

DA 21-0501

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 133

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BART J. CRABTREE,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

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APPEAL FROM: District Court of the Eighth Judicial District,  
In and For the County of Cascade, Cause No. BDC-16-379  
Honorable Elizabeth A. Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Bartley J. Crabtree, Self-Represented, Great Falls, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Tammy K Plubell,  
Assistant Attorney General, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Erik Kitzmiller, Special  
Deputy County Attorney, Great Falls, Montana

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Submitted on Briefs: May 25, 2022

Decided: July 5, 2022

Filed:

  
Clerk

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Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 In 2017, a Cascade County jury found Petitioner/Appellant Bartley John Crabtree guilty of theft by common scheme for embezzling a substantial amount of money from a youth softball organization. The present appeal is Crabtree's third appearance before this Court in this case. After the charges were filed, he attempted to disqualify the District Court judge for personal bias. This Court declined to accept Crabtree's disqualification petition after determining that the affidavit he filed in support of his motion was made in bad faith. After Crabtree's conviction, he filed a direct appeal, represented by appointed counsel. We affirmed the conviction in 2019. *See State v. Crabtree*, DA 17-0650, 2019 MT 239N, 2019 Mont. LEXIS 571. Subsequently, Crabtree filed a petition for postconviction relief in the District Court. He alleged ineffective assistance of his appellate counsel, and he reprised at length the evidence and testimony from the trial, casting the witnesses and prosecutors as corrupt and perjurious and accusing the District Court judge of conspiratorial prejudice against him.

¶2 On August 16, 2021, the Eighth Judicial District Court in Cascade County issued an order denying Crabtree's petition. The order noted that most of Crabtree's complaints were simply about relitigating the facts and evidence presented at trial, unsuitable grounds for postconviction relief. Regarding his ineffective assistance of counsel claim, the District Court held that Crabtree failed to demonstrate deficiency in his appellate counsel's representation. Crabtree now appeals the District Court's postconviction order.

¶3 We restate the issue on appeal as follows:

*Did the District Court correctly deny the petition for postconviction relief?*

¶4 We affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶5 Crabtree served as president of the Electric City Heat girls' softball organization from August 2014 to February 2016. About a year into his tenure, other board members were surprised to discover that the program was in financial trouble: checks bounced, and several bills were overdue, including the lease on the softball fields the organization used. The vice president and the treasurer asked Crabtree for access to their financial records, but Crabtree refused. Crabtree then sent the treasurer a letter purporting to dismiss her pursuant to his power as president.

¶6 Crabtree had maintained complete control over the organization's checkbook and finances. The board members later discovered that he had written about a dozen checks to himself from the organization's account, cashing them at an "EZ money" service in Great Falls. The checks totaled over \$5,000. In early February 2016, the board held a meeting—Crabtree declined to attend—at which they voted to reject his attempted dismissal of the treasurer, Janet Brown, and voted to remove Crabtree as president. The vice president, Marlee Sunchild, took his place.

¶7 Crabtree nonetheless continued to profess his authority as president of the organization. He sent another letter purporting to fire Sunchild and accusing her of misusing organization funds (although the organization's bylaws did not permit such a unilateral removal process). The dispute over Electric City Heat's management led to civil

litigation. Both Crabtree and Sunchild appeared before the Cascade County District Court and claimed to be acting on behalf of the organization. The District Court held a hearing in May 2016 at which Crabtree, Sunchild, and others testified. The court issued an injunction ordering Crabtree to refrain from all Electric City Heat business and preserving, as litigation continued, Sunchild's position as president. The District Court noted in its order that Crabtree was already in open violation of earlier court orders prohibiting his use of Electric City Heat property and representation as president, and the District Court noted that the evidence of Crabtree's embezzlement appeared credible.

¶8 Sunchild and Brown had contacted the police after discovering the many Electric City Heat checks Crabtree wrote to himself. Detective Travis Burrow interviewed numerous members of the organization and discussed the matter with Crabtree on more than one occasion. Crabtree insisted that he had merely been reimbursing himself for softball-related expenses he had incurred. Crabtree produced a list of expenses he had created, which he said documented the many times he needed reimbursement or "cash on hand." After prompting from Burrow, Crabtree belatedly followed up with a folder of photocopied receipts. Not all the listed reimbursements were accompanied by a receipt.

¶9 Sunchild and Brown validated about half of the expenditures but noted issues with the rest (totaling \$2560). In one instance, Crabtree had twice listed a gas expense for the same amount but cited the same receipt for both. Another item Crabtree listed was cash reimbursement for an expense that had actually been paid directly to the store by check. One expense consisted of hundreds of dollars' worth of paint, and Sunchild and Brown noted that all Crabtree had painted was a small garage at the softball fields. Other expenses

included topsoil, sealant, diesel fuel, and a skid steer rental, none of which related to use at the softball fields, Sunchild and Brown said. Notably, Crabtree worked as a contractor under the name Lodestar Construction; expenses he listed for dumping fees at the landfill were documented by the facility as receipts for Lodestar.

¶10 Burrow confirmed that the last time Crabtree had rented a skid steer from Hertz, as he had said on the list, was the year before Crabtree claimed to have incurred the expense for Electric City Heat. Burrow visited the softball fields to look for evidence of the sprinkler and siding work that Crabtree claimed to have reimbursed himself for, but he saw little to justify the large expenses. Burrow noted that Crabtree's list lacked dates for the expenses and that the checks Crabtree had written to himself were for large, round sums not matching the amounts of the various individual items on the list. Burrow concluded that his investigation showed "enough evidence to say that Mr. Crabtree embezzled from the Electric City Heat organization," and he submitted a report to the county attorney's office recommending prosecution.

¶11 The State charged Crabtree with theft by common scheme in July 2016. Crabtree soon thereafter filed a motion to disqualify the District Court judge assigned to the case, citing § 3-1-805, MCA, which provides a process for this Court to review if the facts alleged show "personal bias or prejudice of the presiding judge." Crabtree attached an affidavit to substantiate his allegations of bias, as required by the statute, stating his version of events and casting other witnesses, law enforcement detectives, prosecutors, and the District Court judge as conspirators in a grand scheme of lies against him. Crabtree's affidavit in support of disqualifying the judge essentially attempted to relitigate the civil

hearing regarding the Electric City Heat organization. The District Court, as required by law, proceeded no further on Crabtree's case until that matter was resolved by this Court. This Court rejected the motion because he based his accusations on prior rulings and failed to demonstrate personal bias on the part of the judge. Crabtree failed to comply with the statutory requirements of § 3-1-805, MCA, and therefore had filed the motion in bad faith.

¶12 Through the jury trial in June 2017, Crabtree chose to defend himself. He filed a motion to dismiss, which restated his conspiratorial framing of the investigation into him, and he attached copious documents and notes to bolster his version of events. The District Court denied the motion, noting that Crabtree raised no legal basis to dismiss the charges—instead only contesting the factual allegations—and noting that probable cause supported the State's charges. Crabtree declined to testify under oath, but he repeatedly attempted to argue with witnesses during his opportunities for cross-examination. Crabtree argued in closing that contrary to the State's presentation regarding his personal use of funds, his “cash on hand” strategy was merely a “common sense” way to run the organization. The jury returned a guilty verdict.

¶13 Citing Crabtree's lengthy record, his “disregard and disrespect for the Court, its authority, and the authority of law enforcement officers,” and his abuse of a position of trust with the volunteer sports league, the District Court sentenced Crabtree to five years' incarceration with three suspended. Crabtree's sentence was a reflection of a longstanding pattern apparent through his interactions with the courts and the criminal justice system. It addressed the latest in a succession of theft-related crimes or financial misfeasance. Crabtree was previously convicted on multiple misdemeanor and felony counts of issuing

bad checks, he has faced two prior felony theft convictions (one charge deferred through a two-year probation), he has been charged more than once with failure to pay child support, and he has a history of numerous liens and financial judgments, including restitution ordered for his criminal offenses, some of which remains unpaid. Crabtree received two suspended three-year prison sentences in 1997 for issuing numerous bad checks on at least two separate accounts. The suspension of these sentences was revoked after Crabtree failed to report to his probation officer or pay restitution and had a new arrest for failure to return rented property. In another case, appealed to this Court in 2016, the Justice Court in Cascade County entered a judgment against Crabtree for wages he failed to pay a subcontractor. We affirmed. *Crabtree v. Czech*, DA 16-0184, 2016 MT 326N, 2016 Mont. LEXIS 1026. In 2017, the Montana Department of Labor fined Crabtree almost \$30,000 for failing to pay mandatory insurance for his employees and failing to respond to an audit.

¶14 The status of Crabtree's efforts at repayment or compliance with the prior orders against him is unclear because Crabtree refused to cooperate with the financial evaluation prepared for his presentencing report after the 2017 conviction. At sentencing, the District Court also noted that Crabtree "refuses to acknowledge responsibility and blames others for his conviction." Crabtree has been held in contempt in past proceedings. In this underlying criminal case, the District Court had to issue a bench warrant to secure Crabtree's appearance for a pretrial hearing.

¶15 Crabtree's direct appeal and subsequent postconviction relief petition followed. Crabtree's postconviction relief petition rehashed his argument that Sunchild's testimony "embodied a complete proliferation of perjury and false reports" and that Burrow's

investigation was “skewed to collude” with her. He accused the State of prosecutorial misconduct for presenting the alleged lies, and he again complained that the District Court judge was biased against him and should have recused herself. On that last point, Crabtree made a brief argument that his appellate counsel was deficient for not raising the recusal issue during the earlier direct appeal.

¶16 The District Court denied Crabtree’s petition for postconviction relief, and he now appeals that decision to this Court.

### **STANDARD OF REVIEW**

¶17 We review a district court’s denial of a petition for postconviction relief to determine whether the court’s findings of fact are clearly erroneous and whether its conclusions of law are correct. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. We address ineffective assistance of counsel claims by applying a two-part test that considers whether the petitioner has met their burden to demonstrate that (1) the counsel’s performance was deficient; and (2) the deficient performance prejudiced the defense. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

### **DISCUSSION**

¶18 *Did the District Court correctly deny the petition for postconviction relief?*

¶19 Postconviction relief is a civil remedy and is independent of the underlying criminal cause. *Dillard v. State*, 2006 MT 328, ¶ 13, 335 Mont. 87, 153 P.3d 575. The process exists to permit a person to challenge a sentence if there is no adequate remedy of appeal and they can demonstrate that the court lacked jurisdiction or that the sentence was illegal or unconstitutional. Section 46-21-101, MCA. Similarly, postconviction relief may be

proper if newly discovered evidence can “establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted.” Section 46-21-102(2), MCA.

¶20 The majority of Crabtree’s argument focuses on the idea that newly discovered evidence should vitiate his conviction. In a postconviction proceeding, the petitioner, Crabtree, bears the burden of proving by a preponderance of the evidence that he is entitled to relief. *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473. We have previously discussed how district courts should consider whether alleged new evidence will “establish that the petitioner did not engage in the criminal conduct.” See *Marble v. State*, 2015 MT 242, 380 Mont. 366, 355 P.3d 742 (quoting § 46-21-102(2), MCA). The analysis should consider whether the evidence is actually newly discovered and consider factors set out in *State v. Clark*, 2005 MT 330, ¶ 34, 330 Mont. 8, 125 P.3d 1099: “(1) the evidence must have been discovered since the defendant’s trial; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant’s part; (3) the evidence must be material to the issues at trial; and (4) the evidence must be neither cumulative nor merely impeaching.” See also *Garding v. State*, 2020 MT 163, ¶ 40, 400 Mont. 296, 466 P.3d 501 (noting that these first four *Clark* factors are a viable resource for assessment of the evidence).

¶21 Crabtree correctly cites elements of this standard, and he insists that he is able to meet it. But insistence is not evidence. Repeatedly throughout his briefs, Crabtree asserts that “the ensuing facts will disclose” the perjury at the heart of his trial, that “many facts have been established and uncovered,” that “the following facts tell quite a different story,” that “all the following evidence . . . evince the scheme and artifice,” and so forth. But

nothing revelatory follows these statements. When it comes to disclosing any newly discovered evidence, Crabtree does no more than describe all the testimony and evidence that was available at the time of trial and insist that what the jury heard was lies.

¶22 For one illustrative example, Crabtree relitigates at length whether he did in fact use a skid steer at the softball fields in the spring of 2015. He notes that some witnesses testified to remembering one there, and he attacks the credibility of Sunchild’s testimony that she did not, impeaching it with reference to parts of Detective Burrow’s notes or statements at the earlier civil hearing. Crabtree leaps from these facets of his trial to the conclusion that he has demonstrated “pure fraud” and “perjury/conspiracy” and prosecutorial misconduct. Crabtree performs similarly when he recounts his narratives about other matters like how much paint was needed or who painted what at the facilities.

¶23 But none of this is newly discovered evidence. It is the stuff of the trial. Crabtree had the opportunity at trial to impeach Sunchild’s testimony. He had the opportunity at trial to convince the jury that the State’s evidence did not prove his theft. The jury concluded otherwise. A postconviction proceeding is not an appropriate forum to raise issues that are merely based on the trial record. *See* § 46-21-105(2), MCA; *State v. Evert*, 2007 MT 30, ¶¶ 15-16, 336 Mont. 36, 152 P.3d 713.

¶24 Non-record-based claims of ineffective assistance of counsel, by contrast, can present grounds for postconviction relief. *Rose v. State*, 2013 MT 161, ¶ 18, 370 Mont. 398, 304 P.3d 387. We evaluate allegations of ineffective assistance of counsel by considering whether (1) the counsel’s performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense. *Rose*, ¶ 22.

¶25 Crabtree’s ineffective assistance argument relates to his appellate counsel who filed the direct appeal from Crabtree’s conviction. This argument encompasses Crabtree’s renewed allegations about the District Court judge’s bias and “undue prejudice and animus.” As noted above, Crabtree filed a motion to disqualify the District Court judge on such grounds. This Court reviewed that matter and set aside Crabtree’s motion as void. Counsel on direct appeal, however, focused on three other issues pertaining to the trial and did not raise the issue of the disqualification motion that had earlier been reviewed and rejected.

¶26 Crabtree now claims that his appellate counsel was deficient for failing to appeal that matter. But Crabtree cannot demonstrate that such a strategic decision fell below an objective standard of reasonable representation. Crabtree’s disqualification motion failed to satisfy the procedural standards required by statute and relied on speculative assertions about the judge being “manipulated” into bias during the Electric City Heat civil case, which had not reached any final judgment. As Crabtree’s appellate counsel explained to the District Court in an affidavit filed for the postconviction proceeding, he consulted with Crabtree on possible claims for appeal, researched and considered Crabtree’s suggestions, and raised those issues that had more merit according to his professional judgment.

¶27 The range of reasonable professional assistance is wide, and counsel are presumed to act within it. *Whitlow v. State*, 2008 MT 140, ¶ 15, 343 Mont. 90, 183 P.3d 861. To overcome that presumption regarding which issues are raised on appeal, a petitioner claiming ineffective assistance must show that the “ignored issues are clearly stronger than those presented.” *Miller v. State*, 2012 MT 131, ¶ 14, 365 Mont. 264, 280 P.3d 272.

Crabtree does not demonstrate why appealing his judicial bias claim would have made a stronger case or have been likely to change the outcome for his defense. Instead, similar to the arguments above, Crabtree simply recites the standards for judicial recusal and insists that it was necessary based on the same allegations he raised in the affidavit that was rejected in 2016—things like the judge noting that the evidence in the civil hearing weighed in favor of enjoining him from continuing to run the softball organization. Crabtree’s conclusory arguments are not sufficient to demonstrate that his attorney’s representation was deficient.

### **CONCLUSION**

¶28 The District Court order of August 16, 2021 correctly denied the petition for postconviction relief.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR