

OP 21-0556

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 317

JAMAL M. KASEM,

Petitioner,

MONTANA THIRTEENTH JUDICIAL DISTRICT,
YELLOWSTONE COUNTY, HON. ASHLEY HARADA, Presiding

Respondent.

ORIGINAL PROCEEDING : Petition for Writ of Supervisory Control
In and For the County of Yellowstone, Cause No. DC-20-673
Honorable Ashley Harada, Presiding Judge

COUNSEL OF RECORD:

For Petitioner:

Darcy Critchfield, Assistant Public Defender, Billings, Montana

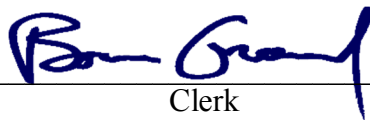
Clark R. Ramsey, Ramsey Law, PLLC, Billings, Montana

For Respondent:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Assistant
Attorney General, Helena, Montana

Decided: December 14, 2021

Filed:


Clerk

Justice Dirk Sandefur delivered the Opinion and Order of the Court.

¶1 By petition filed November 4, 2021, Jamal M. Kasem (Kasem) petitions this Court for exercise of supervisory control in the underlying matter of *State v. Kasem*, Cause No. DC-20-673, Montana Thirteenth Judicial District Court, Yellowstone County, Honorable Ashley Harada presiding. He seeks extraordinary review and reversal of the October 2021 district court order denying his motion for peremptory substitution of district judge filed pursuant to § 3-1-804(11), MCA. Pursuant to M. R. App. P. 14(7), we temporarily stayed the underlying proceedings and ordered the District Court and/or the State to file a summary response, if any. The State, by and through the Montana Attorney General, has timely filed a summary response in support of the District Court’s October 2021 order.

¶2 This Court has “general supervisory control over all other” Montana courts. Mont. Const. art. VII, § 2(2). As pertinent here, in our discretion, we exercise supervisory control by extraordinary writ on petition for review of district court orders granting or denying a motion for substitution of judge in a criminal case if the matter involves a purely legal question and the urgency of the circumstance renders the normal appeal process inadequate. M. R. App. P. 14(3)(c). Kasem’s petition satisfies these threshold criteria and we accordingly exercise supervisory control for review of the October 2021 order denying his motion for substitution of judge.

¶3 The pertinent facts not subject to genuine material dispute on the record presented are as follows. The underlying matter proceeded to jury trial on March 29, 2021, on the offense of assault on a minor, a felony. The State presented its case-in-chief and rested on

the second day of trial. On the third day of trial during direct examination of a witness in the defense case-in-chief, the court and parties convened outside the presence of the jury for argument on a disputed evidentiary issue. A heated exchange then occurred between the court and defense counsel that included an assertion that the court was biased in favor of the State and a counter assertion that defense counsel had acted in an insolent and disrespectful manner toward the court.

¶4 After a recess, court again reconvened outside the presence of the jury at which time the parties presented a signed acknowledgement of waiver of rights and a binding plea agreement. Following a change of plea colloquy, Kasem changed his plea from not guilty to “no contest” and the court set the matter for sentencing. After excusing the defendant and remanding him into custody, a record colloquy then ensued in which the court admonished defense counsel regarding the adequacy of her representation of Kasem at trial. The minutes indicate that the court then excused counsel for both parties, returned the jury into the courtroom, and unconditionally excused the jury from further service in this case.

¶5 Prior to sentencing, through new counsel, Kasem filed an unopposed motion on September 21, 2021, for leave to withdraw his “no contest” plea, and for new trial, pursuant to § 46-16-105(2), MCA, and *State v. Terronez*, 2017 MT 296, ¶¶ 27-34, 389 Mont. 421, 406 P.3d 947 (holding on State appeal that district court correctly allowed pre-sentencing withdrawal of mid-trial guilty plea due to involuntariness based on ineffective assistance of counsel prior to and during trial). By written order on September 23rd, the District Court

granted the unopposed motion, deemed Kasem’s “no contest” plea withdrawn, and set a jury trial for December 6, 2021.

¶6 On October 6th, 13 days after the order deeming his prior plea withdrawn and resetting the matter for trial, Kasem filed a motion pursuant to § 3-1-804(11), MCA, for substitution of judge, accompanied by a receipt for the requisite filing fee. However, by written order filed October 15, 2021, the District Court denied the motion on the stated grounds that:

Procedurally, there is no order for a new trial. Trial did commence on March 29, 2021, however, . . . a verdict was never reached. Defendant was recently allowed to withdraw his plea and the case has been reset for trial. That is not a new trial. Resetting a case for trial is very different from a new trial. The Court routinely resets [criminal] trials . . . , and resetting a case for trial is certainly not intended to trigger an opportunity for counsel to substitute the judge. The plain language of “new trial” implies there was a previous trial, which would require a verdict.

In . . . the plain language of Mont. Code. Ann. § 46-16-702, the new trial is only contemplated following [a] verdict or finding of guilt. . . . [T]his case does not have a verdict or finding of guilt. Defendant entered a plea of no contest and later withdrew his plea and was reset for trial. No motion for new trial has ever been filed in this case.

In support of its construction of “new trial” as referenced in § 46-16-702, MCA, the court further cited § 25-11-101, MCA (statutory rule of civil procedure defining “new trial” for purposes of §§ 25-11-102 through -104, MCA, as “a reexamination of an issue of fact . . . after a trial and decision by a jury or court or by referees”).

¶7 The substitution rule promulgated by this Court pursuant to Article VII, Sections 1 and 2(3), of the Montana Constitution, and codified at § 3-1-804, MCA, expressly provides in pertinent part that:

When a new trial is ordered by the district court, each adverse party shall be *entitled to one motion for substitution* of district judge. The motion must be filed, with the required filing fee, within 20 calendar days after the district court has ordered a new trial.

Section 3-1-804(11), MCA (emphasis added). Here, Kasem timely filed a substitution motion with the required filing fee pursuant to § 3-1-804(11), MCA. The rule does not expressly define the term “new trial” and, in the absence of an applicable rule or statutory definition, we construe the term as a technical term in accordance with the “peculiar and appropriate meaning in law” that it has or has acquired in context. *See* § 1-2-106, MCA (similar rule of statutory construction).

¶8 As a threshold matter, § 25-11-101, MCA, primarily applies in context to motions for a new trial in civil cases under §§ 25-11-102 through -104, MCA. It in any event has no bearing here in the context of the criminal charging, pleading, and plea withdrawal scheme that is not present in a civil case. *See* §§ 46-11-101, -102, -401, 46-12-201, -210, -211, and 46-16-105(1)-(2), MCA. Moreover, while § 46-16-702, MCA, provides a procedural mechanism for a criminal defendant to move for a “new trial . . . in the interest of justice” “[f]ollowing a verdict or finding of guilty,” § 46-16-702 neither defines the referenced term “new trial,” nor is the exclusive procedural means by which a defendant may seek and obtain a new trial. In pertinent part, § 46-16-105(2), MCA, expressly provides that, “[a]t any time *before judgment* . . . , the court may, for good cause shown,” allow the defendant to withdraw a guilty or nolo contendere plea “and a plea of not guilty substituted.” (Emphasis added.) *See also* § 46-1-202(11), MCA (defining “judgment” as “an adjudication . . . that the defendant is guilty or not guilty”). Such plea withdrawal, and

substitution of not guilty plea, takes place in the context of the defendant's federal and state constitutional rights, and the similar Montana statutory right of both parties, to a jury trial on the charged offense(s). *See* U.S. Const. amends. VI and XIV; Mont. Const. art. II, § 24; §§ 46-16-106 and -110(1), MCA.

¶9 Here, as acknowledged by the District Court, a prior trial did “commence” and then ended after the State rested its case-in-chief, the court allowed the defendant to change his plea to “no contest” (i.e., *nolo contendere*) pursuant to §§ 46-12-211 and 46-16-105(1), MCA (authorizing plea agreements and change of not guilty plea to *nolo* or guilty plea “*during trial*” – emphasis added), set the matter for sentencing, and, *inter alia*, unconditionally excused the jury from further service in this case. For purposes of the double-jeopardy protection of the Fifth Amendment to the United States Constitution, and Article II, Section 25, of the Montana Constitution, constitutional jeopardy attached when the jury was first empaneled and sworn on March 30, 2021. *State v. Cates*, 2009 MT 94, ¶¶ 30-32, 350 Mont. 38, 204 P.3d 1224; *State v. Carney*, 219 Mont. 412, 417, 714 P.2d 532, 535 (1986) (citing *Crist v. Bretz*, 437 U.S. 28, 98 S. Ct. 2156 (1978)). Under these circumstances, regardless of how it ended, the proceeding that commenced on March 29th, and ended by change of plea and unconditional jury dismissal on March 31, 2021, was as a matter of fact and law a jury “trial” as referenced in § 46-16-105(1) and -110(1), MCA, that categorically and unconditionally ended.

¶10 Contrary to the District Court's assertion, Kasem did in fact file a motion for a “new trial” in conjunction with his motion to withdraw his plea pursuant to § 46-16-105(2),

MCA. The court then, without qualification, granted the unopposed motion upon an express finding of “good cause,” deemed his prior “no contest” plea withdrawn, and reset the matter for another jury trial—all in accordance with §§ 46-16-105(2), -106, and -110(1), MCA. As a matter of law, the second trial will start anew with new jury selection and a full trial in the ordinary course of law. Aside from their technical argument under the inapplicable §§ 25-11-101 and 46-16-702, MCA, neither the District Court, nor the Attorney General, make any assertion, much less showing, to the contrary.

¶11 Further illuminating here is our recent decision in *Terronez* where we agreed with the State that, in contrast to its acknowledged contradictory position here, it had the right, pursuant to § 46-20-103(2)(c), MCA (state right to appeal any “order or judgment” which has “substantive effect” of resulting in the “granting [of] a new trial”), to appeal because the district court allowance of a pre-sentence withdrawal of a prior mid-trial guilty plea pursuant to § 46-16-105(2), MCA, was also effectively a concomitant “grant” of a “new trial.” *Terronez*, ¶¶ 20-22. Neither the District Court, nor the State, have distinguished that aspect of *Terronez* in any material regard.

¶12 In accordance with §§ 46-16-105(2), -106, and -110(1), MCA, and *Terronez*, ¶¶ 20-22, we hold that court allowance of a withdrawal of a mid-trial guilty or nolo plea pursuant to § 46-16-105(2), MCA, is also effectively a concomitant grant of a new trial. The District Court thus erroneously denied Kasem’s timely perfected motion to substitute judge under § 3-1-804(11), MCA.

¶13 IT IS THEREFORE ORDERED that Kasem’s petition for writ of supervisory control, filed November 4, 2021, is GRANTED. The October 2021 order of the District Court denying his motion for substitution of judge pursuant to § 3-1-804(11), MCA, is hereby REVERSED WITH INSTRUCTION for the court to immediately substitute-in a new presiding judge. Our prior stay of the underlying proceedings is hereby lifted. The Clerk is directed to provide immediate notice of this Opinion and Order to the Attorney General, by and through Assistant Attorney General Katie F. Schulz; Kasem, through counsel of record; and separately to the District Court and Yellowstone County Attorney in the underlying matter of *State v. Kasem*, Cause No. DC-20-673, Montana Thirteenth Judicial District Court, Yellowstone County, Honorable Ashley Harada presiding.

DATED this 14th day of December, 2021.

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA