, ¶ 7. This Court held that his argument had "no merit" because the statute allows a suspended sentence to be revoked for violations of the conditions of suspension before the period of suspension has begun. *Graves*, ¶ 15.

Graves established that the district court could revoke Chalupa's suspended and deferred sentences based on violations that he committed before he began serving the probationary portion of those sentences. That is consistent with the nature of probation. "Probation is an act of grace by a sentencing court, intended to give the offender a chance to rehabilitate outside the prison setting." *State v. Boulton*, 2006 MT 170, ¶ 15, 332 Mont. 538, 140 P.3d 482. "The question in a revocation proceeding is whether the purposes of rehabilitation are being achieved,

and whether, by virtue of subsequent criminal conduct or evidence that the defendant's behavior was not in compliance with the rules and objectives of his probation, the purposes of probation are best served by continued liberty or by incarceration." *Id*. (internal quotation marks and citation omitted). Chalupa's repeated violations of the conditions of his probation, including the commission of four new offenses, demonstrated that he was not rehabilitated and was not suitable for release to the community. The district court's revocation of Chalupa's suspended and deferred sentences did not violate Chalupa's due process rights.

E. Chalupa was serving his deferred sentence in DC 15-0858 while he was incarcerated.

Finally, even if this Court rejects the State's other arguments, the revocation of Chalupa's deferred sentence in DC 15-0858 should be affirmed because he was serving that period of deferral while he was incarcerated based on his sentence in DC 15-0169. Because the sentences in the two cases were imposed concurrently, both sentences should have begun running immediately. While Chalupa was incarcerated for DC 15-0169, his deferred sentence was running. He committed all of the violations at issue during that time period. As a result, his argument does not apply to DC 15-0858, and he has not provided any argument for the reversal of his revocation in that case.

III. The State concedes that DC 15-0169 should be remanded to the district court with instructions to strike the per count user surcharge and to instead impose only one $10 surcharge in that case.

The State concedes the district court erred when it imposed a $10 user surcharge on both of Chalupa's convictions in DC 15-0169, rather than a single $10 user surcharge. Mont. Code Ann. § 3-1-317(1)(a); *State v. Pope*, 2017 MT 12, ¶¶ 31-32, 386 Mont. 194, 387 P.3d 870. Montana Code Annotated § 3-1-317(1)(a) requires a sentencing court to impose one $10 user surcharge per criminal case for court information technology. Chalupa was convicted of two counts in DC 15-0169, and the court imposed a $10 surcharge on each count. (Appellee's App. A; D.C. Doc. 56.) This Court should remand DC 15-0169 to the district court with instructions to strike the $10 per count user surcharge and impose only one $10 user surcharge.

Cause No. DC 15-0858 is a separate case in which the court correctly imposed a separate $10 user surcharge. Because Chalupa was convicted of only one count in that case, the court correctly imposed one $10 user surcharge. Therefore, that case does not need to be remanded.

CONCLUSION

The district court's revocation of Chalupa's suspended and deferred sentences should be affirmed. Cause No. DC 15-0169 should be remanded to the

district court with instructions to modify Condition 12(d) to impose only one $10 surcharge.

Respectfully submitted this 24th day of May, 2019.

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By: */s/ Mardell Ployhar*
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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 3,793 words, excluding certificate of service and certificate of compliance.

/s/ Mardell Ployhar
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APPENDIX

CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-24-2019:

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