DA 18-0401

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 300N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LINDA LOU HEIDINGER,

Defendant and Appellant.

APPEAL FROM: District Court of the Fifteenth Judicial District,
In and For the County of Roosevelt, Cause No. DC 2017-11
Honorable David Cybulski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John J. Ferguson, Ferguson Law Office, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, J. Stuart Segrest, Chief, Civil Bureau, Helena, Montana

Austin Knudsen, Roosevelt County Attorney, Wolf Point, Montana

Submitted on Briefs: December 4, 2019

Decided: December 31, 2019

Filed:

Justice Beth Baker 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 Linda Lou Heidinger appeals the imposition of a fine and several additional conditions of her sentence for negligent homicide. We affirm the fine, reverse the challenged conditions, and remand for entry of an amended judgment.

¶3 On January 10, 2017, Heidinger negligently passed a snowplow while driving herself and two coworkers home. She collided with an oncoming pickup truck, resulting in the death of one of her passengers. Heidinger was not under the influence of alcohol or any other substances on the day of the accident. The State charged Heidinger with Negligent Homicide by information on April 20, 2017. Heidinger later pleaded guilty in the Fifteenth Judicial District Court, Roosevelt County.

¶4 Heidinger's presentence investigation report ("PSI") reported in part that Heidinger had no prior criminal history or driving-related offenses; had a monthly income of $2,400 and no listed assets or debts; last consumed alcohol in 2015; and had no history of alcohol or substance abuse or a gambling addiction. The PSI further concluded that Heidinger posed a minimal risk of reoffending.

¶5 After the District Court conducted a sentencing hearing, it imposed a twenty-year suspended sentence and a $50,000 fine. The court also imposed 27 probation conditions. At issue here, condition numbers 9, 10, 17, 18, and 26 prohibit Heidinger from using or possessing alcohol and illegal drugs, gambling, or entering bars and casinos, and require her participation in a sobriety and drug monitoring program. Upon pronouncement of the sentence, the court and Heidinger's counsel engaged in the following exchange:

> COURT: I'm going to fine her the $50,000. . . . I don't have any heartburn taking money from her. . . . When I look at the probation conditions I know if you look at the standards that the Supreme Court sets down, if there has to be a nexus; I don't know that I can say she shouldn't enter bars or casinos. I don't know that I can do some of these other ones but I'm going to do them anyway and if she wants to appeal. Because my rationalization for staying out of the bars, staying out of the casino and some of those other things is that she has a fine to pay; a financial obligation and if she had money for the bars she has money to pay. So, Ms. Thornton you see [anything] in these probation conditions that are not appropriate that you want to argue about?
>
> MS. THORNTON: Well I'm not quite sure about the fine thing but you're not imposing a fine on her?
>
> COURT: Oh, I'm [imposing] a fine on her. . . . Otherwise on the probation and condition?
>
> MS. THORNTON: Are you saying you didn't find a nexus between the no bars and casinos in this offense?
>
> COURT: Well there isn't a nexus other than a financial nexus of she has a fine to pay and needs the ability to pay. . . . I'm not going to revoke her probation solely for not paying. If she does anything else then it will come into the mix, but generally you won't see somebody revoked for not paying if they can't pay.
>
> MS. THORNTON: Okay.
>
> COURT: If she wins the lottery and doesn't pay then she gets revoked.

MS. THORNTON: So—

COURT: But if she wins the lottery she'll get revoked for gambling, so. . . .

MS. THORNTON: So, the Court is finding from looking at the financial information on the PSI that she has the ability to pay a $50,000 fine?

COURT: Well, I think, you never know. She's got 20 years, that's only $2,500 a year.

MS. THORNTON: If she lives that long.

COURT: Well if you die nobody's going to do anything about you not paying the fine.

MS. THORNTON: Well they probably—I don't know.

COURT: And like the 60-year old sex offenders they give 100 years in prison to. I know they are not going to live the whole 100 years and get off probation, see.

MS. THORNTON: Okay, I guess if I can—

COURT: Any questions [County Attorney] Patch?

¶6 Heidinger first argues that the District Court abused its discretion in imposing condition numbers 9, 10, 17, 18, and 26—all alcohol- and gambling-related prohibitions—because they lack any nexus to her rehabilitation and the protection of the victims or society as required under Montana law. *See* §§ 46-18-201(4)(p), -202(1), MCA. *See also State v. Bullplume*, 2013 MT 169, ¶ 18, 370 Mont. 453, 305 P.3d 753. She contends that defense counsel properly objected to the imposition of these conditions in the District Court, preserving this issue for appeal. Without agreeing that defense counsel properly objected to these conditions, the State concedes they have no reasonable relationship to Heidinger or her offense and should therefore be stricken from the

judgment. Following our review of the record, and in light of the State's concession, we reverse the District Court's imposition of condition numbers 9, 10, 17, 18, and 26 and remand for the court to strike those conditions from the judgment.

¶7 Next, Heidinger argues that the District Court's failure to conduct any ability-to-pay inquiries renders its imposition of the $50,000 fine clearly erroneous. The State responds that defense counsel did not preserve the issue for appeal because her statements were merely "Socratic questions to the court"—not an objection—and urges us to affirm.

¶8 Before imposing a statutorily authorized fine, a sentencing court must first determine that the defendant is or will be able to pay. Section 46-18-231(3), MCA; *State v. Reynolds*, 2017 MT 317, ¶ 20, 390 Mont. 58, 408 P.3d 503. We have held that § 46-18-231, MCA, requires the sentencing court to demonstrate "a serious inquiry and separate determination" into the defendant's ability to pay. *Reynolds*, ¶ 24 (citing *State v. McLeod*, 2002 MT 348, ¶ 35, 313 Mont. 358, 61 P.3d 126 (holding that the sentencing court must "consider whether the defendant will or will not be able to pay the fine" and, in making such determination, "shall take into account the financial resources of the defendant and the nature of the burden that payment of the fine will impose.")).

¶9 On the other hand, a district court's failure to consider the defendant's ability to pay renders the sentence objectionable, not illegal. *State v. MacDonald*, 2013 MT 105, ¶ 17, 370 Mont. 1, 299 P.3d 839 (citing *State v. Kotwicki*, 2007 MT 17, ¶¶ 21-22, 335 Mont. 344, 151 P.3d 892). Even where the district court fails to consider a defendant's financial condition, failure to object to the oversight constitutes a waiver that precludes

review of the issue on appeal. *State v. Thompson*, 2017 MT 107, ¶ 15, 387 Mont. 339, 394 P.3d 197; *State v. Phillips*, 2013 MT 317, ¶ 25, 372 Mont. 317, 312 P.3d 445; *see also MacDonald*, ¶ 18; *Kotwicki*, ¶ 22; *State v. Hunter*, 2008 MT 395, ¶ 7, 347 Mont. 155, 197 P.3d 998 ("Objectionable conditions must be objected to in the trial court to qualify for appellate review."). "This Court will not hold a district court in error when it has not been given an opportunity to correct itself." *State v. Daniels*, 2011 MT 278, ¶ 36, 362 Mont. 426, 265 P.3d 623 (citations omitted). "We will consider an objection sufficient if it specifies the reason for disagreement with the procedure employed by the court." *Pumphrey v. Empire Lath & Plaster*, 2006 MT 99, ¶ 30, 332 Mont. 116, 135 P.3d 797.

¶10 Based on the record, we conclude that defense counsel did not sufficiently object to the error alleged and thus failed to preserve the otherwise objectionable issue for appeal. After the District Court announced its decision to impose the $50,000 fine, defense counsel asked, "Well I'm not quite sure about the fine thing but you're not imposing a fine on her?" The court clarified that it was imposing a fine, after which defense counsel and the court discussed the probation conditions. Defense counsel then asked, "So, the Court is finding from looking at the financial information on the PSI that she has the ability to pay a $50,000 fine?" The court replied that Heidinger would have to pay "only $2,500 a year." After additional comment by the court, defense counsel stated, "Okay. I guess if I can—" and either trailed off or was interrupted by the court. Although we agree with Heidinger that defense counsel's failure to utter the word "objection" is not fatal, *see Pumphrey*, ¶ 30, her statements did not articulate

disagreement with the imposition or amount of the fine or the process by which the court arrived at its determination. Nor did she ask the court to conduct a "serious inquiry and separate determination of" or present argument about Heidinger's ability to pay. For the same reasons, defense counsel failed to give the District Court an opportunity to correct itself. Therefore, we will not hold the District Court in error.

¶11 Heidinger cites our decision in *State v. Rogers*, 2013 MT 221, 371 Mont. 239, 306 P.3d 348, to support her contention that defense counsel's objection was sufficient. But *Rogers* is distinguishable: there, we held the defendant's statements protesting the district court's admission at trial of improper M. R. Evid. 404(b) evidence and articulating reasons why such evidence would taint the trial constituted a proper objection. As explained above, defense counsel here offered no such disagreement or underlying rationale. Heidinger thus waived the issue for appellate review.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. We affirm the District Court's imposition of a $50,000 fine. We reverse its imposition of probation condition numbers 9, 10, 17, 18, and 26, and remand to the District Court with instructions to strike them from the judgment.

/S/ BETH BAKER

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON