

DA 21-0164

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 162

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD WAYNE PULST,

Defendant and Appellant.

APPEAL FROM: District Court of the Twelfth Judicial District,
In and For the County of Liberty, Cause No. DC-12-03
Honorable Kaydee Snipes Ruiz, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Ryan Aikin, Aikin Law Office, PLLC, Missoula, Montana

For Appellee:

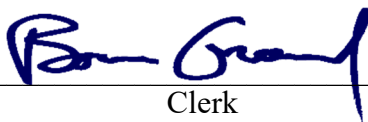
Austin Knudsen, Montana Attorney General, Michael P. Dougherty,
Assistant Attorney General, Helena, Montana

Robert Padmos, Liberty County Attorney, Chester, Montana

Submitted on Briefs: July 26, 2023

Decided: August 22, 2023

Filed:


Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Donald Wayne Pulst (Pulst) appeals from the February 5, 2021 Order Finding Violation and Setting Disposition Hearing and the subsequent February 8, 2021 Order Revoking Sentence issued by the Twelfth Judicial District Court, Liberty County.

¶2 We restate the issue on appeal as follows:

Whether the District Court erred in revoking Pulst’s suspended sentences.

¶3 We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 In 2013, Pulst was convicted of sexual intercourse without consent (SIWOC), a felony; two counts of sexual assault, both felonies; and indecent exposure, a misdemeanor. He was sentenced to 30 years at the Montana State Prison (MSP), with 20 suspended, for the SIWOC. He was sentenced for each sexual assault to 20 years at MSP with 10 suspended. He was sentenced to 6 months detention for the indecent exposure. All of these sentences were concurrent to each other. The June 12, 2013 Judgment also contained the following in probation condition number 30: “. . . If released to community supervision prior to completing Phase II, Defendant shall complete Phase II within three (3) years of such release to community supervision. . . .”

¶5 In 2017, the State petitioned to revoke the sentences for the SIWOC and the sexual assaults. Following a hearing in which the District Court found Pulst violated the conditions of his sentence, the court revoked his suspended sentences and resentenced him. He was sentenced to 20 years at MSP, with 14 years suspended for the SIWOC. He was sentenced for each sexual assault to 10 years to MSP, all suspended. Again, all of these

sentences ran concurrent to each other. Further, in its March 29, 2018 Order and Sentence on Petition to Revoke, the court imposed a slightly different, but similar probationary condition as condition 30 of the original Judgment:

10. dd. The Defendant shall enter and successfully complete sexual offender treatment at least through Phase II (or the equivalent) with an MSOTA clinical member or associate member with supervision, or equivalent, who is approved by the state and the Probation & Parole Officer, at the Defendant's expense and within three years of his release onto community supervision. The Defendant shall abide by all treatment rules and recommendations of the treatment provider.

Pulst did not appeal from this 2018 Order and Sentence on Petition to Revoke.

¶6 Pulst remained incarcerated and completed Phase I of sexual offender treatment. He was granted parole in April of 2019, but since he did not secure an approved sexual offender treatment provider in the community, his parole was halted. Ultimately, Pulst was scheduled to discharge the custodial portion of his sentence on October 23, 2020. On October 20, 2020, the State filed another petition seeking to revoke Pulst's suspended sentences asserting Pulst violated condition 10. dd. of the March 29, 2018 Order and Sentence on Petition to Revoke. On January 27, 2021, the District Court held a hearing on the State's revocation petition. The District Court, in essence, found an anticipatory probation violation by concluding Pulst "violated Condition [10]dd of terms and conditions of his March 29, 201[8] *Order and Sentence o[n] Petition to Revoke*, by not obtaining MSOTA clinical member, or associate member with supervision, or equivalent who is approved by the State and the Probation and Parole Officer" prior to his release into the community. Thereafter, the District Court held a dispositional hearing and resentedenced Pulst as indicated above. Pulst appeals.

STANDARDS OF REVIEW

¶7 The parties agree this Court has plenary review as to whether a district court followed the statutory requirements applicable to revocation proceedings. *State v. Nelson*, 1998 MT 227, ¶ 16, 291 Mont. 15, 966 P.2d 133. We review revocation of a suspended sentence to determine whether the court abused its discretion and whether its decision was supported by a preponderance of the evidence in favor of the State. *State v. Beam*, 2020 MT 156, ¶ 6, 400 Mont. 278, 465 P.3d 1178 (citing *Nelson*, ¶ 16).

DISCUSSION

¶8 *Whether the District Court erred in revoking Pulst's suspended sentences.*

¶9 In order to revoke an offender's suspended sentence, the State must prove at hearing, by a preponderance of the evidence, that the offender has violated the terms and conditions of the offender's suspended sentence. Section 46-18-203(6)(a)(i), MCA.

¶10 Pulst asserts the District Court erred in revoking the suspended portions of his sentences for failing to enroll in or complete treatment prior to his release from prison as there "was no requirement that he enroll in or complete treatment prior to the expiration of the three-year, post-release time limit contained in the original judgment." Pulst asserts *Beam* provides controlling precedent for his case. Contrarily, the State argues Pulst's refusal to engage in sexual offender treatment upon discharge was an express violation of condition "10(dd)" such that the court had the authority to revoke his suspended sentences. The State asserts this case is distinguishable from *Beam* as in *Beam* the district court "erroneously found that the defendant violated his suspended sentence by failing to complete sexual offender treatment while serving the custodial portion of his sentence."

The State asserts this situation is akin to *State v. Cook*, 2012 MT 34, 364 Mont. 161, 272 P.3d 50, as Pulst, like Cook, created a situation “where he was in violation of his suspended sentences the moment he began serving his suspended sentences.” We are not persuaded by the State’s argument.

¶11 Cook did not contest that, upon release to the suspended portion of his sentence, he would be in immediate violation of his probation conditions, but rather the issue before the Court in *Cook* was whether the State was permitted to file a petition for revocation before the start of Cook’s suspended sentence. *See Cook*, ¶ 14. Here, the issue is not whether the State may bring a revocation petition prior to an offender being released to the suspended portion of the offender’s sentence; but whether Pulst would be in immediate violation of his probation conditions upon release. Pulst asserts, by the plain language of condition 10. dd.—“shall enter and successfully complete sexual offender treatment . . . within three years of his release onto community supervision”—he would not, upon release to the suspended portion of his sentence, be in immediate violation of this condition. We agree with Pulst that the plain language of condition 10. dd. contained in the 2018 Order and Sentence on Petition to Revoke did not require that Pulst have sex offender treatment arranged prior to his release to the suspended portion of his sentence. In this regard his situation is similar to that in *Beam*.

¶12 In *Beam*, Beam was sentenced for a SIWOC to a ten-year DOC commitment, fully suspended. Pursuant to his original judgment, he was required to “attend and successfully complete a sexual offender treatment program approved by the Montana Sexual Offender Treatment Association and complete Phase I. If incarcerated, . . . [Beam] shall successfully

complete Phases I and II of the Sex Offender Treatment Program prior to being eligible for parole.” *Beam*, ¶ 3. Within a couple of months, the State asserted Beam violated several probation conditions and, upon finding violations, the district court revoked Beam’s suspended sentence and imposed a ten-year DOC commitment with 4 years suspended. This judgment required only that Beam “attend and successfully complete a sexual offender treatment program approved by the Montana Sexual Offender Treatment Association and complete Phase I.” *Beam*, ¶ 4. Prior to his release to the suspended portion of his sentence, the State sought to revoke his suspended sentence for his failure to complete sex offender treatment while incarcerated. At the revocation hearing, Beam argued there was no requirement that he complete sex offender treatment while in custody. The district court revoked Beam’s sentence for failing to complete sex offender treatment while incarcerated. *Beam*, ¶ 5. On appeal, we reversed the district court’s revocation of Beam’s suspended sentence as it was clear, from the condition’s plain language, that there was no requirement that the sex offender treatment be completed prior to Beam’s release to the suspended portion of his sentence. *Beam*, ¶ 10.

¶13 Pursuant to § 46-18-203(7), MCA, the District Court was required to find Pulst violated condition 10. dd. as a predicate to exercising its authority to impose a new sentence. Here, like *Beam*, the timeline for completing sex offender treatment by the condition’s plain language is inconsistent with the State’s position and the District Court’s conclusion that Pulst violated condition 10. dd. The plain language of condition 10. dd. contained in the 2018 Order and Sentence requires Pulst enter and complete sex offender treatment **within 3 years of release into the community**, not that he have treatment lined

up before his release.¹ The District Court had no authority to revoke Pulst's sentence and impose a new sentence on the basis that Pulst did not have MSOTA sex offender treatment arranged prior to release to the suspended portion of his sentence as no such requirement was contained in condition 10. dd. of the 2018 Order and Sentence on Petition to Revoke.

CONCLUSION

¶14 Pulst's revocation of his 2018 sentence is reversed, and the sentence imposed on February 5, 2021, is vacated. The sentence imposed March 29, 2018, is reinstated.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JIM RICE

¹ The State did not at the lower court level provide any evidence as to the amount of time it reasonably takes to complete sex offender treatment or assert that Pulst had waited too long to initiate treatment to be able to complete it within three years. Obviously, to *complete* sex offender treatment within three years of his release into the community, Pulst will have to enter treatment well in advance of three years after his release into the community. That said, Pulst's probation conditions do not require that he arrange for MSOTA community-based sex offender treatment prior to release to the suspended portion of his sentence. While such a condition may have been preferable and even advisable, it was not required by the plain language of Pulst's probationary conditions.