IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0530

SCOTT SPERLE,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Mike Menahan, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other authorities

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it denied Sperle's claim challenging the factual basis of his guilty plea.

2. Whether the district court abused its discretion when it dismissed Sperle's Petition for Postconviction Relief without obtaining a response from Sperle's trial counsel or conducting an evidentiary hearing.

STATEMENT OF THE CASE

Appellant Scott Sperle was charged with four counts of sexual abuse of children and two related charges. (DC 16-461 Doc. 4.) Pursuant to a plea agreement, he pleaded guilty to one count of sexual abuse of children, and the remaining charges were dismissed. (DC 16-461 Doc. 49 at 2, available at Appellant's App. 2.) He was sentenced to 30 years with 20 years suspended. (*Id*. at 3.) He did not file a direct appeal.

Sperle filed a Petition for Postconviction Relief, which he supplemented with an Addendum (Amendment) To Petition for Postconviction Relief. (DV 18-566 Docs. 1, 5.) His pleadings included a claim that the factual basis for his plea was insufficient, that his counsel was ineffective for allowing him to be convicted of and sentenced to a felony offense, and that his counsel provided inadequate advice.

The district court issued an order denying Sperle's claims without obtaining a response from Sperle's trial counsel or holding an evidentiary hearing. Sperle appeals the denial of his Petition.

STATEMENT OF THE FACTS

I. Proceedings in the trial court

The State charged Sperle in Cause No. DC 16-461 with four counts of sexual abuse of children in violation of Mont. Code Ann. § 45-5-625(1)(b). (DC 16-461 Doc. 4.) Count I alleged that Sperle "recorded a child, A., who was under 16 years of age, engaging in sexual conduct[.]" (*Id*. at 2.) Count II alleged that Sperle "possessed any visual or print medium, including a medium by use of electronic communication in which a child, Jane Doe, who appeared to be 14 or 15 years of age, is engaged in sexual conduct[.]" (*Id*.) Count III alleged that Sperle "recorded a child, B., engaged in sexual conduct[.]" (*Id*. at 2-3.) Count IV alleged that Sperle "recorded a child, B., who was under 16 years of age, engaged in sexual conduct[.]" (*Id*. at 3.) The State also charged Sperle with one count of surreptitious visual observation or recordation, alleging that he surreptitiously observed or recorded an occupant of his house, and with one count of tampering with or fabricating physical evidence, alleging that he "altered, destroyed, concealed or removed any record, document, or thing, to wit: a recording of A.,

taken surreptitiously on his phone, in order to impair its verity or availability in the proceeding or investigation." (*Id*. at 3-4.) Each count of sexual abuse of children carried a possible life sentence, and one count had a mandatory minimum 4-year prison sentence because the victim was less than 16 years of age. (*Id*. at 5.)

The Affidavit of Probable Cause alleged that Sperle recorded a 14-year-old girl, A., when she was in the bathroom. (DC 16-461 Doc. 2 at 2.) The Affidavit alleged that A. needed to use the bathroom when she was in Sperle's home. (*Id*.) Although there were multiple bathrooms, Sperle insisted on using the bathroom A. was going to use before she used it. (*Id*.) Sperle was in the bathroom for about five minutes. When he was done,

> A. went in and used the restroom. While she was washing her hands, A. said she looked down into the garbage can and saw a camera. A. removed the camera from the garbage can, noting it was a Samsung cell phone. When A. looked at the camera, she saw that it was still recording. A. played back the video which depicted the defendant placing the cell phone into the garbage can, positioning it so it pointed in the right direction to record someone using the toilet. According to A., the video showed the defendant placing toilet paper around the camera in an attempt to cover it up. A. paused the video and called for K. A. said when she did that, the defendant ran into the bathroom in a panic and asked her if she'd seen his phone. A. said she was in shock so she just handed the defendant his phone. The defendant went into the living room of his residence and deleted the video.

(*Id*.)

The affidavit alleged that when officers searched other electronic devices in the home, they discovered "numerous images—both photographs and videos—of

females, some of whom appeared to be under the age of 18. Detectives prepared still images that were 'sanitized' of nudity or sexual content in order to show witnesses in an effort to identify those depicted in the photographs and video." (*Id*. at 3.) The affidavit stated that A.'s sister, B., identified two images of herself depicting her "naked from the waist down, using the restroom." (*Id.* at 4.) Sperle's wife was able to identify another female, F., who was a friend of the family, in an image that "showed a view down the front of F.'s shirt." (*Id*.) Officers also located images of a young woman at Yellowstone National Park. (*Id*.) "The focus of the photographs and videos are on the child's intimate parts, particularly her buttocks. There are images of the child bending over, including one that appears to capture an image of her genitalia." (*Id*.)

Christopher Abbott was appointed to represent Sperle. (*Id*. at 1.) While Sperle was represented by Abbott, he entered into a plea agreement with the State. In the agreement, the State agreed to dismiss Counts II through VI, and Sperle agreed to plead guilty to Count I. (DC 16-461 Doc. 36 at 2, available at Appellant's App. 3.) The State agreed to recommend that the court sentence Sperle to 30 years in prison, with 20 years suspended. (*Id*. at 3.) The agreement allowed Sperle to argue for any lawful sentence. (*Id*.) Sperle signed an Acknowledgment of Waiver of Rights acknowledging that he understood the rights he was waiving by pleading guilty. (Appellant's App. 3.) Sperle also

"acknowledge[d] that I am satisfied with the services of my attorney and that there has been ample time to prepare a defense[,]" and that "I am satisfied that my lawyer has been fair to me, has advised me fully of my rights, and has represented me properly." (*Id*. at 8.) The Acknowledgment of Waiver of Rights stated, "The following facts lead me to believe I am guilty of the above offense: Count I: I surreptitiously photographed a 14-year old girl using the bathroom in my home." (*Id*.)

At Sperle's change of plea hearing, the court informed Sperle of the rights that he would waive by pleading guilty, and he agreed that he was waiving those rights. (8/23/17 Tr. at 4, available at Appellant's App. 4.) The following colloquy occurred:

> THE COURT: Are you satisfied with your attorney—Mr. Abbott?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you under the influence of alcohol, drugs, or prescription medication?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Have you been coerced, threatened, or promised any benefits if you plead guilty?
>
> THE DEFENDANT: No, sir.

(*Id*. at 4-5.)

The court asked Sperle what made him think he was guilty. (*Id*. at 5.) Sperle stated again, "I surreptitiously photographed a 14-year-old girl using the bathroom in my home." (*Id*. at 6.) The court accepted Sperle's plea of guilty.

In Sperle's presentence investigation report, he acknowledged that he left his phone in his bathroom "to record a girl." (DC 16-461 Doc. 43 at 4.) He expressed regret for making "the biggest mistake of my life." (*Id*.) A.'s mother submitted a letter before the sentencing hearing talking about events that occurred before A. found the camera recording her in the bathroom. According to A.'s mother, Sperle pressured A. to take her bra off in a bathroom and then let him take pictures of her wearing a shirt without a bra underneath. (DC 16-461 Doc. 43, attached victim letters.) While Sperle was not charged with that conduct, it would have likely been admitted at trial.

Sperle was sentenced to 30 years in prison with 20 years suspended. (DC 16-461 Doc. 49 at 3, available at Appellant's App. 2.)

II. Postconviction proceedings

Sperle did not directly appeal his conviction and sentence. He instead filed a pro se Petition for Postconviction Relief in DV 18-566. (DV 18-566 Doc. 1.) Sperle raised seven claims: (1) ineffective assistance of counsel, (2) excessive

punishment, (3) illegal sentence, (4) insufficient evidence, (5) incompetent to stand trial, (6) due process violation, and (7) involuntary plea. (*Id*.)

Sperle's ineffective assistance of counsel claim briefly alleged that counsel "failed to subject the State's case to adversarial testing; failed to object to the State's use of evidence that was fabricated by their computer tech; [and] failed to prevent any conflict of interest from keeping them from providing defendant with loyal performance." (*Id*. at 5.) He also alleged that "If it wasn't for counsel's ineffective assistance defendant would have elected to go to trial in order to prove his actual innocence." (*Id*.)

In his sentencing claims, Sperle claimed that his sentence was not authorized by statute. (*Id*. at 5-6.)

Sperle argued that there was insufficient evidence because the State admitted in Court that "the video had been 'pieced together by their techn[i]cians.'" (*Id*. at 6.) He claimed, therefore, that the State had admitted to fabricating the evidence against him. (*Id*.)

Sperle argued that he was incompetent to stand trial because he was on strong medication that caused him to not remember things that he did. (*Id*. at 7.) Additionally, he argued that his due process rights were violated because he was "coerced" into taking the plea bargain, and the State did not satisfy its burden of proof. (*Id*.) Lastly, Sperle argued that his plea was involuntary because he was

coerced to enter the plea when he was incorrectly told that his sentence carried a sentence of life when he could actually only be sentenced to 10 years in prison under Mont. Code Ann. § 45-5-625(2)(c). (DV 18-566 Doc. 1 at 8.)

Sperle later amended his petition in a document labeled Addendum (Amendment) To Petition for Postconviction Relief (Addendum). (DV 18-566 Doc. 5.) It appears that Sperle intended for this Addendum to supplement, rather than replace, the Petition. (*Id*.) In the Addendum, he argued that he lost his right to appeal because he did not have access to legal materials when he was transferred to prison. (*Id*. at 1.) Sperle stated that his foundational arguments are contained in his Petition, but he was adding an argument that the claims constituted "plain error." (*Id*.) He alleged that there was never evidence to establish that images existed that captured minors engaging in sexual conduct. (*Id*. at 2.) He claimed that the State acknowledged in court that there were not any "unlawful" images. (*Id*.) Based on that assertion, he argued that his counsel was ineffective and that there was no evidence to support the charges against him. (*Id*.) He also argued that the State's admission that there were no unlawful images demonstrated that the State falsified the charging documents. (*Id*.) He further argued that the "utterly baseless, charges were used to **compel** a plea to an unlawful/unqualified charge." (*Id*.) Sperle asserted that his attorney told him that the State could argue

that he was attempting to acquire unlawful images, but that was wrong because he was not charged with attempt. (*Id*. at 3.)

Sperle next argued the factual basis for his plea was not sufficient. (*Id*. at 4.) He argued that his counsel was ineffective when counsel allowed him to admit to conduct as the factual basis for his plea to a felony offense when that conduct actually only established that he committed the misdemeanor offense of surreptitious recording. (*Id*.) He also argued that he received bad advice from his counsel about the images because the State later admitted that the images were not unlawful. (*Id*.) Sperle asserted that his counsel was ineffective for failing to object to the lack of a basis for the charges because

> defense counsel was surely well aware that the "motion" for leave and its "affidavit" falsely portrayed the actual **existence** of unlawful images—which both counsel and the prosecution both **knew** to be non-existant—in order to unlawfully gain a finding of probable cause by this honorable court and thereby making court an unwitting alley/accomplice to their unlawful conduct and, ultimately, compelling a plea to a non-existant offense.

(*Id*. at 5.) He further asserted that the images did not actually portray sexual conduct, and were "sanitized" "to fraudulently **mislead**" the court into believing the images contained sexual conduct. Sperle also alleged that he did not view or have access to the images that were located. (*Id*. at 6-7.)

Sperle argued that he should not have been convicted of Count I because law enforcement did not locate any image showing a minor engaged in sexual conduct.

(*Id*. at 7.) He argued that he did not knowingly and voluntarily enter his plea. (*Id*.) Sperle included several pages of argument addressing the other counts, which had been dismissed.

Sperle subsequently filed a Notice of Issue, in which he claimed that there was "**no actual 'evidence'**" to support the charge and that the charging documents erroneously led the court to believe that there was evidence against him. (DV 18-566 Doc. 6.)

The district court issued an Order on Petition for Postconviction Relief in which the court denied Sperle's postconviction claims. (DV 18-566 Doc. 9, available at Appellant's App. 1.) The court observed that some of his claims "are arguably record-based," and Sperle did not file a direct appeal. (*Id*. at 3.) But the court indicated that it would still address the merits of Sperle's claims. (*Id*.) The court concluded that "the petition and the files and records of the criminal case conclusively demonstrate Sperle is not entitled to relief, and the petition should be denied." (*Id*. at 4.) The court noted that there is a strong presumption that counsel was effective, and a petitioner who pleads guilty or enters an *Alford* plea waives any claims that arose prior to the entry of his plea. (*Id*.)

The court found that at Sperle's change of plea hearing, he "clearly provided a factual basis to support his guilty plea to sexual abuse of children—that he purposely or knowingly video-recorded a child, who was under 16 years of age,

engaging in sexual conduct, actual or simulated." (*Id*. at 5.) The court explained that sexual conduct includes urination for the purpose of the sexual stimulation of the viewer or the depiction of a child nude or partially undressed for the sexual desire of any person. (*Id*. (citing Mont. Code Ann. §§ 45-5-625(5)(b)(i)(G) and (ii)).)

The court concluded that "Sperle offers no support of his contention the sentence in this matter is illegal, excessive, or was not supported by the evidence. Similarly, Sperle offers no evidence that he was incompetent or otherwise unfit to stand trial." (Appellant's App. 1 at 6.) The court noted that a petition for postconviction relief must be based on more than "mere conclusory allegations." (*Id*. (citing *Ellenberg v. Chase*, 2004 MT 66, ¶ 16, 320 Mont. 315, 87 P.3d 473).) The court concluded that "Sperle plead[ed] guilty and was sentenced in accordance with the offense for which he was convicted." (Appellant's App. 1 at 6.) The court rejected Sperle's claim that he was actually innocent because Sperle pleaded guilty to the offense of sexual abuse of children and admitted that he had surreptitiously filmed a 14-year-old girl using the bathroom in his home. (*Id*.)

The court concluded that the record conclusively established that Sperle was not entitled to postconviction relief. (*Id*.)

SUMMARY OF THE ARGUMENT

Sperle's claim that the factual basis for his plea was insufficient is procedurally barred because he could have raised the claim on direct appeal. Further, the claim fails on the merits. Sperle's admission that he photographed a 14-year-old girl using the bathroom provided a sufficient factual basis for his plea of guilty to sexual abuse of children because the common understanding of the term "using the bathroom" implies that the user is removing clothing to urinate or defecate. Additionally, it is reasonable to infer that a person who records a 14-year-old girl doing that is doing it for a sexual purpose.

The court did not abuse its discretion when it denied Sperle's claims alleging that his counsel was ineffective without obtaining a response from trial counsel or conducting an evidentiary hearing. Sperle's claim that his counsel was ineffective for allowing him to enter a plea and be sentenced to a felony offense is refuted by the record, which demonstrates that Sperle could have been convicted of multiple felony offenses, and he obtained a significant benefit by pleading guilty. The court also did not abuse its discretion when it denied Sperle's claim that his counsel did not advise him that the images had to be made for a sexual purpose because Sperle's self-serving statements were insufficient to support the claim, and the charging documents informed Sperle that the offense of sexual abuse of children required images of sexual conduct. Sperle's Petition was properly dismissed

without further evidentiary development because he could not prevail on any of his claims.

ARGUMENT

I. Standard of review and applicable law

A. Standard of review

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. Discretionary rulings made by the district court in a postconviction relief proceeding, including rulings on whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Heath*, ¶ 13. Mixed questions of law and fact presented by ineffective assistance of counsel claims are reviewed de novo. *Id.* A postconviction petitioner bears a heavy burden in seeking to overturn a district court's denial of postconviction relief based on ineffective assistance of counsel claims. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

B. Pleading requirements for petitions for postconviction relief

The postconviction statutes are demanding in their pleading requirements. *Ellenburg*, ¶ 12. A petition for postconviction relief must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts."

Mont. Code Ann. § 46-21-104(1)(c). The petition must also "be accompanied by a supporting memorandum, including appropriate arguments and citations and discussion of authorities." Mont. Code Ann. § 46-21-104(2); *Ellenburg*, ¶ 12. In addition, a postconviction petitioner has the burden of proving, by a preponderance of the evidence that he or she is entitled to relief. *Ellenburg*, ¶ 12. This Court has explained that mere conclusory allegations and self-serving statements are insufficient. *Kelly v. State*, 2013 MT 21, ¶¶ 9-11, 368 Mont. 309, 300 P.3d 120.

A district court may dismiss a petition for postconviction relief without holding an evidentiary hearing if the petition fails to satisfy the procedural threshold set forth in Mont. Code Ann. § 46-21-104(1)(c). *Hamilton v. State*, 2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588. Additionally, a district court may dismiss a petition for postconviction relief without ordering a response if the petition, files, and records "conclusively show that the petitioner is not entitled to relief." Mont. Code Ann. § 46-21-201(1)(a). Alternatively, the court may order a response and, after reviewing the response, "dismiss the petition as a matter of law for failure to state a claim for relief or may proceed to determine the issue." Mont. Code Ann. § 46-21-201(1)(a); *Hamilton*, ¶ 12.

C. Law applicable to claims of ineffective assistance of counsel

This Court reviews ineffective assistance of counsel claims applying the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A

postconviction petitioner has a burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Baca*, ¶ 16; *Ellenburg*, ¶ 12.

A trial counsel's performance is deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow v. State*, 2008 MT 140, ¶ 20, 343 Mont. 90, 183 P.3d 861. There is a strong presumption that counsel's actions were within the broad range of reasonable professional assistance. *Baca*, ¶ 17.

To establish that the defendant was prejudiced by counsel's deficient performance, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

To demonstrate prejudice in a case where the defendant pleaded guilty or no contest, the defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty or no contest and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Hardin v. State*, 2006 MT 272, ¶ 18, 334 Mont. 204, 146 P.3d 746.

II. Sperle's claim challenging the factual basis for his plea is procedurally barred because he could have raised the claim on direct appeal; further, the claim fails because his admissions established a factual basis for his plea.

A. This claim is procedurally barred because Sperle failed to raise it on direct appeal.

Although it was not phrased as clearly, it appears that Sperle raised this claim in his Addendum when he stated, "The court exceeded its jurisdiction/discretion when it convicted the petitioner of a 'felony' following an admission to **only** the dismissed 'misdemeanor' charge. This fact makes the conviction unlawful on its face." (DV 18-566 Doc. 5 at 4.) He later stated, "[a]gain, by way of a reminder, the only 'factual basis' obtained at the change of plea hearing pertained exclusively to the dismissed misdemeanor." (*Id*. at 8.)

Postconviction is intended to address claims that could not have been raised on direct appeal. Montana Code Annotated § 46-21-105(2) provides that, "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." Sperle's claim that his plea was invalid because the factual basis for his plea was not established is a claim that could have been raised in a petition to withdraw a guilty plea or on direct appeal. *See e.g.*, *State v. Frazier*, 2007 MT 40, ¶¶ 17-21, 336 Mont. 81, 153 P.3d 18 (addressing the factual basis for

the plea on appeal of a motion to withdraw a guilty plea); *State v. Schaff*, 1998 MT 104, ¶¶ 20-25, 288 Mont. 421, 958 P.2d 682 (same)[1]; *see also State v. Rytky*, 2006 MT 134, ¶ 8, 332 Mont. 364, 137 P.3d 530 (determining the validity of a guilty plea on direct appeal). This claim is therefore procedurally barred and cannot be considered in a postconviction proceeding.

B. Sperle provided a sufficient factual basis for his plea.

To accept a plea of guilty, a court must "determin[e] that there is a factual basis for the plea[.]" Mont. Code Ann. § 46-12-212(1). This Court has explained that "a district court's colloquy 'need not extract an admission from the defendant of every element of the crime in order to establish a factual basis for the guilty plea." *State v. Muhammad*, 2005 MT 234, ¶ 22, 328 Mont. 397, 121 P.3d 521. But "the court must ascertain, from admissions made by the defendant at the plea colloquy, that the acts of the defendant, in a general sense, satisfy the requirements of the crime to which he is pleading guilty." *Frazier*, ¶ 20. That requires the "court to solicit admissions from a defendant regarding what acts the defendant committed that constitute the offense charged." *Frazier*, ¶ 21.

In *Muhammad*, this Court held that the factual basis for the defendant's plea of guilty to sexual intercourse without consent with a minor was established where

[1]*Schaff* was overruled on other grounds in *State v. Deserly*, 2008 MT 242, ¶ 12 n.1, 344 Mont. 468, 188 P.3d 1057. *Deserly* was then overruled on other grounds in *State v. Brinson*, 2009 MT 200, ¶ 8, 351 Mont. 136, 210 P.3d 164.

the defendant admitted the facts of the offense but did not specifically admit to knowing the victim's age. *Muhammad*, ¶¶ 6, 15, 22. Similarly, in *Schaff*, this Court held that the absence of an admission from the defendant concerning the mental state of the attempted deliberate homicide offense did not render the court's interrogation into the factual basis inadequate. *Schaff*, ¶¶ 22-25. This Court held that it was reasonable to infer that the defendant intended to kill the victim based on the evidence, including evidence that he stabbed the victim eight times. *Schaff*, ¶ 25.

In contrast, this Court held that the factual basis of the plea was not established in *Frazier*, where the court asked the defendant whether he was admitting the facts contained in the charging document, but did not specifically ask him what he did that established the offense. *Frazier*, ¶¶ 5, 21. Similarly, this Court held in *State v. Wise*, 2009 MT 32, ¶¶ 7, 15, 349 Mont. 187, 203 P.3d 741, that the factual basis for the defendant's plea of guilty to criminal mischief was not established where he stated merely that he "messed up" and damaged the victim's roof when he did work on it.

Sperle pleaded guilty to Count I, which alleged that he committed sexual abuse of children in violation of Mont. Code Ann. § 45-5-625(1)(b). (DC 16-461 Doc. 4.) The Information alleged that he "purposely or knowingly recorded a child, A., who was under 16 years of age, engaging in sexual conduct, actual or simulated." (*Id*. at 2.) The Affidavit of Probable Cause alleged that Sperle left his

phone in his bathroom to record A. when she was going to the bathroom. (DC 16-461 Doc. 2 at 2.) The affidavit explained that the statutory definition of "sexual conduct" includes urination for the sexual stimulation of the viewer and a depiction of a child partially undressed for the sexual gratification of the viewer. (*Id*. at 5 (quoting Mont. Code Ann. §§ 45-5-625(5)(b)(i)(G) and (ii)).)

When Sperle pleaded guilty to Count I, he stated that he "surreptitiously photographed a 14-year-old girl using the bathroom in my home." (Appellant's App. 4, Tr. at 6.) Sperle argues that his admission was inadequate because he did not state what the girl was doing in the bathroom when he photographed her. (Appellant's Br. at 11.) But the phrase "using the bathroom" generally means using the bathroom to urinate or defecate, which involves the user removing their pants and underwear. Given the context in which Sperle made the admission, it is reasonable to assume that his admission that he photographed a girl "using the bathroom" was an admission that he photographed her removing her pants and underwear and urinating or defecating. Further, it is reasonable to infer that he did so for sexual stimulation. *See Schaff*, ¶¶ 22-25 (inferring that the defendant intended to kill the victim when he stabbed her eight times). His admission therefore satisfied the factual basis for a plea to sexual abuse of a child under Mont. Code Ann. § 45-5-625(5)(b)(i)(G), which defines sexual conduct as "Defecation or urination for the purpose of the sexual stimulation of the viewer." It would also be reasonable to

infer from his admission that he recorded the girl in a state of partial undress to gratify his sexual desire. His admission therefore satisfied the factual basis for a plea of sexual abuse of children under Mont. Code Ann. § 45-5-625(5)(b)(ii), which defines sexual conduct as the "depiction of a child in the nude or in a state of partial undress with the purpose . . . to gratify the person's own sexual response or desire or the sexual response or desire of any person."

This Court has stated that the district court need not extract an admission from the defendant to every element of an offense. *Muhammad*, ¶ 22. As this Court required in *Frazier*, Sperle admitted to the act that he committed that constituted the offense; that is, he admitted that he recorded a girl in his bathroom. That admission "in a general sense, satisfy[ied] the requirements of the crime to which he [pleaded] guilty." *See Frazier*, ¶ 20. The district court did not err when it denied this claim because the factual basis for Sperle's plea was sufficient to support his conviction.

III. The district court did not abuse its discretion when it dismissed Sperle's petition without evidentiary development.

Sperle argues that the court erred when it denied his petition without obtaining a response from trial counsel or holding an evidentiary hearing. But the district court did not err in summarily dismissing Sperle's petition because Sperle's petition was based on conclusory allegations that were unsupported, and Sperle

was not entitled to relief on his claims. To demonstrate that the district court erred in dismissing the petition without further evidentiary development, Sperle must demonstrate on appeal that his petition contained a valid claim that the court erroneously dismissed. He has failed to make that showing.

A petition must be supported with affidavits, records, or other evidence. Mont. Code Ann. § 46-21-104(1)(c). A court may dismiss a petition if the records show the petitioner is not entitled to relief. Mont. Code Ann. § 46-21-201(1)(a). This Court has explained that a petition for postconviction relief should not serve as a broad discovery device. *Heath*, ¶ 27. "The petitioner may not conduct a 'fishing expedition' in an attempt to establish the right to an evidentiary hearing." *Id.*

In *Heath*, this Court held that the district court erred in denying Heath an evidentiary hearing because defense counsel's death created a "unique circumstance" making it difficult to determine defense counsel's reasons for his actions. *Heath*, ¶ 27. But, this Court has affirmed a district court's order denying a petition for postconviction relief without holding an evidentiary hearing where the petitioner failed to demonstrate a prima facie claim for relief because petitioner either did not provide the required evidentiary support for the claims or failed to state a claim. *Hamilton*, ¶¶ 10-32; *Herman v. State*, 2006 MT 7, ¶¶ 24-52, 330 Mont. 267, 127 P.3d 422. A "petitioner claiming ineffective assistance of

counsel must ground his or her proof on facts within the record and not on conclusory allegations." *Baca*, ¶ 16.

All of the claims in Sperle's petition were properly dismissed because each claim was either not entitled to relief or was based on conclusory allegations that Sperle failed to support. Sperle has not demonstrated that there was a legitimate factual dispute that needed to be developed by seeking a response from trial counsel or an evidentiary hearing in order to resolve the claims.

A. Sperle's claim that he was unable to file a direct appeal in prison does not demonstrate that the district court's denial of his Petition for Postconviction Relief was erroneous.

Sperle points out in his brief that he alleged in his petition that he lost his right to appeal because he did not have legal access when he first entered prison. But then he erroneously suggests that the court treated Sperle's claims as procedurally barred. (Appellant's Br. at 14.) To the contrary, the court suggested that some of Sperle's claims were "arguably record-based," but the court stated, "Nonetheless, the Court will address the merits of his claims." (Appellant's App. 1 at 3.) The court then rejected his claims on the merits.

Sperle's allegation that he was unable to appeal in prison does not impact the analysis of whether the district court erred in dismissing his claims without an evidentiary hearing because the claims were not dismissed based on the procedural bar. Further, Sperle did not support his allegation with any evidence, and he did

not attempt to file an out of time appeal. His assertion that he was unable to appeal in prison in no way demonstrates that the court's dismissal of his Petition for Postconviction Relief was an abuse of discretion.

B. Sperle's counsel was not ineffective for allowing him to enter the plea and be convicted of sexual abuse of children.

Sperle argues that the court should not have dismissed his claim that it was ineffective and plain error for his counsel to allow him to be sentenced for Count I, a felony, when he only admitted to facts that satisfied the elements of the dismissed misdemeanor charge in Count V. As explained above, Sperle provided a sufficient factual basis for his plea to Count I. Sperle seems to suggest that counsel was ineffective for allowing him to enter a plea to a charge that he did not commit. But Sperle's admission at the change of plea hearing demonstrates that his conduct supports the felony conviction. He admitted that he photographed a 14-year-old girl using the bathroom. (Appellant's App. 4, Tr. at 6.) That implies that the girl had some clothing removed and was urinating or defecating. And a jury would likely conclude that he did that for sexual gratification. His admission therefore supports his conviction for sexual abuse of children under Mont. Code Ann. §§ 45-5-625(5)(b)(i)(G) and (ii), and his counsel was not ineffective for allowing Sperle to be convicted of Count I based on those facts.

If Sperle is arguing that his counsel should not have allowed him to enter a guilty plea to Count I, the record refutes that claim. The record indicates that there

was evidence to support multiple counts of sexual abuse of children, in addition to two other charges. (DC 16-461 Doc. 2; Appellant's App. 4, Tr. at 6.) Because Sperle was charged under Mont. Code Ann. § 45-5-625(1)(b), he was subject to a lifetime sentence for each count of sexual abuse of children. Mont. Code Ann. § 45-5-625(2)(a). Under the plea agreement, Sperle was able to have four felony charges and one misdemeanor dismissed. (Appellant's App. 3.) He also obtained an agreement from the State that it would recommend a sentence of 30 years in prison, with 20 years suspended. (*Id*. at 3.) The agreement significantly reduced the amount of time Sperle would be likely to spend in prison, making him parole eligible in a few years. Sperle told the court that he was not coerced into accepting his plea, he was satisfied with his attorney, and he was not under the influence of any substances. (Appellant's App. 4, Tr. at 4-5.) The record demonstrates that Sperle pleaded guilty to sexual abuse of children because there was evidence to support the charge, and he gained a significant benefit by entering into the plea agreement. His counsel was therefore not ineffective for allowing him to enter his plea.

If Sperle is arguing that his attorney should have required him to admit to more facts at the change of plea hearing, that claim is also incorrect. Sperle would not have benefited in any way by providing more facts about his conduct at the change of plea hearing. His counsel was therefore not ineffective for not requiring that Sperle provide more of a factual basis for his plea. *See Hardin*, ¶¶ 19-20

(holding that petitioner was not prejudiced when his counsel allowed him to enter a no contest plea to a sexual offense because he would not have benefited from being required to admit his guilt).

C. Sperle did not provide support for his claim that counsel provided him inadequate advice, and his claim is refuted by the record.

Further, the district court did not abuse its discretion when it denied the claim Sperle made in the Addendum alleging that his counsel did not advise him that the image created had to be made to capture a child engaged in sexual conduct. (*See* DV 18-566 Doc. 5 at 4 (Sperle's claim).) Sperle's unsupported, self-serving allegation made years after he entered his plea was insufficient to establish that his counsel was ineffective. As this Court explained in *Kelly*, a defendant must "bring forward more evidence than a 'self-serving statement.'" *Kelly*, ¶ 10 (citing *Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002), and *Cuppett v. Duckworth*, 8 F.3d 1132, 1139 (7th Cir. 1993)). In *Turner*, the Ninth Circuit held that the defendant's self-serving statements that his counsel did not advise him that the case was a death penalty case was insufficient to establish that he was unaware of the potential death penalty verdict. *Turner*, 281 F.3d at 881.

Sperle's self-serving claim that counsel did not advise him that the images had to be produced for a sexual purpose is similarly insufficient. The charging documents advised Sperle that the offense of sexual abuse of children involved

capturing images of children engaged in sexual conduct and that the images had to be produced for sexual gratification. (DC 16-461 Docs. 2, 4.) Sperle's suggestion that he did not understand that the images had to have a sexual component is not reasonable. Further, Sperle admitted that he recorded a girl using the bathroom. There was no permissible purpose for that action. Instead, the only logical conclusion is that he recorded the girl for a sexual purpose. And his claim that counsel failed to advise him that the images had to have a sexual component is insufficient because he fails to provide any evidence to support the claim, as required by Mont. Code Ann. § 46-21-104(2) and *Kelly*, ¶¶ 9-11. In the Acknowledgement of Waiver of Rights, Sperle acknowledged that he was satisfied that his attorney had advised him of his rights and represented him properly. (Appellant's App. 3 at 8.) He has failed to demonstrate now that that statement was inaccurate. The district court's dismissal of this claim was therefore not an abuse of discretion.

D. The other claims in the Petition should not be reviewed.

None of the claims that Sperle raised in his petition but has not raised on appeal should be reviewed. *Herman*, ¶ 22 ("We do not consider unsupported arguments; nor do we have an obligation to formulate arguments or locate authorities for parties on appeal."). The State briefly addresses some of his assertions, however, to demonstrate their lack of merit. Sperle's assertion that he was innocent of the sexual abuse of children does not provide a ground for relief

because he pleaded guilty to the offense. *Frazier*, ¶¶ 10-11 (dismissing actual innocence claim of defendant who pleaded guilty because "a defendant who believes he is innocent may still make the voluntary choice to plead guilty.").

Sperle also argued in the Petition that he was improperly advised about the potential sentence, and that the sentence imposed was illegal. Sperle's arguments are based on the false claim that his sentence was governed by Mont. Code Ann. § 45-5-625(2)(c). Subsection (2)(c) applies to a person convicted of sexual abuse of children under Mont. Code Ann. § 45-5-625(1)(e), and it limits the sentence to 10 years in prison. But Sperle was charged under Mont. Code Ann. § 45-5-625(1)(b), rather than subsection (1)(e), so his sentence is governed by Mont. Code Ann. § 45-5-625(2)(a). (DC 16-461 Doc. 4.) A person convicted of sexual abuse of children under Mont. Code Ann. § 45-5-625(1)(b) may be sentenced to life imprisonment or to a term not to exceed 100 years. Mont. Code Ann. § 45-5-625(2)(a). Sperle was therefore subject to a maximum sentence of life imprisonment, and the sentence imposed was a legal sentence.

Many of Sperle's claims were based on his assertion that the State acknowledged in court that none of the images were unlawful and that recordings were fabricated. But Sperle has not provided a transcript of the hearings where these statements were allegedly made, so it is impossible to know what was said or in what context the statements were made. Sperle has not provided any support for

his claim that no illegal images existed, and the Affidavit of Probable Cause refutes that assertion. Sperle's unbelievable assertion that the State fabricated images and then admitted in court to doing so does not entitle him to relief because he failed to support the claim with any evidence.

In sum, all of the claims in the Petition were properly dismissed without further evidentiary development.

CONCLUSION

The district court's dismissal of Sperle's Petition for Postconviction Relief should be affirmed.

Respectfully submitted this 20th day of May, 2020.

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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 6,791 words, excluding certificate of service and certificate of compliance.

/s/ Mardell Ployhar
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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-20-2020:

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