

ORIGINAL

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12/14/2021

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 21-0607

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0607

FILED

DEC 14 2021

Bowen Greenwood
Clerk of Supreme Court
State of Montana

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ORDER

SHAWN SMAAGE,

Defendant and Appellant.

Shawn Smaage has filed a verified Petition for Out-of-Time Appeal, indicating that he discussed filing an appeal with his attorney in 2015, but that his attorney failed to file the appeal. Smaage moves this Court for appointment of counsel. Smaage includes an affidavit in support and a copy of the sentencing judgment. We amend the caption to comport with the court's judgment. M. R. App. P. 2(4).

M. R. App. P. 4(6) allows this Court to grant an out-of-time appeal "[i]n the infrequent harsh case and under extraordinary circumstances amounting to a gross miscarriage of justice[.]"

Smaage seeks to appeal a February 2, 2015 Judgment and Commitment issued in the First Judicial District Court, Lewis and Clark County. On August 21, 2014, Smaage pleaded guilty to felony driving or in actual physical control of a motor vehicle while under the influence of alcohol and/or drugs (DUI). The District Court sentenced Smaage as a persistent felony offender (PFO) to a fifty-year term in the Montana State Prison and imposed a twenty-five-year parole ineligibility restriction.

As grounds, Smaage states he only recently learned about the remedy of an out-of-time appeal. He contends he did not receive the sentence bargained for as part of his guilty plea, his attorney failed to file a motion to suppress concerning the investigative stop, that his attorney failed to consult with him, and that, even though an appeal was discussed, his attorney "abandoned" him.

We conclude Smaage has not demonstrated extraordinary circumstances. In its written Judgment and Commitment, the District Court stated that “the defendant was entering his plea knowingly and voluntarily and that he was aware of his constitutional and statutory rights that he would waive by entering a plea of guilty.” The court further stated “that there was a factual basis to believe that the defendant had committed the offense charged and accepted the guilty plea.” When the court imposed the parole ineligibility restriction, the court gave its reasons, including that Smaage “has been paroled three times on prior offenses and has committed new offenses all three (3) times[,]” and that Smaage has committed ten (10) prior drunk driving-related offenses,” including eight DUIs, negligent homicide, and criminal endangerment.

While Smaage offers a reason for his delay in seeking an appeal, it does not overcome the barrier for an out-of-time appeal when almost seven years have elapsed. Upon review of this Court’s docket and Smaage’s previous writs for extraordinary relief, we point out that since 2015, Smaage has only challenged his DUI sentence from the Powell County District Court. We have denied Smaage his requested relief.¹ Smaage has since been barred from challenging his sentence from Powell County. We also point out that Smaage sought sentence review for his Lewis and Clark County sentence in August 2018, and the Sentence Review Division affirmed his sentence. We conclude that denial of his petition for an out-of-time appeal will not result in a miscarriage of justice. Therefore,

IT IS ORDERED that Smaage’s Petition for an Out-of-Time Appeal is DENIED.

IT IS FURTHER ORDERED that Smaage’s Motion for Appointment of Counsel is DENIED, as moot.

¹ *Smaage v. Berkebile*, No. OP 15-0179, Order (Mont. May 5, 2015) (this Court granted Smaage habeas corpus relief, and on remand, the Powell County District Court resentenced Smaage as a PFO for felony DUI); *State v. Smaage*, No. DA 15-0692, Order dismissing appeal of 2015 sentence imposed on remand (Mont. Mar. 14, 2017); *Smaage v. Fender*, No. OP 16-0241, Order (Mont. May 10, 2016) (We denied Smaage habeas corpus relief and required him to file a motion for leave before further challenging his 2000 DUI conviction and 2015 sentence on remand); and *Smaage v. Guyer*, No. OP 19-0292, Order (Mont. Jun. 12, 2019) (This Court reiterated that Smaage must seek leave before filing a petition for relief concerning his 2000 DUI conviction).

The Clerk of the Supreme Court is directed to provide a copy of this Order to counsel of record to Kevin Smaage personally.

DATED this 14th day of December, 2021.











Justices