

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0029

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSE LUIS PERALTA,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John C. Brown, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
CORI LOSING
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
cori.losing@mt.gov

PETE WOOD
Attorney at Law
1604 N. 30th Street
Boise, ID 83703

ATTORNEY FOR DEFENDANT
AND APPELLANT

MARTY LAMBERT
Gallatin County Attorney
BJORN E. BOYER
Deputy County Attorney
1709 West College Street
Bozeman, MT 59715

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. Standard of review	3
II. Because Peralta’s 1990 DUI conviction was entered after Mont. Code Ann. § 61-8-714(5) (1987)’s expungement provision was repealed and application of Mont. Code Ann. § 61-8-714(5) (1989) is not prohibited by <i>ex post facto</i> , the district court did not err when it denied Peralta’s motion to amend his felony DUI charge	3
A. Peralta’s 1990 DUI conviction is not entitled to expungement pursuant to Mont. Code Ann. § 61-8-714(5) (1987) because the date of conviction controls Mont. Code Ann. § 61-8-714(5)’s applicability	3
B. The district court’s application of Mont. Code Ann. § 61-8-714(5) (1989) did not violate <i>ex post facto</i>	9
1. The 1989 version of Mont. Code Ann. § 61-8-714(5) did not change the legal consequences of Peralta’s 1990 DUI conviction.....	9
2. The application of the 1989 version of Mont. Code Ann. § 61-8-714(5) did not disadvantage Peralta.....	10
3. The district court’s application of Mont. Code Ann. § 61-8-714(5) (1989) also did not undermine Peralta’s right to a fundamentally fair process	11
CONCLUSION	12
CERTIFICATE OF COMPLIANCE.....	13

TABLE OF AUTHORITIES

Cases

<i>City of Missoula v. Fox</i> , 2019 MT 250, 397 Mont. 388, 450 P.3d 898	4
<i>State v. Brander</i> , 280 Mont. 148, 930 P.2d 31 (1996)	5, 7, 9, 10
<i>State v. Christensen</i> , 2020 MT 237, 401 Mont. 247, 472 P.3d 622	4
<i>State v. Cooney</i> , 284 Mont. 500, 945 P.2d 891 (1997)	3, 7
<i>State v. Reams</i> , 284 Mont. 448, 945 P.2d 52 (1997)	passim
<i>State v. Sidmore</i> , 286 Mont. 218, 951 P.2d 558 (1997)	3, 7
<i>State v. Wilson</i> , 279 Mont. 34, 926 P.2d 712 (1996)	6

Other Authorities

Montana Code Annotated	
§ 46-18-404 (1993)	6
§ 61-8-401	1
§ 61-8-714 (1981)	7
§ 61-8-714 (1987)	2
§ 61-8-714(5)	passim
§ 61-8-714(5) (1981)	5, 6, 7, 10
§ 61-8-714(5) (1981-1987)	7
§ 61-8-714(5) (1985)	5
§ 61-8-714(5) (1987)	passim
§ 61-8-714(5) (1989)	passim
Montana Constitution	
Art. II, § 31	9

United States Constitution	
Art. I, § 10.....	9

STATEMENT OF THE ISSUE

Did the district court correctly conclude that Mont. Code Ann. § 61-8-714(5)'s expungement provision, that was repealed effective October 1, 1989, did not apply to Appellant's 1990 DUI conviction and thereby properly deny Appellant's motion to amend his felony DUI charge to a misdemeanor?

STATEMENT OF THE CASE

Appellant Jose Luis Peralta (Peralta) entered a conditional guilty plea to Driving Under the Influence of Alcohol (DUI) (4th or subsequent offense) preserving his right to appeal the district court's denial of his *Motion to Amend Felony DUI Charge*.

STATEMENT OF FACTS

The State, in pertinent part, charged Peralta by Information with DUI (4th or subsequent offense), a felony, in violation of Mont. Code Ann. § 61-8-401, on October 5, 2015. (Doc. 3.) Peralta's three underlying DUI convictions occurred in 1990, 1999, and 2003. (Doc. 74 at 2.) Although Peralta was convicted of his first DUI in 1990, he committed the offense in 1988. (*Id.* at 1.) Peralta argued to the district court that because, at the time of the commission of this offense, Mont. Code Ann. § 61-8-714(5) (1987) authorized expungement of a DUI conviction if the offender did not commit another DUI within five years of the DUI

conviction, Peralta's 1990 DUI conviction no longer existed. (*Id.* at 3.) The State countered that the date of Peralta's conviction controlled application of Mont. Code Ann. § 61-8-714(5). (Doc. 75 at 2.) Because Peralta was not convicted until after the repeal of Mont. Code Ann. § 61-8-714(5)'s expungement provision, Peralta's 1990 DUI conviction was not eligible for expungement. (*Id.*)

Agreeing with the State that the plain language of Mont. Code Ann. § 61-8-714 (1987) required Peralta to have a DUI entered before October 1, 1989, the district court denied Peralta's motion. (Doc. 85 at 3.) On November 23, 2020, the district court imposed, but stayed execution of, Peralta's sentence pending the instant appeal.

SUMMARY OF THE ARGUMENT

This Court has consistently held that the date of conviction controls Mont. Code Ann. § 61-8-714(5)'s applicability. Because Peralta was convicted of a DUI in 1990, the district court correctly concluded the Mont. Code Ann. § 61-8-714(5) (1987)'s expungement provision, which was repealed in 1989, did not apply. Nor did the district court's application of the 1989 version of Mont. Code Ann. § 61-8-714(5), rather than the 1987 version, violate *ex post facto*. The district court's application of Mont. Code Ann. § 61-8-714(5) (1989) did not change the legal consequences of Peralta's 1990 DUI conviction nor did it

disadvantage Peralta. The district court accordingly did not err when it denied Peralta's motion to amend his felony DUI to a misdemeanor.

ARGUMENT

I. Standard of review

This Court considers a motion to amend a felony charge to a misdemeanor akin to a motion to dismiss. *State v. Reams*, 284 Mont. 448, 450, 945 P.2d 52, 54 (1997). This Court reviews *de novo* a district court's denial of a motion to dismiss a criminal case. *State v. Sidmore*, 286 Mont. 218, 223, 951 P.2d 558, 562 (1997). When no factual disputes exist, this Court will only determine whether a district court correctly interpreted the law when it denied the motion to dismiss. *State v. Cooney*, 284 Mont. 500, 502, 945 P.2d 891, 892 (1997).

II. Because Peralta's 1990 DUI conviction was entered after Mont. Code Ann. § 61-8-714(5) (1987)'s expungement provision was repealed and application of Mont. Code Ann. § 61-8-714(5) (1989) is not prohibited by ex post facto, the district court did not err when it denied Peralta's motion to amend his felony DUI charge.

A. Peralta's 1990 DUI conviction is not entitled to expungement pursuant to Mont. Code Ann. § 61-8-714(5) (1987) because the date of conviction controls Mont. Code Ann. § 61-8-714(5)'s applicability.

Peralta's contention that the date of the offense controls whether Mont. Code Ann. § 61-8-714(5) (1987)'s expungement provision applies to his 1990 DUI

conviction disregards this Court’s consistent interpretation that the date of conviction controls Mont. Code Ann. § 61-8-714(5)’s applicability. The district court accordingly correctly concluded, here, “that there can be no application of expungement statute without there first being a conviction of record.” (Doc. 85 at 3.)

Statutory construction requires the district court to simply “ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. “The starting point for interpreting a statute is the language of the statute itself.” *State v. Christensen*, 2020 MT 237, ¶ 95, 401 Mont. 247, 472 P.3d 622. The plain meaning of the statute controls when the “intent of the Legislature can be determined from the plain meaning of the words used in the statute.” *Id.* “Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.” *Fox*, ¶ 18.

Montana Code Annotated § 61-8-714(5) (1987) provides, in pertinent part, “[i]f there has been no additional conviction for an offense under this section for a period of 5 years after a prior conviction hereunder, then such prior offense shall be expunged from the defendant’s record.” Therefore, to have a conviction eligible for expungement pursuant to Mont. Code Ann. § 61-8-714(5) (1987), a person must first have an actual conviction. The district court did not err when it

determined that Mont. Code Ann. § 61-8-714(5) (1987) could not apply to a DUI conviction entered after the statute was repealed.

Furthermore, the district court's interpretation of Mont. Code Ann. § 61-8-714(5) (1987) complies with this Court's consistent holdings that the date of conviction controls whether the expungement provision of Mont. Code Ann. § 61-8-714(5) applies. This Court first addressed Mont. Code Ann. § 61-8-714(5)'s applicability in *State v. Brander*, 280 Mont. 148, 930 P.2d 31 (1996). On appeal, Brander argued that his November 24, 1986 DUI conviction should have been expunged on November 24, 1991 and, therefore, could not be used to enhance his November 1995 DUI charge to a felony DUI. *Brander*, 280 Mont. at 152, 930 P.2d at 34. This Court agreed with the district court that consideration of Brander's previous DUI convictions to enhance his sentence did not violate *ex post facto*. *Brander*, 280 Mont. at 155, 930 P.2d at 36.

This Court, however, expanded the analysis and nonetheless concluded that the district court erred in considering Brander's 1986 DUI conviction because Mont. Code Ann. § 61-8-714(5) (1985), which was in effect at the time of Brander's *conviction*, authorized expungement of Brander's DUI as Brander's next DUI conviction occurred in 1995. *Brander*, 280 Mont. at 157, 930 P.2d at 36-37. This Court subsequently furthered its analysis from *Brander* in *Reams*.

In *Reams*, the State appealed the district court's grant of Reams's motion to dismiss his felony DUI charge based on its determination that Mont. Code Ann. § 61-8-714(5) (1981) authorized expungement of Reams's 1975 DUI conviction. *Reams*, 284 Mont. at 457, 945 P.2d at 58. In affirming the district court's grant of Reams's motion, this Court relied on its rationale in *State v. Wilson*, 279 Mont. 34, 926 P.2d 712 (1996). *Reams*, 284 Mont. at 455-58, 945 P.2d at 56-58.

In *Wilson*, this Court determined that the district court could not designate Wilson as a dangerous offender pursuant to Mont. Code Ann. § 46-18-404 (1993), which was repealed at the time of Wilson's sentencing but in effect when Wilson committed his offense. *Wilson*, 279 Mont. at 37-41, 926 P.2d at 714-16. This Court explained that generally the law in effect at the time of the commission of the offense controls sentencing. *Wilson*, 279 Mont. at 38, 926 P.2d at 715. This Court, however, held that an exception exists to this general rule when (1) a sentencing statute is repealed between the date of the offense and the date of sentencing, (2) the "effect of the repeal lessens or ameliorates the defendant's punishment," and (3) the "repealer contains no savings clause." *Wilson*, 279 Mont. at 40, 926 P.2d at 716. When all three of these elements are satisfied, then the defendant is entitled to be sentenced under the statute in effect at the time of sentencing. *Id.*

Applying its rationale from *Wilson*, this Court concluded that Reams was entitled to the benefit of expungement even though Mont. Code Ann. § 61-8-714(5)

was not enacted until October 1, 1981, six years after Reams's 1975 DUI conviction. *Reams*, 284 Mont. at 450, 455-57, 945 P.2d at 54, 57-58. As this Court explained, Mont. Code Ann. § 61-8-714(5) (1981)'s expungement provision "was ameliorative in nature because it provided previous DUI offenders the benefit of avoiding a sentence enhancement" authorized by Mont. Code Ann. § 61-8-714 (1981). *Reams*, 284 Mont. at 455, 945 P.2d at 57. Montana Code Annotated § 61-8-714(5) (1981) likewise contained no savings clause. *Reams*, 284 Mont. at 457, 945 P.2d at 58. Accordingly, this Court held that "if a defendant's record contained a DUI conviction entered *before* October 1, 1981, and the defendant did not receive another DUI conviction within the next five years, he also was entitled to have the prior DUI conviction expunged from his record." *Id.* (emphasis in original).

Applying its rationale in *Brander* and in *Reams*, this Court concluded that a 1988 DUI conviction was entitled to expungement pursuant to Mont. Code Ann. § 61-8-714(5) (1987). *Sidmore*, 286 Mont. at 229, 238. And, based on that same rationale, this Court likewise determined Mont. Code Ann. § 61-8-714(5) (1987) authorized expungement of a conviction entered on July 31, 1989, as the amendment of the expungement provision was not effective until October 1, 1989. *Cooney*, 284 Mont. at 598, 945 P.2d at 896.

Montana Code Annotated § 61-8-714(5) (1981-1987) accordingly authorizes expungement if (1) the DUI conviction exists before October 1, 1989 and (2) a

period of more than five years must have elapsed without a subsequent DUI conviction. *See Reams*, 284 Mont. at 455-57, 945 P.2d at 57-58. Though more than five years have passed from Peralta's 1990 DUI conviction until the instant offense which occurred in 2015, Peralta simply cannot satisfy the first element as his *conviction* was not entered until July 27, 1990. The district court correctly denied Peralta's motion to amend his felony DUI charge as Peralta's 1990 DUI conviction was not eligible for expungement pursuant to Mont. Code Ann. § 61-8-714(5) (1989), the statute in effect when Peralta's conviction was entered.

Despite the district court's interpretation matching this Court's precedent, Peralta, nonetheless, contends that the district court's interpretation that the date of conviction controls Mont. Code Ann. § 61-8-714(5)'s applicability will lead to absurd results because the version of the statute that applies for expungement purposes may not be the same version that applies for sentencing purposes. (Appellant's Br. at 21-22.) Peralta's argument is without merit. Because a person's DUI conviction obtained before October 1, 1989 cannot be expunged until five years after the conviction has been entered, no confusion would exist at the time of sentencing, where the date of the offense generally would control which sentencing penalty provision was in effect. The district court did not err when it denied Peralta's motion.

B. The district court's application of Mont. Code Ann. § 61-8-714(5) (1989) did not violate *ex post facto*.

Peralta's assertion that application of Mont. Code Ann. § 61-8-714(5) (1989) violated *ex post facto* likewise is without merit. (Appellant's Br. at 7.)¹ Article II, § 31 of the Montana Constitution and Article I, § 10 of the United States Constitution both prohibit *ex post facto* laws. *Ex post facto* prohibits statutes that criminalize an act previously committed that was innocent when done; increase the punishment for an offense after its committed; or deprive the accused with a defense to a crime that was available at the time the offense was committed. *Brander*, 280 Mont. at 153, 930 P.2d at 35. A statute violates the prohibition on *ex post facto* legislation if it is both retrospective in nature and disadvantages the offender affected by it. *Id.*

1. The 1989 version of Mont. Code Ann. § 61-8-714(5) did not change the legal consequences of Peralta's 1990 DUI conviction.

A law is retrospective if "it changes the legal consequences of the actions committed before its effective date." *Id.* The applicable statute, Mont. Code Ann. § 61-8-714(5) (1989), provides, in pertinent part, that "[i]f there has been no additional conviction for an offense under this section for a period of 5 years after a prior conviction hereunder, then all records and data relating to the prior

¹Peralta did not raise an *ex post facto* claim in his motion before the district court. (See Doc. 74.) Nor did the district court rely on *ex post facto* when it denied Peralta's motion. (See Doc. 85.) The State, however, did address *ex post facto* in its response to Peralta's motion. (See Doc. 75.)

conviction are confidential criminal justice information.” Montana Code Annotated § 61-8-714(5) (1989) accordingly did not change the legal consequences of Peralta’s DUI committed in 1988. Rather, Mont. Code Ann. § 61-8-714(5) simply made unavailable the legislative grace of expungement that was available to those who did not earn another DUI conviction within five years of a DUI conviction entered before October 1, 1989. Peralta’s argument that the law is retrospective because under Mont. Code Ann. § 61-8-714(5) (1987) Peralta would have been entitled to expungement despite Peralta not having a DUI conviction before October 1, 1989 fails.

2. The application of the 1989 version of Mont. Code Ann. § 61-8-714(5) did not disadvantage Peralta.

For purposes of *ex post facto* analysis, a law disadvantages an offender if the law is “more burdensome than the previous law.” *Brander*, 280 Mont. at 153, 930 P.2d at 35. In support of his argument, Peralta relies solely on this Court’s conclusion that Mont. Code Ann. § 61-8-714(5) (1981) was ameliorative in nature. (Appellant’s Br. at 9.) This Court, however, has also concluded that Mont. Code Ann. § 61-8-714(5) (1989) amending the expungement provision to a provision allowing a DUI conviction to be classified as confidential criminal justice information was not ameliorative in nature. *Reams*, 284 Mont. at 455, 945 P.2d at 57. The simple modification of the legislative grace afforded to persons with a DUI conviction entered after October 1, 1989 from expungement to classification as criminal justice

information does not equate to Mont. Code Ann. § 61-8-714(5) (1989) being more burdensome than Mont. Code Ann. § 61-8-714(5) (1987). The district court properly applied Mont. Code Ann. § 61-8-714(5) (1989) to deny Peralta's motion.

3. The district court's application of Mont. Code Ann. § 61-8-714(5) (1989) also did not undermine Peralta's right to a fundamentally fair process.

Peralta contends that the purpose behind the prohibition on *ex post facto* legislation—safeguarding fundamental fairness—supports the date of offense controlling application of Mont. Code Ann. § 61-8-714(5) (1987)'s expungement provision. (Appellant's Br. at 11.) In support of his argument, Peralta posits a hypothetical that involves a defendant who commits an offense days before Mont. Code Ann. § 61-8-714(5) (1989)'s effective date and pleads guilty before dissemination of discovery to the DUI based on his attorney's advice that a conviction entered before October 1, 1989 will be entitled to expungement. (*Id.* at 12-13.) Peralta uses the hypothetical to argue that the date of conviction controlling application of the DUI expungement statute may improperly coerce a guilty plea. (*Id.* at 13.)

Both Peralta's argument and hypothetical prove unconvincing considering the facts presented here. First, the hypothetical is a legal impossibility when applied today. Presently, a defendant cannot be improperly coerced into pleading prematurely to a DUI to retain the defendant's ability to expunge a DUI as the

expungement provision has been repealed since October 1, 1989.² Second, nothing in the record supports that the district court correctly finding that Peralta's date of conviction controlled which Mont. Code Ann. § 61-8-714(5)'s applicability to his 1990 DUI conviction undermined Peralta's right to fundamentally fair process. The district court did not err when it denied Peralta's motion to amend his felony DUI charge as it was a legal impossibility for Peralta's 1990 DUI conviction to be expunged under Mont. Code Ann. § 61-8-714(5) (1989), the statute in effect when Peralta's DUI conviction was entered.

CONCLUSION

The State respectfully requests that this Court affirm the district court's order denying Peralta's motion to amend felony DUI charge, Peralta's conviction, and Peralta's sentence.

Respectfully submitted this 21st day of June, 2022.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Cori Losing
CORI LOSING
Assistant Attorney General

² Nor would Peralta in the hypothetical be left without a remedy as he suggests. (See Appellant's Br. at 12-13.) A defendant still could raise a claim of ineffective assistance of counsel based on allegations that they were coerced into pleading guilty.

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 2,781 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Cori Losing
CORI LOSING

CERTIFICATE OF SERVICE

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-21-2022:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Jose Luis Peralta
Service Method: eService

Martin D. Lambert (Govt Attorney)
1709 W. College
Bozeman MT 59715
Representing: State of Montana
Service Method: eService

Peter Allan Wood (Attorney)
1604 N 30th St
Boise ID 83703
Representing: Jose Luis Peralta
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Cori Danielle Losing
Dated: 06-21-2022