

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 18-0619

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL PAUL FURBUSH,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable Deborah K. Christopher, Presiding

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ARGUMENT

I. Either Furbush pled “no contest” without meaningful advice of counsel, or the court completely lacked a sufficient factual basis to enter a guilty plea, either requires reversal.

The State insists that Furbush’s plea was “guilty” rather than “no contest,” because Furbush admitted every element of the theft offense. While it is true that Furbush said “yes” to the district court’s recitation of the statutory elements, he flatly refused to admit the factual basis for those elements, especially whether he knew the items were stolen:

THE COURT: Is it true that on or about February 1 and February 9th, 2016, in Lake County, Montana, you purposely or knowingly obtained or exerted unauthorized control over property that belonged to Richard Krogstad that had the value of more than \$1500?

THE DEFENDANT: Yes.

COP Trans. at 5-6.

THE DEFENDANT: I may have pawned a coin, but not knowing exactly where they came from, I wasn't with her the whole time. But I pawned a coin that obviously did belong to Mr. Krogstad. At the time I did not know it was his because her mom, Crystal, Crystal's mom, Terry Waugh, was in and out of the vehicle. So I pawned a coin that apparently belonged to Mr. Krogstad, so I'm guilty of that.

THE COURT: And you knew it wasn't yours.

THE DEFENDANT: Yes.

THE COURT: And you knew it wasn't something that your wife should have, or Crystal should have?

THE DEFENDANT: I was not aware because her mom has given her stuff over the years that were collectibles, and I didn't think too much of it. Obviously I wasn't thinking.

THE COURT: But you came to the information that that in fact was not your coin, her coin, and you didn't follow up in her –

THE DEFENDANT: Later I did, yes.

THE COURT: So you ultimately knew that it was not yours, that it was stolen property, and you didn't do anything to get that back?

THE DEFENDANT: I found out later that that was correct.

THE COURT: Did you ever attempt to get the coin returned or back for Mr. Krogstad?

THE DEFENDANT: I just know that whatever was taken, that it was returned I believe.

THE COURT: Through your actions?

THE DEFENDANT: Yes.

COP Trans. at 7-8.

In order to be guilty of theft, a defendant must “knowingly . . . exert[] unauthorized control over property of the owner” and take some action to deprive the owner of the property. Mont. Code Ann. 45-6-301. When Furbush disputed the factual basis, he was essentially arguing that he did not knowingly commit theft

because he thought he was authorized to sell the coin, and did not know he was wrongfully depriving the true owner of the property.

If the State contends that this confusing plea colloquy was actually a guilty plea, then the plea lacks a sufficient factual basis and should be thrown out on those grounds alone. *See* Mont. Code Ann. 46-12-212. Whether the plea was a hastily entered no contest plea or a legally insufficient guilty plea, Furbush should have been permitted to withdraw the plea on the grounds that he did not enter the plea knowingly, intelligently, and voluntarily.

The State argues that Furbush essentially acquiesced to having a guilty plea entered because he did not contest or correct the written judgment or oral pronouncement finding him guilty. Regardless of what the district court found and wrote in its judgment, this Court reviews *de novo* a district court's conclusions of law regarding a motion to withdraw plea. *State v. Zunick*, 2014 MT 239, ¶ 10, 376 Mont. 293, 339 P.3d 1228). The district court's oral or written judgment does not cure errors that may occur during the plea colloquy. The discussion between Furbush, his attorney, and the district court did not establish the statutory elements of theft and could not be the basis for a knowing and intelligent plea, whether it be guilty or no contest.

Finally, the State points out that Furbush only moved to withdraw his plea when he was facing revocation. But the grounds for Furbush's motion to withdraw

were the same grounds he raised during the change of plea: that he did not believe he was guilty because he did not know the items belonged to someone else; that he was perhaps willing to enter a no contest plea but did not discuss it with his attorney until the plea colloquy. (Appendix D at 6). Furbush has consistently asserted that he was actually innocent both at the change of plea and in his motion to withdraw guilty plea.

Where the record leaves genuine doubt as to whether a defendant misunderstood the nature of his plea, that doubt should be resolved in the defendant's favor. *State v. Rave*, 2005 MT 78, ¶ 19, 326 Mont. 98, 109 P.3d 753; *State v. Enoch*, 269 Mont. 8, 18, 887 P.2d 175, 181 (1994). In this matter, Furbush did not understand the nature of his plea. Given the confusing plea colloquy and Furbush's flat refusal to admit guilt, the district court and defense counsel also failed to understand the nature of Furbush's plea.

II. The confrontation error prejudiced Furbush even if he admitted some violations.

The State argues that the confrontation issue should not be reached because Furbush can be revoked based on his admissions alone. Upon a thorough reading of the transcript, however, many of these "admissions" are actually denials of wrongdoing. For instance, the State asserts that Furbush admitted to going to Billings without probation's approval. (St. Br. at 18). Furbush explained that he went to

Billings to talk to probation there in an attempt to transfer his probation, and that his Polson probation officer never educated him on how to go about transferring probation. (Revo. Trans. at 24). The State asserts that Furbush admitted using marijuana. (St. Br. at 18). Furbush denied that he ever admitted to using marijuana, (Revo. Trans. at 28:11-15), and the officer who allegedly heard his confession was not present for cross examination.

Even if Furbush did admit to some violations, the State's position does not comport with this Court's holding in *State v. Pedersen*, 2003 MT 315, ¶ 21, 318 Mont. 262, 267, 80 P.3d 79, 83. There, this Court held that minimum guarantees of fairness exist in revocation hearings, such as notice and confrontation. If those rights are violated, "a District Court's error may be harmless *if its findings do not rely upon the erroneously admitted evidence.*" *Id.* (emphasis added). The evidence at issue in *Pedersen* was a positive drug test that the defendant did not know about prior to the hearing. This Court found that it was erroneous to admit the drug test results because of untimely notice, but because the district court never relied on the test results in its findings, the error was harmless. This Court has also held that a confrontation error on revocation could be harmless if abundant evidence, admitted without error, is sufficient for revocation. *State v. Megard*, 2004 MT 67, ¶ 28, 320 Mont. 323, 330, 87 P.3d 448, 453

Here, the district court's findings relied on a plethora of erroneously admitted testimony. Although Furbush's half-admissions were apparently a large part of the district court's findings, the testimony of probation officer McRae made up a significant portion of the most concerning allegations, like drug and alcohol use. Unlike the courts in *Pedersen* and *Megard*, the district court's findings were heavily reliant on testimony that violated Furbush's right to confrontation.

CONCLUSION

The Defendant respectfully requests this Court reverse and remand for a new revocation hearing, or alternatively, reverse and remand with instructions that Furbush be permitted to withdraw his plea.

Respectfully submitted this 8th day of June, 2020.

/s/ Nick K. Brooke

Attorney for Appellant and Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 5,000 words. The exact words count is 1781 words as calculated by my Microsoft Word software excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

Dated this 8th day of June, 2020.

/s/ Nick K. Brooke

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CERTIFICATE OF SERVICE

I, Nicholas Kirby Brooke, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-08-2020:

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