DA 19-0555

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 39N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHANDA LEANN KIRKLAND,

Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDC 2018-293
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Alexander H. Pyle, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, C. Mark Fowler, Assistant Attorney General, Helena, Montana

Leo Gallagher, Lewis and Clark County Attorney, Fallon Stanton, Deputy County Attorney, Helena, Montana

Submitted on Briefs: January 6, 2021

Decided: February 16, 2021

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Chanda Leann Kirkland appeals the First Judicial District Court's order revoking her deferred sentence and resentencing her to a five-year Department of Corrections ("DOC") commitment with two years suspended and placement at an independent treatment facility followed by drug treatment court. We reverse and remand for a new sentencing hearing.

¶3 In 2018, Kirkland pleaded guilty to accountability for felony theft in violation of §§ 45-2-301 and 45-6-301(1)(a), MCA. The District Court deferred imposition of her sentence for two years. During this time, Kirkland's chemical dependency issues resulted in several violations of the terms of her deferred sentence. These violations led the State to seek revocation of Kirkland's deferred sentence. Its petition noted that the violations were compliance violations and that Kirkland exhausted the Montana Incentives and Intervention Grid for Adult Probation and Parole ("MIIG"). Kirkland admitted to the violations at her bond hearing and remained in custody until the day before her sentencing hearing. Once released from custody, Kirkland contacted the Rimrock in-patient addiction treatment center; Rimrock offered her a placement upon referral from her

Licensed Addiction Counselor and her chemical dependency assessment. To obtain these referrals, Kirkland additionally scheduled an appointment with the Helena Indian Alliance.

¶4 At the sentencing hearing, the State recommended that the District Court revoke Kirkland's deferred sentence and commit her to the DOC to complete a treatment program. Kirkland, however, requested the District Court to continue her deferred sentence while she sought treatment. Expressing interest in Kirkland receiving substance abuse treatment, the District Court questioned counsel for both parties on the extent of its authority under § 46-18-203(7), MCA, to continue to defer imposition of Kirkland's sentence while adding new terms and conditions relating to treatment. Both parties agreed that the statute provided the District Court no such authority. The District Court asked defense counsel: "how can I impose any conditions? . . . Under the statute, it doesn't seem that I can impose, 'You go to Rimrock.' . . . [I]t would be, in my view, in contravention of 46-18-203(7)(a)(i). So you're asking me to do something I don't think the law allows me to do." Defense counsel agreed: "yes, I guess there is not a hammer that the Court could specifically state if you don't go to Rimrock . . . you're in violation of your conditions of release."

¶5 Conceding that the District Court lacked authority to add terms or conditions to Kirkland's deferred sentence, defense counsel argued instead that because she would be "back on supervision on probation" for another fifteen months, the court should continue the deferred sentence and essentially trust Kirkland to undergo treatment on her own initiative. Defense counsel additionally represented to the District Court that it could not simply order Kirkland to treatment court but would rather "have to give her a DOC commit

or incarceration for women's prison or . . . [s]omething like that." Following the discussion, the District Court revoked Kirkland's deferred sentence and resentenced her to five years with the DOC, with two suspended. It recommended that she be screened for placement in an appropriate in-patient treatment center and drug treatment court. In pronouncing the new sentence, the District Court expressed its hopes that the new sentence would facilitate Kirkland's rehabilitation; it did not mention any punitive reasons for the sentence.

¶6 Kirkland argues that her defense counsel rendered ineffective assistance when he failed to advise the District Court that § 46-18-203(8), MCA, allowed the court to continue her deferred sentence with additional terms. "Claims of ineffective assistance of counsel are mixed questions of law and fact that we review de novo." *State v. Larsen*, 2018 MT 211, ¶ 6, 392 Mont. 401, 425 P.3d 694 (citing *State v. Jefferson*, 2003 MT 90, ¶ 42, 315 Mont. 146, 69 P.3d 641). Pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), Kirkland must "(1) demonstrate that counsel's performance was deficient or fell below an objective standard of reasonableness and (2) establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Larsen*, ¶ 7 (citation and internal quotations omitted).

¶7 Section 46-18-203(8)(b), MCA, states in relevant part that:

> (b) . . . if the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence, that the violation is a compliance violation, and that the appropriate violation responses under the

> [MIIG] have been exhausted and documented in the offender's file, the judge may:
>
> . . .
>
> (ii) continue the suspended or deferred sentence with modified or additional terms and conditions, *which may include placement as provided in subsection (7)(a)(ii)*.

(Emphasis added.)

¶8 Section 46-18-203(7)(a)(ii), MCA, states that a sentencing court may:

> (ii) continue the suspended sentence with modified or additional terms and conditions, which may include placement in:
>
> (A) a secure facility designated by the department for up to 9 months; or
>
> (B) a community corrections facility or program designated by the department for up to 9 months, including but not limited to placement in a prerelease center, sanction or hold bed, transitional living program, enhanced supervision program, relapse intervention bed, chemical dependency treatment, or 24/7 sobriety program.

¶9 It is not disputed that Kirkland's violations were "compliance violations" or that the MIIG had been exhausted, and Kirkland admitted to violating the conditions of her deferred sentence. The District Court expressly stated to defense counsel that it found itself constrained by § 46-18-203(7)(a)(i), MCA, which permits a court to continue a deferred sentence only "without a change in conditions." In the District Court's view, pursuant to § 46-18-203(7)(a)(ii), MCA, only if Kirkland had a suspended sentence could it both continue her sentence and add new treatment requirements.

¶10 Under the clear terms of § 46-18-203(8)(b), MCA, however, when an offender violates the terms and conditions of a deferred sentence, the violations are compliance

violations, and the appropriate MIIG responses are exhausted—all of which fit Kirkland's circumstances—a deferred sentence may be continued with modified or additional conditions as provided in § 46-18-203(7)(a)(ii), MCA. Kirkland's defense counsel incorrectly confirmed the District Court's reliance on subsection (7)(a)(i), failing to mention the controlling subsection—which permitted the option for new court-ordered treatment. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *State v. Walter*, 2018 MT 292, ¶ 15, 393 Mont. 390, 431 P.3d 22 (quoting *Hinton v. Alabama*, 571 U.S. 263, 274, 134 S. Ct. 1081, 1089 (2014)). Defense counsel's erroneous responses to the District Court's inquiries regarding the controlling statute constituted deficient performance and fell below an objective standard of reasonableness. *See also Larsen*, ¶ 18.

¶11 The State argues that Kirkland failed to meet *Strickland*'s deficiency prong. It contends that, when read in full, the hearing transcript reveals defense counsel's statements correctly informed the District Court that it could not in fact order Kirkland to attend either Rimrock or the Montana Chemical Dependency Center ("MCDC") as they are private, non-DOC facilities not eligible under § 46-18-203(7)(a)(ii), MCA. This interpretation lacks record support. The District Court asked defense counsel, "how can I impose *any* conditions? . . . Under the statute, it doesn't seem that I can impose, 'You go to Rimrock.' . . . [I]t would be, in my view, in contravention to 46-18-203(7)(a)(i)." (Emphasis added.) This exchange makes clear that the District Court was concerned about

its statutory authority to continue a deferred sentence with any additional treatment terms. Whether the District Court could impose treatment only at a particular facility or program, the fact remains that the statute permitted the court the same range of options even if it chose to continue the deferred imposition of Kirkland's sentence. Defense counsel's misrepresentation of the statute foreclosed the possibility of a treatment placement under a deferred imposition.

¶12 Kirkland must show defense counsel's deficient performance prejudiced her by demonstrating "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Larsen*, ¶ 7 (citation omitted). The record reveals that the District Court repeatedly expressed interest in continuing Kirkland's deferred sentence with additional terms relating to substance abuse treatment. Indeed, ensuring Kirkland received effective treatment—rather than ensuring a felony conviction appeared on Kirkland's record—was the driving force behind the District Court's revocation decision. Similar to *Larsen*, given the District Court's perceived lack of authority to continue Kirkland's deferred sentence with additional terms related to treatment, we are unable to determine that the court would not have again deferred imposition of Kirkland's sentence had it been correctly advised of the law. Kirkland therefore has demonstrated "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Larsen*, ¶ 19 (citations omitted).

¶13 Finally, we are not persuaded by the State's argument that Kirkland's ineffective assistance of counsel claim is more appropriately addressed in a post-conviction relief

proceeding. Defense counsel's erroneous statements of legal authority and failure to alert the District Court to the controlling subsection completely undermined Kirkland's attempt to secure the continued deferred imposition of her sentence. *See generally State v. Jefferson*, 2003 MT 90, ¶ 50, 315 Mont. 146, 69 P.3d 641. There is no plausible tactical or strategic justification for defense counsel misrepresenting, omitting, or failing to recognize the applicable provision of a statute fundamental to his case. In similar cases, we have considered such a claim on direct appeal. *See generally Walter*, ¶¶ 13-16; *Larsen*, ¶¶ 15-19.

¶14 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. Defense counsel's failure to advise the court of its statutory sentencing authority was deficient performance that prejudiced Kirkland during her sentencing hearing. *Larsen*, ¶ 19. We therefore reverse Kirkland's sentence and remand for a new sentencing hearing in accordance with this Opinion.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE