IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0578

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID LLOYD ORR,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, the Honorable Howard F. Recht, Presiding

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STATEMENT OF THE ISSUES

1. Montana law authorizes a district court to suspend execution of sentence for a period up to the maximum sentence allowed or for a period of six months, whichever is greater. Did the district court illegally sentence David Orr for reckless driving when it suspended his sentence for one year when the maximum sentence allowed for the offense was 90 days?

2. A district court lacks the power to impose a condition in a written judgment that was not orally ordered if the condition increases the defendant's loss of property. Did the district court illegally sentence David Orr when it included $2,124.46 in financial conditions in the written judgment that were not orally pronounced at sentencing?

3. Alternatively, should the Court remand for the district court to strike a $50 prosecution fee because the district court lacked authority to impose it and to conduct an ability to pay inquiry into the remaining financial conditions?

STATEMENT OF THE CASE

In early 2019, the State charged Appellant David Orr with reckless driving in violation of Mont. Code. Ann. § 61-8-301(1)(a)(1st) for allegedly hitting his brakes while driving and causing a vehicle following closely behind him to hit the back of his vehicle. (Notice to Appear and Complaint.) A jury found Mr. Orr guilty. (3/2/20 Tr. at 114.) Following trial, on March 24, 2020, a "Clerk of Court Claim for Civil and Criminal Jury Service Costs" was filed that alleged $1,749.46 in jury costs. (D.C. Doc. 25 ("the Claim").)

At sentencing six months later, the State requested $5,153.45 in restitution and a "minimal fine." (9/23/20 Tr. at 19, 26; *see* 9/23/20 Tr. at 7-8.) The State did not request any additional fees or costs, nor did it mention the Claim filed six months prior. (9/23/20 Tr.) Mr. Orr's counsel did not make any specific sentencing recommendation but emphasized that Mr. Orr was on social security disability and had "a very limited income." (9/23/20 Tr. at 26.) He informed the court he "could certainly elaborate to any questions [the court] may have about his financial situation." (9/23/20 Tr. at 26.) The court did not inquire into Mr. Orr's ability to pay. (9/23/20 Tr. at 26.)

The court sentenced Mr. Orr to 30 days at the Ravalli County Detention Center suspended for one year and imposed a $25 fine and $3,950 in restitution. (9/23/20 Tr. at 27, attached as App. A.) Regarding conditions of sentence, the court stated:

> The conditions of the suspended sentence will include standard conditions, which require the Defendant to obey all laws, and the Court will order that the Defendant write a letter of apology to the victim, which must be approved by me.

(9/23/20 Tr. at 27.) The court "f[ou]nd the Defendant is able to meet the financial obligations, as it includes a modest fine, but also restitution that

is mandatory." (9/23/20 Tr. at 27.) The court did not impose any additional fees or costs, nor did it ever refer to the Claim. (9/23/20 Tr.)

The written judgment reflected the sentence orally imposed except for several additional financial obligations totaling $2,124.46. (D.C. Doc. 32, attached as App. B.) The breakdown of the new financial obligations is as follows:

> Misdemeanor surcharge: $15
> Victim and witness advocate program surcharge: $50
> Court information technology fee: $10
> Costs of counsel: $250
> Costs of prosecution: $50
> Costs of jury trial: $1,749.46

(D.C. Doc. 32 at 3-4.)

Mr. Orr timely appealed. (D.C. Doc. 34.)

STATEMENT OF THE FACTS

A statement of facts contains "facts relevant to the issues presented for review." Mont. R. App. P. 12(1)(d). No additional facts beyond those recounted in the Statement of the Case are necessary.

SUMMARY OF THE ARGUMENT

The district court illegally sentenced Mr. Orr when it suspended his sentence for one year instead of six months. Montana law authorizes a court to suspend a criminal sentence for a period up to the maximum

sentence allowed or for a period of six months, whichever is greater. Because the maximum sentence for a first offense of reckless driving is 90 days, the district court exceeded its statutory authority when it suspended Mr. Orr's sentence for one year.

The district court likewise imposed an illegal sentence when it issued a nonconforming written judgment that included $2,124.46 in financial obligations that were not orally imposed. This Court has repeatedly held that a district court cannot add new conditions to a written judgment that were not orally imposed and that substantively increase a defendant's loss of property. The court here did just that. Without giving Mr. Orr the opportunity to respond to the inclusion of $2,124.46 in financial conditions, the Court threw the conditions into Mr. Orr's written judgment. The conditions are illegal and must be struck.

Alternatively, the district court must strike the $50 prosecution fee and conduct an ability to pay inquiry into the remaining financial conditions. Montana Code Annotated § 46-18-232 grants a court authority to impose a $50 prosecution fee *or* the actual costs of jury service, whichever is greater. There was no authority for the court in this case to impose both the $50 fee *and* the $1,749.46 costs of jury service.

Moreover, Montana law requires a court to inquire and determine whether a defendant can pay the fees and costs imposed in this case. The court here failed to do so.

STANDARD OF REVIEW

"[S]entences not subject to sentence review are subject to review on direct appeal both for threshold legality and, to the extent discretionary, an abuse of discretion." *State v. Thibeault*, 2021 MT 162, ¶ 7, 404 Mont. 476, 490 P.3d 105. Sentencing conditions are reviewed both for threshold legality and an abuse of discretion. *Thibeault*, ¶ 7; *State v. Reynolds*, 2017 MT 317, ¶ 15, 390 Mont. 58, 408 P.3d 503.

ARGUMENT

I. The district court illegally sentenced Mr. Orr when it suspended his sentence for one year.

The court only had authority to suspend Mr. Orr's sentence for a maximum period of six months. The sentencing authority of a criminal court is constrained by statutory law. *Thibeault*, ¶ 10. Courts have no authority to impose a sentence not authorized by statute. *Thibeault*, ¶ 10. Montana Code Annotated § 61-8-715(1) (2017) provides that a person convicted of a first offense of reckless driving under § 61-8-301(1)(a) shall be punished by "imprisonment for a term of not more than

90 days, a fine of not less than $25 or more than $300, or both." Per Mont. Code Ann. § 46-18-201(2) (2017), a court may suspend execution of sentence "for a period up to the maximum sentence allowed or for a period of 6 months, whichever is greater." Accordingly, when sentencing a person for a first offense of reckless driving, a district court has authority to suspend the sentence up to six months and nothing more.

Here, the district court exceeded its statutory authority when it suspended Mr. Orr's sentence for one year. Although Mr. Orr did not object to the illegal sentence below, it is reviewable for the first time on appeal under *Lenihan*. *State v. Lenihan*, 184 Mont. 338, 342-43, 602 P.2d 997, 999-1000 (1979) (holding that an unpreserved assertion of error that a sentence is facially illegal is subject to review for the first time on appeal); *Thibeault*, ¶ 9 (reviewing allegation for the first time on appeal under *Lenihan* that a 10-day jail term was illegal). The Court should reverse the sentence and remand to the district court to correct the illegal term so that it does not exceed six months. *See State v. Heafner*, 2010 MT 87, ¶ 11, 356 Mont. 128, 231 P.3d 1087 (holding that when a portion of a sentence is illegal, the remedy is to remand to the district court to correct the illegal provision).

II. The district court illegally ordered Mr. Orr to pay $2,124.46 when it imposed various financial conditions in the written judgment that were not orally pronounced at sentencing.

Mr. Orr was illegally sentenced *in absentia* when the court added financial conditions totaling $2,124.46 to his written judgment that were not orally ordered in his presence. "[T]he sentence orally pronounced from the bench in the presence of the defendant is the legally effective sentence and valid, final judgment." *State v. Lane*, 1998 MT 76, ¶ 40, 288 Mont. 286, 957 P.2d 9. A district court accordingly lacks the power to impose a condition in the written judgment that contradicts the oral pronouncement if (1) the defendant did not have an opportunity to respond to the condition's inclusion at sentencing, and (2) the condition substantively increases a defendant's loss of liberty or sacrifice of property. *Johnson*, 2000 MT 290, ¶ 24, 302 Mont. 265, 14 P.3d 480; *State v. Kroll*, 2004 MT 203, ¶ 20, 322 Mont. 294, 95 P.3d 717. What is "truly at issue" under this inquiry is "whether the written judgment had, without notice, substantively increased a defendant's criminal sentence which had been previously imposed in open court." *Kroll*, ¶ 20. As this Court has repeatedly held, defendants must be aware of their sentences when they leave the courtroom. *Lane*, ¶ 38; *Johnson*, ¶¶ 31, 38.

"Standard" or "stock" conditions do not substantively increase a sentence. *Kroll*, ¶¶ 22-23; *State v. Lucero*, 2004 MT 248, ¶ 28, 323 Mont. 42, 97 P.3d 1106. Importantly, many conditions believed to be "standard" are not. *State v. Ashby*, 2008 MT 83, ¶ 23, 342 Mont. 187, 179 P.3d 1164. Standard conditions are those mandated by the Legislature and codified in the Administrative Rules of Montana at § 20.7.1101. *Ashby*, ¶ 23. While these conditions often can be legally added to a written judgment when not orally imposed, non-standard conditions to which a defendant did not acquiesce cannot. *Kroll*, ¶ 22-23 ("the imposition of a condition which is not a standard condition will run afoul of this Court's holding in *Lane*"); *Lucero*, ¶¶ 28-30; *State v. Andress*, 2013 MT 12, ¶¶ 41-43, 368 Mont. 248, 299 P.3d 316.

In *Johnson*, the Court reversed a condition imposing costs of prosecution that were not orally imposed. *Johnson*, ¶¶ 37-40. Although the district court stated at sentencing that Johnson would be assessed with "additional fees and surcharges," it did not specify the $100 costs of prosecution. *Johnson*, ¶ 38. As such, "Johnson did not leave the court room that day 'aware of her sentence' with respect to the imposition of the 'cost of prosecution' that, at the court's discretion, may be imposed

pursuant to § 46-18-232, MCA." *Johnson*, ¶ 38. The costs of prosecution in the written judgment were "included without notice, and unlawfully increased Johnson's sentence." *Johnson*, ¶ 39. Similarly, in *Andress*, the Court ordered the district court to strike several conditions that required Andress to pay certain fines and fees because they were non-stock conditions and not orally imposed at sentencing. *Andress*, ¶ 43. *See also State v. Byrd*, 2015 MT 20, ¶ 12, 378 Mont. 94, 342 P.3d 9 (reversing condition in written judgment requiring defendant pay $800 in counsel fees when the court only ordered $500 at sentencing); *State v. Reynolds*, 2017 MT 317, ¶ 33, 390 Mont. 58, 408 P.3d 503 (reversing condition in written judgment requiring defendant pay two $15 surcharges that were not orally ordered); *Lucero*, ¶ 31 (ordering the district court to strike from the written judgment several non-standard conditions pertaining to being in bars and casinos and submitting to chemical substance tests when the conditions were not orally imposed).

Here, the financial conditions in the written judgment totaling $2,124.46 for a victim and witness advocate program surcharge, a court information technology fee, costs of counsel, costs of prosecution, and costs of jury trial were not orally imposed at sentencing and not part of

Mr. Orr's "legally effective sentence." *See Lane*, ¶ 40. The only financial obligations the court ordered were a $25 fine and $3,950 in restitution. (9/23/20 Tr. at 27.) The court also imposed "standard conditions, which require the Defendant to obey all laws" and a condition requiring "the Defendant write a letter of apology to the victim." (9/23/20 Tr. at 27.) At the end of sentencing, the court emphasized that the total financial obligations only included a fine and restitution. (9/23/20 Tr. at 27 ("I find the Defendant is able to meet the financial obligations, as it includes a modest fine, but also restitution that is mandatory.").) The court never mentioned, let alone imposed, any additional fees or costs. (9/23/20 Tr.)

In the event the State argues the additional financial conditions are "standard conditions" that do not increase Mr. Orr's sacrifice of property, the State is wrong. None of these conditions are "standard" conditions mandated by the Legislature and codified in the Administrative Rules. *See* Mont. Admin. R. 20.7.1101. They are not automatically imposed on all probationers; rather, they are discretionary conditions that a court may or may not order depending upon its determination that a defendant can pay. Mont. Code Ann. §§ 46-18-236(2); 3-1-317(2); 46-8-113(4); 46-18-232(2); *Reynolds*, ¶¶ 20-22 (emphasizing that prior to the imposition

of a fine, fee, a surcharge, costs of prosecution, costs of the jury trial, and costs of counsel the district court "must" determine whether the defendant has the ability to pay by "question[ing]" the defendant). Certainly, if these financial conditions were "standard" conditions that could be thrown into a written judgment when not orally imposed, they typically would not be based on an ability to pay inquiry and determination which is necessarily done at the sentencing hearing when the conditions are discussed. The imposition of the conditions would run afoul of this legal requirement.

Notably, in further support that the court in this case did not impose these non-standard conditions is that fact that the court never made the requisite ability to pay determination. Although the court found that Mr. Orr was "able to meet the financial obligations," it limited that finding to the "modest" $25 fine and the "mandatory" "restitution." (9/23/20 Tr. at 27.) It never questioned Mr. Orr regarding his ability to pay an additional $2,124.46 in fees and costs, nor did it find that he could afford them. Nobody at sentencing addressed the $2,124.46 of financial obligations—they were completely off the table—and Mr. Orr never had the opportunity to respond to the court's inclusion of them. The

conditions were not part of Mr. Orr's oral sentence and were not "standard" conditions that could be added to the written judgment.

Mr. Orr did not leave the courtroom following sentencing "aware of h[is] sentence" with respect to the imposition of $2,124.46. *See Johnson*, ¶¶ 31, 38. It was not until he received his written judgment weeks later that he learned the court added thousands of dollars in fees and costs to his sentence. He was illegally sentenced *in absentia*. *See Lane*, ¶ 38 ("A defendant is present only when being sentenced from the bench. Thus, a defendant is sentenced *in absentia* when the [written] judgment and commitment is allowed to control when there is a conflict."); *Andress*, ¶ 33. Because these non-standard monetary conditions were not orally imposed and resulted in a loss of Mr. Orr's property, this Court must strike them. *See Johnson*, ¶ 37-40; *Andress*, ¶ 43; *Byrd*, ¶ 12; *Reynolds*, ¶ 33.

III. Alternatively, the court should strike the $50 prosecution fee and remand for an ability to pay determination.

Montana Code Annotated § 46-18-232(1) authorizes a court to order a defendant to pay "costs of jury service, prosecution, and pretrial, probation, or community service supervision . . . limited to expenses specifically incurred by the prosecution or other agency in connection

with the proceedings against the defendant *or* $100 per felony case *or* $50 per misdemeanor case, whichever is greater." Mont. Code Ann. § 46-18-232(1) (emphasis added). "The word 'or' connotes a disjunctive particle, and it is used to express an alternative between two or more things." *Contreras v. Fitzgerald*, 2002 MT 208, ¶ 15, 311 Mont. 257, 54 P.3d 983. Per the plain language of the statute, upon a misdemeanor conviction, a court only has authority to impose the actual costs of jury service *or* a $50 fee, not both. In Mr. Orr's written judgment, the court exceed its authority when it ordered Mr. Orr to pay $1,749.46 in costs of jury service *and* a $50 fee for the misdemeanor offense per Mont. Code Ann. § 46-18-232. (*See* D.C. Doc. 32 at 4.) In the event this Court determines that, contrary to Mr. Orr's argument and Montana precedent, the $2,124.46 in financial obligations were lawfully imposed as "standard" conditions, it must strike the $50 fee.

Moreover, as previously discussed, the district court failed to conduct any inquiry into Mr. Orr's ability to pay $2,124.46 in financial obligations and failed to make the requisite ability to pay finding. *See Reynolds*, ¶¶ 20-22. Despite defense counsel informing the court of Mr. Orr's limited income and offering to elaborate on Mr. Orr's financial

situation, the court conducted no inquiry. (9/23/20 Tr. at 26.) While the court found that Mr. Orr was able to pay the $25 fine and mandatory restitution, it never found he could pay the additional $2,124.46 for a victim and witness advocate program surcharge, a court information technology fee, costs of counsel, costs of prosecution, and costs of jury trial. (9/23/20 Tr. at 26.) There was no presentence investigative report or other record describing Mr. Orr's financial situation. If, contrary to Mr. Orr's argument, the court lawfully ordered Mr. Orr to pay $2,124.46 in financial obligations, it failed to first "scrupulously and meticulously" examine and determine his ability to pay. *See State v. Moore*, 2012 MT 95, ¶¶ 14, 18, 365 Mont. 13, 277 P.3d 1212 (district court failed to "demonstrate a serious inquiry or separate determination" into a defendant's ability to pay costs of counsel; a court must "first scrupulously and meticulously" determine ability to pay prior to imposing costs of jury service); *Reynolds*, ¶¶ 27-29 (district court appropriately inquired into Reynolds's ability to pay fines, fees, and charges when it "spent significant time considering Reynolds's ability to pay" and "delved into Reynolds's work history, ability to work, and financial circumstances"). If the Court does not order the district court to strike

the illegal conditions because they were not orally imposed, it must remand for an ability to pay inquiry. *See Moore*, ¶ 21; *State v. McLeod*, 2002 MT 348, ¶ 35, 313 Mont. 358, 61 P.3d 126.

CONCLUSION

The district court illegally sentenced Mr. Orr when it suspended his sentence for one year and added financial conditions totaling $2,124.46 in the written judgment that were not orally pronounced. The conditions were not standard conditions imposed upon all probationers; rather, they were new conditions that substantively increased Mr. Orr's loss of property. They must be struck. Alternatively, the Court should remand for the district court to strike the $50 prosecution fee and conduct an ability to pay inquiry regarding the financial conditions.

Respectfully submitted this 16th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook 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 3176, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Haley Connell Jackson
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APPENDIX

CERTIFICATE OF SERVICE

I, Haley Jackson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-16-2022:

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