DA 19-0367

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 27

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STORMI RENEA WILKES,

Defendant and Appellant.

APPEAL FROM: District Court of the Third Judicial District,
In and For the County of Anaconda-Deer Lodge, Cause No. DC 17-99
Honorable Ray J. Dayton, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Caitlin Boland Aarab, Boland Aarab, PLLP, Great Falls, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Ben Krakowka, Deer Lodge County Attorney, Anaconda, Montana

Submitted on Briefs: June 17, 2020

Decided: February 9, 2021

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Defendant Stormi Renea Wilkes (Wilkes) appeals the judgment of the Montana Third Judicial District Court, Deer Lodge County, sentencing her, upon jury verdict for felony possession of methamphetamine and misdemeanor possession of drug paraphernalia, to a net five-year suspended term of commitment to the Montana Department of Corrections (DOC) and a $15,000 fine. We address the following restated issues:

1. *Whether the District Court erroneously deviated from the statutory presumption that a defendant is entitled to a deferred imposition of sentence on a first-offense Criminal Possession of Dangerous Drugs (CPDD)?*

2. *Whether the District Court erroneously imposed the fine required by § 45-9-130(1), MCA (market rate fine), without considering its relative proportionality to the gravity of Wilkes's adjudicated criminal conduct and ability to pay?*

We affirm in part, reverse in part, and remand.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 On November 9, 2017, while on evening patrol in and about the City of Anaconda, Anaconda-Deer Lodge County law enforcement Officers Jack Doemel (Doemel) and Peter Lorello (Lorello), observed a red Subaru traveling on Montana Highway 1 with expired registration. Upon effecting an investigatory traffic stop near the Anaconda slag pile, the officers encountered Wilkes driving the vehicle and ascertained that she did not own the vehicle, was unable to specifically identify who did, and was unable to produce the requested insurance and registration information for the vehicle. Wilkes explained,

however, that she was on her way back to Missoula after visiting her friend Adam in Anaconda. Another officer had seen the red Subaru parked in front of Adam Reiss's (Reiss) residence at 401 Cherry Street in Anaconda the night before.

¶3 Upon further investigation, the officers observed that the vehicle driven by Wilkes had a license plate registration tag issued for a different vehicle. Upon identifying Wilkes's passenger as David Skaw (Skaw), the officers ascertained that he was the subject of an active arrest warrant out of Missoula. Two other officers arrived and arrested Skaw on the warrant. The officers later found methamphetamine and a butane torch on Skaw at the detention center during intake processing.

¶4 Back at the scene of the traffic stop, Doemel issued Wilkes citations for operating a vehicle with expired registration, altered registration tags, and no proof of liability insurance. He advised Wilkes that the vehicle would be towed to a safe location pending identification of the owner. He offered her a ride to a nearby gas station due to the inclement weather, but she declined and said she would try to get a ride from a friend, either "Adam" or "Johnny."

¶5 While Wilkes was calling for a ride, the officers intently scanned the inside of the vehicle with their flashlights and observed a small plastic Ziploc bag on the floor near the front passenger door where Skaw had been sitting. In the backseat area, they observed a small glass cylinder with a melted end that appeared to be a methamphetamine pipe. While Wilkes was talking on the phone in the driver's seat, the officers asked her about those items. She picked both up and, without hesitation, handed them to Doemel. Based on

those observations, and the knowledge that Skaw was in possession of suspected methamphetamine and paraphernalia when arrested, Doemel asked Wilkes for consent to search the vehicle. Wilkes declined and the officers had the vehicle towed to the detention center pending application for a search warrant.

¶6 Upon obtaining a warrant and searching the vehicle, the officers found a heat-sealed rubber tube, a couple of syringes, and some pieces of cotton in a backpack that Wilkes had previously claimed as hers. In a separate duffle bag containing men's clothing, they found several empty Ziploc bags and another Ziploc bag containing approximately 30 grams of methamphetamine. Also found in the vehicle was a woman's purse containing syringes, tweezers, cotton swabs, "bags with [suspected drug] residue on them," and another person's identification card. In the center console they found a suspected Clonazepam tablet, and a scale with suspected drug residue. Behind the driver's seat, officers found a glass vial containing a small quantity of suspected methamphetamine. The vehicle search further yielded a Fed-Ex box containing an extraordinarily large quantity (220.99 grams) of methamphetamine. The shipping label on the box was addressed to "E and H Enterprises," 401 Cherry Street, in Anaconda and indicated that Fed-Ex delivered the box on November 9, 2017, from an address in Tucson, Arizona. Based on their observations from the traffic stop, and their resulting collective knowledge that Reiss lived at 401 Cherry Street, Wilkes claimed him as her friend, and another officer had observed the vehicle she was driving, and which contained the Fed-Ex box, parked outside Reiss's residence the night before, the officers obtained a warrant to search Reiss's residence.

¶7 The residence search yielded various items of drug-related contraband, but nothing further linking Wilkes to those items or related illegal activity at that location. The officers nonetheless arrested the two men present in the home at the time of the search—Reiss and Erik Henderson (Henderson). In a subsequent 90-minute police interrogation, Henderson only briefly mentioned Wilkes, stating that "she is a good person." However, in a later interview with defense investigator Preston Davis, Henderson allegedly stated, *inter alia*, that Wilkes was present with him, Weiss, and Skaw at Reiss's residence the day before when the four of them sat down together and weighed and apportioned the large quantity of methamphetamine shipped to the residence from Arizona. He described Wilkes as "second" to Skaw and alleged that she had previously suggested that they have the Fed-Ex box containing the methamphetamine shipped directly to her home in the Bitterroot Valley for further distribution by her and Skaw.

¶8 The State separately charged Reiss, Henderson, Skaw, and Wilkes in separate cases. The State charged Wilkes with four offenses: felony criminal possession of methamphetamine with intent to distribute (CPDD with Intent to Distribute); felony criminal possession of methamphetamine (CPDD-methamphetamine); felony criminal possession of Clonazepam (CPDD-Clonazepam); and misdemeanor criminal possession of drug paraphernalia. Prior to trial, on the State's motion, the District Court dismissed the CPDD-methamphetamine and CPDD-Clonazepam charges, and the case proceeded to trial on the CPDD with Intent to Distribute methamphetamine and misdemeanor drug paraphernalia charges.

¶9 At Wilkes's trial, Doemel testified, *inter alia*, that the methamphetamine shipment from Arizona was extraordinary insofar that it included large crystals that weighed 30-40 grams each, compared to the one or half gram street sales typical in the Anaconda area. He testified further that the methamphetamine found in the Fed-Ex box was still wet and odorous, indicating only recent manufacture, and, to his knowledge, was the largest quantity of methamphetamine seized by law enforcement in the Anaconda area to date. Doemel thus opined that the methamphetamine found in the Fed-Ex box was most likely recently manufactured in Mexico.

¶10 The State also presented the testimony of Henderson at Wilkes's trial. He gave only limited testimony, however, that he lived at 401 Cherry Street in Anaconda in November 2017 and that the State similarly charged him with Criminal Distribution of Dangerous Drugs (methamphetamine) based on his unspecified interaction with Wilkes and Skaw on November 9, 2017. When questioned further about the specifics of the distribution operation and Wilkes's involvement therein, Henderson asserted his right to remain silent. Henderson's assertion of right further thwarted the State's case against Wilkes when the District Court sustained her objection that his prior statements about Wilkes to the defense investigator were inadmissible due to her resulting inability to cross-examine him about them in accordance with her right to confront adverse witnesses.

¶11 At the close of evidence, the District Court instructed the jury on felony possession of methamphetamine with intent to distribute, and misdemeanor drug paraphernalia possession, as charged. However, the court also alternatively instructed the jury on felony

criminal possession of methamphetamine as a lesser-included offense of CPDD with Intent to Distribute. During closing argument, the State asserted that Wilkes was guilty of the greater intent to distribute charge, rather than the lesser-included possession charge, based on the large quantity of methamphetamine found in the Fed-Ex box in the vehicle she was driving, an amount far in excess of an amount that she would have reasonably possessed for personal use. Wilkes essentially argued, however, that she was not guilty of the greater offense because she was not purposely or knowingly in possession of any quantity of methamphetamine with intent to distribute. She argued, rather, that she "was simply at the wrong place at the wrong time with a person she didn't know" was in possession of illegal drugs.

¶12 The jury found Wilkes guilty of the lesser included offense of methamphetamine possession, rather than possession with intent to distribute, and misdemeanor possession of drug paraphernalia. In accordance with the non-specific instructions and verdict form given to the jury, the verdict did not specify which, or any, particular quantum of methamphetamine upon which the jury found Wilkes guilty of the lesser included possession offense, rather than the greater possession with intent to distribute offense.[1]

[1] In separate proceedings based on the same fact pattern, Skaw (Wilkes's passenger in the vehicle at the time of the traffic stop) was found guilty and sentenced on the greater offense of possession of methamphetamine with intent to distribute, Henderson pled guilty to criminal distribution of dangerous drugs and was sentenced, and Reiss was convicted and sentenced only on the lesser offenses of criminal possession of methamphetamine and misdemeanor possession of drug paraphernalia.

¶13 The presentence investigation report (PSI) prepared by DOC for Wilkes's sentencing pursuant to §§ 46-18-111 and -112, MCA, indicated, *inter alia*, that Wilkes had no prior felony convictions and was a "low risk to reoffend" based "on the risk assessment tool" used by DOC.[2] In her supplemental testimony at sentencing, the PSI author further acknowledged that, despite Wilkes's admission of a significant methamphetamine problem, she had remained drug-free for a period of ten years prior to her most recent methamphetamine use. Wilkes similarly testified at sentencing to her strong desire and asserted ability to get and stay "clean." However, apart from positive comment about Wilkes's potential to get and remain drug-free, the PSI author noted that Wilkes's PSI interview account minimized her criminal activity to giving a friend a ride without knowledge that he happened to be in possession of a large quantity of methamphetamine.

¶14 In contrast, based on information not presented at trial, Lorello contrarily testified at sentencing that:

> [Wilkes] and [Skaw] were in a romantic relationship . . . [and were] pick[ing] up methamphetamine from [] Henderson at [] Reiss' house . . . they all got together, took the methamphetamine out and . . . divvied it up between them.

Based on Henderson's post-arrest statements similarly not presented at trial, Lorello further testified that, but for the traffic stop that led to their arrests, Wilkes and Skaw knowingly intended and were engaged in transporting several hundred grams of methamphetamine to the Missoula/Bitterroot Valley area for distribution. Lorello testified that, in stark contrast

[2] But the PSI also ambiguously later stated on page five that she was a "moderate risk" to reoffend.

to the extraordinarily large quantity of methamphetamine they were transporting, Anaconda-area seizures of methamphetamine possessed for personal use are typically no more than a gram or so. He testified further that, based on a typical $80-$140 per gram street value in the Anaconda area, the street value of the quantity of methamphetamine seized in this case ranged between $26,988 to $33,735, depending on the extent "cut" with additives before retail sale. Lorello opined that methamphetamine is involved in 75-80% of all crimes committed in the Anaconda area.

¶15 Based on the extraordinarily large methamphetamine quantity involved, the parties' manifest distribution purpose, and the nature and degree of Wilkes's knowing involvement in the enterprise, the State recommended that the court sentence her on CPDD to the maximum five-year prison term, with no time suspended. In accordance with Montana's statutory presumption for first-time felony CPDD offenders, Wilkes's stated desire to live a drug-free life, her part-time employment, and her joint custody of two children, Wilkes's counsel contrarily recommended that the court impose a deferred sentence, with conditions that she successfully complete intensive outpatient chemical dependency treatment and comply with all other PSI-recommended supervision conditions. However, rejecting both recommendations, the District Court sentenced Wilkes on CPDD to a suspended five-year term of commitment to DOC, for placement in an appropriate correctional facility or program, with specific recommendation that DOC "emphasize [treatment] in their placement decision." The sentence also included the maximum $5,000 fine on CPDD, and

an additional $10,000 for the 35% market value fine mandated by § 45-9-130(1), MCA. Wilkes timely appeals.

STANDARD OF REVIEW

¶16 Except for sentences not subject to statutory sentence review, we review criminal sentences only for legality, *i.e.*, whether the court sentenced the defendant in accordance with governing statutory parameters and requirements. *State v. Hicks*, 2006 MT 71, ¶ 41, 331 Mont. 471, 133 P.3d 206; *State v. Herd*, 2004 MT 85, ¶ 22, 320 Mont. 490, 87 P.3d 1017; *State v. Montoya*, 1999 MT 180, ¶ 15, 295 Mont. 288, 983 P.2d 937. A sentence that does not comply with governing statutory parameters and requirements is an illegal sentence. *Hicks*, ¶ 41 (internal citation omitted). We review sentences not subject to sentence review first for legality and then, as applicable, for an abuse of discretion. *Herd*, ¶¶ 22-23.[3] Whether a district court erroneously imposed a suspended sentence, rather than a deferred imposition of sentence, in violation of a constitutional or statutory provision is an issue of legality not subject to sentence review. *See State v. Upshaw*, 2006 MT 341, ¶¶ 13 and 49, 335 Mont. 162, 153 P.3d 579; *State v. Bolt*, 204 Mont. 261, 264, 664 P.2d 322, 324-25 (1983). An abuse of discretion occurred if an exercise of discretion was based on a clearly erroneous finding of fact, an erroneous conclusion or application of law, or reasoning that was arbitrary, lacking in conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice. *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont.

[3] Sentence review generally applies only to unsuspended commitments to the state prison or DOC for a term of "1 year or more." *See* § 46-18-903(1), MCA; *Herd*, ¶¶ 19-23.

167, 434 P.3d 241; *In re D.E.*, 2018 MT 196, ¶ 21, 392 Mont. 297, 423 P.3d 586; *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811.

DISCUSSION

¶17 *1. Whether the District Court erroneously deviated from the statutory presumption that a defendant is entitled to a deferred imposition of sentence on a first-offense Criminal Possession of Dangerous Drugs (CPDD)?*

¶18 "A person convicted of a first violation" of § 45-9-102(1), MCA (CPDD), "is presumed to be entitled to a deferred imposition of sentence of imprisonment." Section 45-9-102(3), MCA. However, the presumption specified in § 45-9-102(3), MCA, "is not conclusive" and "may be overcome" by evidence on the trial or sentencing hearing record of some substantial aggravating circumstance such as, for example, evidence that either elevates the circumstances of the offense itself beyond a typical prima facie case in nature, degree, or effect or involves subsequent post-offense, presentence conduct indicating continued criminal propensity. *See Bolt*, 204 Mont. at 264, 664 P.2d at 324-25 (noting insufficiency of prior criminal conduct or lack of candor at trial or sentencing as aggravating factors but affirming deviation from presumption based on "subsequent criminal conduct during confinement"). The sentencing court has broad discretion to determine whether an aggravating factor exists based on evidence on the trial or sentencing hearing record and pertinent correctional and sentencing policies defined by statute. *See Upshaw*, ¶ 49 (affirming deviation from presumption based on violent or threatening nature of co-charged offenses). *See also* § 46-18-101(2)(a) and (3)(d), MCA (correctional and sentencing policies of the State of Montana).

¶19 Here, regardless of the jury determination that Wilkes was merely guilty of CPDD, rather than the greater offense of CPDD with Intent to Distribute, the District Court determined that the predicate quantity of methamphetamine found in the car she was driving was 269.88 grams,[4] an amount it noted to be far in excess of any amount typically possessed for personal use.[5] The court further noted the statements of co-defendant Henderson indicating that Wilkes was far more actively and directly involved than merely transporting a friend who just happened to be in possession of a large quantity of methamphetamine. The court additionally acknowledged the extraordinarily pervasive co-involvement of methamphetamine in a wide range of other criminal activity in Montana. Substantial evidence in the trial and sentencing hearing records thus supported the aggravating circumstances found by the District Court.

¶20 In conjunction with the aggravating factors found by the District Court, it is the express correctional and sentencing policy of the State of Montana that sentencing courts "punish each defender commensurate with the nature and degree of harm caused" by the subject offense, and thereby "hold [the] offender accountable." Section 46-18-101(2)(a), MCA. To that end, sentencing courts may "consider aggravating and mitigating circumstances" and must consider "alternatives to imprisonment for the punishment of . . .

[4] *See* note 6, *infra*, regarding the only evidence presented at trial regarding the weighed quantity of methamphetamine involved in this case.

[5] Lorello testified at sentencing that the quantity seized in this case was enough to supply the addiction of users in a medium-sized town like Anaconda for at least a week or more.

nonviolent offenders who do not have serious criminal records." Section 46-18-101(3)(d) and (f), MCA. *See also* § 45-9-202, MCA (alternative dangerous drug offense sentencing authority).

¶21 Here, the maximum penalty for methamphetamine-based CPDD was five years in state prison and a $5,000 fine. Section 45-9-102(2), MCA. The District Court's deviation from the State's recommendation for an unsuspended five-year prison term clearly reflected the court's careful and balanced consideration of both the aggravating nature and magnitude of Wilkes's record criminal activity, and the mitigating nature of her chemical dependency problem, potential for rehabilitation, the nonviolent nature of her offense, and her lack of any prior felony conviction. For purposes of §§ 45-9-102(3) and 46-18-101(2)(a), MCA, and in the manifest discretion of the District Court, the noted aggravating factors elevated and aggravated the nature and magnitude of her record criminal conduct beyond a simple or typical possession of dangerous drugs, well within the range of legal sentencing authority provided for CPDD. The court had discretion under §§ 45-9-102(2), (3), 46-18-101(2)(a), and (3), MCA, to consider those aggravating factors at sentencing regardless of the fact that the State was unable to convict her on the greater charged offense of CPDD with Intent to Distribute. We hold that the District Court did not abuse its discretion in deviating from the statutory presumption that a defendant is entitled to a deferred imposition of sentence upon a first-offense CPDD conviction.

¶22 2. *Whether the District Court erroneously imposed the fine required by § 45-9-130(1), MCA (market rate fine), without considering its relative*

proportionality to the gravity of Wilkes's adjudicated criminal conduct and ability to pay?

¶23 Wilkes asserts that the District Court erroneously calculated the 35% market value fine mandated by § 45-9-130(1), MCA, without considering her relatively limited role in the larger criminal enterprise that resulted in her CPDD conviction. She asserts that her conviction on the lesser included offense of CPDD, rather than the greater intent to distribute offense, manifests that the jury necessarily convicted her based solely on the small quantity of methamphetamine in the glass vial found behind her seat in the car, rather than the several hundred grams of methamphetamine found in the Fed-Ex box, and the additional 30 grams found in the duffle bag containing men's clothes.

¶24 As a threshold matter, neither the non-specific jury instructions, nor the general verdict form given to and utilized by the jury, gave any indication as to the specific quantity, or container-based description, of methamphetamine upon which the jury found Wilkes guilty of the lesser included offense of CPDD-methamphetamine. Wilkes's assertion that the jury did not convict her of possession of either or both of the larger quantities of methamphetamine found in the Fed-Ex box or duffle bag is a reasonable, albeit speculative, inference as to the factual predicate upon which the jury found her guilty of the lesser included offense of CPDD, rather than the greater offense of CPDD with Intent to Distribute. However, Wilkes's assertion is merely one of many reasonably conceivable, but equally speculative, factual bases upon which the jury may have reasonably concluded that she was guilty only of the lesser offense of CPDD in this case.

¶25 The trial evidence reflects, and Wilkes does not dispute, that police found at least four distinct quantities of methamphetamine in the car when searched by warrant after the initial traffic stop—220.99 grams in the Fed-Ex box, approximately 30 grams in the duffle bag containing men's clothes, a small amount found in a glass vial on the floor behind the driver's seat, and trace amounts of residue on the meth pipe found in the backseat and on the various drug paraphernalia found in the woman's purse.[6] Thus, it is just as reasonably conceivable on the trial evidence, and non-specific instructions and verdict form given to the jury, that the jury unanimously found Wilkes in purposeful or knowing possession of: (1) either or both of the quantities of methamphetamine found in the Fed-Ex Box and/or the duffel bag but could not unanimously agree about her intent to distribute it;[7] (2) the small quantity found in the glass vial on the floor behind the driver's seat; and/or (3) either or both of the trace amounts of methamphetamine residue on the meth pipe in the backseat and/or on the various drug paraphernalia found in the woman's purse in the vehicle. All, including Wilkes's assertion, are reasonable inferences equally supported by the trial

[6] Our review on appeal indicates that the only reference to a measured quantity of methamphetamine admitted for jury consideration on the trial record was the 220.99 grams weighed at the Montana Crime Lab, as indicated in the redacted Crime Lab report admitted into evidence (Trial Exhibit 44). The additional 48.89 grams included in the total of 269.88 grams referenced by the District Court is based on the unredacted Crime Lab report which was not admitted for jury consideration. The trial record further indicates the reference to the additional 48.89 grams was redacted from the Crime Lab report to avoid conflation of the 48.89 grams seized from 401 Cherry Street with the amount of weighed methamphetamine seized from the vehicle. We find no reference in the evidence admitted at trial to the approximately 30 grams found in the duffle bag, the lesser amount found in the small glass vial, or any of the residue on other items found in the car.

[7] *See* § 45-9-103(1), MCA (elements of CPDD with intent to distribute).

record in this case. However, all four are also equally speculative in light of the non-specific instructions and verdict form given to the jury. Wilkes does not assert that her CPDD conviction is not supported by sufficient evidence and, absent an improper jury instruction issue,[8] neither the District Court, nor either of the parties, had any proper basis upon which to speculate as to the jury's assessment of the trial evidence.

¶26 Aside from that threshold error, the mandatory 35% market rate fine ($10,000) imposed in this case was further plagued by the District Court's failure to consider other mitigating factors. In addition to the penalties specified by § 45-9-102(2), MCA, for methamphetamine-based CPDD, "the court shall fine each person found to have possessed or stored dangerous drugs 35% of the market value of the drugs as determined by the court." Section 45-9-130, MCA. However, regardless of § 45-9-130, MCA, criminal defendants have a fundamental right under the Eighth and Fourteenth Amendments to the United States Constitution, and Article II, Section 22, of the Montana Constitution, to be free from excessive fines. *State v. Yang*, 2019 MT 266, ¶¶ 15-17, 397 Mont. 486, 452 P.3d

[8] A criminal defendant has a Montana constitutional right to have the jury be in "substantial agreement as to the principal factual elements underlying a specific offense." *State v. Vernes*, 2006 MT 32, ¶ 21, 331 Mont. 129, 130 P.3d 169 (quoting *State v. Weaver*, 1998 MT 167, ¶ 33, 290 Mont. 58, 964 P.2d 713). Here, however, Wilkes does not assert on appeal that the District Court erroneously rejected an offered special unanimity instruction, or that the general unanimity instruction given was insufficient to satisfy the special unanimity requirement of Montana Constitution Article II, Section 26. *Compare State v. Russell*, 2008 MT 417, ¶¶ 37-43, 347 Mont. 301, 198 P.3d 271 (affirming rejection of offered special unanimity instruction not error where general unanimity instruction adequate under charged offenses and facts at issue); *Vernes*, ¶¶ 21-25 (right to specific unanimity not violated by general unanimity instruction as applied to charged offense and facts at issue); *Weaver*, ¶¶ 39-43 (specific unanimity instruction required when a single charged offense is susceptible to proof by more than illegal act alleged).

897; *Timbs v. Indiana*, __ U.S.__, __, 139 S. Ct. 682, 686-87 (2019) (quoting *McDonald v. Chicago*, 561 U.S. 742, 767, 130 S. Ct. 3020, 3026 (2010). The proportionality of a fine to the gravity of the subject offense is the touchstone to whether a fine is constitutionally excessive. *Yang*, ¶¶ 16-17 (quoting *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 2036 (1998)).

¶27 Consistent with the proportionality requirement of the United States and Montana constitutions, Montana law expressly specifies that:

> The sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine. In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose.

Section 46-18-231(3), MCA. *Inter alia*, § 46-18-231(3), MCA, ensures that "a fine is not grossly disproportionate to the gravity of the offense." *Yang*, ¶ 19. Sentencing courts must therefore read § 45-9-130, MCA, in conjunction with § 46-18-231(3), MCA, and may not impose the mandatory 35% market value fine "without considering the factors in § 46-18-231(3), MCA." *Yang*, ¶ 28. In considering the gravity of the defendant's offense under § 46-18-231(3), MCA sentencing courts may consider all relevant factors of record including, *inter alia*: "(1) the nature and extent of the crime[;] (2) whether the violation was related to other illegal activities[;] (3) the other penalties that may be imposed for the violation[;] and (4) the extent of the harm caused" by the crime. *See United States v. 100,348.00 in United States Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004) (citing *Bajakajian*, 524 U.S. at 337-40, 118 S. Ct. at 2038-40).

¶28 Here, the District Court imposed a $10,000 35% market rate fine pursuant to § 45-9-130, MCA, without any record indication of consideration of *any* of the factors specified in § 46-18-231(3), MCA. If, for purposes of calculating the amount of the base 35% fine under § 45-9-130, MCA, there had been a proper basis upon which to determine the amount of methamphetamine the jury found Wilkes guilty of possessing, then the failure to consider the relative proportionality of her adjudicated criminal conduct, and her ability to pay, would have merely warranted reversal of the fine and remand for recalculation upon consideration of those factors in accordance with § 46-18-231(3), MCA, and *Yang*. However, prior to consideration of those factors, calculation of the base 35% market value fine under § 45-9-130, MCA, necessarily requires: (1) a conviction based on a single quantum of drugs subject to the fine as proven or stipulated at trial; (2) a conviction on a plea to a particular quantum of drugs subject to the fine as in *State v. Tam Thanh Le*, 2017 MT 82, ¶ 14, 387 Mont. 224, 393 P.3d 607; or (3) as here, in cases involving multiple distinct quantities of drugs, a conviction on a special verdict in which the factfinder specifies on what drug(s), and quantity(s) thereof, it found the defendant guilty of the subject offense. Lacking such a particularized special verdict determination here, due process required that the sentencing court calculate the base fine under § 45-9-130, MCA, based on the lowest particular quantum of drugs inherent in the verdict. On the trial evidence, the lowest quantum of drugs inherent in the CPDD verdict here was either or both of the trace amounts of methamphetamine residue on the meth pipe and/or drug paraphernalia found in the car Wilkes was driving when stopped by police. Based on those

de minimis quantities, no qualifying basis existed for calculation of the base 35% market value fine under § 45-9-130, MCA, a deficiency not curable on remand. We hold that imposition of the 35% market rate fine under § 45-9-130, MCA, was erroneous under the unique circumstances of this case.

CONCLUSION

¶29 We hold that the District Court did not abuse its discretion in deviating from the statutory presumption that a defendant is entitled to a deferred imposition of sentence upon a first-offense CPDD conviction. However, under the unique circumstances of this case, we hold that the District Court erroneously imposed the 35% market rate fine under § 45-9-130, MCA, without a qualifying basis on the trial evidence and without consideration of the factors specified in § 46-18-231(3), MCA. We reverse the $10,000 fine imposed pursuant to § 45-9-130, MCA, and accordingly remand for entry of an amended judgment of sentence not including a 35% market rate fine under § 45-9-130, MCA.

¶30 Affirmed in part, and reversed in part.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JIM RICE