

DA 18-0093

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 241N

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

NOAH JOSEPH CHALUPA,

Defendant and Appellant.

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APPEAL FROM: District Court of the Thirteenth Judicial District,  
In and For the County of Yellowstone, Cause Nos. DC 15-169  
and DC 15-858  
Honorable Rod Souza, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Gregory Hood, Assistant Appellate  
Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Mardell Ployhar, Assistant  
Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Ingrid Rosenquist, Deputy  
County Attorney, Billings, Montana

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Submitted on Briefs: August 7, 2019

Decided: October 8, 2019

Filed:

  
Clerk

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Chief Justice Mike McGrath 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 Noah Joseph Chalupa appeals the revocation of his suspended sentence and imposition of a per count technology user surcharge issued by the Thirteenth Judicial District Court, Yellowstone County. We affirm in part and reverse in part.

¶3 On July 2, 2015, Chalupa pleaded guilty to two counts of Intimidation (DC 15-169), a felony, after Chalupa threatened a principal and assistant principal outside of a school. While that case was pending, Chalupa broke windows at a Billings business and pleaded guilty to Felony Criminal Mischief (DC 15-858).

¶4 On December 11, 2015, Chalupa was sentenced at the same hearing for two counts of Intimidation, a felony, and one count of Felony Criminal Mischief. Before the hearing, a probation officer prepared a presentence investigation report ("PSI"), listing 34 conditions to be "recommended for any suspended time imposed by the court." Chalupa was sentenced to five years for the Intimidation charges, with three years suspended on each count. Chalupa also received a three-year deferred sentence for the Felony Criminal Mischief charge. The court applied the 34 conditions recommended in the PSI, as well as an additional condition prohibiting Chalupa from any contact with public schools, to

Chalupa's sentence. Both written judgments required the 35 conditions to apply "for any period of community supervision." All sentences were to run concurrently. In addition, the sentences included a per count Information Technology fee of \$10.00.

¶5 On July 7, 2017, the State filed a petition to revoke Chalupa's sentences. A violation report was attached to the petition, alleging Chalupa violated condition nine, requiring Chalupa to "comply with all laws and conduct himself as a good citizen." The report alleged Chalupa committed 104 major infractions while serving the active portion of his sentences at the Montana State Prison ("MSP"). In addition, the report included new criminal charges pending against Chalupa for felony assault on a peace officer and possession of a deadly weapon by a prisoner. Chalupa was scheduled for discharge to suspended time on July 21, 2017.

¶6 On July 20, 2017, Chalupa was transferred from the MSP to the Yellowstone County Detention Facility ("YCDF") for adjudication of the Criminal Mischief charge. On July 21, 2017, Chalupa signed the rules of probation, commencing the suspended portion for his Intimidation sentence. Subsequently, while detained in the YCDF, Chalupa committed 32 disciplinary infractions, including non-compliance misdemeanor criminal violations for assault on an officer with a bodily fluid and criminal mischief for damaging a sprinkler head in his cell.

¶7 On August 17, 2017, Chalupa filed a motion to dismiss the State's petition to revoke. Chalupa argued that his sentence could not be revoked because he was not yet under community supervision when he committed the violations.

¶8 On September 5, 2017, the State responded to Chalupa's motion to dismiss, arguing that § 46-18-203, MCA, and *State v. Graves*, 2015 MT 262, 381 Mont. 37, 355 P.3d 769, allowed for the State to file for revocation of Chalupa's suspended and deferred sentences prior to his release on probation.

¶9 On September 12, 2017, the State filed an amended petition for Chalupa's revocation of sentence and affidavit in support. The amended report detailed Chalupa's 32 disciplinary infractions since his transfer to the YCDF, and recommended Chalupa be returned to the District Court for a revocation hearing.

¶10 On November 1, 2017, the District Court held a hearing on the State's petition to revoke Chalupa's sentence. Chalupa was present with counsel. Officers and investigators from the MSP and YCDF testified as to Chalupa's conduct while in custody.

¶11 On November 6, 2017, the District Court issued an order denying Chalupa's motion to dismiss. The District Court held that the plain language of § 46-18-203(2), MCA, allowed for revocation of Chalupa's sentence prior to the period of suspension. The District Court determined that the State had proven by a preponderance of evidence that Chalupa violated the conditions of his sentence while in custody. Chalupa's motion to dismiss was denied and the court revoked Chalupa's sentences. The court imposed a three-year commitment to the Department of Corrections in both cases, with the sentences to run concurrently.

¶12 An appellate court reviews a district court's decision to revoke a suspended or deferred sentence for abuse of discretion and whether a preponderance of the evidence

supported the court's decision. *State v. Cook*, 2012 MT 34, ¶ 12, 364 Mont. 161, 272 P.3d 50. The trial judge must be reasonably satisfied that the conduct of the probationer has not been what the probationer agreed it would be if the probationer were given liberty. *State v. Goff*, 2011 MT 6, ¶ 13, 359 Mont. 107, 247 P.3d 715. A district court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Cook*, ¶ 12. However, when the issue presented is whether the district court had authority to take a specific action, the question is one of law and is subject to de novo review. *Cook*, ¶ 12.

¶13 The interpretation of a statute is a question of law that an appellate court reviews for correctness. *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 18, 384 Mont. 503, 380 P.3d 771. The general rule of statutory interpretation is that legislative intent controls. *Boegli v. Glacier Mountain Cheese Co.*, 238 Mont. 426, 429, 777 P.2d 1303, 1305 (1989). If legislative intent can be determined by the plain meaning of the words, we may go no further in applying any other meaning or interpretation. *In re Archer*, 2006 MT 82, ¶ 16, 332 Mont. 1, 136 P.3d 563.

¶14 Due process protections for a revocation hearing are codified in § 46-18-203, MCA. *State v. Triplett*, 2008 MT 360, ¶ 17, 346 Mont. 383, 195 P.3d 819. In 2011, the Montana Legislature enacted language in § 46-18-203(2), MCA, to permit the filing of a petition to revoke a suspended sentence “*either before the period of suspension or deferral has begun or during the period of suspension or deferral but not after the period has expired.*” Section 46-18-203(2), MCA (2011) (emphasis added); 2011 Mont. Laws ch. 230, § 1. Pursuant to the plain meaning of § 46-18-203, MCA, it was permissible for

the State to file a petition to revoke Chalupa's sentence before his period of community supervision commenced. *Graves*, ¶ 14.

¶15 A hearing is required before a suspended or deferred sentence can be revoked. Section 46-18-203(5), MCA. At a probation violation hearing, the State must prove by a preponderance of evidence that the defendant violated the terms and conditions of the suspended or deferred sentence. Section 46-18-203(6)(a)(i), MCA. The violation must be more than a compliance violation, which is a violation of the conditions of supervision that does not include new criminal offenses. Section 46-18-203(11)(b)(i), MCA.

¶16 The District Court's revocation of Chalupa's sentence is affirmed. Despite his assertion, Chalupa was on supervision when he committed the non-compliance violations at the YCDF; he was already serving time on his deferred sentence for the Felony Criminal Mischief charge and had begun the suspended portion of his Intimidation sentence. Subsequently, Chalupa received a revocation hearing, he was present, and represented by counsel. The State proved by a preponderance of evidence, through extensive testimony of officers and investigators, that Chalupa violated the terms of his supervision. Pursuant to § 46-18-203, MCA, the District Court did not abuse its discretion in determining Chalupa violated the terms of his supervision, and the court comported with due process requirements in revoking Chalupa's sentence.

¶17 On appeal, Chalupa also argues that the District Court erred in imposing a total of \$20 for a court information technology fee—\$10 for each count of Intimidation rather than one \$10 user surcharge per criminal case. The State concedes that the District Court erred when imposing a \$10 user surcharge on both of Chalupa's Intimidation convictions,

rather than a single \$10 user surcharge. Section 3-1-317(1)(a), MCA, authorizes courts to impose “on a defendant in criminal cases, a \$10 *user* surcharge upon conviction for any conduct made criminal by state statute . . . .” (Emphasis added.) The plain language of the statute authorizes the surcharge applied per user upon conviction, not per count. We remand DC 15-169 to the District Court with instructions to strike the \$10 per count user surcharge and impose only one \$10 user surcharge.

¶18 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.

¶19 Affirmed in part, reversed in part, and remanded with further instructions consistent with this Opinion.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ JIM RICE

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR