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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 19-0028

DA 19-0028

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 217N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LIONEL SCOTT ELLISON,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 14-0614
Honorable Blair Jones, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Lionel Scott Ellison, Self-represented, Deer Lodge, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Julie Elaine Mees, Deputy County Attorney, Billings, Montana

Submitted on Briefs: July 24, 2019

Decided: September 10, 2019

Filed:

Clerk

Justice Jim Rice 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 Appellant Lionel Scott Ellison (Ellison) appeals the judgment entered by the Thirteenth Judicial District Court, Yellowstone County, following this Court's remand for resentencing.

¶3 In September 2015, Ellison was found guilty by a jury of two felony counts of tampering with or fabricating physical evidence and one felony count of impersonating a public servant. Ellison appealed, and this Court vacated Ellison's conviction of one count of tampering with or fabricating physical evidence, while affirming Ellison's convictions of the other counts, and remanded the case to the Thirteenth Judicial District Court, Yellowstone County, for re-sentencing. *State v. Ellison*, 2018 MT 252, ¶ 29, 393 Mont. 90, 428 P.3d 826.

¶4 In December 2018, upon remand, the District Court sentenced Ellison to ten years imprisonment for the tampering conviction and five years imprisonment for the impersonation conviction, with no time suspended. Judgment was entered on

December 14, 2018. Ellison timely appealed and raises multiple issues in challenge to his new sentence, but also to his underlying convictions, which we address in turn.[1]

¶5 This Court reviews criminal sentences that include at least one year of incarceration for legality only, meaning "we will not review a sentence for mere inequity or disparity." *State v. Webb*, 2005 MT 5, ¶ 8, 325 Mont. 317, 106 P.3d 521. Rather, we determine if the sentence is authorized by statute. *State v. Ariegwe*, 2007 MT 204, ¶ 174, 338 Mont. 442, 167 P.3d 815. A district court's application of the sentencing statutes is a question of law that we review de novo. *Ariegwe*, ¶ 175. We may review a criminal sentence that is alleged to be facially illegal or in excess of statutory mandates even if those issues were not preserved for appeal. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979); *State v. Kotwicki*, 2007 MT 17, ¶ 8, 335 Mont. 334, 151 P.3d 892.

Judicial bias

¶6 Ellison challenges his sentence by arguing that "Judge Blair Jones was bias[ed] and prejudice[d]" against him, asserting that he and Judge Jones "had a previous bad business relationship" involving two houses that Ellison and his father constructed, which he claims were financed, at least in part, by Judge Jones. In open court, Judge Jones denied having a prior business relationship with Ellison.

[1] Ellison was represented by counsel in his trial and first appeal, and by new public counsel for his re-sentencing hearing on remand. However, he has represented himself on appeal herein. We previously entered an order in this matter approving Ellison's waiver of his right to counsel and addressing his right to represent himself on appeal.

¶7 Due process "requires recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Reichert v. State*, 2012 MT 111, ¶ 28, 365 Mont. 92, 278 P.3d 455 (quoting *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872, 129 S. Ct. 2252, 2257 (2009)). When faced with a claim of judicial bias, our inquiry is an objective one—that is, we must determine "not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral or [whether] there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 869, 129 S. Ct. at 2255. "There is 'a presumption of honesty and integrity in those serving as adjudicators.'" *Reichert*, ¶ 39 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1975)). As such, "'charges of disqualification should not be made lightly.'" *Reichert*, ¶ 39 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826-27, 106 S. Ct. 1580, 1588 (1986)). "Absent evidence to the contrary, the 'presumption of honesty and integrity in those serving as adjudicators' stands." *Reichert*, ¶ 50 (quoting *Withrow*, 421 U.S. at 47, 95 S. Ct. at 1464) (holding that no judicial bias existed where the appellant failed to provide "actual evidence of bias, prejudice, or unethical conduct" on the part of the accused adjudicators); *see also Ortiz v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998) ("[W]e abide by the general presumption that judges are unbiased and honest."); *cf. In re George Tr.*, 253 Mont. 341, 346, 834 P.2d 1378, 1382 (1992) ("any relief provided by the court must be based on evidence presented before the court.").

¶8 Ellison's bias claims are based on conjecture, and he has not provided evidence substantiating bias on the part of the District Court. We cannot conclude Ellison has carried

his burden of demonstrating "actual evidence of bias, prejudice, or unethical conduct" on the part of Judge Jones. *Reichert*, ¶ 50. Although Ellison also complains the District Court erred by not allowing him to submit documents and exhibits demonstrating Judge Jones' bias, the asserted evidence was based on Ellison's postconviction relief (PCR) petition and accompanying exhibits, which are not within the scope of his current appeal. Ellison initiated a PCR proceeding in Yellowstone County on October 25, 2018, *Ellison v. State*, Yellowstone County Dist. Ct. No. DV-56-2018-0001629-PR, which is currently pending. That matter is a separate proceeding, and is not before us in this appeal.

Evidentiary claims

¶9 Ellison argues the District Court abused its discretion by preventing him from presenting evidence related to his character, history, and mental health at his resentencing hearing. The Rules of Evidence do not apply at a sentencing hearing. Mont. R. Evid. 101(c)(3). Ellison sought to introduce a 2009 report from a Park County criminal proceeding that allegedly stated Ellison had not committed sexual intercourse without consent, for the asserted purpose of demonstrating Ellison was "framed" in that matter, which Ellison wanted to use to support his innocence in this proceeding. However, the District Court clearly did not abuse its discretion in the proceeding by excluding this evidence as irrelevant.

¶10 During the hearing, Ellison referenced mental health evidence, but did not request introduction of such evidence. Accordingly, Ellison cannot demonstrate the District Court erred in its evidentiary rulings.

Prosecutorial misconduct

¶11 Ellison offers several arguments alleging wide-scale misconduct by the State during the guilt phase of his trial. However, these issues constitute a collateral attack on his convictions and are beyond the scope of this proceeding. In *Ellison*, ¶¶ 26, 29, we stated, "[W]e reverse Ellison's conviction for the second count of tampering. The sentence imposed by the District Court is vacated and the court is ordered to resentence the Defendant after notice and hearing . . . Ellison's conviction for the second count of tampering with or fabricating evidence is reversed. His convictions on all other charges are affirmed. We remand for further proceedings consistent with this Opinion." Thus, the remand was limited in scope to Ellison's re-sentencing. Ellison's convictions were affirmed and were not part of the remand. Ellison has initiated a PCR action in Yellowstone County, which is the proper venue for bringing a collateral attack upon a conviction. *See* §§ 46-21-101 and -103, MCA. Ellison's PCR claims cannot be raised in this appeal. *Cf. State v. Clark*, 2008 MT 391, ¶ 35, 347 Mont. 113, 197 P.3d 977 (discussing defendant's challenges as being "outside the scope of remand.").

Ineffective assistance of counsel

¶12 Ellison alleges he received ineffective assistance of counsel (IAC), both during the guilt phase of his trial and during his first appeal. Ellison raised an IAC claim in his direct appeal, upon which he was granted relief. *Ellison*, ¶ 26. However, further IAC claims are beyond the scope of the remand for resentencing, and cannot be pursued in this appeal.

Ellison has commenced a PCR proceeding that may be the appropriate vehicle to raise such claims, subject to properly establishing them in that forum.

¶13 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. Appellant has not demonstrated that the District Court committed error upon remand for resentencing.

¶14 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JAMES JEREMIAH SHEA