

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 19-0392

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PHILLIP BRUINSMA,

Defendant and Appellant.

APPELLANT'S ANDERS BRIEF

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I. STATEMENT OF THE ISSUES

- A. Did the Lower Court err in designating Mr. Bruinsma a level III sex offender?**
- B. Did the lower court err in accepting the Guilty Plea by Alford, and in proceeding to sentencing?**
- C. Is the subsequent Decision of this Court, holding that a defendant charged with a sex offense can enter a guilty plea by Alford, applicable to this case?**

II. PREFACE

After carefully examining the record on appeal, and researching the relevant law, Counsel has concluded that this case has no legally non-frivolous issues. Counsel has reviewed the entire record, researched any possible violations of the applicable provisions of the Montana or U.S. Constitutions, the applicable statutes and the Montana Rules of Evidence, in reaching this conclusion. As Counsel has decided that no non-frivolous issues are presented by this appeal, she requests leave to withdraw as counsel and submits this brief, in accord with Sec. 46-8-103, M.C.A.

III. COMBINED STATEMENT OF THE CASE FACTS AND PROCEDURE

On March 23, 2015, Appellant was charged with sexual abuse of minors in the Eleventh Judicial District Court. App. A-docket sheet- DC# 2, 3. Information and affidavit in support. The State Public Defender appeared in the first case as his counsel of record. DC# 10. Notice of Appearance. Mr. Bruinsma appeared and plead not guilty on April 9, 2015. Id, DC# 9. An amended scheduling order was issued on September 30, 2015. Id, DC# 15. The Omnibus hearing memorandum was entered on December 3, 2015. Id, DC# 20. On June 8, 2015, new counsel was assigned.

Two more amended scheduling orders were entered. Id, DC# 13;22. The State had subpoenas issued and commenced other trial preparations. Id, DC# 23-29. On February 13, 2017, an amended information was filed, charging Mr. Bruinsma with one count of sexual abuse of children, and a second count of sexual intercourse without consent, alleging the victim was under the age of 14 years. Id, DC# 38; 2/13/17 Change of Plea hearing transcript, p.3. A plea agreement was reached by the parties and filed on the same date. Mr. Bruinsma plead guilty, by Alford, on that date. Id, DC# 38 & 39. As a factual basis for the plea, the lower

court took judicial notice of the facts alleged in the charging documents. COP Tr, p. 17.

The lower court ordered a presentence investigation after it accepted Mr. Bruinsma's Alford/guilty plea. Id, p.18. Considerable discussion then occurred regarding the choice of a psychosexual evaluator, and the lower court requested that both counsel keep the Court apprised of the status of that necessary evaluation. Id, p. 21.

On June 15, 2017, a status hearing was held. 6/15/17 Hearing Transcript. Mr. Bruinsma had turned in his presentence questionnaire to the jail staff but apparently, it was misplaced. Id, pp.4-5. Defense counsel then advised the Court Mr. Bruinsma was not going to cooperate with the psychosexual evaluator. Id, pp. 7-8. Sentencing was set for August 24 at 9 am. Id, p. 13.

On June 23, 2017, the lower court issued an order to show cause, directing the parties to appear and advise of the status of the PSI and psychosexual evaluation. App. A, DC# 45. A hearing was convened on June 30, 2017, and Defense counsel advised the questionnaire was turned in to the probation officer. 6-30-17 Hrg Tr, p. 5. The Court and counsel discussed the issue of whom could perform the psychosexual evaluation, and Dr. Scolatti was selected to complete that report. Id.,p. 25-27. Complication arose as Mr. Bruinsma was allegedly a

suspect in two homicide cases, and defense counsel was being vigilant about his Fifth Amendment rights in that situation. *Id.*, p. 11. The court then reset the sentencing hearing for August 25, 2017. App. A, DC# 47

The PSI was filed, and the author recommended that the lower court adopt Dr. Scolatti's recommendation that Mr. Bruinsma be designated a level II sex offender. App. A, # 50. The report also reflected Mr. Bruinsma's refusal to answer any of the PSI questionnaire's numerous questions. *Id.* Dr. Scolatti's psychosexual evaluation report was attached to the PSI report. *Id.*, # 50.

Prior to the sentencing hearing, the State filed, under seal, two exhibits related to other investigations pending against Mr. Bruinsma. App. A, DC# 52; 54. One of the exhibits was a transcript of a microcassette tape, dated June 10, 1995, which tape was seized during a search of Mr. Bruinsma's garage, and which depicted his "monologue" describing the abduction, and rape of a 7 year old female, and having another male join him in raping her. *Id.* Another exhibit was a series of text messages between him and a female, a co-defendant in the case, which outlined his desires for her to obtain young females so he could have sex with them. *Id.* Also, photos of children's undergarments and of children engaged in sex acts were submitted by the state that were found on Mr. Bruinsma's devices during the forensic examinations in the case investigation. *Id.*

The sentencing hearing was held on August 25, 2017, and the investigating detective, Jeanne Parker and four of the victims, and their mother testified. Sent Hrg Transcript, 8/25/17. Detective Parker testified regarding the exhibits the state had submitted, and clarified that the FBI lab that analyzed the tape recording thought it might be a reading of a fantasy- type document, as opposed to depiction of an actual crime that had been committed. Id, pp. 20-23. She also related that Mr. Bruinsma had over 10,000 child pornographic images on his devices, and he had nude photos of each of the five victims in the case, as well. Id.

Defense counsel objected to the State's exhibits as confidential criminal justice information, and unrelated to the charges he had plead guilty to. Id, pp. 8-9. The lower court denied that objection, citing the evidentiary rule that states the rules of evidence don't apply at sentencing hearings, and finding those exhibits relevant to sentencing and Mr. Bruinsma's tier level designation. Id, pp. 11-12.

Sara Coonce, the mother of the victims , testified to the extreme injuries caused to her children, as a result of the sexual assaults, and requested lengthy sentence. Id, p. 28. The four victims gave compelling testimony about the emotional and other damages they had to live through, and the lasting effects on their lives, psyches, and futures. Id, pp. 29-42.

The Defense represented no testimony and did not call Dr. Scolatti to explain why he recommended a level II tier designation in his report.

The State requested 100 years sentence on each count, concurrent, and that Mr. Bruinsma be designated a level III sex offender, arguing that the nature of the sex acts depicted in the numerous photos and videos seized, indicated that risk level was justified. *Id.*, pp. 47-51. The defense contended that Dr. Scolatti's decision as to the recommended tier level was well-founded, due to his extensive experience, and he considered the damaging material submitted to him by the state, and thus, a risk level of II- moderate risk to reoffend- was appropriate. *Id.*, pp. 52-54.

The lower court followed the basic sentencing recommendations of the plea agreement and sentenced Mr. Bruinsma to 100 years, concurrent on each count with a 35 year parole restriction. *Id.*, pp. 61-62. It then designated him as a level III sex offender, finding that due to the egregious nature of the facts of the case, and the other evidence submitted by the state, and the lack of cooperation with the psychosexual evaluations, that was appropriate and fitting. *Id.* p. 62. The lower court further found that on the record before it, particularly his refusal to cooperate with the PSI process and the psychosexual evaluation, Mr. Bruinsma was not amenable to treatment.

The lower court did not include any findings of fact in its judgment regarding the tier designation, but simply noted in condition no. 39 the level III tier designation, and that such was based on the psychosexual evaluation and other pertinent documentation. App. B- judgmental conviction, p. 6.

On June 24, 2019, Mr. Bruinsma filed his notice of appeal. App. A, DC# 67.

IV. SUMMARY OF ARGUMENT

First, no objections to an illegal sentence based on an improper guilty plea, or any objection to the Tier III level designation, were made in this case. Mr. Bruinsma was allowed to enter a Guilty plea by Alford, on February 15, 2017. His plea and sentencing predated the decision of the Montana Supreme Court in *Lawrence v. Guyer*, 2019 MT 74, ¶¶ 9-10, 395 Mont. 222, 226–27, 440 P.3d 1, 3–4, reh'g denied (May 14, 2019) in which this Court held that such pleas are legal, as are any sentences imposed thereto. That decision applies retroactively to this case, pursuant to *State v. Goebel*, 2001 MT 155, ¶ 23, 306 Mont. 83, 89, 31 P.3d 340, 345, which held when a court interprets a statute, the decision applies retroactively.

The designation of Mr. Bruinsma as a level III Sex offender was well within the lower court's wide discretion, and under the facts of this case, was appropriate.

The lack of specific finding in the written judgment does not void the lower court's decision, as at the sentencing hearing, the lower court made it clear the specific facts and circumstances it relied on for its decision.

Consequently, there are no non-frivolous issues in this direct appeal.

V. ARGUMENT

A. Standards of Review.

1. Tier Level Designation.

The standard of review for designation of a tier level for a sex offender is one of abuse of discretion. 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.” *State v. Rovin*, 2009 MT 16, ¶ 23, 349 Mont. 57, 201 P.3d 780,18.

2. Validity of Alford/Guilty Plea and Retroactivity Analysis.

The standard of review for whether or not the court was correct in accepting an Alford guilty plea, and then in imposing sentence is one of whether a District Court had statutory authority to impose a sentence is reviewed *de novo*. *State v. Ring*, 2014 MT 49, ¶ 15, 374 Mont. 109, 321 P.3d 800 (citations omitted).

B. The Lower Court Acted within Its Discretion in Designating Mr.

Bruinsma as Level III Sex Offender , and No Suitable Objection was Made.

As a preliminary matter, any objection to the tier level was not properly preserved as defense counsel did not preserve this issue with a proper objection.

Sent. Tr. Hrg.

Assuming defense counsel's objection to introduction of the state's sentencing exhibits and his argument to adopt Dr. Scolatti's tier recommendation could function as an objection, the record displays adequate evidence for the lower court to deviate from the psychosexual evaluation's tier level. Sent.Tr. pp. 11-12. Moreover, Mr. Bruinsma refused to cooperate with both the probation officer and Dr. Scolatti in their critical reports, and the Court acted well within its discretion in finding this was another factor militating toward the highest tier level designation. Id.

C. Mr. Bruinsma's Alford Plea of Guilty is Sound, and No Suitable Objection was Made by the Defense to Preserve that Issue.

Again, any objection to a sentence imposed as being illegal because the guilty plea on which it is founded was not authorized by statute or law, must be properly made. Generally speaking, a litigant may raise on direct appeal only those

issues and claims that were properly preserved. *See State v. Rosling*, 2008 MT 62, ¶ 76, 342 Mont. 1, ¶ 76, 180 P.3d 1102, ¶ 76.

However, a significant issue may be active in this case, or plain error might apply, as the court decision holding that a guilty plea by Alford for a sex offense was legal; to wit, *Lawrence v. Guyer*, 2019 MT 74, ¶¶ 9-10, 395 Mont. 222, 226–27, 440 P.3d 1, 3–4, reh'g denied (May 14, 2019) didn't occur until after Mr. Bruinsma's plea was entered on February 15, 2017. He was sentenced on August 25, 2017, so the relevant case law still provides that such holding would apply to his situation retroactively.

In *Lawrence*, *supra*, the Montana Supreme Court interpreted one of the statutes that governs the entry and acceptance by courts of various types of pleas in criminal cases. Specifically, it found that Section 46-12-212 (2), M.C.A. could be utilized to accept a guilty plea by Alford, and that such was distinct from the statutory prohibition on nolo contendere pleas in sexual crimes found in Sec. 46-12-204 (4), M.C.A.

The Montana Supreme Court held in *State v. Goebel*, 2001 MT 155, ¶ 23, 306 Mont. 83, 89, 31 P.3d 340, 345, that a court's interpretation of a statute does not constitute new law because such a decision declares what the statute meant from the day of its enactment, not from the date of the decision. This would serve

to validate application of *Lawrence*, supra, to Mr. Bruinsma' s guilty plea in 2017, and thus, there is no viable appeal on this issue.

VI. CONCLUSION.

Appellant requests that the relief requested herein be ordered.

Respectfully submitted this 3rd day of August, 2020.

/s/ Penelope S. Strong
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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
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Dated this 3rd day of August, 2020.

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CERTIFICATE OF SERVICE

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