

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ANDREW DAVID SHEROD,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Mary Jane Knisely, Presiding

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STATEMENT OF THE ISSUE

Whether Andrew Sherod's violent offender registration condition is lawful, given the District Court did not orally pronounce it and Andrew did not commit a "violent offense" under Montana law.

STATEMENT OF THE CASE

Andrew Sherod pled guilty to negligent homicide, in violation of Mont. Code Ann. § 45-5-104. (District Court Document (Doc.) 81.) The District Court sentenced him to 15 years to the Montana State Prison, with two years suspended. (Doc. 101 at 1 (Judgment, Attached as Appendix A).) The court also imposed various probation conditions on the suspended portion of Andrew's sentence. Among those was condition 29, which read, "[F]or any period of community supervision, the following conditions of probation will apply: . . . The Defendant shall register as a violent offender." (Doc. 101 at 5.)

Andrew filed a notice of appeal. (Doc. 107.)

STATEMENT OF THE FACTS

On the night of August 28, 2019, Andrew was driving in Billings when he allegedly ran a red light and collided with and killed a motorcyclist. (See Doc. 1 at 1–3.) Andrew and the State entered into a

plea agreement under Mont. Code Ann. § 46-12-211(1)(c). (Doc. 81 at 2.) Andrew pled guilty to negligent homicide. (Doc. 81 at 1–3; 2/2/2022 Hearing Transcript (2/22 Tr.) at 2–8.) The parties agreed the State would recommend a sentence of 15 years to the Montana State Prison with three years suspended, and the defense could argue for any legal sentence. (Doc. 81 at 2.)

The plea agreement did not mention Andrew registering as a violent offender. (*See generally* Doc. 81; 2/22 Tr. at 1–12.) The pre-sentence investigation report (PSI) recommended 28 conditions on any period of supervision, none of which said Andrew should register as a violent offender. (Doc. 82 at 7–9.)

At sentencing, the District Court orally imposed 15 years in prison with two years suspended. (4/26/2022 Hearing Transcript (4/26 Tr.) at 72.) The court said it was also imposing “all of the standard and special conditions as a condition of any supervision you will have [to] do.” (4/26 Tr. at 73–74.) The District Court said nothing of violent offender registration. (4/26 Tr. at 67–75.) The first and only mention in the record of the violent offender registration requirement was in Andrew’s written judgment. (Doc. 101 at 5.)

STANDARD OF REVIEW

This Court reviews the legality of a sentence *de novo*. *State v. Ingram*, 2020 MT 327, ¶ 8, 402 Mont. 374, 478 P.3d 799. In conducting such review, the Court determines “whether the sentence falls within the statutory parameters, whether the district court had statutory authority to impose the sentence, and whether the district court followed the affirmative mandates of the applicable sentencing statutes.” *Ingram*, ¶ 8.

SUMMARY OF THE ARGUMENT

The District Court did not orally pronounce at sentencing that Andrew must register as a violent offender as a condition on the suspended portion of his sentence. Because the oral pronouncement controls, and because it conflicts with the written judgment, the violent offender registration condition must be stricken from the judgment.

Even if the court had orally pronounced this condition, it would still be illegal. Under Montana’s Sexual or Violent Offender Registration Act (SVORA), only people who commit a statutorily defined “violent offense” are required to register as violent offenders. Negligent homicide is not a “violent offense.” Because Andrew did not commit a

violent offense, the District Court had no statutory authority to require him to register as a violent offender.

ARGUMENT

I. Condition 29, which requires Andrew to register as a violent offender, is illegal and must be stricken from the judgment.

A. The District Court did not orally pronounce this condition at sentencing, rendering its inclusion in the written judgment illegal.

“A district court’s oral pronouncement of a criminal sentence is the legally effective sentence and valid, final judgment.” *State v. Thompson*, 2017 MT 107, ¶ 8, 387 Mont. 339, 394 P.3d 197 (cleaned up). The written judgment “is merely evidence of the oral sentence.” *Thompson*, ¶ 8. “[I]n the event of a conflict between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement controls.” *Thompson*, ¶ 8. A “conflict” between the two occurs when the written judgment “substantively increases” the defendant’s “loss of liberty” beyond what the oral pronouncement did. *Thompson*, ¶ 8.

The District Court’s oral pronouncement said nothing of Andrew having to register as a violent offender. (4/26 Tr. at 67–75.) Nor did the

PSI mention this condition, such that the District Court might arguably have implicitly referred to it when it imposed “all of the standard and special conditions.” (Doc. 82 at 7–9; 4/26 Tr. at 73.)

The District Court’s surprise inclusion in the written judgment of this previously unmentioned condition substantively increased Andrew’s loss of liberty. *See State v. Hinman*, 2023 MT 116, ¶ 24, 412 Mont. 434, 530 P.3d 1271 (holding registration requirements under SVORA “significantly hinder [a defendant’s] liberty”). It thus conflicts with the oral pronouncement. *See Thompson*, ¶ 8.

Because the oral pronouncement controls over the conflicting written judgment, and because the oral pronouncement did not mention a registration requirement, that condition must be stricken from the judgment. *See Thompson*, ¶ 8.

B. Andrew did not commit a “violent offense,” so the District Court had no authority to require him to register as a “violent offender.”

Even if the District Court had mentioned the violent offender registration condition in its oral pronouncement, this condition would still be illegal. “The sentencing authority of a criminal court derives solely from and is constrained by statutory law.” *State v. Thibeault*,

2021 MT 162, ¶ 10, 404 Mont. 476, 490 P.3d 105. Courts “have no authority to impose a sentence or sentencing provision not authorized by statute.” *Thibeault*, ¶ 10.

Under SVORA, a “violent offender” must register as such for 10 years following release from confinement. Mont. Code Ann. §§ 46-23-504, -506(2)(a). That law defines a “violent offender” as “a person who has been convicted of . . . [a] violent offense.” Mont. Code Ann. § 46-23-502(11). A “violent offense” is defined as “any violation of” one of 13 enumerated criminal statutes. Mont. Code Ann. § 46-23-502(14)(a). Negligent homicide is not one of those 13 offenses. *See* § 46-23-502(14)(a)(i)–(xiii).

Because the negligent homicide offense to which Andrew pled guilty is not a “violent offense” under § 46-23-502(14)(a), Andrew was not a “violent offender” subject to a registration requirement. *See* §§ 46-23-502(11), -504, -506(2)(a). The District Court thus had no statutory authority to require him to register as a violent offender. *Thibeault*, ¶ 10; *cf. State v. Greene*, 2015 MT 1, ¶ 30, 378 Mont. 1, 340 P.3d 551 (holding that if an offense “is not designated a sexual offense” under

§ 46-23-502, then “there is no statutory authority” under SVORA for a court to impose restrictions reserved for “sexual offender[s]”).

The only exception that allows a court to impose a violent offender registration requirement on a person who did not commit a violent offense is when the person agrees to register as part of a plea deal.

Mont. Code Ann. § 46-23-512. Andrew did not agree to this in his plea agreement, so this exception does not apply. (*See* Doc. 81; 2/22 Tr. at 1–12.)

Because the District Court lacked statutory authority to impose condition 29, that condition is illegal, and this Court must strike it from the judgment.¹

CONCLUSION

Andrew pled guilty to negligent homicide, but he did not agree to register as a violent offender. The District Court did not say anything at

¹ Although Andrew did not contemporaneously object to imposition of this condition—which, notably, he could not have done at the sentencing hearing, since the court did not orally pronounce it—the legality of this condition is directly reviewable under *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979). *Thibeault*, ¶ 9. Under *Lenihan*, “unpreserved assertions of error that a particular sentence or sentencing condition was [] facially illegal (*i.e.*, of a type or character not authorized by statute [. . .])” are “subject to review for the first time on appeal.” *Thibeault*, ¶ 9.

the sentencing hearing about requiring Andrew to register as a violent offender. And Montana law did not consider him a violent offender.

The District Court's spontaneous inclusion of condition 29 in the written judgment was illegal. This Court should remand with instructions to strike this condition from the judgment.

Respectfully submitted this 10th day of January, 2024.

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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 1,437, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
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APPENDIX

Judgment.....App. A

CERTIFICATE OF SERVICE

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-10-2024:

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