

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0412

STATE OF MONTANA,

Plaintiff and Appellee,

v.

THOMAS J. ELLSWORTH,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, The Honorable Matthew J. Cuffe, Presiding

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STATEMENT OF THE ISSUES

1. Whether Ellsworth waived his argument that his 2016 five-year deferred imposition of sentence was illegal when he never objected to nor timely appealed the deferred sentence.

2. Whether the district court erroneously granted the State's petition to revoke Ellsworth's deferred imposition of sentence filed more than three years but less than five years after the date of imposition when the 2016 deferred sentence was for a term of five years and contained conditions that Ellsworth pay various costs and fees.

STATEMENT OF THE CASE

In March 2015, Appellant Thomas Joe Ellsworth (Ellsworth) pleaded no contest to assault on a peace officer, a felony, in violation of Mont. Code Ann. § 45-2-101(55). (Doc. 19.) Pursuant to the plea agreement, the State dismissed his other charge, obstructing a peace officer. (*Id.*)

On May 9, 2016, in accordance with the plea agreement, the court deferred the imposition of sentence for five years. (Tr. at 5; Doc. 26 at 2.) Based on the income information provided in the presentence investigation report (PSI), the prosecutor did not ask for, and the court did not impose, any fines or restitution. (*Id.* at 3; Doc. 21 at 10; Tr. at 6-7.) However, the court imposed costs and fees in

accordance with the recommendation in the PSI, which totaled \$230, plus a monthly supervision fee of \$21. (Docs. 21 at 14-15; 26 at 3.) The court specifically addressed these costs and fees during the sentencing hearing and told Ellsworth that it was not going to suspend them. (Tr. at 7.) Ellsworth indicated he understood and did not object to the imposition of costs or fees based on an inability to pay or any other grounds. (*Id.*) Ellsworth never appealed the deferred imposition of sentence or its terms.

On April 9, 2021, the State filed a petition to revoke Ellsworth's deferred sentence, alleging Ellsworth had absconded from supervision. (Doc. 28.) The State filed an amended petition a week later that asserted Ellsworth had also committed the additional violation of failing to remain law abiding after his probation officer discovered he had been arrested and charged with multiple offenses. (Doc. 35.)

Following an adjudication hearing on the petition to revoke, the district court found that Ellsworth had violated the terms of his deferred sentence by absconding and failing to remain law-abiding. (Doc. 47; Tr. at 81-82.) The court revoked Ellsworth's deferred imposition and sentenced him to the Department of Corrections for 5 years with credit for 138 days served. (Doc. 49 at 2; Tr. at 106-08.) The court recommended that Ellsworth "be screened for and receive appropriate chemical dependency and mental health treatment, followed by a pre-release program." (Doc. 49 at 2.) The court reviewed the chronological notes

entered into the record by Ellsworth's probation officer, Darrell Vanderhoef (Vanderhoef), and found that Vanderhoef had properly utilized the grid to address Ellsworth's ongoing and repeated violations. (Tr. at 106.) Based on these violations that occurred throughout the entirety of the deferred term, the court expressly denied credit for elapsed time. (Doc. 49 at 2; Tr. at 106-08.) Ellsworth did not raise any objection or claim in the district court that his 2016 deferred imposition of sentence was illegal.

In this appeal of his 2021 revocation, Ellsworth challenges, for the first time, the legality of his 2016 deferred sentence. Ellsworth claims the five-year term exceeded statutory parameters because the statute only permits a term longer than three years if the court imposes a financial obligation as a condition of the deferred sentence. (Appellant's Br. at 3-4.) Ellsworth ignores the costs and fees imposed as conditions of his deferred sentence and instead claims that the court was limited to imposing a three-year term because it did not impose a fine or restitution as a condition of the deferred sentence. (*Id.*)

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STATEMENT OF THE FACTS

On December 8, 2015, officers were dispatched to Ellsworth's residence following a report that Ellsworth had assaulted his wife. (Exs. B and C, attached to Doc. 2).¹ Ellsworth was angry that law enforcement officers were on his property investigating the alleged assault, and he became aggressive with one of the officers. (*Id.*) When the officer told Ellsworth he was being detained and attempted to handcuff him, Ellsworth tried to evade the officer's grasp. (*Id.*) As the officer took Ellsworth to the ground, Ellsworth stepped on the officer's foot and then punched him in the eye. (*Id.*) When questioned about how the officer reacted to the incident, Ellsworth said the officer's "eyes rolled back into his head[,] and he laid on the floor" after he punched him. (Ex. B attached to Doc. 2.) As a result of the incident, the officer suffered a broken facial bone on the right side of his nose and a sprained ankle. (*Id.*)

During the adjudication hearing in 2021 regarding the petition to revoke, Vanderhoef testified that Ellsworth had stopped reporting on February 18, 2021, and that he did not know Ellsworth's location until his arrest on new charges in April 2021. (Tr. at 16-69.) During that time, Vanderhoef had heard unsubstantiated

¹ Because Ellsworth pleaded no contest, the State relied upon the charging documents for the recitation of the facts.

rumors about where Ellsworth was residing but could not verify his location. (*Id.* at 56.) Vanderhoef said he had addressed Ellsworth's numerous and ongoing supervision violations through alternate means until Ellsworth absconded. (*Id.* at 63-72.)

Vanderhoef also testified that Ellsworth was required to comply with all laws as a condition of his probation. (*Id.* at 57.) Vanderhoef explained that Ellsworth was arrested for several offenses and that he pleaded guilty to some of the charges, including driving under the influence of drugs. (*Id.* at 57-58.) Ellsworth had also admitted to Vanderhoef that he had ingested methamphetamine. (*Id.*)

On cross-examination, Ellsworth challenged Vanderhoef on why he only utilized phone messages to attempt to locate him after he stopped reporting and implied that the amount of methamphetamine and marijuana in his system could be considered "small amount[s]" of either drug. (*Id.* at 63-72.) Ellsworth also questioned Vanderhoef on whether he had ever given Ellsworth permission to seek work out of the county. (*Id.* at 67-68.) Vanderhoef explained that he had given Ellsworth permission to look for work in Kalispell and that "[he] even encouraged that," but with "the stipulation that he call [Vanderhoef] when he leaves, [and that he] call [Vanderhoef] when he gets back." (*Id.*)

The court found that Ellsworth violated his deferred sentence by absconding and failing to remain law-abiding. (Tr. at 81-82; Doc. 47.) The court noted Ellsworth had entered a guilty plea to the driving under the influence charge and that Vanderhoef made reasonable efforts to locate Ellsworth after he stopped reporting. (*Id.*)

During the dispositional hearing, Vanderhoef testified that Ellsworth had been in violation of the terms of his deferred sentence throughout the entirety of his supervision. (Tr. at 91-93.) Vanderhoef stated that Ellsworth did not comply with treatment recommendations, constantly had traffic violations, purchased vehicles without permission in violation of his supervision terms, failed to maintain employment, missed payments on court-ordered costs and fees, changed his address without permission, consistently tested positive on urinary analysis tests, and would fail to report as ordered. (*Id.* at 91-96.) Before filing a report of violation, Vanderhoef addressed Ellsworth's lack of compliance through 17 verbal reprimands, a jail sanction, referral to treatment, increased urinary analysis testing, verbal reprimands for failing treatment, and increased reporting. (*Id.* at 91-93.)

Ellsworth appeals the revocation of his deferred sentence, alleging that the 2016 deferred imposition was illegal to the extent that it was for a term longer than three years and, therefore, the State's petition to revoke filed on April 9, 2021, was untimely.

SUMMARY OF THE ARGUMENT

Ellsworth's sole claim on appeal—that his 2016 deferred sentence was illegal—is untimely. Ellsworth not only jointly recommended a five-year deferred term in 2016, but he also never appealed the deferred imposition of sentence. A defendant has 60 days from the entry of the judgment to file an appeal challenging a sentence. Ellsworth argues that this Court can review his claim under the narrow *Lenihan* exception. In limited circumstances, the *Lenihan* rule permits a party to raise an issue on appeal that they failed to object to in the district court. However, Ellsworth never timely filed a direct appeal of his 2016 deferred imposition of sentence, and the *Lenihan* exception does not permit him to utilize this appeal of his 2021 revocation to reach back in time and challenge the terms of his 2016 deferred sentence. This Court should not address Ellsworth's claim that his 2016 deferred sentence was illegal on the merits because it is untimely.

Even if this Court does address Ellsworth's sole claim on the merits, his 2016 deferred imposition of sentence was not illegal because the court imposed various financial obligations as conditions of Ellsworth's deferred sentence. Pursuant to Mont. Code Ann. § 46-18-201(1)(a)(ii), a court may defer imposition of sentence for up to six years for a felony if any financial obligation is imposed as a condition of the deferred sentence, regardless of whether any other conditions were imposed. Ellsworth fails to address the six fines and costs imposed as

conditions of his 2016 deferred sentence and instead implies that restitution and fines are the only financial obligations that permit a court to impose a deferred term of longer than three years. Ellsworth offers no case law or legal analysis that costs and fees are not financial obligations, and the statute's plain language establishes that fees and costs are financial obligations that permit a court to impose a term of up to six years for a felony deferred imposition of sentence.

ARGUMENT

I. Standard of review

This Court reviews a district court's revocation of a suspended sentence for an abuse of discretion. *State v. Adams*, 2013 MT 189, ¶ 11, 371 Mont. 28, 305 P.3d 808. This Court reviews a criminal sentence for legality to determine whether the sentence is within the statutory parameters. *Id.* Such a determination of legality is a question of law, which this Court reviews de novo. *Id.*

II. Ellsworth waived his right to challenge his 2016 deferred imposition of sentence that he affirmatively asked the district court to impose because he failed to timely appeal the deferred imposition of sentence.

Ellsworth's only claim on appeal—that his 2016 deferred imposition was illegal—is untimely. Therefore, this Court should decline to review the claim on the merits. Pursuant to Mont. R. App. P. 4(5)(b)(i), a defendant has 60 days from

the entry of the judgment to file an appeal challenging a sentence. *Adams*, ¶ 15; *State v. Muhammad*, 2002 MT 47, ¶ 22, 309 Mont. 1, 43 P.3d 318. This Court has concluded it is without jurisdiction to review untimely claims of underlying sentences on direct appeal of a revocation. *Adams*, ¶ 17; *State v. White*, 2008 MT 464, ¶ 20, 348 Mont. 196, 199 P.3d 274 (*overruled on other grounds* by *State v. Tirey*, 2010 MT 283, 358 Mont. 510, 247 P.3d 701); *Muhammad*, ¶ 2.

In this case, Ellsworth not only jointly recommended the 2016 five-year deferred term but also never appealed the deferred sentence. Ellsworth claims he can still challenge the five-year deferred term imposed in 2016 through this direct appeal of his 2021 revocation under this Court's narrow exception to unpreserved claims articulated in *State v. Lenihan*, 184 Mont. 338, 342-43, 602 P.2d 997, 999-1000 (1979). (Appellant's Br. at 5-6.) However, the narrow *Lenihan* exception, which permits review of unpreserved claims on appeal, is unavailable to Ellsworth to reach back and untimely challenge the imposition of his 2016 deferred sentence. While the *Lenihan* exception may have been available were Ellsworth raising unpreserved claims on appeal that the terms of his 2021 revocation sentence were illegal, it does not permit him to untimely challenge his 2016 deferred sentence.

This Court's analysis in *Muhammad* illustrates the difference between timely appealing an unpreserved claim and untimely appealing an unpreserved claim. In *Muhammad*, Muhammad asserted the district court abused its discretion when it revoked his 1999 deferred sentence based upon a finding that he violated a banishment condition Muhammad claimed was illegal. *Muhammad*, ¶ 20. This Court found Muhammad was precluded from challenging his 1999 sentence, including the banishment condition, because Muhammad did not timely appeal his sentence. *Id.* ¶ 22. However, the district court also imposed a banishment condition in its 2000 revocation sentence. *Id.* ¶ 23. This Court reviewed the 2000 banishment condition under the narrow *Lenihan* exception even though Muhammad did not preserve his claim that the banishment condition was illegal in his 2000 revocation hearing in the district court. *Id.*

Similarly, in *Adams*, Adams never challenged his 2007 sentence until the State petitioned to revoke his sentence in 2012. *Adams*, ¶¶ 4-9. Adams argued that the district court did not have the authority in 2007 to order his adult criminal sentence to run consecutively to his juvenile disposition in another matter. *Id.* ¶ 13. Under Adams' theory, an adult sentence could never run consecutive to a juvenile disposition; therefore, as a matter of law, his adult sentence had to run concurrently to the juvenile disposition. *Id.* This would have made the State's 2012 petition to revoke untimely as his sentence would have already been discharged had the two

run concurrently. *Id.* This court held that Adams was limited to challenging the 2012 revocation sentence on appeal. *Id.* ¶ 17.

Here, Ellsworth’s sole claim is that his 2016 deferred sentence exceeded permissible statutory bounds by imposing more than a three-year deferred term and, therefore, the district court could not revoke his sentence based on a petition filed more than three years after imposition. Ellsworth is precluded from challenging his 2016 deferred sentence because he did not timely appeal the 2016 deferred sentence. The narrow *Lenihan* exception is not available for Ellsworth’s untimely and unpreserved claim that his 2016 deferred imposition was illegal. Unlike in *Muhammad*, Ellsworth does not claim any portion of his 2021 revocation sentence was illegal. Because Ellsworth’s sole claim is untimely, the issue is dispositive, and this Court does not need to address the merits of his argument on appeal.

III. Even if this Court considers Ellsworth’s claim that his 2016 five-year deferred term was illegal, Ellsworth’s 2016 deferred imposition was not illegal because financial obligations were imposed, which permitted the court to defer imposition of sentence for a term of up to six years.

The crux of Ellsworth’s claim centers on the meaning of “financial obligations” under Mont. Code Ann. § 46-18-201(1)(a)(ii).² For Ellsworth to

² Unless otherwise noted, all statutory references are to the 2015 Montana Code Annotated.

succeed in his argument, this Court would have to determine that costs and fees imposed pursuant to Mont. Code Ann. § 46-18-201(4) are not “financial obligations.” The plain language of the statute establishes that a condition that includes any payment of money by the offender is a “financial obligation.”

A district court’s authority to impose a sentence is defined and constrained by statute, and the court cannot impose a sentence in the absence of specific statutory authority. *Deshields v. State*, 2006 MT 58, ¶ 7, 331 Mont. 329, 132 P.3d 540 (citing *State v. Nelson*, 1998 MT 227, ¶ 24, 291 Mont. 15, 966 P.2d 133). This Court uses the statutes in effect at the time the crime was committed to evaluate the legality of a sentence. *Id.* (citing *Dexter v. Shields*, 2004 MT 159, ¶ 13, 322 Mont. 6, 92 P.3d 1208).

Montana Code Annotated § 46-18-201 provides that:

- (1) (a) whenever a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere, a sentencing judge may defer imposition of sentence, except as otherwise specifically provided by statute, for a period:
 - (i) not exceeding 1 year for a misdemeanor or for a period not exceeding 3 years for a felony; or
 - (ii) not exceeding 2 years for a misdemeanor or for a period not exceeding 6 years for a felony if a financial obligation is imposed as a condition of sentence for either the misdemeanor or the felony, regardless of whether any other conditions are imposed.

.....

- (4) When deferring imposition of sentence or suspending all or a portion of execution of sentence, the sentencing judge may impose on the offender any reasonable restrictions or conditions during the period of the deferred imposition or suspension of sentence. Reasonable restrictions or conditions imposed under subsection (1)(a) or (2) may include but are not limited to:
 - (a) limited release during employment hours as provided in 46-18-701;
 - (b) incarceration in a detention center not exceeding 180 days;
 - (c) conditions for probation;
 - (d) payment of the costs of confinement;
 - (e) payment of a fine as provided in 46-18-231;
 - (f) payment of costs as provided in 46-18-232 and 46-18-233;
 - (g) payment of costs of assigned counsel as provided in 46-8-113;
 - (h) . . . an order that the offender be placed in a community corrections facility or program as provided in 53-30-321;
 - (i) . . . an order that the offender be placed in a chemical dependency treatment program, prerelease center, or prerelease program for a period not to exceed 1 year;
 - (j) community service;
 - (k) home arrest as provided in Title 46, chapter 18, part 10;
 - (l) payment of expenses for use of a judge pro tempore or special master as provided in 3-5-116;

- (m) participation in a day reporting program provided for in 53-1-203;
 - (n) participation in the 24/7 sobriety and drug monitoring program . . . ,
 - (o) participation in a restorative justice program approved by court order and payment of a participation fee of up to \$150 for program expenses if the program agrees to accept the offender;
 - (p) any other reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society;
 - (q) . . . an order that the offender be placed in a residential treatment program; or
 - (r) any combination of the restrictions or conditions listed in this subsection (4).
- (5) In addition to any other penalties imposed, if a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere and the sentencing judge finds that a victim, as defined in 46-18-243, has sustained a pecuniary loss, the sentencing judge shall, as part of the sentence, require payment of full restitution to the victim, as provided in 46-18-241 through 46-18-249, whether or not any part of the sentence is deferred or suspended.

Mont. Code Ann. § 46-18-201(1)(a), (4), (5).

Summarized, Mont. Code Ann. § 46-18-201, in pertinent part, permits a court to defer imposition of a felony sentence for up to six years if the court imposes a financial obligation as provided under subsections (4) or (5) as a condition of the deferred sentence. The non-exhaustive list of conditions and

restrictions under subsection (4) can be divided into financially based conditions and restrictions and nonfinancial conditions and restrictions. For example, conditions (d), (e), (f), (g), and (o) all expressly require the offender to pay some sum of money as a condition of the deferred sentence.

Montana Code Annotated does not define “financial obligation,” nor is it a legal term of art defined in Black’s Law Dictionary. The ordinary meaning of “financial” is “relating to finance or financiers.” *Meriam-Webster*, <https://www.merriam-webster.com/dictionary/financial> (Accessed Sept. 22, 2022). In turn, the pertinent plain meaning of “finance” is “money or other liquid resources of a government, business, group, or individual.” <https://www.merriam-webster.com/dictionary/finance> (Accessed Sept. 22, 2022). “Obligation” means “something (such as a formal contract, a promise, or the demands of conscience or custom) that obligates one to a course of action.” <https://www.merriam-webster.com/dictionary/obligation> (Accessed Sept. 22, 2022). Thus, the plain meaning of “financial obligation,” as used in Mont. Code Ann. § 46-18-201(1)(a)(ii) is money an offender must pay as a court-ordered condition of a deferred imposition of sentence.

In his brief, Ellsworth omits that the court imposed various costs and fees as part of his deferred sentence and implies that the phrase “financial obligations”

only includes fines and restitution. (Appellant’s Br. at 3 (“the court could only defer imposition of Ellsworth’s sentence for a period of three years, as no financial obligations—fines or restitution—were imposed”).) Ellsworth offers no legal analysis or case law of whether “financial obligations” includes costs and fees. The obligation to establish error falls squarely on the appellant. *State v. Clausell*, 2001 MT 62, ¶ 42, 305 Mont. 1, 22 P.3d 1111. “It is not this Court’s job to conduct legal research on [an appellant’s] behalf. . . .” *Id.* (citing *Johansen v. Dep’t of Nat’l Res. & Conserv.*, 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653).

Ellsworth’s implied interpretation that costs and fees are something other than “financial obligations” not only defies the ordinary meaning of “financial obligations” but also ignores the plain language of Mont. Code Ann. § 46-18-201. Further, the legislature’s changes over time to Mont. Code Ann. § 46-18-201 also establish that the legislature intended a broad interpretation of “financial obligations.”

Under an earlier version of the statute, deferred imposition terms were limited to three years for any felony and one year for any misdemeanor, regardless of what conditions were imposed. *See* Mont. Code Ann. § 46-18-201 (1979). The non-exhaustive list of permissible conditions or restrictions a court could impose when deferring imposition of sentence was also much narrower than it is now.

Compare Mont. Code Ann. §§ 46-18-201(1)(a)(i)-(vi) (1979) *and* -201(4)(a)-(r) (2015). Under the previous version of the statute, there was no provision for the imposition of costs, fees, or fines as a condition of a deferred imposition of sentence. *See* Mont. Code Ann. § 46-18-201(1)(a) (1979). Restitution was the only condition listed in the statute’s non-exhaustive list that involved payment of money by the offender. Mont. Code Ann. § 46-18-201(1)(a)(iv) (1979).

When the legislature first included a provision that expanded the permissible length of a deferred sentence, the statute only permitted a court to impose a longer term on a deferred sentence if restitution was imposed. *See* Mont. Code Ann. § 46-18-201(2) (1983) (“If restitution is imposed as a condition under subsection (1)(a) or (1)(b), sentence may be deferred for a period not exceeding 2 years for any misdemeanor or for a period not exceeding 6 years for any felony, regardless of whether any other conditions are imposed.”). As the legislature expanded the non-exhaustive list of permissible restrictions and conditions that could be imposed to include more conditions that required the payment of money, the legislature also expanded when a court could lengthen the term of deferment. *Compare* Mont. Code Ann. §§ 46-18-201(2) (1983) *and* -201(2) (1985) (“restitution” replaced with “financial obligation”).

The non-exhaustive list of permissible conditions and restrictions that a court may impose on an offender when deferring imposition of sentence now

includes numerous possible financial obligations. The statute's plain language permits a court to defer the disposition of sentence for a felony offense for up to six years if any financial obligations are imposed as a condition of the deferred sentence, regardless of what other conditions are imposed. The district court imposed six conditions requiring payment of fees or costs, including one specifically included in the non-exhaustive list under Mont. Code Ann. § 46-18-201(4).³ Testimony during the revocation hearing indicates that Ellsworth needed that additional time as he still had not paid off his financial obligations imposed as a condition of his sentence by the time the State filed to revoke his deferred sentence. (Tr. at 95-96.) Because the district court imposed various financial obligations as conditions of Ellsworth's 2016 deferred imposition of sentence, the 2016 five-year deferred term was legal.

CONCLUSION

This Court should affirm the district court's revocation of Ellsworth's deferred imposition of sentence because any challenge to the legality of his 2016 deferred sentence is untimely and because the five-year deferred term was legal

³ Condition 12.f. of Ellsworth's deferred imposition of sentence ordered Ellsworth to pay \$100 as authorized in Mont. Code Ann. § 46-18-232(1). Montana Code Annotated § 46-18-201(4)(f) specifically includes the payment of costs as provided in Mont Code Ann. § 46-18-232 as a permissible condition of a deferred sentence.

because the district court imposed various financial obligations as conditions of the deferred sentence.

Respectfully submitted this 30th day of September, 2022.

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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 4,058 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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