

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0033

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JUSTIN LEE LONGTINE,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Amy Eddy, Presiding

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STATEMENT OF THE ISSUES

Whether Longtine's failure to specifically object to the district court's consideration of whether he should receive credit for time served on probation constituted a waiver of that issue.

If Longtine's claim may be reviewed on appeal, whether the district court erred when it did not grant Longtine credit for street time.

STATEMENT OF THE CASE

In April 2018, Longtine was sentenced in multiple cases. (Docs. 91, 94.) As part of that sentence, Longtine was sentenced to the Department of Corrections (DOC) for a term of 10 years with 5 years suspended in Cause No. DC-09-461(A). When Longtine began serving the 5-year suspended portion of his sentence in DC-09-461(A) on August 30, 2018, he was classified as "non-compliant" because he had not reported to his probation officer (PO) for five months. (Doc. 96.) A sworn report of violation (ROV) affidavit and petition to revoke were filed and a bench warrant was issued for Longtine's arrest. (Docs. 96, 98-99.) Longtine's whereabouts were finally discovered when he was arrested for his second felony DUI on January 30, 2019. (Docs. 100, 107.)

On June 27, 2019, Longtine pled guilty to his new felony DUI and admitted he failed to remain law abiding. (Docs. 113, 125-126; 06/27/19 Tr.) The court

revoked Longtine's suspended sentence in DC-09-461(A). (*Id.*) A combined sentencing and dispositional hearing was held on November 14, 2019. (Docs. 123-125; 11/14/19 Tr.) The court followed the joint recommended sentence/disposition that resolved Longtine's new felony DUI and three pending revocations. (*Id.*) The court granted Longtine credit for actual time served, but concluded that Longtine was not entitled to any street time credit in DC-09-461(A) and in the written judgment and sentence, the court ordered that Longtine was given "0 days of good street time credit based on continuous violations." (Tr. at 9; Docs. 125-126.) Longtine made no objections to the court's order denying street time credit, nor did he argue that he was entitled to such credit.

Longtine appeals the court's denial of 154 days of street time credit in DC-09-461(A)¹

STATEMENT OF THE FACTS

Following guilty pleas on April 12, 2012, to felony theft and misdemeanor bail jumping in DC-09-461(A) and DC-11-294(C) respectively, the court deferred imposition upon Longtine for a period of two years and imposed a concurrent term

¹ Since the only probationary sentence Longtine had begun to serve as of August 30, 2018, was his sentence in DC-09-461(A), and his sentences in his other two revocation cases all ran consecutive to one another, DC-09-461(A) is the only case in which street time credit could have been at issue.

of six months in jail, all suspended. (Doc. 53.) Longtine's adjustment to supervision was "miserable" and he was immediately placed on day reporting. (Doc. 55.)

On July 17, 2012, Longtine fired a 9mm handgun at his girlfriend and was charged with felony assault with a weapon and felony partner/family member assault in Cause No. DC-12-304(A). (Docs. 55, 85.) Longtine had also consumed alcohol and marijuana. (*Id.*, Doc. 59.) An ROV and petition to revoke his deferred sentence were filed. (Docs. 55, 57.) While his revocation petition was pending, Longtine's bond was revoked because he continued to consume alcohol and enter bars and was arrested on an outstanding warrant. (Docs. 76, 81.)

On January 3, 2013, Longtine pled guilty in DC-12-304(A) to the amended charge of felony criminal endangerment and admitted to violating the conditions of his probationary sentences by consuming alcohol, possessing a firearm, and failing to remain law abiding. (Docs. 82, 85, 94.)

On April 18, 2013, the court sentenced Longtine as follows: in DC-09-461(A), he was committed to the DOC for a period of 10 years with 5 of those years suspended; in DC-11-294(C), he was sentenced to a concurrent period of 6 months; and in DC-12-304(A), he was committed to the DOC for a period of 20 years, all suspended, but consecutive to his sentence in DC-09-461(A).

(Docs. 91, 94.) Longtine was granted credit for actual time served, but not for time served on probation. (*Id.*)

Longtine entered Connections Corrections on October 14, 2013, and transitioned to the Billings Pre Release Center two months later. (Docs. 95, 96.) On June 14, 2014, Longtine was granted a conditional release. (*Id.*) On October 10, 2014, Longtine was arrested for felony DUI in Cause No. DC-14-376(D). (*Id.*) Following a DOC administrative hearing, Longtine's conditional release was revoked. (*Id.*)

Longtine was sentenced on his felony DUI on February 19, 2015, to the DOC for a period of 13 months followed by 5 years of probation. (Doc. 96.) The court ordered this sentence to run consecutively to his sentences in DC-09-461(A) and DC-12-304(A). (*Id.*) After completing the WaTCH program, Longtine was granted a conditional release on November 28, 2015. (*Id.*)

In late 2016, Longtine violated his conditional release by not maintaining employment and driving without approval, and was placed in the Intensive Supervision Program from January to June 2017. (Doc. 96.) In February 2018, Longtine lost his job and his UA test in April 2018 tested positive for cocaine. (*Id.*) Following that test, Longtine absconded from supervision. (*Id.*)

On August 30, 2018, when Longtine discharged his DOC commitment and began serving his suspended sentence in DC-09-461(A), he was classified as

“non-compliant” because he had not reported since April 2018. (Doc. 96.)

Because Longtine’s whereabouts remained unknown, Mary Aggers, Longtine’s probation officer (PO), filed a sworn ROV affidavit about his absconder status and recommended Longtine not receive credit for street time. (Doc. 96.) Accordingly, petitions to revoke were filed and bench warrants were issued in DC-09-461(A), DC-12-304(A), and DC-14-376(D). (Docs. 98-99.)

Aggers did not learn of Longtine’s whereabouts until January 30, 2019, when Longtine was arrested for his second felony DUI in Cause No. DC-19-036(A), and served with the pending bench warrants. (Docs. 100, 107.) Aggers filed an ROV addendum explaining Longtine had been charged with felony DUI and again recommended Longtine not receive any street time credit since he had been classified as absconding since the day he began his probationary sentence. (Doc. 107 at 4.)

Longtine was released on his own recognizance on February 1, 2019, and ordered to appear for a revocation hearing on February 21, 2019. (Doc. 101, 102.) Longtine plead not guilty to his latest felony DUI charge and entered denials to alleged probation violations in his other three cases. (Doc. 104.) The court set a revocation hearing for April 25, 2019. (Doc. 104.) The revocation hearing was continued twice to allow time for the parties to collectively resolve the

four pending matters and so Longtine could complete a chemical dependency (CD) evaluation. (Docs. 110-112.)

On June 27, 2019, Longtine appeared telephonically for a change of plea hearing in his new felony DUI and revocation hearing for his three other cases. (Docs. 113, 125-126; 06/27/19 Tr.) Pursuant to a global plea agreement, Longtine plead guilty to felony DUI in DC-19-036(A) and admitted violating his probationary sentences DC-09-461(A), DC-12-304(A), and DC-14-376(D) by failing to remain law abiding. (*Id.*; Doc. 114.)

Regarding the remaining alleged violations, Longtine claimed he had told his PO about his employment change and that he was changing residence, but admitted he had not made those notifications in writing. (Tr. at 11-14.) Longtine admitted he did not report on April 30, 2019, but alleged his PO had told him to get his reporting dates through email and asserted he “never was able to get ahold of her.” (*Id.*) The State did not present any testimony. Longtine’s probationary sentences were revoked and the court set the matter for combined sentencing and dispositional hearing. (Docs. 115-116, 121; 11/14/19 Tr.)

On November 14, 2019, Longtine appeared for his sentencing and dispositional hearings. (Docs. 123-125; 11/14/19 Tr.) In addition to the sworn ROV affidavit and ROV addendum, the district court also received a Presentence Investigation Report (PSI) in DC-19-036(A), to review for sentencing. (*Id.*) The

PSI writer confirmed that when Longtine was arrested in January 2019, he was on absconder status. (Doc. 124.) The PSI writer also explained that Longtine “report[ed] some sobriety with SCRAM unit since his release” and did not complete the CD evaluation as offered. (Doc. 124 at 5, 7.)

The parties and the court discussed the agreed sentence/dispositional recommendations from the plea agreement and the court confirmed what actual days Longtine spent in custody. (11/14/19 Tr.) After giving Longtine the opportunity to speak, which he declined, the court imposed the sentences as recommended by the parties. (*Id.*)

In DC-19-036(A), the court sentenced Longtine to the DOC for a period of 13 months followed by 5 years on probation and gave him credit for 3 days in custody. (Docs. 123-125; 11/14/19 Tr.) The court further ordered this new sentence to run concurrently with the following dispositions: in DC-09-461(A), 5-year commitment to the DOC, suspended; in DC-12-304(A), a consecutive 10-year DOC commitment, suspended; and in DC-14-376(D) a consecutive 5-year DOC commitment, suspended. (*Id.*)² In his revocation cases, the court ordered that Longtine receive the following credit for days already served: 133 days in DC-14-376(D) and 128 days in DC-09-461(A) and DC-12-304(A). (*Id.*)

² The net sentence imposed upon Longtine was a 13 month-commitment to the DOC followed by 20-year commitment to the DOC, all suspended.

The court ordered that Longtine was not entitled to any “good street time credit” and in the written judgment and sentence, the court ordered that Longtine was given “0 days of good street time credit based on continuous violations.” (Tr. at 9; Docs. 125-126.) Longtine made no objections to the court’s order denying street time credit, nor did he argue that he was entitled to such credit.

Five weeks after the sentencing/dispositional hearing, Longtine filed a motion to conform the oral and written judgments to reflect the correct amount of actual time credit, but the court denied the request, noting that the amended judgment and sentence comported with the oral pronouncement. (Docs. 127, 129.) Longtine did not include any arguments concerning street time credit in his motion to conform.

STANDARD OF REVIEW

This Court reviews criminal sentences that include at least one year of incarceration for legality only. *State v. Daricek*, 2018 MT 31, ¶ 7, 390 Mont. 273, 412 P.3d 1044; *State v. Hinshaw*, 2018 MT 49, ¶ 7, 390 Mont. 372, 414 P.3d 271. “A sentence is lawful when it falls within the statutory parameters.” *Daricek*, ¶ 7. “Whether a sentence is legal is a question of law that we review *de novo* to determine whether the court’s interpretation of the law is correct.” *Daricek*, ¶ 7 (citing *State v. Thompson*, 2017 MT 107, ¶ 6, 387 Mont. 339, 394 P.3d 197).

This Court applies plenary review to determine if a probationer's constitutional right of due process was violated. *State v. Triplett*, 2008 MT 360, ¶ 13, 346 Mont. 383, 195 P.3d 819.

SUMMARY OF THE ARGUMENT

The disposition imposed by the district court was within the statutory parameters, granted credit for actual time served, and properly denied street time credit after consideration of the record that established by a preponderance of the evidence that Longtine had failed to report since he probationary period began until he was arrested for felony DUI. Longtine did not argue for street time credit at disposition and did not oppose the court's order denying the same. Longtine's failure to object to the court denying him credit for time served while on probation in DC-09-461(A) from August 2018 to January 30, 2019, precludes appellate review of that issue because his challenge is to an "objectional sentence," not an "illegal sentence."

Even if this Court chooses to consider Longtine's claim that he was entitled to 154 days of street time, his arguments that the record was insufficient to support the court's order is unavailing. Longtine's testimony at the revocation hearing confirmed Aggers' sworn ROV affidavit that he had not reported. At the dispositional hearing, the court properly considered the documentation presented

by Aggers and the PSI, which also established Longtine had not reported between August 30, 2018 and January 30, 2019. Longtine’s claims on appeal are not compelling because the Rules of Evidence do not apply at either revocation hearings or sentencing/dispositional hearings. The district court properly determined that Longtine was not entitled to street time between those dates pursuant to Mont. Code Ann. § 46-18-203(7)(b), noting his “continuous violations.”

Finally, Longtine has not established that his due process rights were violated because the court did not hold a separate “evidentiary hearing” to consider whether records demonstrated he was not entitled to street time credit. Longtine was afforded notice and opportunity to present such evidence or argument at two different hearings. Longtine was afforded fundamentally fair procedures at both his revocation hearing and dispositional hearing.

ARGUMENT

I. Longtine’s failure to object to the court’s consideration and order denying him credit for street time between August 30, 2018 and January 30, 2019, constituted a waiver of that issue.

Longtine argues that he was entitled to 154 days of street time credit in DC-09-461(A) between August 30, 2018 (when he began the suspended portion of his sentence) and January 30, 2019 (when he was arrested for

felony DUI). (Opening Brief (Br.) at 17, 18, 23.)³ However, when the district court issued its dispositional order in his revocation case and stated Longtine would not receive any street time credit, Longtine voiced no objection or argument. Nor did Longtine assert any argument about street time credit in his post-disposition motion to compel.

Generally, this Court will not review an issue on appeal if the party raising the issue did not object in the trial court. *State v. Kotwicki*, 2007 MT 17, ¶ 8, 335 Mont. 344, 151 P.3d 892 (citing *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979)). The *Lenihan* rule “provides an exception to the general rule and allows appellate review of a criminal sentence that is alleged to be illegal or in excess of statutory mandates.” *Kotwicki*, ¶ 8 (citing *Lenihan*, 184 Mont. at 343, 602 P.2d at 997). However, this Court will not review an unpreserved challenge to a sentence if the sentence is merely alleged to be objectionable, but not illegal. *Kotwicki*, ¶¶ 13, 21.

The statutory requirement that a court expressly consider and grant or deny credit for street time is similar to the statutory requirement that a court consider a defendant’s ability to pay fines, fees, and surcharges. *See Kotwicki*, ¶¶ 13, 21; *State v. Hinshaw*, 2018 MT 49, ¶¶ 16-18, 390 Mont. 372, 414 P.3d 271 (failure to

³ Longtine concedes that he was not entitled to street time credit after January 30, 2019, because he committed a felony DUI. (Br. at 17.)

challenge a court's lack of consideration of ability to play constitutes an "objectionable sentence," not an illegal sentence); *Keeland v. Frink*, OP 13-0227 (Mont. Sup. Ct. May 21, 2013), 2013 Mont. LEXIS 297 at 4 (defendant did not have a statutory or constitutional right to credit for time served, his sentence was not facially invalid and his claim could not be reviewed in a habeas action).

Here, the sentences imposed in Longtine's revocation cases were within the statutory authority granted to the district court. *See* Mont. Code Ann. § 46-18-203(7)(a)(iii). The district court properly granted credit for actual time already served. *See* Mont. Code Ann. § 46-18-203(7)(b). Finally, the district court correctly denied credit for street time credit pursuant to Mont. Code Ann. § 46-18-203(7)(b) (2019), after considering the PO's records and the PSI which established Longtine had not adhered to his conditions of probation.

When imposing a disposition following revocation of either a suspended or deferred sentence,

the judge shall consider any elapsed time, consult the records and recollection of the probation and parole officer, and allow all of the elapsed time served without any record or recollection of violations as a credit against the sentence. If the judge determines that elapsed time should not be credited, the judge shall state the reasons for the determination in the order. Credit must be allowed for time served in a detention center or for home arrest time already served.

Mont. Code Ann. § 46-18-203(7)(b).

Longtine has not established that the court failed to consider whether he should receive credit for time served or that it failed to follow the requirements of Mont. Code Ann. § 46-18-203(7)(b). Longtine did not raise any challenge to the court's consideration and determination he was not entitled to street time credit.

Because the court imposed a legal sentence within statutory parameters, including its order denying street time credit, to which Longtine failed to assert any objection, Longtine waived appellate review of this unpreserved allegation of an objectionable, not illegal, sentence. *See Kotwicki*, ¶¶ 13, 21.

Longtine cites to *State v. Erickson*, 2005 MT 276, 329 Mont. 192, 124 P.3d 119, as support that his issue was not waived. (Br. at 15.) However, in *Erickson*, the issue was whether the district court failed to grant credit for actual time, which is not discretionary. Unlike actual time served, whether an offender gets credit for street time depends on the court's consideration of any records or recollections of probation violations during the time at issue. While an offender is guaranteed credit for actual time served, he is not guaranteed credit for street time.

Longtine also cites to *State v. Jardee*, 2020 MT 81, 399 Mont. 459, 461 P.3d 108, for the premise that an order granting credit for street time is mandatory. (Br. at 14.) However, as Justice McKinnon noted in *Jardee*, the only portion of the statute that is mandatory is that the district court *consider* whether an

offender is entitled to street time credit by consulting records and recollections. *Jardee*, ¶ 19 (McKinnon, J., specially concurring). The district court applies its discretion when consulting the “record or recollection” in making its determination of whether (and when) a violation may have occurred.

Montana Code Annotated § 46-18-203(7)(b) does not mandate or guarantee an award of street time credit. Rather, the statute sets out a presumption that an offender is entitled to credit absent the court’s determination that the offender had violated the conditions of probation.

Here, as part of the legally imposed disposition, the district court “consulted” the records and determined Longtine had not adhered to all the conditions of probation. Longtine failed to contemporaneously object to either the denial or absence or rationale during the revocation hearing. Therefore, the issue of street time credit for that period of time is not subject to appellate review.

II. Longtine is not entitled to street time credit.

A. The district court’s order denying street time credit was supported by a sworn affidavit and ROV, ROV addendum, and PSI.

The district court was presented with a sworn affidavit from Longtine’s PO that established Longtine was in violation of his suspended sentence in DC-09-461(A) the day he began serving it in August 2018. When the petition to

revoke and warrant were filed in November 2018, Longtine was still on absconder status. Had Longtine been reporting as directed, he would have been served with the warrant as his whereabouts would have been known. Yet, it was not until the end of January 2019—when he committed his second felony DUI—that his PO finally discovered his whereabouts and he was served with the warrants in his revocation cases.

In addition, the PSI confirmed Longtine’s absconder status when he was arrested in January 2019. The PSI also stated that Longtine did not appear for his CD evaluation appointment and reported the SCRAM unit only helped him maintain “some” sobriety. Moreover, in both her ROV and ROV addendum, Aggers recommended Longtine not receive credit for street time.

At the dispositional hearing, the court properly considered the documentation presented by Aggers and the PSI which established Longtine had not reported between August 30, 2018 and January 30, 2019, and did not obtain a CD evaluation or maintain sobriety after he was released. The court’s determination that Longtine was not entitled to street time credit was not clearly erroneous. *See State v. Barrick*, 2015 MT 94, ¶ 11, 378 Mont. 441, 347 P.3d 24 (findings at sentencing hearings are reviewed under the clearly erroneous standard; factual findings are not clearly erroneous if they are supported by substantial evidence).

Longtine’s argument on appeal—that the court cannot consider the sworn affidavit ROV or ROV addendum as proof of whether he had adhered to probation conditions for the purposes of denying street time—is unavailing. (Br. at 16-23.) Longtine’s argument fails to appreciate that the rules of evidence do not apply at revocation proceedings. *See State v. Macker*, 2014 MT 3, ¶ 9, 373 Mont. 199, 317 P.3d 150 (Montana Rules of Evidence do not apply to probation revocation hearings); Mont. R. Evid 101(c)(3). Nor do the rules of evidence apply to sentencing hearings, which are akin to dispositional hearings. *State v. Roedel*, 2007 MT 291, ¶ 65, 339 Mont. 489, 171 P.3d 694 (“rules of evidence do not apply in order to provide a sentencing court with access to the fullest information possible concerning a defendant’s life and character”).

Longtine also incorrectly argues that without testimony from the PO testimony, the district court was not presented with any evidence upon which it could deny him credit for street time. (Br.)

First, this argument fails to appreciate that at the revocation hearing, when asked about why his PO listed him as absconding, Longtine agreed he had not reported in April 2018, and while he claimed his PO “always told me to email her and not call her to get reporting dates” and alleged he was “never able to get ahold of her,” he did not refute the fact he had not reported since April. (06/27/19 Tr. at 12-13.) Moreover, the district determines whether testimony related to a

sentencing issue was credible. *See State v. Simpson*, 2014 MT 175, ¶ 18, 375 Mont. 393, 328 P.3d 1144 (“credibility of witnesses and the weight to be given their testimony are determined by the trier of fact, whose resolution of disputed question of fact and credibility will not be disturbed on appeal”).

Second, Longtine’s complaint about the lack of PO testimony also ignores the plain language of Mont. Code Ann. § 46-18-203(7)(b) which specifically directs the court to consider a PO’s “records.” Although “records” is not defined, the plain meaning of the word contemplates written documentation, not testimony.

When interpreting statutes, this Court first looks to the provisions’ plain language. *State v. Barrick*, 2015 MT 94, ¶ 17, 378 Mont. 441, 347 P.3d 241. When construing statutory language, this Court must “ascertain and declare what is in terms or in substance contained therein” and “may not insert what has been omitted or omit what has been inserted.” *State v. LaTray*, 2000 MT 262, ¶ 11, 302 Mont. 11, 11 P.3d 116 (citing Mont. Code Ann. § 1-2-101).

Finally, it is undisputed that a district court may consider document evidence at sentencing (e.g., PSI, ROVs, restitution amounts) as long as the defendant is allowed the opportunity to correct any erroneous information.

The record contains substantial and credible facts to establish by a preponderance of the evidence that Longtine had not reported and his whereabouts were unknown to his PO until he was apprehended for his second felony DUI.

See Mont. Code Ann. § 46-18-203(6)(a) (standard for revoking probationary sentence is preponderance of the evidence); *State v. Oropeza*, 2020 MT 16, ¶ 14, 398 Mont. 379, 456 P.3d 1023; *State v. Sebastian*, 2013 MT 347, ¶ 16, 372 Mont. 522, 313 P.3d 198 (“A preponderance of the evidence is ‘such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.’”).

The court did not misapprehend the effect of the evidence, and the record does not support a mistake was made. *State v. Aragon*, 2014 MT 89, ¶ 9, 374 Mont. 391, 321 P.3d 841 (substantial evidence is “evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance”). The district court properly determined that Longtine was not entitled to street time pursuant to Mont. Code Ann. § 46-18-203(7)(b), noting his “continuous violations.”

Although the Rules of Evidence do not apply, “due process, however, requires a sentencing court to provide the defendant with an opportunity to explain, argue, and rebut any information that may lead to a deprivation of life or liberty.” *Id.* The same is true for revocation proceedings. *See State v. Gillingham*, 2008 MT 38, ¶ 26, 341 Mont. 325, 176 P.3d 1075 (while Rules of Evidence do not apply, “[n]evertheless, a probation revocation hearing must be fundamentally fair”).

B. Longtine was afforded fundamentally fair procedures

Longtine’s claim that without an “evidentiary hearing” the court was without authority to deny him credit for street time is unsupported in law and fact.

First, pursuant to Mont. Code Ann. §§ 46-18-203(5), (6), absent circumstances not relevant here, only one hearing is required before a suspended or deferred sentence can be revoked. That hearing is when the State must prove that the offender violated conditions of his deferred or suspended sentence. *Id.* While most district courts in Montana set a dispositional hearing following revocation hearing, a separate hearing is not statutorily required. *See* Mont. Code Ann. § 46-18-203(7) (if court finds offender has violated conditions, it may impose one of four dispositions/sentences). Nothing in this provision requires the court conduct an “evidentiary” hearing, let alone a separate hearing to consider credit for street time.

Second, contrary to Longtine’s claim, a revocation hearing was conducted. It was held at the same time as Longtine’s change of plea hearing for the new felony DUI. All the notices and orders setting the hearing specified it was a revocation hearing. His plea agreement stated Longtine would enter admissions in his revocation cases. The court confirmed that Longtine was “waiving his right to a contested revocation hearing” as well. (06/17/19 Tr. at 6.)

There is no question Longtine was on notice that the June 27, 2019 hearing was a revocation hearing. In addition to pleading guilty to felony DUI, he admitted he failed to remain law abiding. His testimony was sufficient for the court to revoke his probationary sentences. The State was not obligated to present additional evidence at the revocation hearing since Longtine admitted he had failed to remain law abiding. “A single violation of the terms and conditions of a sentence is sufficient to support a court's revocation of that sentence.” *State v. Cook*, 2012 MT 34, ¶ 23, 364 Mont. 161, 272 P.3d 50.⁴

Next, Longtine was advised that the district court would conduct both his sentencing hearing for his second felony DUI and dispositional hearing for his three revocation cases together. Thus, Longtine was afforded notice and opportunity to argue he was entitled to street time credit at the combined sentencing and dispositional hearing on November 14, 2019. Like sentencing hearings, dispositional hearings are the time for parties to make recommendations for the term of commitment, whether it should be suspended, and present argument as to conditions of probation or parole restrictions. It is also the time for a

⁴ Whether the violation was a “non-compliance” or a “compliance” impacts the disposition options, not whether the court may revoke the sentence or whether street time credit may be denied. *See* Mont. Code Ann. §§ 46-18-203(6) through (8).

defendant to make sure the court is aware of any actual time spent in custody and assert argument for credit for time served or street time.

Longtine was clearly afforded fundamentally fair procedures. Longtine testified at the revocation hearing. Longtine submitted a brief in opposition to certain conditions in the PSI which the district court considered favorably at sentencing. Longtine was given the opportunity to address the court at the dispositional/sentencing hearing, but he declined. Longtine did not challenge any of the facts set forth in the sworn ROV affidavit or PSI. Nor did he present any argument for credit for street time. Longtine remained silent when the court ordered he would not receive credit for street time and at no time did he request an additional “evidentiary” hearing.

Longtine’s due process rights were not violated, especially when considering that as a probationer, Longtine was “not entitled to the full range of constitutional rights available to a defendant in a criminal trial.” *State v. Edmundson*, 2014 MT 12, ¶ 16, 73 Mont. 338, 317 P.3d 169; *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); *State v. Macker*, 2014 MT 3, ¶ 9, 373 Mont. 199, 317 P.3d 150 (“A revocation hearing is subject to the minimum requirements of due process.”) “An offender is entitled to the protections of due process, including written notice of the alleged violation, disclosure of the evidence against him or her, the opportunity to be heard and to present evidence, the right to confront

witnesses, the right to a neutral arbiter, and the right to receive a written statement of the evidence relied upon and the reason for the revocation. *Edmundson*, ¶ 16; *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). Thus, in revocation proceedings, “due process is ultimately measured by the fundamental fairness of the proceeding.” *Edmundson*, ¶ 17.

As this Court recently noted, “minimum due-process requirements for a probation revocation proceeding require that the probationer be given the ‘opportunity . . . to present . . . documentary evidence.’” *State v. Graves*, 2015 MT 262, ¶ 24, 381 Mont. 37, 355 P.3d 769 (citing *Gagnon*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 489 (in revocation proceedings, “the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial”). As this Court explained in *Macker*, “It is apparent that the Legislature contemplated the application of different rules in trials compared to revocation hearings.” *Macker*, ¶ 12 (Mont. Code Ann. § 46-18-203 sets forth “certain due process protections, which do not include restrictions on the use of extrajudicial admissions” as in criminal trials).

Notably, the proceeding at issue on appeal is not Longtine’s *revocation* hearing. Rather, at issue is the *dispositional* hearing, which is akin to a sentencing hearing, where district courts are the trier of fact and possess discretion in

determining what materials or evidence it may consider. *State v. Passwater*, 2015 MT 159, ¶¶ 23-24, 379 Mont. 372, 350 P.3d 382 (not error when hearsay admitted at sentencing hearing since Mont. R. Evid. 101(c)(3) provides that the rules of evidence do not apply to sentencing proceedings; no due process violation since defendant was not denied the opportunity to rebut the State's evidence). *See also, Bauer v. State*, 1999 MT 185, ¶ 22, 295 Mont. 306, 983 P.2d 955 (at sentencing hearing, the defendant has an affirmative duty to show that the sentence was premised upon "materially inaccurate or prejudicial" information; but where no erroneous information is involved in imposing a sentence, there is no due process violation).

Longtine was not prevented from arguing he was entitled to 154 days of street time credit. Longtine was afforded fundamentally fair procedures. Longtine had notice of these hearings and Aggers' recommendation that he should not receive credit for street time because of his absconder status, which was confirmed by the sworn ROV affidavit and PSI. Longtine was represented by counsel at all times. Longtine filed an objection to certain conditions set forth in the PSI, but did not contest any representations made in the PSI. Nor did Longtine voice any response (orally or in writing) to Aggers' recommendation that he not receive any street time credit because he had been classified as an absconder from August 2018 until he was arrested for felony DUI in January 2019. Finally, after

the sentencing/dispositional hearing, Longtine filed a motion regarding credit for actual time served, but did not mention street time credit.

The State acknowledges that the court did not orally announce its reasons for denying Longtine street time credit, but explained in the written judgment and sentence that it was because of “continuous violations.” The oral pronouncement of sentence is “the legally effective sentence,” and thus controls over any inconsistency in the subsequent written judgment. *State v. Lane*, 1998 MT 76, ¶¶ 40 and 48, 288 Mont. 286, 957 P.2d 9. However, the absence of an oral rationale for denying street time credit does not constitute reversible error.

Pursuant to Mont. Code Ann. § 46-20-701(2), “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” Here, the district court properly determined that Longtine was not entitled to street time pursuant to Mont. Code Ann. § 46-18-203(7)(b), noting his “continuous violations.” As established above, there was substantial credible evidence presented to the court through testimony at the revocation hearing and documentation presented to support the court’s decision.

Nonetheless, should this Court conclude the court’s oral pronouncement was inadequate, the proper remedy is to remand this matter with instructions for the court to enter more specific rationale for denying street time credit. *See State v. Williams*, 2003 MT 136, ¶¶ 13-14, 316 Mont. 140, 69 P.3d 222.

CONCLUSION

The district court's order of revocation, judgment and sentence should be affirmed.

Respectfully submitted this 2nd day of April, 2021.

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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 Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,535 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-02-2021:

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