

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID ABRAHAM LORENZ,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Seventh Judicial District Court,
Richland County, the Honorable Katherine M. Bidegaray, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
GREGORY HOOD
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
Gregory.Hood@mt.gov
(406) 444-9505

**ATTORNEYS FOR DEFENDANT
AND APPELLANT**

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
P.O. Box 201401
Helena, MT 59620-1401

CHARITY McCLARTY
Richland County Attorney
300 12th Avenue NW Ste. 3
Sidney, MT 59270

**ATTORNEYS FOR PLAINTIFF
AND APPELLEE**

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE	1
FACTS OF THE CASE	2
STANDARD OF REVIEW.....	4
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
The district court did not make an adequate initial inquiry into the nature of Mr. Lorenz’s complaints about counsel to determine if they were seemingly substantial.....	5
CONCLUSION	8
CERTIFICATE OF COMPLIANCE.....	9
APPENDIX.....	10

TABLE OF AUTHORITIES

Cases

<i>State v. Dewise</i> , 2022 MT 145, 409 Mont. 284, 513 P.3d 1249	5, 6
<i>State v. Dillingham</i> , 2020 MT 310, 402 Mont. 239, 477 P.3d 328	7
<i>State v. Fry</i> , (1982), 197 Mont. 354, 642 P.2d 1053	5
<i>State v. Gallagher</i> , 1998 MT 70, 288 Mont. 180, 955 P.2d 1371	4, 5, 7
<i>State v. Weaver</i> , (1996), 276 Mont. 505, 917 P.2d 437	8

Montana Code Annotated

§ 46-18-203	5
-------------------	---

STATEMENT OF THE ISSUE

The district court abused its discretion by failing to conduct even a cursory inquiry into Mr. Lorenz's complaints about counsel to determine if they were seemingly substantial.

STATEMENT OF THE CASE

David Lorenz appeals the district court's failure to inquire into his complaints that his lawyer failed to adequately represent him and that communication had broken down making it impossible to work together or provide proper representation.

In 2003, Mr. Lorenz was convicted of possession of drugs and precursors and operating a drug lab. D.C. Doc. 17. Mr. Lorenz's deferred sentence was revoked in 2005 and he received a suspended sentence. D.C. Doc. 41. In 2014, his suspended sentence was revoked and his sentence re-suspended. D.C. Doc. 49.

In 2020, the petition for revocation that is the subject of this appeal was filed. D.C. Doc. 55. In September 2021, the petition was granted after a hearing and Mr. Lorenz was sentenced to the department of corrections for five years on both the drug lab operation

charge and possession of precursors, to run consecutive¹. D.C. Doc. 76 (attached at Appendix A). Mr. Lorenz timely appealed. D.C. Doc. 81.

FACTS OF THE CASE

On July 20, 2021, the district court appointed OPD to represent Mr. Lorenz on the 2020 petition for revocation. D.C. Doc. 67. On July 23, 2021, Michael Haase filed a notice of appearance on behalf of Mr. Lorenz. D.C. Doc. 70. The adjudicatory hearing was on August 16, 2021, and the dispositional hearing was on August 30, 2021. D.C. Docs. 71, 73.

Mr. Lorenz's counsel filed a motion to withdraw as counsel four days before the dispositional hearing. D.C. Doc. 75. In it he alerted the district court that Mr. Lorenz believed that he had "failed to adequately represent him," and that "communication has broken down between attorney and Defendant where it is impossible for either to work together to afford the Defendant proper representation in this matter." D.C. Doc. 75.

The district court's response was, in its entirety:

¹ Mr. Lorenz had successfully discharged the drug possession charge.

In the meantime, Mr. Haase has filed a motion to withdraw. Mr. Lorenz, have you seen that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you contest it or do you consent to it?

THE DEFENDANT: I consent to it.

THE COURT: Okay. Mr. Haase, you're free to go.

Let's proceed to dispositional hearing. Does the State have any witnesses?

THE DEFENDANT: If I proceed without a lawyer then I don't consent to it.

THE COURT: Well, you don't get to pick your lawyer is the thing. Do you have one hired?

THE DEFENDANT: No. We had a conflict.

THE COURT: Yeah, well, I don't think that the State established. You have the right to proceed without a lawyer.

THE DEFENDANT No, I want an attorney.

THE COURT: Okay. You don't get to pick your attorney.

THE DEFENDANT: Okay. Well, I never fired him.

THE COURT: Okay. Mr. Haase, are you prepared to proceed?

MR. HAASE: I can proceed, Your Honor, yes.

THE COURT: Okay. Ms. Christoffersen, call your first witness.

8/30/21 Transcript at 4–5 (attached at Appendix B).

The hearing then proceeded in full with Mr. Haase as counsel against Mr. Lorenz’s will. Mr. Lorenz was sentenced to the department of corrections for five years on both the drug lab operation charge and possession of precursors, to run consecutive. 8/30/21 Tr. at 21; D.C. Doc. 76.

STANDARD OF REVIEW

This Court reviews rulings on requests for new counsel for an abuse of discretion. *State v. Gallagher*, 1998 MT 70, ¶10, 288 Mont. 180, 955 P.2d 1371.

SUMMARY OF THE ARGUMENT

Mr. Lorenz’s counsel filed a motion to withdraw four days before the dispositional hearing in which he relayed to the district court that Mr. Lorenz believed counsel (1) was inadequately representing him and (2) communication had broken down between them making it impossible to work together to afford Mr. Lorenz proper representation. The district court admonished Mr. Lorenz for trying to “pick your

attorney” and immediately held the disposition hearing without addressing the complaints. The district court abused its discretion by failing to inquire into the nature of the complaints to determine whether they were seemingly substantial.

ARGUMENT

The district court did not make an adequate initial inquiry into the nature of Mr. Lorenz’s complaints about counsel to determine if they were seemingly substantial.

Montanans have the right to the effective assistance of counsel in revocation proceedings. Mont. Code Ann. § 46-18-203(4)(d); *State v. Fry* (1982), 197 Mont. 354, 357, 642 P.2d 1053, 1054. So, upon a complaint about counsel, this Court mandates that district courts “make an adequate initial inquiry into the nature of those complaints and determine if they are seemingly substantial.” *Gallagher*, ¶ 15. An adequate initial inquiry should focus on “whether the defendant presented material facts showing good cause for the substitution request as demonstrated by the following: ‘(1) an actual conflict of interest; (2) an irreconcilable conflict between counsel and the defendant; or (3) a complete breakdown in communication between counsel and the defendant.’” *State v. Dewise*, 2022 MT 145, ¶ 26, 409

Mont. 284, 513 P.3d 1249. “A district court’s initial inquiry is inadequate if the court fails to conduct even a cursory inquiry” into the request for substitution. *Dewise*, ¶ 26.

Here, the district court failed to conduct even a cursory inquiry into the complaints relayed in counsel’s motion to withdraw. The motion to withdraw laid out clearly and succinctly that Mr. Lorenz believed that his counsel “failed to adequately represent him,” and counsel averred in it that “communication has broken down between attorney and Defendant where it is impossible for either to work together to afford the Defendant proper representation in this matter.” D.C. Doc. 75. The motion implicates at least two of the three situations that justify substituting counsel: irreconcilable conflict and a complete breakdown in communication between counsel and the defendant. *Dewise*, ¶26.

Mr. Lorenz made clear that he wanted to substitute his attorney rather than represent himself. Mr. Lorenz initially consented to his counsel’s withdrawal but upon realizing that would mean he was pro se, quickly indicated, “If I proceed without a lawyer then I don’t consent to it.” Instead of determining whether the complaint was seemingly

substantial, the district court instead admonished Mr. Lorenz twice that he does not “get to pick” his attorney. 8/30/21 Tr. at 4–5. That admonishment clearly indicates that the district court understood that Mr. Lorenz wanted to substitute counsel². Still, the district court made no inquiry of any sort into the complaints listed in the motion to withdraw.

The district court should have first determined whether the complaints were seemingly substantial and if they were, had a hearing on whether to substitute counsel. *Gallagher*, ¶ 15. Instead, the district court ignored the complaints that counsel had “failed to adequately represent him,” and that “communication has broken down between attorney and Defendant where it is impossible for either to work together to afford the Defendant proper representation in this matter.” D.C. Doc. 75. So, Mr. Lorenz was forced to either go forward in the disposition hearing with that same counsel or represent himself, despite

² Defendants “need not make a formal motion titled a “Request for Substitution of Counsel” to trigger the District Court’s duty to make an adequate inquiry; the District Court should look to the content, rather than the form, of a defendant’s statements on the matter.” *State v. Dillingham*, 2020 MT 310, ¶ 18, 402 Mont. 239, 477 P.3d 328.

two specific complaints relayed by his attorney that, if true, would justify a substitution of counsel.

When the district court fails to make an adequate initial inquiry, the remedy is to vacate the judgment and remand to the district court so that it can make an adequate initial inquiry whether the complaint was seemingly substantial. *State v. Weaver* (1996), 276 Mont. 505, 512, 917 P.2d 437, 442.

CONCLUSION

Mr. Lorenz respectfully requests that this Court reverse the revocation and remand with instructions to the district court to conduct an adequate inquiry into whether the complaints relayed in the motion to withdraw were seemingly substantial and if so, have a hearing on whether to substitute counsel. *Weaver*, 276 Mont. at 512.

Respectfully submitted this 30th day of May, 2023.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Gregory Hood
GREGORY HOOD
Assistant Appellate Defender

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 1,406, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Gregory Hood
GREGORY HOOD

APPENDIX

D.C. Doc. 76 Order Revoking Suspended Sentence and Sentence.....	App. A
8/30/21 Transcript pages 4–5	App. B

CERTIFICATE OF SERVICE

I, Gregory Nelson Hood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-30-2023:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Charity Sue McLarty (Govt Attorney)
300 12th Ave. NW Ste. 7
Sidney MT 59270
Representing: State of Montana
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Gregory Nelson Hood
Dated: 05-30-2023