DA 19-0729

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 50N

CHRISTOPHER WAGNER,

Petitioner and Appellant.

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV-14-319B
Honorable Rienne McElyea, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Penelope S. Strong, Attorney at Law, Billings, Montana

For Appellee:

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

Marty. Lambert, Gallatin County Attorney, Bozeman, Montana

Submitted on Briefs: February 3, 2021

Decided: February 23, 2021

Filed:

Chief Justice Mike McGrath 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 Christopher Wagner appeals from an April 27, 2020 order dismissing his petition for postconviction relief. We reverse and remand.

¶3 Petitioner Christopher Wagner (Wagner) was convicted in a second jury trial of attempted deliberate homicide with a weapon, following a shootout with a man who had previously been in a relationship with the woman who had recently broken up with Wagner. *See State v. Wagner*, 2013 MT 47, 369 Mont. 139, 296 P.3d 1142; *State v. Wagner*, 2009 MT 256, ¶¶ 3-11, 352 Mont. 1, 215 P.3d 20. After the second conviction was upheld on appeal, Wagner timely filed a pro se 75-page postconviction relief (PCR) petition on April 24, 2014. The District Court ordered the State to file a response within 60 days, but then granted the State's request for an extension until September 8, 2014. The court appointed Wagner counsel and ordered counsel to request a scheduling conference to set a hearing after the close of briefing.

¶4 On August 6, 2014, Wagner's counsel, Joseph Howard (Howard), filed an Unopposed Motion to Vacate Briefing Schedule, citing his status as a "solo practitioner, laboring under a significant caseload" and the need to review Wagner's extensive file

before likely filing an amended petition. On August 8, 2014, the District Court granted the motion vacating the briefing schedule, ordering "Petitioner shall request a scheduling and/or status conference to establish a new scheduling order once counsel has completed his review of Petitioner's file."

¶5 No documents were filed in the matter for over four years, until November 16, 2018, when Judge McElyea—who had taken over the case from her predecessor—entered a Notice for Failure to Prosecute citing § 25-1-104, MCA (providing that a court may dismiss a case inactive for over two years after a 60-day notice) and stating that "[u]nless a pleading or other document is filed within sixty days of the date of this Order, this matter shall be dismissed."

¶6 On January 14, 2019, fifty-nine days later, Howard responded by filing a Notice to Court. In this Notice, Howard reiterated his heavy caseload and status as a solo practitioner but stated that he anticipated filing Wagner's Amended Petition for postconviction relief (Amended Petition) by June 1, 2019. On May 31, 2019, Howard filed a lengthy Amended Petition and supporting brief. The District Court ordered the State to file a written response and the State subsequently moved to dismiss the Amended Petition due to inexcusable delay. After Howard's response, the District Court granted the motion, dismissing the proceeding under M. R. Civ. P. 41(b). The District Court addressed Howard's claims of a heavy workload: "he is busy. The Court is busy. The Gallatin County Attorney's Office is busy." The court faulted Howard for his apparent lack of "candor," his failure to report back to the court in a timely fashion or take responsibility for the delay, and because he "did not request additional time, he simply took" it. Wagner appeals.

¶7 We review a denial of a petition for postconviction relief to determine whether findings of fact were clearly erroneous and whether conclusions of law were correct. *Robinson v. State*, 2010 MT 108, ¶ 10, 356 Mont. 282, 232 P.3d 403 (citation omitted). A ruling on a M. R. Civ. P. 41(b) motion to dismiss is reviewed for abuse of discretion. *Lear v. Jamrogowicz*, 2013 MT 147, ¶ 16, 370 Mont. 320, 303 P.3d 790 (citation omitted).

¶8 Wagner first argues that M. R. Civ. P. 41(b)'s dismissal procedure is not applicable to a PCR petition, contending that the Rule is inconsistent with the policies and procedures of PCR proceedings as set forth in statute. Initially, we note that § 46-21-201(1)(c), MCA, provides that Montana Rules of Civil Procedure apply to PCR proceedings to the extent they are not inconsistent with PCR statutes and Rule 41(b) provides that a defendant may move for dismissal with prejudice "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order."

¶9 Wagner points to no caselaw indicating that any such inconsistency between Rule 41(b) and the PCR statutes exists. Instead, Wagner maintains that the Rule 41(b) dismissal should be withheld from PCR proceedings to counterbalance the heightened pleading standards and generally more onerous and time-consuming aspects of filing a PCR petition. However, we "simply ascertain and declare what is in terms or substance contained in the rule, neither inserting what has been omitted or omitting what has been inserted." *State v. Incashola*, 1998 MT 184, ¶ 11, 961 P.2d 745, 289 Mont. 399. As the statutory plain language provides that the Rules of Civil Procedure apply to PCR proceedings to the extent that they are not inconsistent, the District Court did not err in applying Rule 41(b).

¶10 Wagner next argues that the District Court abused its discretion by dismissing Wagner's Amended Petition under Rule 41(b). In determining whether a district court has abused its discretion in dismissing for failure to prosecute, we consider four factors: (1) the plaintiff's diligence in prosecuting claims; (2) the prejudice to the defendant caused by the plaintiff's delay; (3) availability of alternate sanctions; and (4) the existence of a warning to plaintiff that the case is in danger of dismissal. *Becky v. Norwest Bank Dillon, N.A.*, 245 Mont. 1, 8, 798 P.2d 1011, 1015 (1990). These elements are considered in the context of balancing a plaintiff's right to a hearing on the merits and the court's need to manage its docket and reach timely resolutions. *Becky*, 245 Mont. at 8, 798 P.2d at 1015.

¶11 While the parties contest Howard's diligence in prosecuting Wagner's claim, we note that the State never moved for, and neither of the two presiding District Court judges ever established, deadlines for filing the Amended Petition. *See* § 46-21-105(1)(a), MCA ("At the request of the state or on its own motion, the court shall set a deadline for the filing of an amended original petition.").[1] Second, though the State points to no specific instances of prejudice resulting from the delay, the District Court correctly acknowledged the presumption of prejudice to the moving party. *ECI Credit Ltd. Liab. Co. v. Diamond S Inc.*, 2018 MT 183, ¶ 28, 392 Mont. 178, 422 P.3d 691. However, the State's

[1] The State contends that Judge McElyea's Notice for Failure to Prosecute—requiring a "pleading or other document" be filed within 60 days to avoid dismissal—set a deadline that Wagner failed to meet. We do not interpret this notice as imposing a 60-day deadline for filing a completed amended petition, especially in light of the involved nature of preparing such a petition and that the most recent prior court order, provided in 2014, had indicated only that "Petitioner shall *request a scheduling and/or status conference* to establish a new scheduling order once counsel has completed his review of Petitioner's file." (Emphasis added.)

corresponding malaise on the matter—demonstrated by its decision not to move to impose deadlines under § 46-21-105(1)(a), MCA, or to bring a Rule 41(b) motion until *after* Wagner's extensive Amended Petition had been filed—suggests that, even with the presumption in its favor, any resulting prejudice felt by the State was slight. Third, while the parties do not dispute the District Court's unelaborated conclusion that no other relief was appropriate, we note that, to the extent that the District Court found that Howard had not acted with "candor" or good faith, M. R. Civ. P. 11(b-c) allows a court to impose sanctions upon counsel for presenting filings containing baseless factual representations or causing unnecessary delay or expense.[2]

¶12 Finally, we conclude that Wagner was given adequate warning that his petition for PCR was in danger of being dismissed. Given that several extensions had been granted, Judge McElyea's Notice for Failure to Prosecute was sufficient under these facts. However, the warning—requiring only a "pleading or other document" be filed within 60 days to avoid dismissal—did not provide actual notice that he was required to file something more substantial than his subsequent Notice to the Court. Notice is a fundamental aspect of due process, the importance of which is highlighted by the severe criminal consequences that form the backdrop of a PCR proceeding such as this one.

¶13 Significantly, these factors are to be considered in the context of balancing a plaintiff's right to be heard on the merits and the court's docket management needs.

[2] Additionally, M. R. Pro. Cond. 1.3 requires that a "lawyer shall act with reasonable diligence and promptness in representing a client" and the rules provide for a disciplinary process for compliance violations.

Becky, 245 Mont. at 8, 798 P.2d at 1015. While docket management is a legitimate judicial interest, the unique, quasi-criminal nature of a PCR proceeding elevates the relative importance of a petitioner's interest in having a court review on the merits that should not be collaterally sacrificed when a court seeks to respond to misdeeds attributable to the blameless petitioner's appointed counsel.

¶14 Here, the State makes no allegation that Wagner is personally at fault for the delay or for Howard's various excuses that seemingly aggravated the District Court's frustration. In fact, Wagner had filed his own 75-page PCR Petition before the court appointed him counsel, after which Wagner, as a represented party, could no longer file his own legal documents with the court. *See State v. Weaver*, 2001 MT 115, ¶ 24, 305 Mont. 315, 28 P.3d 451 (upholding district court refusal to consider a pro se motion made by a represented party). Moreover, Howard's interactions with the court are less attributable to Wagner, a prisoner with court-appointed counsel, than they might be to a typical civil litigant better positioned to actively monitor counsel's progress and more readily retain new counsel if necessary.

¶15 Here, despite his lack of fault in the matter, Wagner bears the consequences of the District Court's ruling. Because PCR is not a criminal proceeding, Wagner does not enjoy the same constitutional protections from ineffective assistance of counsel that are typically attendant to criminal matters. *State v. Bromgard*, 285 Mont. 170, 175, 948 P.2d 182, 185 (1997).

¶16 A civil litigant, including a PCR petitioner, assumes some degree of "risk of ordinary error in either his or his attorney's assessment of the law and facts." *McMann v.*

Richardson, 397 U.S. 759, 774, 90 S. Ct. 1441, 1450 (1970); *see also State v. Nelson*, 251 Mont. 139, 142, 822 P.2d 1086, 1088 (1991) (holding that, pursuant to statute, criminal defendant was bound by defense counsel's case decision waiving right to speedy trial). However, courts exist to provide dispute resolution for parties, not performance reviews for lawyers, and we have granted relief to civil litigants when necessary to protect them from gross neglect by their attorneys. *See, e.g.*, *In re Marriage of Orcutt*, 2011 MT 107, ¶ 16, 360 Mont. 353, 357, 253 P.3d 884, 887 (reversing district court's denial of motion for M. R. Civ. P. 60(b) relief when divorce litigant's counsel failed to call necessary experts for whom the litigant had provided contact information); *Skogen v. Murray*, 2007 MT 104, ¶¶ 19-20, 337 Mont. 139, 157 P.3d 1143 (reversing district court's denial of motion for M. R. Civ. P. 60(b) relief in property dispute when litigant's counsel failed to file timely objection to surveys despite litigant having hired a surveyor to review surveys and prepare objections for counsel).

¶17 Unlike the typical civil litigant, Wagner's appointed counsel cost him the opportunity to exercise his statutory ability to challenge the conviction underlying his hefty prison sentence through a PCR petition. Wagner's due process rights are uniquely vulnerable in this context and demand caution when a court determines how to respond to shoddy lawyering by appointed counsel.

¶18 Wagner had already filed a 75-page petition before Howard was appointed as his counsel. The District Court's expressed displeasure with Howard's performance over the years and the resulting dismissal of Wagner's PCR proceeding without a ruling on the merits, clearly demonstrates that Wagner was hindered, not assisted, by his appointed

counsel. The dismissal of Wagner's Amended Petition did not result from "ordinary error" in Howard's assessment of law or fact, *McMann*, 397 U.S. at 774, 90 S. Ct. at 1450, but from what the District Court deemed to be Howard's unacceptably slow progress and insufficient candor and responsiveness to the court. Howard's behavior should have consequences, and the court had the authority to impose sanctions on counsel as an alternative to dismissal of the case without a review of the petition's merits. The court abused its discretion in imposing those consequences directly upon the PCR petitioner for whom the court had appointed Howard as counsel. Wagner's Amended Petition should have its day in court.

¶19 On remand, it is within the purview of the District Court to determine whether the Amended Petition fails to state a claim or if additional pleadings or a hearing will be necessary to reach a final resolution of this matter.

¶20 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.

¶21 Reversed and remanded for proceedings consistent with this Opinion.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR