

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0522

JEFFERY J. LOUT,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Jeffrey H. Langton, Presiding

APPEARANCES:

TIMOTHY C. FOX

Montana Attorney General

MICHEAL S. WELLENSTEIN

Assistant Attorney General

215 North Sanders

P.O. Box 201401

Helena, MT 59620-1401

Phone: 406-444-2026

Fax: 406-444-3549

mwellenstein@mt.gov

JEFFERY J. LOUT

AO#45407

Montana State Prison

700 Conley Lake Road

Deer Lodge, MT 59722

PETITIONER AND APPELLANT

PRO SE

WILLIAM FULBRIGHT

Ravalli County Attorney

Courthouse

205 Bedford Street, Ste. C

Hamilton, MT 59840

ATTORNEYS FOR RESPONDENT

AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE AND FACTS1

STANDARD OF REVIEW5

SUMMARY OF THE ARGUMENT5

ARGUMENT6

Lout’s claims in his district court motion are requests for postconviction relief6

 A. Lout waived appellate review of his claims that his sentence was excessive and the he was denied the right to challenge his sexual offender designation by failing to raise them in the district court.....7

 B. All of Lout’s claims are procedurally barred8

 C. All of Lout’s claims are also time barred.....9

CONCLUSION10

CERTIFICATE OF COMPLIANCE.....11

APPENDIX12

TABLE OF AUTHORITIES

Cases

<i>Ellenburg v. Chase</i> , 2004 MT 66, 320 Mont. 315, 87 P.3d 473	7
<i>Lout v. State</i> , 2005 MT 93, 326 Mont. 485, 111 P.3d 199	2, 3, 4, 9
<i>In re Manula</i> , 263 Mont. 166, 866 P.2d 1127, (1993)	8
<i>Sartain v. State</i> , 2012 MT 164, 365 Mont. 483, 285 P.3d 407	5
<i>State v. Baker</i> , 272 Mont. 273, 901 P.2d 54 (1995)	7
<i>State v. Baker</i> , 1999 MT 251, 296 Mont. 253, 989 P.2d 335	6
<i>State v. Cobell</i> , 2004 MT 46, 320 Mont. 122, 86 P.3d 20	5
<i>State v. Gorder</i> , 243 Mont. 333, 792 P.2d 370, (1990)	8
<i>State v. Howard</i> , 282 Mont. 522, 938 P.2d 710, (1997)	7
<i>State v. Nichols</i> , 1999 MT 212, 295 Mont. 489, 986 P.2d 1093 <i>overruled on other grounds by State v. Whitehorn</i> , 2002 MT 54, 309 Mont. 63, 50 P.3d 121	6-7

Other Authorities

Montana Code Annotated

§ 46-21-101	6
§ 46-21-102	9
§ 46-21-102(1)	10
§ 46-21-102(1)(a)	9
§ 46-21-105(1)(b)	9
§ 46-21-105(2)	8

Montana Rules of Appellate Procedure

Rule 4(5)(b)(i)	9, 10
-----------------------	-------

STATEMENT OF THE ISSUES

1. Has Appellant waived appellate review of his postconviction claims that his sentence was excessive and that he was denied the right to challenge his sexual offender designation by not raising those claims in the district court?
2. Are Appellant's postconviction claims procedurally barred?
3. Are Appellant's postconviction claims time barred?

STATEMENT OF THE CASE AND FACTS

This appeal involves two separate district court cases from Ravalli County district court.

In district court cause number 99-22, on May 4, 1999, the State charged Appellant Jeffery Lout by amended information with 8 felony counts of criminal sale of dangerous drugs. (D.C. No. 99-22 Doc. 13 at 2.) Lout later pled guilty to two of the counts. (D.C. No. 99-22 Doc. 20 at 2.) On November 9, 1999, the district court sentenced Lout to prison for 20 years, with 15 years suspended, on each count. *Id.* The district court ordered the sentences to run consecutively. Lout received a total prison sentence of 40 years, with 30 years suspended. *Id.* Lout did not appeal his conviction and sentence. *See* Case Register Report in D.C. No. 99-22.

In district court cause number 02-79, on October 24, 2002, the State charged Lout by amended information with two felony counts of sexual intercourse without

consent by common scheme, two additional felony counts of sexual intercourse without out consent, and one felony count of sexual assault. (D.C. No. 02-79 Doc. 15.) The charges stemmed from Lout engaging in sex with minors during his time as a Boy Scout leader and as a boxing coach, and his performing oral sex on a fellow sleeping inmate at the detention center. (D.C. No. 02-70 Docs. 13, 15; *Lout v. State*, 2005 MT 93, ¶ 5, 326 Mont. 485, 111 P.3d 199.)

On January 3, 2003, Lout entered into a plea agreement with the State. (D.C. No. 02-79 Doc. 32.) Lout agreed to plead guilty to two counts of sexual intercourse without consent and the State agreed to dismiss the other charged offenses. *Id.* at 1. The plea agreement was an “open” plea agreement, meaning “there is no agreement regarding the sentence in this matter and that the State is free to argue for and the Judge impose the maximum sentence allowed by law.” *Id.* at 2. The plea agreement noted that “the maximum sentence is imprisonment for two (2) life terms or no more than 200 years imprisonment, plus any applicable penalty enhancement provisions, and \$100,000 in fines.” *Id.* The plea agreement also stated: “By pleading guilty, the Defendant waives his right to appeal or otherwise challenge his conviction by direct appeal, habeas corpus, or post-conviction relief.” *Id.* at 1.

On January 8, 2003, Lout pled guilty to two counts of sexual intercourse without consent. (D.C. No. 02-79 Doc. 33.1.)

On March 26, 2003, the district court sentenced Lout to two concurrent life prison terms. (D.C. No. 02-79 Doc. 38 at 3.) The district court ordered the sentence to run concurrently with Lout's prior drug sentence in cause number 99-22. *Id.* The court designated Lout a Level III sexual offender. *Id.* Lout did not file a direct appeal. *See* Case Register Report in D.C. No. 02-79. The Sentence Review Division later affirmed Lout's sentence. (D.C. No. 02-79 Doc. 46.)

Instead of filing a direct appeal of his sexual intercourse without consent convictions, Lout filed a petition for writ of habeas corpus with this Court, claiming his counsel provided ineffective assistance. (D.C. No. 02-79 Doc. 48.) On December 9, 2003, this Court concluded that Lout's ineffective assistance of counsel claims were inappropriate for habeas corpus relief and that Lout should raise his claims in a postconviction petition. *Id.* This Court denied Lout's habeas petition, and forwarded Lout's petition to the district court with instructions for the district court to review "any claims cognizable as claims for postconviction relief." *Id.* at 2.

On April 20, 2004, the district court issued a written order denying Lout postconviction relief. (D.C. No. 02-79 Doc. 55.) Lout appealed the district court's order. On April 19, 2005, this Court affirmed the district court's decision. *Lout v. State*, 2005 MT 93, 326 Mont. 485, 111 P.3d 199. This Court concluded: "In accepting the plea agreement, Lout validly waived any right he had to appeal or

challenge his conviction and lawfully imposed sentence. Lout did not receive ineffective assistance of counsel.” *Id.* ¶ 21.

In 2008, in district court cause number 02-79, the district court denied Lout’s motion to withdraw his guilty pleas and/or petition for postconviction relief. (D.C. No. 02-79 Docs. 96, 100.)

In 2018, in both district court cause number 99-22 and district court cause number 02-79, Lout filed a “Motion to Dismiss and Exonerate For the Unlawful Conviction[s] and Illegal Incarceration For States [sic] Failure to comply with Legislative Intent of the State Law Statutes.” (D.C. No. 99-22 Doc. 29; D.C. 02-79 Doc. 119.) Lout filed a memorandum and brief in support of his motion. (D.C. No. 99-22 Doc. 27; D.C. No. 02-79 Docs. 116, 117.) On July 2018, the district court issued a written order denying Lout’s motion. (D.C. No. 99-22 Doc. 29; D.C. No. 02-79 Doc. 119, Order attached as App. A.) The district court treated Lout’s motion as a request for postconviction relief and found that his claims were procedurally barred. (App. A at 2-3.) The district court also addressed the underlying merits of Lout’s claim challenging the method of his prosecutions. The district court rejected Lout’s argument that his prosecutions were invalid because the State charged him by information after leave of court instead of by indictment upon a finding of a grand jury. (App. A at 3-5.)

STANDARD OF REVIEW

A petitioner requesting postconviction relief has the burden to show, by a preponderance of the evidence, that the facts justify postconviction relief. *State v. Cobell*, 2004 MT 46, ¶ 12, 320 Mont. 122, 86 P.3d 20. In a postconviction proceeding, this Court reviews a district court’s findings of fact to determine if they are clearly erroneous and reviews its conclusions of law to determine if they are correct. *Sartain v. State*, 2012 MT 164, ¶ 9, 365 Mont. 483, 285 P.3d 407.

SUMMARY OF THE ARGUMENT

Although Lout labeled his district court document a “Motion,” no provision of law allows a district court to vacate a conviction or sentences years after the fact on a defendant’s motion. Since Lout’s claims are collaterally attacking his convictions and sentences, the only possible avenue of relief available for Lout to address his claims is postconviction relief. This Court should treat Lout’s “Motion” as a petition for postconviction relief.

Lout has waived appellate review of his claims that his sentence was excessive and that he was denied the right to challenge his sexual offender designation by failing to first raise those claims in the district court. Also, all of Lout’s claims are procedurally barred and time barred.

ARGUMENT

Lout's claims in his district court motion are requests for postconviction relief.

In the district court, in his motion, Lout claimed that his prosecution was invalid because the State charged him by information and the district court judge was biased because he was charged by information. On appeal, Lout claims that the district court judge had no “jurisdiction” to remain on his case because he was charged by information and the district court judge was biased. Lout additionally claims that the district court excessively sentenced him, and he was denied his due process right to challenge his Level III sexual offender designation. In this appeal, Lout seems to have dropped his claim that his prosecution was invalid because he was charged by information.

Lout's claims are attacking the validity of his convictions and sentences. Although Lout labeled his district court document a “Motion,” the district court correctly recognized that Lout was asking for postconviction relief. *State v. Baker (Baker II)*, 1999 MT 251, ¶ 14, 296 Mont. 253, 989 P.2d 335 (“No provision of law allows a court to vacate a conviction simply upon the motion of the defendant.”). Postconviction relief is the exclusive remedy for collaterally attacking the validity of a conviction and sentence. Mont. Code Ann. § 46-21-101; *Baker II*, ¶¶ 14-15 (motion for modification of sentence construed as a petition for postconviction relief); *State v. Nichols*, 1999 MT 212, ¶ 4, 295 Mont. 489,

986 P.2d 1093 (motion for amended sentence and judgement treated as postconviction petition) *overruled on other grounds by State v. Whitehorn*, 2002 MT 54, ¶¶ 2, 42, 309 Mont. 63, 50 P.3d 121; *State v. Howard*, 282 Mont. 522, 524-27, 938 P.2d 710, 711-13 (1997) (motion to vacate conviction construed as postconviction petition). This Court should treat Lout’s “Motion” as a petition for postconviction relief.

A. Lout waived appellate review of his claims that his sentence was excessive and that he was denied the right to challenge his sexual offender designation by failing to raise them in the district court.

In the district court, Lout claimed that his prosecution was invalid because the State charged him by information and the district court judge was biased because he was charged by information. (App. A; D.C. No, 99-22 Docs. 25, 27; D.C. No. 02-79 Docs. 115, 116, 117.) In the district court proceedings, Lout did not claim that the district court excessively sentenced him or that he was denied his due process right to challenge his Level III sexual offender designation. This Court should not consider Lout’s claims that the district court excessively sentenced him and he was denied the right to challenge his sexual offender designation because he failed to raise those claims in the district court. *State v. Baker (Baker I)*, 272 Mont. 273, 280, 901 P.2d 54, 58 (1995) (declining to consider postconviction claims that petitioner failed to raise in the district court); *see also Ellenburg v. Chase*, 2004 MT 66, ¶¶ 14, 16-17, 320 Mont. 315, 87 P.3d 473.

B. All of Lout's claims are procedurally barred.

The postconviction statutes do not allow a petitioner to present claims that were raised or which could reasonably have been raised on direct appeal. Montana Code Annotated § 46-21-105(2) provides in part:

When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter.

The purpose of this statutory requirement is to preserve postconviction relief as an opportunity to explore only those issues which are not properly considered on direct appeal. Postconviction relief is not intended as a substitute for direct appeal. *In re Manula*, 263 Mont. 166, 169, 866 P.2d 1127, 1129 (1993). Postconviction is also not a means to review issues that were not properly preserved for direct appeal. *State v. Gorder*, 243 Mont. 333, 334-36, 792 P.2d 370, 370-71 (1990).

Lout could reasonably have raised his claims that the district court judge was biased because he was charged by information, his sentence was excessive and he was denied the right to challenge his sexual offender designation on direct appeal, but he failed to do so. Lout never filed a direct appeal of his convictions and sentences. Accordingly, his claims are now procedurally barred by Mont. Code Ann. § 46-21-105(2).

Also, Lout pursued postconviction relief in 2003-2004 in the district court (D.C. No. 02-79 Doc. 55) and this Court affirmed the district court's order denying

Lout postconviction relief on April 19, 2005. *Lout*, ¶¶ 9, 20-21. In 2008, the district court also denied Lout's motion to withdraw his guilty plea and/or petition for postconviction relief. (D.C. No. 02-79 Docs. 96, 100.) Accordingly, Lout's current request for postconviction relief in this case is a successive postconviction petition and procedurally barred by Mont. Code Ann. § 46-21-105(1)(b).

C. All of Lout's claims are also time barred.

Montana Code Annotated § 46-21-102 sets forth the time requirements for filing a postconviction petition and it states in relevant part:

(1) Except as provided in subsection (2), a petition for the relief referred to in 46-21-101 may be filed at any time within 1 year of the date that the conviction becomes final. A conviction becomes final for purposes of this chapter when:

(a) the time for appeal to the Montana supreme court expires;

Here, Lout never filed a direct appeal in either of his district court convictions. Lout's convictions became final when the time for filing his appeals to the Montana Supreme Court expired. Mont. Code Ann. § 46-21-102(1)(a).

Montana Rule of Appellate Procedure 4(5)(b)(i) requires an appellant in a criminal case to file a notice of appeal within 60 days after entry of the judgment. In district court cause number 99-02, the district court entered its written judgment on November 9, 1999. (D.C. No. 99-22 Doc. 20.) Lout's time for filing his direct appeal expired on January 10, 2000. Lout had one year from January 10, 2000, or

until January 10, 2001, to file his postconviction petition in district court cause number 99-02. Mont. Code Ann. § 46-21-102(1).

In district court cause number 02-79, the district court entered its written judgment on April 14, 2003. (D.C. No. 02-79 Doc. 38.) Lout’s time for filing a direct appeal expired on June 13, 2003. Mont. R. App. P. 4(5)(b)(i). Lout had one year from June 13, 2003, or until June 14, 2004,¹ to file his postconviction petition in district court cause number 02-79. Mont. Code Ann. § 46-21-102(1).

Lout first raised his postconviction claims by filing his “motion” in the district court in June 2018. (D.C. No. 99-02 Docs. 24, 25, 26, 27; D.C. No. 02-79 Docs. 114, 115, 116, 117.) Lout’s postconviction claims are clearly time barred.

CONCLUSION

Lout has waived appellate review of his claims that his sentence was excessive and that he was denied the right to challenge his sexual offender designation by not first raising those claims in the district court. Also, all three of Lout’s postconviction claims are procedurally barred and time barred. Lout is not

¹June 13, 2004 fell on a Sunday. Accordingly, Lout had until June 14, 2004 to file his postconviction petition.

entitled to postconviction relief from his convictions and sentences. This Court should affirm the district court's decision denying Lout relief.

Respectfully submitted this 6th day of September, 2019.

TIMOTHY C. FOX
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Micheal S. Wellenstein
MICHEAL S. WELLENSTEIN
Assistant Attorney General

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 2,380 words, excluding certificate of service and certificate of compliance.

/s/ Micheal S. Wellenstein
MICHEAL S. WELLENSTEIN

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0522

JEFFERY J. LOUT,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPENDIX

Order Denying Defendant's Motion to Dismiss, Ravalli County

Cause Nos. DC-99-22 and DC-02-79, dated July 19, 2018 App. A

CERTIFICATE OF SERVICE

I, Micheal S. Wellenstein, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-06-2019:

Jeffery J. Lout (Appellant)
Inmate 45407
Montana State Prison
700 Conley Lake Rd.
Deer Lodge MT 59722
Service Method: Conventional

William E. Fulbright (Attorney)
205 Bedford St., Suite C
Hamilton MT 59840
Representing: State of Montana
Service Method: E-mail Delivery

Electronically signed by LaRay Jenks on behalf of Micheal S. Wellenstein
Dated: 09-06-2019