

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0565

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES JESSE JOHNSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Robert B. Allison, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion when it revoked Johnson's sentence?
2. Did the district violate the due process rights afforded to Johnson in a revocation proceeding?

STATEMENT OF THE CASE

Appellant James Jesse Johnson (Johnson) was sentenced in 2008 for the offense of Sexual Assault, a felony. A condition of his suspended sentence required him to continue with sex offender treatment for the entirety of his sentence if recommended by a treatment provider and probation officer. In 2018, following the filing of a Report of Violation from his probation officer, the State sought to revoke Johnson's sentence based on an allegation he failed to continue sex offender counseling and was terminated from a second program. A Petition to Revoke was filed, and an adjudication hearing was held on May 24, 2018. Probation Officer Sarah Reil (Reil) was the only witness to testify. At the conclusion of the hearing, Johnson argued that the condition he was alleged to have violated was contingent and only in effect if treatment was recommended by a treatment provider and his probation officer. Johnson argued no evidence was before the district court to this effect, thus, the condition was not in effect and,

therefore, could not have been violated. The district court found Johnson had violated the condition and revoked his sentence.

STATEMENT OF THE FACTS

On November 13, 2008, Johnson was sentenced for the offense of Sexual Assault, a felony, by the Honorable Stewart Stadler. (D.C. Doc. 29.) Johnson was sentenced to the Montana State Prison for a term of 20 years with 12 years suspended. Included in Judge Stadler's Judgment and Sentence were conditions with which Johnson was ordered to comply when on probation. Specifically at issue on appeal is condition 23, which states "The Defendant must continue with an approved sexual offender counseling (aftercare or otherwise) for the entirety of the supervision period, at his own cost, if deemed necessary by his supervising officer and sex offender therapist." (D.C. Doc. 29 at 8.) Johnson's prison term expired, and he was discharged to the suspended portion of his sentence on September 24, 2015. (D.C. Doc. 31.)

On February 27, 2018, Reil filed a Report of Violation with the district court, county attorney's office and defense counsel, alleging Johnson had violated condition 23. (D.C. Doc. 31; attached as App. 1). Based on this Report of Violation, a Petition for Revocation of Suspended Sentence was filed by the Flathead County Attorney's Office on March 2, 2018. (D.C. Doc. 32.) "Having reviewed Sarah

Reil's February 23, 2018, Report of Violation, and finding there is probable cause to believe that the Defendant has violated the conditions of his suspended sentence as alleged," the Honorable Robert Allison issued a warrant for Johnson's arrest. (D.C. Doc. 33.) Johnson and counsel appeared on the Petition to Revoke on April 23, 2018 and entered a general denial to the allegation. (D.C. Doc. 39.)

Reil's Report of Violation details the alleged violation of condition 23 and lists the supporting evidence as, "On February 15, 2018, [Johnson] was terminated from Sexual Offender Treatment at South Central Treatment Associates." (D.C. Doc. 31.) The Report of Violation also details the Case Management Responses Utilized. (D.C. Doc 31.) In Johnson's case, the response details are as follows:

On March 14, 2016, [Johnson] was terminated from Sexual Offender Treatment with Lisa Hjelmstad, MSW, LCSW, LMFT, MAC, SAP with Wellness Possibilities. She terminated him for the following reasons; he has no insight or remorse for his actions, cannot recognize the impact of his behavior on others and could not take his group's feedback without defensiveness. [Hjelmstad] recommended he complete SOP I and II at the Montana State Prison again to complete the same tasks on his behavior. [Johnson] was given an opportunity by Probation and Parole Officer Michael Price to find another sexual offender treatment provider in lieu of a revocation.

Id. at 2.

Shortly after his termination in March 2016, Johnson enrolled with South Central Treatment Associates for outpatient sex offender treatment. This is the program from which he was terminated in February 2018, resulting in the Report of Violation and subsequent Petition to Revoke at issue in this appeal. (D.C. Doc.

31.) Attached to the Report of Violation submitted by Reil is a letter from Howard Lewis (Lewis) of South Central Treatment Associates detailing the reasons for the termination, indicating concerns for an elevated risk to reoffend and recommendations. (D.C. Doc. 31.)

A hearing on the Petition was held on May 24, 2018. (D.C. Doc. 42.) Johnson and counsel were present for the hearing. (D.C. Doc. 42.) The State called Reil to testify and she was subject to cross examination. (D.C. Doc. 42.) No other witnesses for either side were called to testify. Reil testified that she had been Johnson's supervising officer for approximately a year and a half. (5/24/18 Tr. at 6, attached to Appellant's Br. as App. A.) Reil testified Johnson was required to enroll in sex offender treatment and was not in compliance with that condition of his probation. (5/24/18 Tr. at 7.) Reil's testimony included Johnson's most recent termination from sex offender treatment, that he had an outstanding balance at the time he was terminated from treatment, some reasons he was terminated and that he had been previously terminated from Lisa Hjelmstad's (Hjelmstad) program. (5/24/18 Tr. at 10-11.) Reil testified that Lewis' letter regarding Johnson's termination from South Central Treatment Associates contained Johnson's departing words to his therapist as, "I'm tired of your shit . . . I'll go back to prison." (5/24/18 Tr. at 11.) Johnson questioned Reil regarding Hjelmstad's recommendations for treatment and it was established Hjelmstad had

recommended Johnson retake Sex Offender Programming (SOP) I and SOP II.

(5/24/18 Tr. at 13-15.) It was further established that Reil was not the supervising officer at the time Hjelmstad made her recommendations or part of Johnson's treatment decision at that time. (5/24/18 Tr. at 15.)

At the close of the hearing, Johnson's counsel argued no evidence was before the court that Johnson's sex offender therapist deemed it necessary that he continue with treatment. (5/24/18 Tr. at 19.) Johnson argued further that because no finding had been made, condition 23 had not vested, therefore, he was not required to comply and, therefore, his sentence could not be revoked. (5/24/18 Tr. at 21.)

At the conclusion of the revocation hearing, the district court found Johnson had violated his sentence and discussed reasons for his findings, stating:

[T]he Judge further ordered that he enter into and successfully complete a program, and that he remain in the aftercare component for the entirety of his supervision, and it does say "if deemed necessary." Well, he was in it—he had been terminated from an earlier treatment, there was testimony to that, he was in treatment, and then was in a second aftercare treatment, which was then terminated in February of this year for a number of reasons, including nonpayment.

So the Court does find that it was a requirement of his probation. I don't think he was engaging in aftercare treatment of his own volition, I think he was required to do so by his probation officer, and that's why he was in treatment. That was terminated, that is a critical components of his probation, and as a result Court does find that he violated the terms of the Judgment and Sentence by failing to—or being terminated from sex offender treatment in Billings, Montana, as a result his suspended sentence is hereby revoked.

(5/24/18 Tr. at 22.)

At the disposition hearing held on June 14, 2018, after Johnson renewed his argument that no evidence was in the record that the condition was in effect, the district court again addressed his argument, stating:

I didn't find it persuasive in view of the fact that Mr. Johnson had been in treatment with a prior—I believe he was in treatment with a prior sex offender treatment provider and then somehow blew out—the testimony was that he blew out of that treatment and then he was placed in another one but it was on sort of a zero-tolerance basis, so I have not a doubt whatsoever that the probation officers were requiring him to do that, otherwise those conditions would not have existed and he would have been able to come and go and do or not do sex offender treatment as he saw fit.

(6/14/18 Tr. at 9, attached as App. 2.)

Judge Allison sentenced Johnson to 12 years in the Montana State Prison with 6 years suspended with the recommendation Johnson be screened for prerelease and appropriate treatment as soon as possible. (6/14/18 Tr. at 9-10.) Johnson was given credit for street time in the amount of 875 days and actual time of 77 days. (6/14/18 Tr. at 10.) All previously imposed conditions of his suspended sentence were reimposed with the recommendation the conditions be part of any community release placement. (6/14/18 Tr. at 10.)

On August 9, 2018, the Order of Revocation, Judgement, & Sentence was filed by the district court stating:

On March 2, 2018, the State filed a petition for revocation of [Johnson's] suspended sentence, alleging [Johnson] violated the conditions of his suspended sentence in a number of respects as set

forth in the Report of Violation prepared by probation officer, Sarah Reil.

On May 24, 2018, [Johnson], accompanied by counsel, Maury Solomon, appeared and following testimony the Court found [Johnson] in violation of certain conditions of the suspended sentence. Accordingly, the Court revoked [Johnson's] suspended sentence. A dispositional hearing was later held on June 14, 2018. In consideration of the nature of [Johnson's] violations, the testimony provided to the Court, the recommendations of the parties and the Report of Violation prepared by Sarah Reil of the Adult Probation and Parole office,

IT IS THE JUDGEMENT OF THE COURT

(D.C. Doc. 46.)

SUMMARY OF THE ARGUMENT

Ample evidence exists in the court record to support, by the preponderance of the evidence, that Johnson violated a condition of his probation. The record reveals in 2016 Johnson was terminated from sex offender treatment, and it was the recommendation of the treatment provider (Hjelmstad) that he retake SOP I and SOP II. At that time, Johnson's probation officer, Michael Price (Price), allowed him the opportunity to attempt treatment again in the community. These facts show that per condition 23 of Johnson's suspended sentence, continued sexual offender counseling was deemed necessary by both his sex offender therapist and his supervising officer. In February 2018, Johnson was no longer taking advantage of the opportunity to be treated in the community and was

terminated from his second sex offender treatment program as testified to by his current probation officer. The district court did not abuse its discretion in revoking Johnson's suspended sentence based on this violation.

Further, contrary to Johnson's claim, his due process rights were not violated and the district court adequately afforded him the due process rights required for a revocation proceeding, including adequately setting forth its reasons for revoking Johnson's suspended sentence.

ARGUMENT

I. Standard of review

The standard for revocation of a suspended or deferred sentence is whether the trial judge is reasonably satisfied that the conduct of the probationer has not been what the probationer agreed it would be if the probationer were given liberty. This Court reviews a district court's decision to revoke a deferred or suspended sentence to determine whether the court's decision was supported by a preponderance of the evidence in favor of the State and, if it was, whether the court abused its discretion. *State v. Goff*, 2011 MT 6, ¶ 13, 359 Mont. 107, 247 P.3d 715. Whether a probationer's right to due process has been violated presents questions of law, and this Court's review is plenary. *State v. Finley*, 2003 MT 239, ¶ 10, 317 Mont. 268, 77 P.3d 193.

II. Evidence in record of violation

Even a single violation of the terms and conditions of a suspended sentence is sufficient to support a district court's revocation of that sentence. *State v. Rudolph*, 2005 MT 41, ¶ 13, 326 Mont. 132, 107 P.3d 496.

Johnson argues no evidence was before the district court to show that a treatment provider and a probation officer recommended treatment continue and, therefore, he cannot have violated condition 23 of his suspended sentence. This argument ignores the testimony of Reil that Johnson was ordered to complete sex offender treatment, and that the Report of Violation contained in the court record was relied upon by the district court in issuing the warrant finding probable cause a violation had occurred, was testified to by Reil, and is noted in the Order of Revocation, Judgment & Sentence. (5/24/18 Tr. at 7; D.C. Docs. 31, 33, 46.) The Report of Violation contains evidence that both Hjelmstad, the treatment provider and Price, his prior probation officer, deemed continued treatment necessary. That Reil was not supervising Johnson at the time, has no bearing on whether Johnson was required to continue treatment.

Even Johnson's own words as he left treatment as testified to by Reil and contained in the attached letter to the Report of Violation of, "I'm tired of your shit . . . I'll go back to prison," is persuasive evidence that Johnson was required to go to treatment and knew the consequences of noncompliance.

Lastly, condition 23 required him to pay for sex offender treatment and testimony included that he had an outstanding balance at the time of termination of \$2,300 as noted by the district court in its findings at the dispositional hearing. This balance alone is sufficient to revoke Johnson's sentence.

Taken together, there is sufficient evidence in the record for the judge to find by the preponderance of the evidence, that Johnson violated conditions of his sentence.

III. Due process requirements of revocation hearing met

A probationer's right to due process in a revocation proceeding is different from the right to due process in a criminal proceeding. We have explained:

The revocation hearing is not a criminal trial but a summary hearing to establish a violation of the conditions of the prisoner's probation. The probationer already stands convicted of a crime no matter what the grounds for the revocation may be[.]

As a result, the revocation hearing is not subject to the Montana Rules of Evidence, although it must be fundamentally fair.

State v. Sebastian, 2013 MT 347, ¶ 19, 372 Mont. 522, 313 P.3d 198 (citing *State v. Triplett*, 2008 MT 260, ¶ 16, 346 Mont. 383, 195 P.3d 819).

The United States Supreme Court elaborated the following minimum due process requirements for a probation revocation hearing: (1) written notice of the claimed probation violation; (2) disclosure of the evidence against the defendant; (3) the opportunity to be heard in person and present testimonial and documentary evidence;

(4) the right to confront and cross-examine adverse witnesses; (5) a neutral arbiter; and (6) a written statement of the evidence relied upon by the arbiter and the reason for revoking probation.

Finley, ¶ 31 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (2003)). In Montana, due process protections for revocations are codified in Mont. Code Ann. § 46-18-203.

[S]pecific findings with reference to the evidence supporting charges are not constitutionally required where a defendant raises no objection to the sufficiency or accuracy of the evidence, and the district court finds that the government sufficiently proved the charged conduct. Where the parties have any specific disagreements, however, the record must clearly reflect that the court considered the position of each of the parties and must identify the basis on which the court resolved any disputes at the time of the hearing.

United States v. Sesma-Hernandez, 253 F.3d 403, 409 (9th Cir. 2001).

“In the same manner as the federal courts, this Court has held that a sentencing court's memorandum combined with the transcript of the hearing may provide the necessary written statement explaining the evidence relied upon and the reason for the decision to revoke the probation.” *State v. Baird*, 2006 MT 266, ¶ 30, 334 Mont. 185, 145 P.3d 995 (citing *State v. Richardson*, 2000 MT 72, ¶ 15, 299 Mont. 102, 997 P.2d 786). This Court explained in *Baird* that “[d]ue process is achieved when the oral and written record support accurate factfinding and appellate review.” (*Id.*) This Court has concluded “that the due process requirements of a written statement by the district court may be satisfied by a record that provides adequate factfinding and an adequate basis for appellate review.” (*Id.*)

Johnson argues the district court violated his right to due process based on insufficiency of evidence previously discussed above, and because he asserts the oral and written findings of the district court are unsupported and based on presumptions and inferences.

All the safeguards required by *Morrissey*, *Gagnon*, and statute occurred in Johnson's case. Written notice of an alleged violation was provided in the Petition to Revoke; the Report of Violation filed with the district court and provided to both parties contained the evidence that would be used against him supporting the violation; a hearing was held where he had the opportunity to be heard and present testimony and evidence, though he chose not to present either; he had the opportunity to confront the State's witness; the hearing was in front of a neutral judge; and that judge issued a written statement containing reasons for revoking Johnson's sentence.

A review of the hearing transcripts and written order taken together reveal the district court adequately set forth its reasons for revoking Johnson's sentence. During both the evidentiary hearing and the sentencing hearing, the district court addressed Johnson's "contingent/conditional" condition argument and explained why the court did not find it persuasive.

CONCLUSION

The district court did not abuse its discretion when it determined the State had shown, by the preponderance of the evidence, that Johnson had violated his conditions of release. Sufficient evidence was before the district court that showed Johnson was not in compliance with conditions of his suspended sentence, specifically condition 23. This Court should affirm the district court's revocation of Johnson's sentence.

Respectfully submitted this 6th day of September, 2019.

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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 3,029 words, excluding certificate of service and certificate of compliance.

/s/ Anna Saverud
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STATE OF MONTANA,

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APPENDIX

Report of Violation, Flathead County Cause No. DC 07-458B
dated February 23, 2018 App. 1

Transcript, Flathead County Cause No. DC-07-458B
dated June 14, 2018 App. 2

CERTIFICATE OF SERVICE

I, Anna Saverud, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-12-2019:

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