DA 18-0687

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 246N

DOUGLAS P. PASQUINZO,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Fifth Judicial District,
In and For the County of Jefferson, Cause No. DV 2017-101
Honorable Luke Berger, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Douglas P. Pasquinzo, Self-Represented, Deer Lodge, Montana

For Appellee:

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

Steven C. Haddon, Jefferson County Attorney, Boulder, Montana

Submitted on Briefs: September 25, 2019

Decided: October 15, 2019

Filed:

Clerk

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 Douglas P. Pasquinzo appeals a Fifth Judicial District Court order denying his petition for post-conviction relief. We affirm.

¶3 On September 30, 2015, the State charged Pasquinzo with two counts of sexual intercourse without consent, felonies, pursuant to § 45-5-503(4)(a), MCA. The victim was a seven-year-old girl. Both charges carried a minimum sentence of 100 years, 25 which could not be suspended, and a minimum 25-year parole eligibility restriction. Section 45-5-503(4)(a), MCA (2013).

¶4 On June 15, 2016, Pasquinzo and the State entered into a plea agreement. The State agreed to dismiss both counts of sexual intercourse without consent in exchange for Pasquinzo pleading no contest to two counts of sexual assault, felonies, pursuant to § 45-5-502(3), MCA (sexual assault of a victim under the age of 16 by an offender at least 3 years older than the victim). Prior to sentencing, Mariah Eastman, Pasquinzo's appointed counsel, met with Pasquinzo. She informed him that the State would recommend Pasquinzo be sentenced to the Department of Corrections ("DOC") for 20 years, with 15 years suspended on both counts, each to run concurrently; completion of

phases one and two of the sexual offender treatment program at the Montana State Prison ("MSP"); and registration as a sex offender.

¶5 At the change-of-plea hearing, the State explained that it entered into the plea agreement to avoid having the victim testify at trial. Before accepting the plea, the District Court informed Pasquinzo that it was not bound by the sentencing recommendations in the plea. The court also advised Pasquinzo of his rights and confirmed that by entering into the plea agreement, Pasquinzo knowingly and voluntarily waived these rights, including his right to appeal. Pasquinzo then pleaded no contest to each count. The prosecutor provided an offer of proof, detailing the abuse. Pasquinzo confirmed that the State would be able to prove the allegations in the offer of proof beyond a reasonable doubt. He also asked for forgiveness and stated, "I am sorry."

¶6 A pre-prepared psychosexual evaluation was provided to the court, labeling Pasquinzo as a tier two sexual offender, and admitted without objection. The court then proceeded to sentencing. The court declined to adopt the recommendation of the plea agreement and instead imposed a 15-year sentence in the MSP, with 5 years suspended on each count, both to run concurrently, with 268 days credit for time served. In addition, Pasquinzo was required to complete phases one and two of the offender treatment program and register as a sex offender for life.

¶7 Pasquinzo did not appeal his sentence. In October 2017, Pasquinzo filed a pro se petition for postconviction relief. On August 22, 2018, the District Court issued an order denying Pasquinzo's petition. Pasquinzo appeals.

¶8 On appeal, Pasquinzo argues: (1) that his attorney was ineffective when she allowed him to plead no contest to sexual assault; and (2) that the District Court erred in accepting an invalid nolo contendere plea.

¶9 Ineffective assistance of counsel claims are mixed questions of law and fact, which we review de novo. *Thurston v. State*, 2004 MT 142, ¶ 8, 321 Mont. 411, 91 P.3d 1259. We review a district court's denial of postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Sartain v. State*, 2012 MT 164, ¶ 9, 365 Mont. 483, 285 P.3d 407.

¶10 On appeal, Pasquinzo claims that his counsel was ineffective when she allowed him to enter a no contest plea to a sexual offense. A defendant claiming ineffective assistance of counsel must show: (1) that counsel's representation is deficient; and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Woeppel v. City of Billings*, 2006 MT 283, ¶ 9, 334 Mont. 306, 146 P.3d 789. A defendant must satisfy both prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *State v. LeMay*, 2011 MT 323, ¶ 40, 363 Mont. 172, 266 P.3d 1278. A court may approach the inquiry in any order and need not address both prongs if an insufficient showing is made regarding the first. *Whitlow v. State*, 2008 MT 140, ¶ 11, 343 Mont. 90, 183 P.3d 861.

¶11 To meet the second prong of *Strickland* in ineffective assistance claims based on a challenge to an alleged illegal nolo contendere plea, the defendant must demonstrate a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hardin v. State*, 2006 MT 272, ¶ 18, 334 Mont.

204, 146 P.3d 746. "[T]he fact that a sentence may be illegal does not necessarily mean that there is merit to a claim of ineffective assistance of counsel." *Hardin*, ¶ 19. Here, Pasquinzo's counsel was able to negotiate a favorable plea agreement, in which the State recommended he only be committed to the DOC for 20 years, 15 of which would be suspended. Conversely, had the case proceeded to trial, Pasquinzo faced a mandatory minimum sentence on each count of 100 years. Section 45-5-503(4)(a), MCA (2013). Such an outcome was likely given that at the plea hearing Pasquinzo admitted that the State would be able to prove his guilt beyond a reasonable doubt. If an error works to his benefit, counsel is not ineffective in obtaining a more lenient, albeit illegal, sentence. *Hardin*, ¶ 19. Because Pasquinzo has not met the prejudice the prong of *Strickland*, we decline to address whether counsel's performance was deficient.

¶12 Pasquinzo also asserts that the District Court erred in accepting his no contest plea, in violation of § 46-12-204(4), MCA, and that his conviction should be reversed. In support of this argument, Pasquinzo relies on *State v. Hansen*, 2017 MT 280, 389 Mont. 299, 405 P.3d 625. In *Hansen*, the defendant agreed to enter a no contest plea to an amended charge of sexual assault under § 45-5-502(3), MCA. *Hansen*, ¶ 3. The district court denied the recommendation and imposed a greater prison sentence with no time suspended. *Hansen*, ¶ 5. Hansen challenged the validity of his plea and sentence on direct appeal. Finding the district court exceeded its statutory authority, we voided the plea agreement and vacated the sentence. *Hansen*, ¶ 13.

¶13 The facts in this case are distinguishable from *Hansen*, and more analogous to *Hardin*. Like *Hansen*, the district court violated § 46-12-204(4), MCA, when it accepted

Hardin's plea of nolo contendere to sexual intercourse without consent. *Hardin*, ¶ 14. Unlike *Hansen*, however, Hardin did not directly appeal his conviction; instead, he filed a petition for postconviction relief, alleging the court lacked jurisdiction to accept a nolo contendere plea to a sexual offense. *Hardin*, ¶ 9. In *Hardin*, we noted that a lack of jurisdiction to accept a plea and impose a sentence is more accurately characterized as a claim that the sentence is illegal and exceeds statutory authority. *Hardin*, ¶ 15 (citing *Pena v. State*, 2004 MT 293, ¶ 24, 323 Mont. 347, 100 P.3d 154). Because Hardin did not challenge the legality of his sentence on direct appeal, we held that the claim was procedurally barred pursuant to § 46-21-105(2), MCA. *Hardin*, ¶ 16.

¶14 Section 46-12-204(4), MCA, dictates that the court may not accept a plea of nolo contendere in sexual offense cases, as defined in § 46-23-502, MCA, which includes sexual assault. However, § 46-21-105(2), MCA, states, "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." Pasquinzo did not appeal the legality of his sentence, but instead raises this claim in his petition for postconviction relief. Such a claim is proper *only* on direct appeal or a petition for habeas corpus. Section 46-21-105(2), MCA; *Hardin*, ¶ 16. Pasquinzo knowingly and voluntarily entered a no contest plea, effectively waiving his right to appeal all nonjurisdictional defects upon entry of the plea. The District Court correctly denied Pasquinzo's petition for postconviction relief.

¶15 Finally, Pasquinzo argues in his opening brief that counsel failed to file a direct appeal at his request but does not directly raise a claim to those issues here. We apply the *Strickland* test to an attorney's failure to file a notice of appeal, which provides that: (1) failure to preserve a defendant's right to appeal when he has requested notice be filed is error; and (2) when, but for counsel's deficient performance, defendant would have appealed, such error is prejudicial. *State v. Rogers*, 2001 MT 165, ¶ 24, 306 Mont. 130, 32 P.3d 724. To show prejudice under the second prong, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the defendant would have appealed. *Woeppel*, ¶ 10. A defendant can establish that he or should would have appealed by presenting evidence that the defendant expressed a desire to appeal, or that there were nonfrivolous grounds to do so. *Woeppel*, ¶ 10. If a defendant objectively indicated intent to appeal, he or she is not required to demonstrate the merits of the underlying claim and is entitled to a new appeal. *Woeppel*, ¶ 10; *Roe v. Flores-Ortega*, 528 U.S. 470, 484-86, 120 S. Ct. 1029, 1038-39 (2000).

¶16 If Pasquinzo directed his counsel to file a notice of appeal and she failed to do so, the procedural bar in § 46-21-105(2), MCA, should not be applied to Pasquinzo. If Pasquinzo can demonstrate that he directed his attorney to file an appeal, he may refile a petition for postconviction relief for ineffective assistance of counsel on those grounds.

¶17 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.

¶18 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

Justice Laurie McKinnon, concurring.

¶19 I agree that Pasquinzo has failed to demonstrate that he was prejudiced by his counsel allowing him to enter a no contest plea to two counts of sexual assault. Pasquinzo gained the benefits of a plea agreement without having to expressly acknowledge his guilt.

¶20 I write separately only to suggest, as urged by the State, that this Court revisit its decision in *Hansen*. I believe *Hansen* was unique procedurally and stands in contrast to our precedent distinguishing between an illegal sentence and an invalid plea. A claim that a plea is invalid because § 46-12-204(4), MCA, prohibits a court from accepting a no contest plea in a case involving a sexual offense, is a claim challenging the conviction. Pasquinzo's claim challenging the validity of his conviction is waived because he failed to object in the trial court. Conversely, a claim challenging the legality of a sentence may always be raised, despite it not having been raised in the trial court. However, Pasquinzo's sentence is within the legal range for a sexual assault of a seven-year-old and is, therefore, a legal sentence.

/S/ LAURIE McKINNON