

DA 17-0720

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 216

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL ANTHONY WEBBER,

Defendant and Appellant.

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APPEAL FROM: District Court of the Eighth Judicial District,  
In and For the County of Cascade, Cause No. ADC 16-526  
Honorable Gregory G. Pinski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Kristina L. Neal, Assistant Appellate  
Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Roy Brown, Assistant  
Attorney General, Helena, Montana

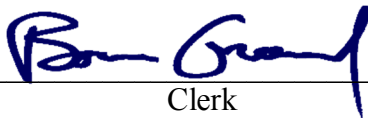
Joshua A. Racki, Cascade County Attorney, Ashley Wilkinson, Deputy  
County Attorney, Great Falls, Montana

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Submitted on Briefs: August 7, 2019

Decided: September 10, 2019

Filed:

  
Clerk

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Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Michael Anthony Webber (Webber) appeals following his sentence for felony sexual intercourse without consent issued by the Eighth Judicial District Court, Cascade County, on October 13, 2017. We reverse and remand for a new sentencing hearing.

¶2 We restate the issue on appeal as follows:

*Did the District Court abuse its discretion by not continuing the sentencing hearing?*

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶3 In 2015, Webber, who was then 30 years old, worked at a fast food restaurant in Great Falls with H.P., the 15-year-old half-sister of his ex-girlfriend. Webber and H.P. began dating and had sexual intercourse several times, beginning in November 2015, when H.P. was still 15. In August 2016, another ex-girlfriend of Webber's posted a picture of Webber and H.P. kissing on social media. H.P.'s mother took her to the Great Falls police station to report H.P.'s relationship with Webber. Great Falls police contacted Webber as part of their investigation. Webber waived his *Miranda*<sup>1</sup> rights and admitted to his relationship with H.P., to having sexual intercourse with her, and to knowing she was 15 when they first began their sexual relationship.

¶4 On September 28, 2016, Webber was charged with one count of felony sexual intercourse without consent. On December 1, 2016, Dr. Michael Scolatti (Dr. Scolatti), a licensed clinical psychologist and clinical member of the Association for the Treatment of Sexual Abusers (ATSA) and Montana Sex Offender Treatment Association (MSOTA),

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

conducted an interview of Webber as part of a psychosexual evaluation at the request of Webber's counsel. On February 27, 2017, Dr. Scolatti issued his psychosexual evaluation report, which, in relevant part, recommended that Webber receive a minimal term of incarceration to allow him to complete Phase I of sex offender treatment at the Montana State Prison (MSP). On March 6, 2017, Webber and the State entered into a non-binding plea agreement in which Webber would plead guilty to the felony sexual intercourse without consent charge and could argue for any legal sentence, and the State would recommend a ten-year suspended sentence. After Webber moved to vacate the upcoming jury trial and set a change of plea hearing, the District Court issued an order vacating trial and setting a change of plea hearing for April 12, 2017.

¶5 On April 5, 2017, Webber filed Dr. Scolatti's psychosexual evaluation report under seal with the District Court. The District Court held a change of plea hearing on April 12, 2017, and Webber pled guilty to one count of felony sexual intercourse without consent. At the change of plea hearing, the District Court ordered Webber to undergo an updated psychosexual evaluation. The District Court ordered Dr. Scolatti to update his February 2017 psychosexual evaluation, rather than have Webber see a different doctor to get a new psychosexual evaluation. On April 19, 2017, the District Court issued an order which set Webber's sentencing hearing for May 31, 2017. On May 25, 2017, Webber filed an unopposed motion to continue the sentencing hearing because neither the updated psychosexual evaluation nor the pre-sentence investigation (PSI) would be completed in time. The District Court then issued an order re-setting the sentencing hearing for June 28, 2017. On June 21, 2017, Webber filed another unopposed motion to continue the

sentencing hearing, because neither the updated psychosexual evaluation nor the PSI would be completed in time and to allow Webber to file a motion for an order forcing the State to pay for the cost of the updated psychosexual evaluation. The District Court thereafter issued orders which ordered the State to pay for the cost of the updated psychosexual evaluation and re-set the sentencing hearing for August 23, 2017. On August 14, 2017, Webber filed an unopposed motion to continue the sentencing hearing, because the attorneys and the presiding judge would be in trial on another matter on the date currently set for sentencing. The District Court then issued an order re-setting sentencing for September 20, 2017.

¶6 On September 6, 2017, Webber filed another unopposed motion to continue sentencing, because Dr. Scolatti would not be available on September 20, 2017, as he conducts group counseling sessions on Wednesdays and there was no qualified doctor available to cover for him on the 20th. Webber informed the District Court that Dr. Scolatti was a necessary witness for the defense at the hearing and requested that the District Court re-set the sentencing hearing for a Friday afternoon. The Cascade County Attorney's Office had no objection to Webber's motion. On September 11, 2017, the District Court issued an Order Denying Defendant's Motion to Continue Hearing, with the only apparent reason listed in the order being that it was "the Defendant's fourth motion to continue this hearing." The matter proceeded to sentencing on September 20, 2017. At the hearing, the District Court repeatedly disparaged Dr. Scolatti's evaluation, increased Webber's sexual offender tier designation from Dr. Scolatti's Tier I to a Tier II designation, and rejected the State's recommendation that Webber receive a ten-year suspended sentence. The District

Court sentenced Webber to 60 years at MSP, with ten years suspended. The District Court issued its written sentencing order on October 13, 2017.

¶7 Webber appeals.

### STANDARD OF REVIEW

¶8 This Court reviews a district court’s ruling on a motion for continuance for an abuse of discretion. *State v. Gleed*, 2014 MT 151, ¶ 10, 375 Mont. 286, 326 P.3d 1095 (citing *State v. Toulouse*, 2005 MT 166, ¶ 14, 327 Mont. 467, 115 P.3d 197). A district court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in a substantial injustice. *State v. Sebastian*, 2013 MT 347, ¶ 14, 372 Mont. 522, 313 P.3d 198.

### DISCUSSION

¶9 *Did the District Court abuse its discretion by not continuing the sentencing hearing?*

¶10 “[T]he rights of the defendant must be protected and due process must be observed in sentencing hearings.” *State v. Webb*, 2005 MT 5, ¶ 18, 325 Mont. 317, 106 P.3d 521 (citations omitted). Under the due process guarantee, a defendant must be given an opportunity to explain, argue, and rebut “any information that may lead to a deprivation of life, liberty, or property.” *Webb*, ¶ 19 (citing *State v. McLeod*, 2002 MT 348, ¶ 18, 313 Mont. 358, 61 P.3d 126).

¶11 In this case, the District Court was presented with an unopposed motion to continue the sentencing hearing to accommodate the schedule of a key—and only—witness for the defense. The motion contained an alternative day which would accommodate that

witness's schedule and would possibly only amount to a delay of two days. The District Court denied this motion in a written order with no analysis beyond a notation that the motion was the defendant's fourth motion to continue the sentencing hearing.

¶12 Early in the proceedings of this matter, Webber's counsel arranged for Dr. Scolatti to conduct a psychosexual evaluation of Webber. Dr. Scolatti completed his original psychosexual evaluation of Webber on February 27, 2017. Shortly after receiving the psychosexual evaluation results, Webber entered into the plea agreement with the State. At the April 12, 2017 change of plea hearing, the District Court noted that under MSOTA guidelines a pre-plea psychosexual evaluation was "not valid." The District Court then stated that it "would be comfortable if Dr. Scolatti updated his evaluation" now that Webber had pled guilty, rather than ordering a new psychosexual evaluation by a different provider. Neither Webber nor the State objected to the District Court's proposed course of action.

¶13 After Webber's change of plea hearing, his sentencing hearing was continued three times based on unopposed motions made by counsel for Webber. The first two continuances were granted because neither Dr. Scolatti's updated psychosexual evaluation nor the PSI would be completed in time. The third continuance was granted because both counsel and the District Court had an unrelated trial set for the same time as Webber's sentencing and would be unavailable. Webber's counsel thereafter moved for a fourth continuance based on the unavailability of Dr. Scolatti. This motion was unopposed and contained an alternative day where Dr. Scolatti could be available to testify. The motion noted that the sentencing hearing was expected to last "between 2 and 3 hours" and that,

because of the gravity of the offense, Webber “must have the evaluating doctor present for the hearing.”

¶14 The District Court denied Webber’s unopposed motion to continue the hearing to allow Dr. Scolatti to testify, and the matter proceeded to sentencing on September 20, 2017. At the sentencing hearing, the District Court heard testimony from H.P. and her mother before the State made its recommendation in accord with the plea agreement—a sentence of ten years, all suspended, and a sex offender tier designation of Tier I. The District Court then expressed its incredulity at the recommended sentence and noted that “Dr. Scolatti, who was hand-picked to do the evaluation, on page 27 of his evaluation, says that this defendant should complete Phase 1 of the Montana State Prison sex offender treatment program.” Dr. Scolatti in fact did recommend that Webber complete Phase I of sex offender treatment at MSP in his psychosexual evaluation—his February 27, 2017, original evaluation which the District Court determined, at the change of plea hearing, was “not valid.” A convicted defendant has a due process guarantee against a sentence predicated on misinformation. *State v. Hocevar*, 2000 MT 157, ¶ 100, 300 Mont. 167, 7 P.3d 329 (citing *Bauer v. State*, 1999 MT 185, ¶ 21, 295 Mont. 306, 983 P.2d 955). Here, the District Court clearly believed Dr. Scolatti’s original recommendation—from a psychosexual evaluation the District Court itself had already determined was “not valid”—was somehow more valid than Dr. Scolatti’s updated psychosexual evaluation which found that the plea agreement should be followed as Webber could be treated in the community.

¶15 After the District Court made its comment about how Dr. Scolatti was “hand-picked” by the defense, he asked Webber’s counsel what basis there was “to get

around the mandatory minimum that's imposed by the legislature in this case?" Webber's counsel responded, "Your Honor, I really wanted to have Dr. Scolatti here for the hearing." The District Court then stated that it had already reset the hearing "on multiple occasions to try to accommodate Dr. Scolatti . . . and I understand that you wanted to have him here, but a Wednesday will never work for him, so I don't know what else I can do." The record in this case shows that, of the three previous continuances, none of them had anything to do with Dr. Scolatti's physical availability to testify. The first two continuances were granted because neither Dr. Scolatti's updated psychosexual evaluation—ordered by the District Court—nor the PSI were yet completed. After the second continuance, the District Court ordered the State to pay the cost of the updated psychosexual evaluation. The District Court granted the third continuance because counsel for the parties and the District Court had a trial scheduled during the time set for Webber's sentencing. Only the fourth motion to continue made any mention of Dr. Scolatti's availability, and it came with an alternative day that would work for Dr. Scolatti—Friday. The District Court, by stating that it didn't know what else it could do because Dr. Scolatti would not be available on a Wednesday, arbitrarily ignored the fact that Webber had already provided a different day when Dr. Scolatti could testify. Setting that aside, the District Court simply refused to consider that the court's usual workweek contains four other days besides Wednesday—Monday, Tuesday, Thursday, and Friday. It was already known to the parties and the District Court that Dr. Scolatti would be available to testify on a Friday.

¶16 After the District Court explained why it refused to continue the sentencing hearing, Webber's counsel attempted to summarize the findings of Dr. Scolatti as presented in the



psychosexual evaluation, noting that Dr. Scolatti designated Webber as a Tier I sex offender. Webber's counsel further noted that all the parties agreed with the proposed sentence contained in the plea agreement. After Webber's counsel finished his summary, H.P.'s mother asked to be heard by the District Court again. She stated that had she known there was a mandatory minimum of four years in prison, she would have asked for that as a sentence. She then noted that H.P. was leaving for college in six months and requested that Webber serve at least six months in prison, or all four years if the mandatory minimum applied. Webber then made a short statement apologizing for his actions and explaining a statement he made while completing the PSI before the District Court proceeded to announcing its sentence.

¶17 The District Court then made a statement which referred to a portion of Dr. Scolatti's evaluation as "an obnoxious[,] offensive, absurd, repulsive statement" made by "the Defendant's hand-picked evaluator[.]" The District Court further stated that the "Court will not stand idly by while the Defendant's hand-picked evaluator trivializes and rationalizes the sexual assaults and predatory conduct that occurred." The District Court again incorrectly stated that the psychosexual evaluation stated that Webber "should complete Phase I of the sex offender treatment at the Montana State Prison before placement in the community." The District Court then held that its findings, "which are inappropriately discounted by the evaluator, coupled with numerous inconsistencies in the psychosexual evaluation" along with Dr. Scolatti's "failure to consider the totality of the Defendant's predatory grooming behavior justify the Court designating Mr. Webber as a Tier 2 offender, contrary to the evaluator's Tier 1 recommendation." The District Court

then stated that, “based on Dr. Scolatti’s own recommendation that [Webber] complete Phase One of the sex offender treatment program at the Montana State Prison, community placement is not an option at the outset of the sentence.” The District Court then sentenced Webber to 60 years at MSP, with ten years suspended to account for his guilty plea.

¶18 Dr. Scolatti was not present to address any of the District Court’s litany of disparaging accusations regarding Dr. Scolatti’s work. Dr. Scolatti was not present to address the District Court’s clear misconception of Dr. Scolatti’s recommendation with regard to treatment options—repeatedly stating that Dr. Scolatti found that Webber was required to complete Phase I of sex offender treatment at MSP, even though that recommendation was made in the original psychosexual evaluation which the District Court had already determined was “not valid.” Dr. Scolatti was not present to refute the District Court’s repeated characterization of Dr. Scolatti as “hand-picked” by the defense, even though it was the District Court itself which ordered Dr. Scolatti to complete the updated psychosexual evaluation for sentencing. The District Court could have simply ordered another provider to complete a psychosexual evaluation. The District Court ultimately appeared to ignore the updated psychosexual evaluation anyway, choosing instead to repeatedly refer to recommendations made in the original psychosexual evaluation, which, again, the District Court had determined were “not valid.” Webber’s due process rights were clearly prejudiced by the District Court’s actions, as he had no opportunity to rebut the District Court’s repeated attacks on Dr. Scolatti’s work and character due to the District Court’s denial of his motion to continue. *Webb*, ¶ 19.

¶19 In both the original and updated psychosexual evaluations, Dr. Scolatti designated Webber a Tier I sex offender. The District Court ignored those recommendations, repeatedly disparaged both the character and professional skill of Dr. Scolatti, and designated Webber a Tier II sex offender. Webber was denied opportunity to present Dr. Scolatti as a witness to respond to the District Court’s concerns, and Webber was prejudiced by the District Court creating its own misinformation and then sentencing Webber in accordance with that misinformation. *Hocevar*, ¶ 100.

¶20 When a continuance is requested and is reasonable under the circumstances, it is an abuse of discretion for a district court to refuse to grant the continuance. *State v. Sotelo*, 209 Mont. 86, 92, 679 P.2d 779, 782 (1984). In this case, Webber’s request for a continuance to accommodate Dr. Scolatti was reasonable—Dr. Scolatti was a necessary witness to explain why Webber may qualify for a deviation from the mandatory minimum sentence involved; Dr. Scolatti was necessary to rebut the accusations the District Court made against Dr. Scolatti’s work; the request was made two weeks before the scheduled hearing; the State did not object to the continuance; and Webber specifically suggested a day which would work for Dr. Scolatti (and presumably Webber and the State as well, because the motion was unopposed). From the record before us, the District Court abused its discretion by acting arbitrarily in not granting Webber’s unopposed motion to continue the sentencing hearing so that Dr. Scolatti would be available to testify. *Gleed*, ¶ 10.

¶21 Because Webber pled guilty to the charged offense pursuant to a plea agreement, he is not entitled to a new trial—he is only entitled to a new sentencing hearing. “In criminal cases, there is no right of substitution when the cause is remanded for sentencing.”

Section 3-1-804(12), MCA. Pursuant to statute, Webber is not entitled to a substitution of the presiding district court judge on remand. Because of the unusual circumstances of this case, however, we deem it appropriate to remand this matter for resentencing before a new district court judge. *See generally Bauer*, ¶ 32.

### **CONCLUSION**

¶22 The District Court abused its discretion by not continuing the sentencing hearing.

¶23 Reversed and remanded for a new sentencing hearing.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH  
/S/ JAMES JEREMIAH SHEA  
/S/ LAURIE McKINNON  
/S/ BETH BAKER  
/S/ DIRK M. SANDEFUR  
/S/ JIM RICE