

DA 17-0455

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 176N

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRIAN THOMAS NORVELL,

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-16-98  
Honorable Matthew J. Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Laura M. Reed, Attorney at Law, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant  
Attorney General, Helena, Montana

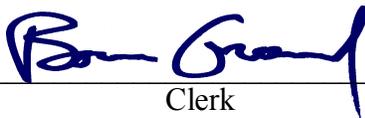
Marcia Boris, Lincoln County Attorney, Jeffrey Zwang, Deputy County  
Attorney, Libby, Montana

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Submitted on Briefs: June 12, 2019

Decided: July 30, 2019

Filed:

  
Clerk

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Justice Laurie McKinnon 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 Brian Thomas Norvell (Norvell) appeals from an order of the Nineteenth Judicial District Court, Lincoln County. Norvell pleaded no contest to criminal charges and the District Court sentenced Norvell to Montana State Prison (MSP) for ten years with all time suspended. Norvell appeals, raising the issue of ineffective assistance of counsel (IAC). We affirm.

¶3 In July 2016, Norvell struck a detention officer while he was in custody for separate felony charges and awaiting transport to Montana State Hospital (MSH) for a competency evaluation. Consequently, the State charged Norvell with felony assault on an officer. Norvell suffers from paranoid schizophrenia and was not taking his prescribed medications when the incident occurred. Norvell remained at MSH until medical professionals deemed him competent to stand trial. The same plea agreement resolved both the prior felony charges and the felony assault on an officer charge. In the matter relevant to this appeal, the District Court sentenced Norvell to MSP for ten years with all time suspended. On appeal, Norvell argues his counsel was ineffective in failing to negotiate a suspended sentence through the Department of Public Health and Human

Services (DPHHS) instead of MSP. We conclude Norvell’s IAC claim is not record based and therefore affirm his conviction.

¶4 Norvell’s IAC claim is rooted in the perceived failure of his counsel to negotiate a sentence through DPHHS instead of MSP. IAC claims present mixed issues of law and fact that we review de novo. *State v. Clary*, 2012 MT 26, ¶ 12, 364 Mont. 53, 270 P.3d 88. “If we cannot answer from the record the question ‘why’ counsel did or did not take the actions constituting the alleged ineffective assistance, the claims are better raised by a petition for post-conviction relief where the record can be more fully developed . . . .” *State v. Larsen*, 2018 MT 211, ¶ 8, 392 Mont. 401, 425 P.3d 694.

¶5 After reviewing the record in this case, we cannot determine why counsel did or did not negotiate a sentence through DPHHS instead of MSP. Norvell’s counsel negotiated the plea agreement, and the record is silent regarding whether counsel inquired about the possibility of DPHHS administering Norvell’s sentence. After the parties executed the plea agreement, counsel was bound by its terms. Because the record is silent regarding the alleged error, we cannot review Norvell’s IAC claim on direct appeal. While Norvell’s IAC claim is not reviewable on direct appeal, he may still raise the issue in a petition for post-conviction relief. Accordingly, Norvell’s conviction is affirmed.

¶6 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶7 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH

/S/ JAMES JEREMIAH SHEA

/S/ BETH BAKER

/S/ JIM RICE