

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0009

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DELORISANN N. GIBSON,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court, Missoula
County, the Honorable Leslie Halligan, Presiding

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Statement of the Issue

Whether the Missoula Municipal Court violated Gibson's constitutional right to due process in her revocation hearing when it predicated her sentence following revocation on allegations of new criminal conduct unsupported by any evidence.

Statement of the Case and Facts

Defendant/Appellant Delorisann Gibson ("Gibson") pled guilty to a single count of Partner or Family Member Assault ("PFMA") in the Missoula Municipal Court on October 7, 2019. (D.C. Doc 11 at 34 (Appendix A).) The court sentenced her to 12 months in jail, all but 2 days of which were suspended, and awarded her 2 days of credit for time served. (*Id.*) As conditions of her suspended sentence, the court ordered Gibson to: (1) obey all laws; (2) provide proof of enrollment in an Anger Management/Batterer's Intervention program within two weeks of sentencing; (3) participate in the next available Family Violence Intervention and Education Session ("FVIES"); and (4) have no contact with the victim, W.G. (*Id.*)

On October 29, 2019, the court issued an Order requiring Gibson to appear on November 18, 2019, at 3:00 p.m., to show cause why she should not be held in contempt for failing to attend the FVIES and to

provide proof of enrollment in a batterer's intervention program. (D.C. Doc. 1 at 30.)

On November 15, 2019, Gibson was arrested and charged with two new counts of PFMA in cause number TK-19-7034. She pled not guilty on the morning of November 18 and was released on her own recognizance. (Mun. Ct. Case TK-620-2019-007034 Initial Appearance Docs. (Appendix B).)¹ She did not appear that afternoon for the show cause hearing previously set by the court in this case. (D.C. Doc. 1 at 39.)

On November 25, 2019, the City of Missoula ("City") filed a Petition to Revoke Gibson's suspended sentence. (D.C. Doc. 1 at 25-26 (Appendix C).) The City alleged the following violations:

Violation #1. Failed to complete Anger Management hours as ordered by the Court within deadlines imposed by this Court.

Violation #2. Failure to complete the Family Violence Intervention & Education Session.

Violation #3. Failure to abide by court orders by failing to appear at court ordered order to show cause hearing.

Violation #4. Failure to obey the law/commit no offenses. On or about November 15, 2019, the defendant was cited by Missoula City Police for two counts of Partner Family Member Assault.

¹ Appellant respectfully requests this Court take judicial notice of the appended Municipal Court documents pursuant to Mon. R. Evid. 202(6).

Violation #5. Failure to abide by no contact order by having contact with [W.G.] at least twice on November 15, 2019.

(Id.)

Gibson denied the allegations in the Petition to Revoke on May 28, 2019. (D.C. Doc. 1 at 15.) The court held a hearing on the petition on August 24, 2020. (D.C. Doc. 1 at 9.) Gibson admitted to violations 1-3 (failing to complete Anger Management and FVIES, and failing to appear at the show-cause hearing), but maintained her denials to violations 4 and 5 (committing new offenses and violating the court's no-contact order). (*Id.*; 8/24/20 Hrg. Aud. at 01:00-02:38.) The court asked the City if it wished to submit proof of the allegations Gibson had denied. The City declined to present evidence supporting these allegations, stating, "No, Judge, the first two admissions would be sufficient." (*Id.* at 2:38-3:05.) The court then dismissed violations 4 and 5. (*Id.*)

The court then proceeded to sentencing. In providing the City's recommendation, the Deputy City Attorney argued:

So, Judge, the allegations were for...the two that she denied were for new PFMA charges. I would note that, while they were alleged, the court can look at its own record that those charges were filed. It is the same victim in that case. And then, there is now another PFMA pending from August 5 of 20. It's not included in this PTR, but it is again the same victim. This case occurred back in October.

The sentencing was October 7 of 2019. Here we are...almost a year later. She did fail to appear, and she has committed, you know, a number of PFMA's against the same victim since that time.

(*Id.* at 3:50-4:44.)

Gibson objected to the City's reference to other alleged PFMA charges, arguing that the City declined to offer proof of these allegations, and that they were therefore not relevant to sentencing. (*Id.* at 4:43-4:51.) The City responded that there are no rules of evidence at a PTR hearing that would limit what it can argue. (*Id.* at 4:51-5:03.)

The court did not rule on Gibson's objection. (*Id.* at 5:03-5:26.) The City recommended that Gibson's suspended sentence be revoked and re-imposed with an additional seven days in jail, and that she be ordered to report to misdemeanor probation. (*Id.* at 4:44-5:55.) Gibson reiterated her objection to the consideration of her pending charges, noting that she maintained her innocence to those charges. (*Id.* at 6:00-7:34.)

Gibson argued that she should be sentenced based solely on the compliance violations and her failure to appear and asked that the suspended sentence be re-imposed with one additional day in jail, with credit for an additional day served. (*Id.*)

The court adopted the City's recommendation, sentencing Gibson to twelve months in jail with all but nine days suspended, with credit for three days served, and requiring that she report to misdemeanor supervision. (*Id.* at 7:55-10:30.) The court did not provide the reasons for its sentence, either orally or in writing. (D.C. Doc. 1 at 9-12 (Appendix D).) Gibson notified the court of her intent to appeal to the district court, and the court ordered execution of her jail sentence stayed. (D.C. Doc. 1 at 1, 5.)

Gibson appealed the municipal court's order to the Montana Fourth Judicial District Court, Missoula County, which affirmed the lower court's order on November 12, 2020. (D.C. Doc. 1 at 6; D.C. Doc. 6.)

On April 27, 2021, the Municipal Court Dismissed the PFMA charges in cause number TK-19-7034 that served as the basis for violations 4 and 5, and for the City's sentencing recommendation in this case. (Appendix E.)² Gibson now appeals.

² Appellant respectfully requests this Court take judicial notice of the appended Municipal Court Bench Order pursuant to Mont. R. Evid. 202(6).

Summary of Argument

Due process in a revocation proceeding requires that a court's discretion be guided by verified facts and an accurate knowledge of the probationer's behavior. Sentencing decisions cannot be predicated on bare allegations unsupported by a minimal indicium of reliability. Here, the Court's decision to revoke Gibson's sentence and impose an additional week in jail was predicated on unsubstantiated allegations of new criminal charges that were later dismissed. This violated Gibson's constitutional right to due process.

Standard of Review

On appeal from a municipal court, the district court functions as an intermediate appellate court. When the district court is subsequently appealed, this Court reviews the case as if the appeal had originally been filed in this Court, and applies the appropriate standard of review. *City of Billings v. Barth*, 2017 MT 56, ¶ 7, 387 Mont. 32, 390 P.3d 951 (citation omitted).

This Court's review of questions of constitutional law is plenary. *State v. Hocevar*, 2000 MT 157, ¶ 96, 300 Mont. 167, 7 P.3d 329 (citation omitted). This includes the question of whether a lower court violated a

defendant's due process rights in a revocation proceeding. *See State v. Finley*, 2003 MT 239, ¶ 10, 317 Mont. 268, 77 P.3d 193 (citations omitted).

Argument

The municipal court violated Gibson's constitutional right to due process at her revocation hearing by predicated her sentence following revocation on unsubstantiated allegations of new criminal offenses.

Both the fourteenth amendment to the United States Constitution and article II, section 17, of the Montana Constitution provide that no person shall be deprived of liberty without due process of law. *State v. Davis*, 2016 MT 102, ¶ 26, 383 Mont. 281, 371 P.3d 979. These protections extend to the revocation of a defendant's suspended sentence, which may result in the loss of liberty. *State v. Sebastian*, 2013 MT 347, ¶ 17, 372 Mont. 522, 313 P.3d 198. The potential loss of liberty for an individual facing revocation represents a "grievous loss" to the individual, and often to others. *Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S. Ct. 2593, 33 L. Ed. 484 (1972). In the context of a revocation proceeding, due process requires "a hearing structured to ensure that the parolee or probationer's violation will be based on verified facts and that the exercise of discretion will be informed by an accurate

knowledge of the parolee's or probationer's behavior.” *Sebastian*, ¶ 18 (quoting *Morrissey*, 408 U.S. at 484).

Due process also requires information considered at sentencing to be proven by a preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 157, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (“[A] jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence.”; *United States v. Wilson*, 900 F.2d 1350, 1354 (9th Cir. 1990) (“[D]istrict courts are constitutionally required to make factual determinations underlying application of the [Federal Sentencing] Guidelines by at least a preponderance of the evidence.”)

Moreover, due process protects criminal defendants from sentences “predicated on misinformation about that defendant’s criminal history.” *Bauer v. State*, 1999 MT 185, ¶ 20, 295 Mont. 306, 983 P.2d 955. “While not every type of misinformation will justify relief, a sentence cannot stand if it is based on assumptions concerning the defendant’s criminal record that are ‘materially false[.]’” *Id.* (quoting

Townsend v. Burke, 334 U.S. 736, 741, 68 S. Ct. 152, 92 L. Ed. 1690 (1948)).

“A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process.” *United States v. Weston*, 448 F.2d 626, 634 (9th Cir. 1971). In *Weston* the Ninth Circuit Court of Appeals held the lower court violated the defendant’s right to due process when it considered unsubstantiated statements from federal narcotics agents contained in the presentence report suggesting Weston was a large-scale dealer of heroin. *Id.* The agents referenced specific trips Weston took to Mexico and Arizona, allegedly to obtain large quantities of drugs, and provided the names and case numbers of four others individuals who had already been prosecuted as a result of their investigations. *Id.* at 628. When confronted with these allegations in court, Weston simply denied them. *Id.*

After reviewing its own precedent and that of other federal courts, the Ninth Circuit concluded that while other alleged criminal conduct may be considered at sentencing, the sentence "cannot be predicated on information of so little value” as the unverified allegations of federal

agents. *Id.* at 633-34. The court also rejected the notion that Weston had an affirmative duty to rebut such unsubstantiated allegations:

This will not do. It is tantamount to saying that once a defendant has been convicted of offense A, narcotics agents can say to the probation officer, and the probation officer can say to the judge, "We think that she is guilty of much more serious offense B, although all we have to go on is an informer's report," and the judge can then say to the defendant, "You say it isn't so; prove that to me!" In addition to the difficulty of "proving a negative," we think it a great miscarriage of justice to expect Weston or her attorney to assume the burden and expense of proving to the court that she is not the large scale dealer that the anonymous informant says that she is.

Id. at 634. *See also United States v. Huckins*, 53 F.3d 276, 278-280 (9th Cir. 1995) (holding witness statements in presentence report claiming defendant carried a firearm during bank robberies did not meet preponderance standard for consideration at sentencing because they were unsupported by extrinsic evidence.)

In subsequent cases, the Ninth Circuit has refined the rationale of *Weston* to a two-part test: "a sentence will be vacated on appeal if the challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence." *Farrow v. United States*, 580 F.2d 1339, 1359 (1978). "Challenged information is 'false or unreliable' if it lacks 'some minimal indicium of reliability beyond mere allegation.'" *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984) (*quoting*

United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir. 1982)). At least seven other federal circuit courts of appeal have expressly adopted this “minimal indicium of reliability” standard for information considered at sentencing.³

This Court’s standard for sentence reversal based on misinformation substantially mirrors the federal test: “the inquiry turns on whether the sentence was premised on materially false information.” *Bauer*, ¶ 22. Also like the federal courts, Montana’s due process guarantee includes a requirement that the defendant have a meaningful opportunity to rebut information considered at sentencing. *Id.* at ¶ 22; *Hocevar*, ¶ 103 (holding sentencing court erred when it considered evidence that had been presented at trial regarding charges on which the jury could not reach a verdict without providing the defendant an additional procedural opportunity to rebut the evidence at sentencing.)

³ See *United States v. Juwa*, 508 F.3d 694, 701 (2d Cir. 2007); *United States v. Young*, 981 F.2d 180, 187 (5th Cir. 1992); *United States v. Silverman*, 976 F.2d 1502, 1504 (6th Cir. 1992); *United States v. Hicks*, 948 F.2d 877, 878 (4th Cir. 1991); *United States v. Beaulieu*, 893 F.2d 1177, 1181 (10th Cir. 1990); *United States v. Collins Spencer Catch the Bear*, 727 F.2d 759, 761 (8th Cir. 1984); *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982).

In *Bauer*, this Court took the further step of holding that information that was accurate at the time of sentencing may become misinformation based on later developments. ¶ 28. There, the defendant was convicted of sexual intercourse without consent and aggravated assault in 1983. *Id.* ¶ 3. In 1996, he was convicted of three more felony offenses in another case. *Id.* ¶ 5. By the time of sentencing in the later case, Bauer had filed a petition for postconviction relief in the earlier case, alleging actual innocence based on new DNA evidence. *Id.* ¶ 13. The presentence investigation (“PSI”) in the 1996 case referenced the earlier convictions, and the court expressly relied on that report at sentencing. *Id.* ¶ 12. The 1983 convictions were later overturned, and Bauer subsequently sought postconviction relief in the 1996 case, arguing he was entitled to a new sentencing hearing excluding information regarding the 1983 convictions. *Id.* ¶¶ 13-14.

This Court agreed that fundamental fairness required that Bauer receive a new sentencing hearing. *Id.* ¶ 27. Although Bauer had an “affirmative duty” to rebut information contained in the PSI, this Court rejected the notion that he had a meaningful opportunity to do so at the sentencing phase of his 1996 case while he was still developing his

claims in a separate postconviction proceeding in the 1983 case. *Id.* ¶¶ 22, 25. This Court further acknowledged that although Bauer stood convicted of the earlier offenses at the time of sentencing in the 1996 case, that information “became misinformation after the fact” when the earlier convictions were set aside. *Id.* ¶ 28.

The State also argued Bauer had failed to rebut the lower court’s “finding” at the PCR hearing that it had not actually predicated its sentence in the 1996 case on the prior convictions because it was aware those convictions were under dispute. *Id.* ¶¶ 28-29. This Court held that requiring the defendant to refute such a finding would put an “impossible burden” on the defendant. *Id.* ¶ 29. Where the judge’s thought processes were not evident from the record, “it would be inconsistent with the truth-seeking function of due process” to assume a criminal defendant could explain away the inner workings of the sentencing judge’s mind. *Id.*

For this very reason, the Montana Code expressly requires a sentencing judge to “clearly state for the record the reasons for imposing the sentence.” § 46-18-102(3)(b), MCA. In the context of a revocation proceeding, the Ninth Circuit has held that:

[S]pecific findings with reference to the evidence supporting charges are not constitutionally required where a defendant raises no objection to the sufficiency or accuracy of the evidence, and the district court finds that the government sufficiently proved the charged conduct. *Where the parties have any specific disagreements, however, the record must clearly reflect that the court considered the position of each of the parties and must identify the basis on which the court resolved any disputes at the time of the hearing.*

United States v. Sesma-Hernandez, 253 F.3d 403, 409 (2001) (emphasis added).

Here, the City of Missoula and the Missoula Municipal Court violated Gibson's right to due process when: (1) the City argued the court should sentence Gibson based on unsubstantiated allegations of new criminal conduct; (2) the court failed to rule on, or even acknowledge, Gibson's objection to its consideration of the unsubstantiated allegations; (3) the court adopted the City's sentencing recommendation; and (4) the court provided no explanation for its sentence.

The City's allegation that Gibson committed new PFMA's and knowingly violated the municipal court's no-contact order were materially false. While Gibson does not dispute that new charges had been filed, the existence of a charge is nothing more than an allegation.

As in *Weston* and *Huckins*, a sentence cannot be predicated on unverified allegations. Unlike in those cases, here the City did not provide statements from law enforcement, the alleged victim, or any other witness. Indeed, it presented no extrinsic evidence at all that would lend its allegations even a minimal indicium of reliability, let alone sufficient evidence for the court to find they were proven by a preponderance of the evidence. In the face of Gibson's blanket denial of those allegations, and her invocation of her presumption of innocence, the City asked the court to simply assume the allegations were true and sentence her accordingly.

While this Court has previously held that a defendant has an affirmative duty to rebut information considered at sentencing, a defendant cannot be expected to rebut evidence that does not exist. Due process cannot place the burden on the defendant to prove her own innocence where the City has not even attempted to meet its own initial burden of establishing the factual basis of its allegations and providing extrinsic evidence of their reliability. This is especially true where, as in *Bauer*, the defendant is still developing her defense to those allegations in a separate proceeding. Here, the City successfully circumvented

Gibson's presumption of innocence on the new charges and her right to a trial by jury by convincing the court to sentence her in this case based on allegations alone. If the fundamental unfairness of this process was unclear at the time of the revocation, it became abundantly clear when the charges underlying those allegations were dismissed five months later.

Finally, it cannot fall on Gibson to prove the lower court's sentence was in fact predicated on the City's unsubstantiated allegations when the lower court did not articulate the reasons for its sentence, nor address Gibson's objection to the City's arguments. The City's emphasis on the new charges as a basis for imposing additional jail time, and the lower court's wholesale adoption of the City's sentencing recommendation, provide ample basis for this Court to infer that the sentence was predicated on those allegations. Any doubt on this point, however, should be resolved in Gibson's favor, as it would be inconsistent with the truth-seeking function of due process to require Gibson to prove the inner workings of the sentencing judge's mind where the record is silent.

Conclusion

In exercising its discretion to determine an appropriate sentence in this case, the lower court improperly considered materially false information. The City asked the court to sentence Gibson based on bare allegations of new charges unsupported by any evidence at all. The court obliged, adopting the City's sentencing recommendation without addressing Gibson's objection or providing the rationale for its sentence. This violated Gibson's constitutional right to due process. She respectfully requests this Court reverse the district court's Order affirming the municipal court and remand for a new hearing on the Petition to Revoke Gibson's suspended sentence, with an order to exclude any reference to the now dismissed PFMA charges.

Respectfully submitted this 20th day of March, 2022.

/s/Ryan W. Aikin

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 3,530, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Ryan W. Aikin

Appendix

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CERTIFICATE OF SERVICE

I, Ryan Aikin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-20-2022:

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