

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0460

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRANDON LEE BLACK,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Tenth Judicial District Court,
Fergus County, The Honorable Jon A. Oldenburg, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
tplubell@mt.gov

PENELOPE S. STRONG
Attorney at Law
2501 Montana Ave., Ste. 4
Billings, MT 59101

ATTORNEY FOR DEFENDANT
AND APPELLANT

KENT M. SIPE
Fergus County Attorney
JEAN ADAMS
Deputy County Attorney
801 W. Broadway Street
Lewistown, MT 59457

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 6

SUMMARY OF THE ARGUMENT14

ARGUMENT.....15

I. Standard of review15

II. The district court did not abuse its discretion when it concluded that
Black had absconded and revoked his sentence16

 A. Applicable law16

 B. Failure to report “for purposes of avoiding supervision”17

 C. Reasonable efforts22

III. The district court had authority to revoke Black’s deferred imposition of
sentence regardless of whether he absconded.....24

CONCLUSION29

CERTIFICATE OF COMPLIANCE.....30

TABLE OF AUTHORITIES

Cases

<i>Ditton v. DOJ Motor Vehicle Div.</i> , 2014 MT 54, 374 Mont. 122, 319 P.3d 1268	23
<i>Ford v. Sentry Cas. Co.</i> , 2012 MT 156, 365 Mont. 405, 282 P.3d 687	23
<i>Interstate Brands Corp. v. Cannon</i> , 218 Mont. 380, 708 P.2d 573 (1985)	24
<i>State v. Fjelstad</i> , 2020 MT 278, 402 Mont. 46, 475 P.3d 387	17, 18, 19, 20
<i>State v. Gable</i> , 2015 MT 200, 380 Mont. 101, 354 P.3d 566	24
<i>State v. Graves</i> , 2015 MT 262, 381 Mont. 37, 355 P.3d 769	16
<i>State v. Jardee</i> , 2020 MT 81, 399 Mont. 459, 461 P.3d 108	15
<i>State v. Lally</i> 2008 MT 452, 348 Mont. 59, 199 P.3d 818	23
<i>State v. Michelotti</i> , 2018 MT 158, 392 Mont. 33, 420 P.3d 1020	16
<i>State v. Oropeza</i> , 2020 MT 16, 398 Mont. 379, 456 P.3d 1023	17, 18, 19, 20, 25
<i>State v. Sage</i> , 221 Mont. 192, 717 P.2d 1096 (1986)	17
<i>State v. Sebastian</i> , 2013 MT 347, 372 Mont. 522, 313 P.3d 198	26
<i>State v. Thomas</i> , 2019 MT 155, 396 Mont. 284, 445 P.3d 777	16
<i>State v. Worrell</i> , 1999 MT 55, 293 Mont. 439, 976 P.2d 968	23

Other Authorities

Montana Code Annotated

§ 46-18-101	28
§ 46-18-203	24
§ 46-18-203(1)	25
§ 46-18-203(6)(a)	17
§ 46-18-203(6)(a)(i)	25
§ 46-18-203(7)	26
§ 46-18-203(7)-(8) (2017)	16
§ 46-18-203(7)(a)	17
§ 46-18-203(7)(a)(i), (ii), or (iii)	16, 17, 25
§ 46-18-203(7)(a)(iii)	17, 26
§ 46-18-203(8)	25
§ 46-18-203(8)(a)	25
§ 46-18-203(8)(c)	25, 26
§ 46-18-203(11)(a)	16, 17, 20
§ 46-18-1028	16, 25

STATEMENT OF THE ISSUES

1. Whether the district court properly exercised its discretion when it found that Appellant absconded because, after he tested positive for methamphetamine and THC, he then failed to report to his probation officer despite repeated requests that he do so, and his probation officer could not contact him because his cell phone was deactivated, Appellant's employer had terminated him, and the probation officer did not know where Appellant was residing.

2. Alternatively, whether the district court was authorized to revoke Appellant's deferred imposition of sentence based upon multiple compliance violations and a record of Appellant's conduct that indicated he would not be responsive to further efforts under the incentives and interventions grid.

STATEMENT OF THE CASE

On May 12, 2015, Brandon Lee Black (Black) entered into a plea agreement for a ten-count Information in Fergus County, for his part in a series of burglaries and property damage in Lewistown. (Doc. 32.) Black pled to Counts I through VII, and the State agreed to dismiss Counts VIII through X. (Doc. 32 at 11.) However, the State retained the right to seek restitution for Counts VIII through X. (*Id.*)

For Counts I, III, IV, and VI, the district court deferred imposition of sentence for a period of five years.¹ (Doc. 56 at 2-3.) On Count V, one of the burglary charges, the district court sentenced Black to the Department of Corrections (DOC) for a period of five years with two years suspended, to run consecutively with the deferred sentences, and with the intent that the deferral periods would begin to run upon the expiration of the sentence on Count V. (*Id.* at 4.) Black’s sentence included restitution in the amount of \$23,519.97. (Doc. 52 at 5.)

Further, the district court imposed numerous conditions for the deferred and suspended sentences, including:

Unless otherwise directed, the Defendant must submit written monthly reports to his/her supervising officer on forms provided by the probation and parole bureau. The Defendant must personally contact his/her supervising officer or designee when directed by the officer.

(Doc. 56 at 5, Condition “k.”)

On May 8, 2018, the State filed a petition for revocation of Black’s deferred imposition of sentences, with the report of violation (ROV) attached as Exhibit 1.

(Doc. 61, Ex. 1.) The ROV alleged Black had assaulted someone with brass

¹ Count II was a misdemeanor charge of criminal mischief, and Black received credit for six months served at Youth Services Center. (Doc. 32 at 12.)

knuckles in Cascade County, which was a noncompliance violation. (Doc. 61, Ex. 1.)

A summary of the case management responses utilized for Black indicated that he had been sanctioned to the Enhanced Supervision Program following a May 19, 2018 intervention hearing for “Failing to Report” and “Illegal Drug Use.” (*Id.* at 5.) The probation officer recommended revocation of Black’s suspended probation time for placement at a secure DOC facility. (*Id.*)

On July 12, 2018, Black entered “True” pleas to the allegations in the petition, but did not admit guilt to the underlying assault. (Doc. 75 at 2.) On October 23, 2018, the district court resentenced Black, revoked his sentence on Count V, and reimposed two years to the DOC with no time suspended. (Doc. 80.) The court reimposed the deferrals for Counts I, III, IV, and VI, under the same conditions, to run consecutively to Count V, and concurrently to each other. (*Id.*)

On November 10, 2021, Probation Officer Jackie Plowman attempted to make a home visit to Black’s last known address in Billings, which she then determined did not exist. (Doc. 85.1 at 3.) Officer Plowman attempted to call Black, but he did not answer, and Officer Plowman was unable to leave a message. (*Id.* at 4.) The same day, Officer Plowman sent Black an e-mail, telling him to report in person to the Probation and Parole Office on November 12, 2021, at or before 3 p.m. (*Id.*) Black failed to appear. (*Id.*)

On November 15, 2021, Enhanced Transitional Supervision Services (ETSS) provider Rochelle Stephens (Stephens) with Alternatives, Inc., e-mailed Officer Plowman and informed her that Black had been at her office and was requesting a drug testing patch. (*Id.*) Black admitted to Stephens that he had ripped off his previous patch as he thought Officer Plowman was trying to “mess with him.” Stephens directed Black to report back to Alternatives, Inc., on November 22, 2021, to explain his situation further. (*Id.*) However, Black did not report on the 22nd. (*Id.*)

On November 23, 2021, Officer Plowman contacted Black’s last reported employer, Grateful Builders. (*Id.*) The owner informed Officer Plowman that he had terminated Black’s employment earlier that month for failing to report to work. (*Id.*)

Officer Plowman filed an ROV on December 9, 2021. (Doc. 85.1.) The ROV contained six alleged violations, including that Black had absconded, which is a noncompliance violation. (*Id.* at 3.) The other five allegations were compliance violations, for being terminated from his job, testing positive for illegal drugs, leaving his assigned district without permission, associating with a known probationer without obtaining permission, and failing to report a contact with law enforcement. (*Id.* at 2-3.)

In the ROV, Officer Plowman documented that on October 27, 2021, Black “came into [her] office under the influence of methamphetamine and THC, his attitude was negative towards any kind of substance abuse treatment and [he] made jokes regarding his new conditions.” (*Id.* at 4.) Officer Plowman further recorded that:

Probationer Black reported several times that if he is placed on intensive supervision probation (ISP) he would not do it Due to Probationer Black’s unwillingness to abide by his conditions and verbal indication he does not want to attend any substance abuse treatment offered in the community, it is clear that a community placement is not appropriate at this time.

(*Id.* at 4.) A warrant was issued, and Black was served on December 9, 2021.

(Doc. 86.1.)

On December 17, 2021, Black entered “not true” responses to the six alleged violations. (Doc. 89.1.) The district court held an adjudicatory hearing on February 15, 2022, after which it found Black had committed all six violations in the ROV.

(Doc. 97 at 2.)

The district court held a dispositional hearing on June 21, 2022, revoked Black’s previous sentence, and resented him to four years to the DOC on Counts I and III, with no time suspended, to run concurrently with each other, but consecutively to Counts IV and VI. The sentences on Counts IV and VI were for four years to the DOC, with no time suspended, to run concurrently with each other, but consecutively to Counts I and III. (6/21/22 Tr. at 89; Doc. 109 at 2.)

STATEMENT OF THE FACTS

At the February 15, 2022 adjudicatory hearing, the State called Officer Plowman as its first witness. (2/15/22 Transcript [Tr.] at 3.) Officer Plowman testified that she had been supervising Black since April 2021. (*Id.*)

When asked about Black's compliance with respect to reporting to probation, Officer Plowman responded, "As of this date he hasn't. On November 10th of 2021 he was directed to report to Probation and Parole [on November 12, 2021] at or before 3:00 p.m. and he didn't report. He hasn't submitted any monthly reports He hasn't put in a single one of those since he signed up." (*Id.* at 4.) Officer Plowman clarified, "The only way he has reported since was randomly showing up to his ETSS provider with, he was showing up unscheduled as well as leaving myself random voice messages that were less than audible." (*Id.* at 4-5.)

Officer Plowman testified that she contacted Black's last reported employer on November 23, 2021, and learned that Black had been terminated earlier in the month for failing to report to work. (*Id.* at 5.) Officer Plowman also testified that Black had made one \$8.33 payment towards his restitution, which totaled \$26,506.33 at the time of the hearing. (*Id.*)

Officer Plowman stated that on November 12, 2021, Stephens reported to her that Black had provided a "patch" he had worn from October 29 until November 5, 2021, which tested positive for methamphetamine, amphetamine, and

THC. (*Id.*) Officer Plowman said that she had not spoken to Black about that positive test because she had been unable to contact him. (*Id.* at 6.) She had instructed Black to report to her on November 12, 2021, but he failed to show up. (*Id.* at 6.) This made it impossible for Officer Plowman to discuss Black’s violation with him. (*Id.* at 6-7.)

Officer Plowman further relayed that Black had been pulled over by law enforcement in Madison County on November 9, 2021. (*Id.* at 6-7.) Aside from not reporting the contact with law enforcement to his probation officer, Madison County was outside of Black’s allowed area. (*Id.* at 8.) Further, Black was in the company of another probationer who was known to have absconded. (*Id.*)

On cross-examination, Officer Plowman agreed that Black’s adjustment to being out of prison began to deteriorate when he decided to leave a sober living facility without permission. (*Id.* at 14.) Officer Plowman testified that she had directed Black to return to his sober living residence. (*Id.*) Instead, he “house hopp[ed]” and failed to report to her. (*Id.*)

Officer Plowman observed that the end of October 2021 was when Black “started really struggling.” (*Id.* at 20.) She made a referral to ETSS with Alternatives, Inc., to get Black fitted with a drug patch. (*Id.* at 21.)

On October 27, 2021, Black admitted to Officer Plowman that he had been evicted from his rental unit, he was staying with friends, and he was struggling

with substance abuse. (*Id.* at 22.) He initially denied the substance abuse, but admitted to it after he was confronted with providing a test sample. (*Id.*)

Black never informed Officer Plowman that his phone was not working. (*Id.* at 23.) Black left her voice mail messages, so she assumed he had a working phone. (*Id.* at 27.)

Officer Plowman clarified the sequence of Black's appearances at his ETSS provider during the month of November. Black reported there unannounced on November 15, 2021. (*Id.* at 28.) On that date, Black told Stephens he had been at the "Psych Center."² Stephens' notes from that visit indicated that Black had ripped off his patch because he believed Officer Plowman and probation were trying to "mess with him." (*Id.* at 29.)

Stephens directed Black to return to Alternatives, Inc., on November 22, 2021, but he failed to do so. (*Id.* at 30.) Officer Plowman drafted the ROV on November 23, 2021, but did not submit it. (*Id.* at 32.) She testified that she was giving Black one last opportunity to "come in." (*Id.*) When Black failed to report as directed, Officer Plowman filed the ROV on November 30, 2021.³ (*Id.*)

² Black later testified that he was present at the "Psych Center" for "maybe 6 hours, 8 hours," and they gave him some medication to calm him down and released him. (Tr. at 53.)

³ Officer Plowman testified that Black did show up to Alternatives, Inc., on November 29, 2021, and assured Stephens that he would report to Officer Plowman on November 30, 2021. (Tr. at 31.)

Officer Plowman added that “a problem we had with Mr. Black is he wasn’t submitting patches regularly. He had them missing when he went in there and he wasn’t going to those appointments as directed.” (*Id.* at 33.) Officer Plowman explained that Black “has not been compliant with his probation thus far due to his failing to report for supervision. It’s been quite difficult for me to try and get him in compliance when he doesn’t report.” (*Id.* at 37.)

The district court questioned Officer Plowman regarding how Black’s failure to report had affected her supervision, and she responded, “I can’t utilize the grid if he doesn’t show up for it to be utilized unfortunately.” (*Id.* at 38.) Officer Plowman also confirmed that Black had not reached out to her to get assistance with his chemical dependency treatment. (*Id.*) Lastly, the court asked, “The issue of him leaving voicemails for you like Friday nights and off hours and that is that specifically why you request that they come see you in person, make those appointments?”⁴ (*Id.* at 38.) Officer Plowman responded, “Yes.” (*Id.* at 39.)

Fergus County Detention Officer Guy Stefani testified about a letter he intercepted that Black had authored and attempted to send on December 29, 2021. (*Id.* at 39-40.) The letter was introduced into evidence as “Exhibit 1.” (*Id.* at 41.) Black’s letter was addressed to “Daniel and Tanya.” (State’s Ex. 1 at 4.) Black

⁴ Black left a message for Officer Plowman on November 5, 2021, on “Friday night.” (2/15/22 Tr. at 25.)

wrote that he and his girlfriend, Aulycia, had obtained a pit bull. (*Id.*) In the context of discussing his bond, Black wrote,

Also I need a place to stay. I didn't know Maddies [sic] place address so I told her yours. Bro, are you on the lease or anything? Cuz if not, Tanya could call and email and say that if bonded out, I could stay there. I won't obviously, maybe the first night if its cool with ya'll, but I'll find somewhere else to stay when I'm out Probably have him or you or someone email my attorney saying you'll come get me and take me to Billings but I'm sure Aulycia will come get me.

(*Id.*)

Black testified at the hearing. (Tr. at 47.) He admitted that his problems on probation were due to his use of methamphetamine, which he attributed to a prior girlfriend. (*Id.* at 48.) According to Black, he lost his job in early November and could no longer pay his rent or afford to keep his phone. (*Id.*) Despite no evidence or testimony indicating Black had obtained a new job or source of income, he admitted that he got his phone “reset up” on November 23, 2021. (*Id.*) Black claimed that this was the first time he heard a message from his “old boss” stating that his probation officer was looking for him. (*Id.* at 49.)

Black claimed that during the time his phone was shut down, he was calling Officer Plowman using other people's phones and was doing so, in his opinion, “once a week.” (*Id.*) He admitted Officer Plowman had told him to call every day, but explained that he was only calling once a week because his address had not changed. (*Id.*) Black denied receiving any text messages or e-mails from Officer

Plowman, and denied being aware that he was supposed to “check in” with probation in person. (*Id.* at 49, 52.)

Black stated that he reported to Alternatives, Inc., [on November 29, 2021], “because I’d gotten, I’d gotten the message from my boss on [November] 23rd that [Officer Plowman] was looking for me.” (*Id.* at 54-55.) For some reason, rather than report to Officer Plowman, Black went to his ETSS provider and admitted that he was aware Officer Plowman was looking for him. (*Id.* at 54-55.) Black testified that “[Stephens] told me that I should go in and check in to [Probation and Parole] as soon as I can.” (*Id.* at 55.)

According to Black, “I called from Eric’s house and I told [Officer Plowman] that [Stephens] told me that I needed to come and that I would come in if I had a ride. Unfortunately, I wasn’t able to get a ride into town.”⁵ (*Id.*) Black believed this took place on November 29, 2021. (*Id.*) He testified that he was not aware there was a warrant for his arrest until he was arrested by the Billings Police Department on December 8, 2021. (*Id.*)

On cross-examination, Black stated he did not report his contact with law enforcement, because he did not have a phone and he was the passenger in the vehicle. (*Id.* at 59.) He claimed he was not aware that he could not be in Madison

⁵ Officer Plowman denied receiving this message. She stated, “He didn’t call anybody, he just, he assured that, his ETSS provider he would be here.” (Tr. at 31.)

County. (*Id.* at 60.) Black admitted to using methamphetamine during the time when he went to the Billings Psych Center, but stated he had “gone to sleep before then and I was sober at the time that I went in to the, in to the Billings Clinic.” (*Id.*)

After hearing from two defense witnesses, and arguments from the attorneys, the district court announced:

Then the Court will find based on the evidence before the Court, the entirety of the record, the testimony, the Court will find that by a preponderance of the evidence that Mr. Black has violated all 6 counts of the reported violation dated November 23rd, 2021.

(2/15/22 Tr. at 72.)

At the dispositional hearing on June 21, 2022, the State called Officer Plowman as its first witness. (6/21/22 Tr. at 2.) Officer Plowman testified that Black had not completed any of the mental health or substance abuse programs available to him. (*Id.* at 4.) She testified that Black had been screened for Pine Hills, as well as a prerelease to follow Pine Hills. (*Id.* at 5.) Further, she indicated that Pine Hills had vocational training that would be available to Black, in addition to the pairing of mental health and chemical dependency treatment programs.

(*Id.* at 6.)

Officer Plowman indicated that this programming would be beneficial to Black, as he could “solely focus” on the programming without the stressors of “other aspects” of his life getting involved. (*Id.*) She added, “I believe he can get vocational training there that he desperately needs when he goes back in to the

community to be successful on his own as well as learning the life skills that he may not have when he reacclimates to the community.” (*Id.*) Officer Plowman added that upon completion of Pine Hills, Black would be transferred to Great Falls Prerelease and able to utilize their programming to get his treatment set up in the community, and he would also be allowed to look for a job and be in a budget program that would teach him how to manage his finances as opposed to trying to figure that out on his own. (*Id.* at 8.)

The district court addressed Black directly, stating:

We’ve given you two prior chances with deferred imposition of sentence, quite frankly you blew us away on those. These same type of services have been offered to you before, they’ve been there and you made the decision you would go and use methamphetamine and abscond from supervision and ignore your responsibilities and it’s time for you to face up to those responsibilities, Mr. Black.

(*Id.* at 88.)

Based upon the evidence presented at the dispositional hearing, Black’s previous deferred sentence and subsequent violations, a substance abuse assessment, and the “overall record in this matter,” the district court revoked Black’s sentences. (Doc. 109 at 1-2.)

Further, the district court detailed the reasons for the sentence, stating that the sentence was “consistent with the overall record in this matter, which is lengthy and complex.” (*Id.* at 3.) The court made clear that it had considered Black’s

criminal record, the details of the original crimes, and his failure to successfully complete either of the first two sentences imposed in this matter. (*Id.*)

The district court acknowledged that Black was still a “young man who has spent significant spans of his life to this point in some form of detention,” and that he still had “uncontrolled chemical dependency issues, which warrant intensive treatment if [Black] hopes to ultimately build and live a sober, law-abiding life.” (*Id.* at 3-4.)

Lastly, the district court reasoned that this sentence provided “an appropriate blend of punishment for [Black’s] crime[s], potential punishment to motivate [Black’s] continued progress and deter further criminal behavior, and opportunity for [Black] to benefit from the many treatment programs offered by DOC followed by a term of prerelease.” (*Id.* at 4.)

SUMMARY OF THE ARGUMENT

Evidence presented at the revocation hearing demonstrated that after Black’s patch, which he wore from October 29, 2021, through November 5, 2021, tested positive for methamphetamine and THC, Black failed to report to his probation officer, even though he had been directed to report and was aware his probation officer was looking for him. Officer Plowman attempted to directly contact Black multiple times based upon the contact information Black had

provided, but was unsuccessful. Given Black's desire to avoid sanctions, his continued use of illegal drugs, as well as his implausible testimony, the evidence was sufficient to support the district court's conclusion that Black had absconded. Absconding is a noncompliance violation that gives a court the authority to revoke an offender's sentence even if the State has not exhausted the Montana Incentives and Interventions Grid (MIIG). The court did not abuse its discretion when it revoked Black's suspended sentence for absconding and resentenced Black to the DOC.

Regardless of whether Black absconded, the overwhelming evidence of compliance violations the State presented to the district court made it clear that Black would not be responsive to further probationary efforts under the MIIG. The court's sentencing order strongly implied this finding, and was supported by the facts in the record.

ARGUMENT

I. Standard of review

This Court generally reviews a district court's decision to revoke a suspended sentence to determine whether the court abused its discretion. *State v. Jardee*, 2020 MT 81, ¶ 5, 399 Mont. 459, 461 P.3d 108. A court abuses its discretion if it acts arbitrarily, without employing conscientious judgment, or

exceeds the bounds of reason, resulting in substantial injustice. *State v. Michelotti*, 2018 MT 158, ¶ 8, 392 Mont. 33, 420 P.3d 1020. Whether the district court had the authority to take a specific action is a question of law that this Court reviews de novo. *State v. Graves*, 2015 MT 262, ¶ 12, 381 Mont. 37, 355 P.3d 769.

II. The district court did not abuse its discretion when it concluded that Black had absconded and revoked his sentence.

A. Applicable law

A court may not revoke a suspended or deferred sentence based on a violation of a condition of the sentence unless the violation qualifies as a noncompliance violation, the probation officer has exhausted all of the responses in the MIIG, or the court finds that the defendant would not be responsive to further efforts under the MIIG. Mont. Code Ann. §§ 46-18-203(7)-(8),⁶ -1028.

One of the five noncompliance violations that permits a court to revoke a sentence without exhaustion of the MIIG is absconding. Mont. Code Ann. § 46-18-203(11)(a). Absconding is defined as “when the offender deliberately makes the offender’s whereabouts unknown to a probation and parole officer or fails to report for the purposes of avoiding supervision, and reasonable efforts by the probation

⁶ The law with respect to the revocation of suspended or deferred sentences has been amended twice since the date of offense in this case. The references to Mont. Code Ann. § 46-18-203(7)-(8) will be to these provisions as they existed in 2017. See *State v. Thomas*, 2019 MT 155, ¶ 14, 396 Mont. 284, 445 P.3d 777.

and parole officer to locate the offender have been unsuccessful.” Mont. Code Ann. § 46-18-203(11)(a). Notably, the plain language of the statute does not require that an offender abscond for any particular length of time.

“If a court finds by a preponderance of the evidence that an offender has committed a noncompliance violation, it may revoke a suspended or deferred sentence and impose any sentence that may have been originally imposed.”

State v. Oropeza, 2020 MT 16, ¶ 17, 398 Mont. 379, 456 P.3d 1023 (citing Mont. Code Ann. § 46-18-203(6)(a), (7)(a), (7)(a)(iii).)

B. Failure to report “for purposes of avoiding supervision”

“When determining whether an offender deliberately failed to report ‘for the purposes of avoiding supervision’ under § 46-18-203(11)(a), a court can infer the defendant’s state of mind from the defendant’s actions or lack of actions.” *State v. Fjelstad*, 2020 MT 278, ¶ 14, 402 Mont. 46, 475 P.3d 387 (citing *State v. Sage*, 221 Mont. 192, 199, 717 P.2d 1096, 1100 (1986)).

On October 27, 2021, Black’s landlord kicked him out of his rental unit and let Officer Plowman know that Black was using alcohol while he was living there. (Doc. 85.1 at 4.) The same day, Black reported to Officer Plowman’s office under the influence of methamphetamine and THC, and informed her “several times” that if he was placed on ISP, he “would not do it.” (*Id.*)

On November 10, 2021, Officer Plowman directed Black to report to probation on November 12, 2021, at or before 3 p.m. (2/15/21 Tr. at 7.) He failed to report. (*Id.*)

Black admitted his phone had been reactivated and he was aware that Officer Plowman was attempting to locate him on November 23, 2021. (*Id.* at 49, 54-55.) On November 29, 2021, his ETSS provider told Black he needed to report to Officer Plowman by 9 a.m. on November 30, 2021. (*Id.* at 31.)

Black alleged that he could not report to probation because he “wasn’t able to get a ride into town.” (Tr. at 54-55.) Black had testified earlier that his residence at the time was about “8 miles out of [Billings].” (*Id.* at 50.) However, the record shows that Black was able to obtain a ride to Madison County on November 9, 2021. (*Id.* at 8.) Further, in December 2021, Black expressed confidence to his friends that he would have no problems getting a ride from Fergus County to Billings. (Ex. 1 at 5.) Even if true, Black’s alleged inability to find a ride on November 30, 2021, does not excuse his failure to report for the entire month of November, nor does it account for the subsequent eight days of not reporting to probation until his arrest on December 8, 2021.

In *Oropeza* and *Fjelstad*, this Court affirmed revocations for absconding based upon similar actions or inactions on the part of the defendants. In *Oropeza*, the defendant was told to report to probation in October 2017, after a positive drug

test. *Oropeza*, ¶ 9. The probation officer tried twice to contact Oropeza at his home, but was unsuccessful. *Id.* Oropeza’s previous probation officer ran into him in a grocery store and told him to contact his current probation officer. *Id.* Oropeza did not report. *Id.* Other attempts to contact Oropeza were also unsuccessful, and his probation officer submitted an ROV in January 2018. *Id.*

This Court quoted the district court from the adjudication hearing, which admonished the defendant, stating, “it is not anybody’s job to chase you around and to look for you. That’s just not what it is. It is your responsibility.” *Oropeza*, ¶ 12.

In affirming the revocation for absconding, this Court held that evidence that Oropeza knew he was supposed to report, had been directed to report, and had failed to report for over three months, was “beyond adequate” to make a finding that he failed to report for purposes of avoiding supervision. *Oropeza*, ¶ 18.

In *Fjelstad*, the probation officer attempted to call the defendant, and a letter to his address was returned because Fjelstad had not provided a unit number. *Fjelstad*, ¶ 5. After his arrest, Fjelstad informed the probation officer that someone had stolen his phone. *Id.*

The district court stated. “It is possible that this officer did not do all that she could have. But Mr. Fjelstad has a burden on him You have to keep in contact with the probation officer and tell them that your phone is stolen. Beyond that, you

did not report.” *Fjelstad*, ¶ 7. In affirming the district court’s revocation for absconding, this Court stated, “It is a defendant’s responsibility to provide correct contact information to the probation office.” *Id.* ¶ 15. The same logic applies to a probationer who can no longer afford his phone and is therefore unable to be contacted at that number.

Black attempts to distinguish his situation from *Oropeza* and *Fjelstad* by pointing out that those defendants absconded for three and five months, respectively, whereas Black only failed to report as directed for one month. (Appellant’s Br. at 17.) However, the plain language of the statutory definition of “absconding” does not require that a defendant fail to report for any amount of time, so long as the defendant fails to report for purposes of avoiding supervision. Mont. Code Ann. § 46-18-203(11)(a). As Officer Plowman explained to the district court, “I can’t utilize the grid if he doesn’t show up for it to be utilized, unfortunately.” (Tr. at 38.)

Black also claims that, unlike the defendant in *Oropeza*, he “provide[d] an accurate address, called regularly, and weekly was visiting his ETSS provider, [who] serviced his drug patch.” (Appellant’s Br. at 14-15.) The record does not align with these assertions.

Officer Plowman described Black’s “regular” calls as “random voice messages that were less than audible.” (Tr. at 5.) Black does not dispute that

Officer Plowman told him to call in every day, but he decided it was acceptable to call “once a week” because his address hadn’t changed. (*Id.* at 49.)

Further, Black’s “weekly” visits to his ETSS provider were not weekly, nor did they indicate that he was obeying the rules of probation—they showed the opposite. The first and only patch that Black turned in was worn from October 29, 2021, to November 5, 2021. (*Id.* at 5.) That patch tested positive for methamphetamine and THC. (*Id.*) The next time he showed up to his ETSS provider was on November 15, 2021. This visit was unannounced, and Black informed Stephens that he had “ripped off” his patch because he thought Officer Plowman and probation were trying to “mess with him.” (*Id.* at 29.)

Stephens told Black to return to Alternatives, Inc., on November 22, 2021, but he failed to comply. (*Id.* at 30.) While Officer Plowman drafted the ROV on November 23, 2021, she did not submit it. (*Id.* at 32.) Officer Plowman intended to give Black one last opportunity to report. (*Id.*)

Black claimed that he reactivated his phone on November 23, 2021. (*Id.* at 48.) He admitted that he became aware Officer Plowman was looking for him at that time. (*Id.* at 48-49.) Rather than contact Officer Plowman, Black waited six days, then reported to his ETSS provider on November 29, 2021. (*Id.* at 30-31.) Black assured his ETSS provider he would report to Officer Plowman the next day.

(*Id.* at 31.) When Black failed to report as directed on November 30, 2021, Officer Plowman filed the ROV. (*Id.*)

C. Reasonable efforts

Black does not challenge the exhaustive efforts of Officer Plowman to get him to report. (*See* Doc. 85.1 at 3-4.) Rather, he contends he is blameless because he didn't have a cell phone due to his loss of employment. (Appellants Br. at 15.) This argument is unavailing.

First, Black testified that he could no longer afford his phone in early November because he had lost his job. (Tr. at 48.) Officer Plowman learned that Black was terminated because he failed to show up for work. (*Id.* at 5.) Despite no change in his unemployed status, nor any evidence of a new source of income, Black was able to afford his phone again by November 23, 2021. (*Id.* at 48.)

Second, Black admitted that he knew Officer Plowman was looking for him on November 23, 2021. (*Id.* at 49.) In other words, Black still had 15 days prior to his December 8, 2021 arrest, *during which he was not employed*, to simply contact Officer Plowman directly from his own, now-functioning phone and set up a time to report. He chose not to do so, even after assuring ETSS provider Stephens he would report to probation on November 30, 2021. The only plausible explanation for his repeated inaction, particularly when he was continuing to use

methamphetamine (*id.* at 48, 60), is that Black was deliberately attempting to avoid supervision so he could avoid a revocation of his suspended sentence.

Lastly, Black’s claims of ignorance about the rules of probation were not credible. (*Id.* at 52, 59.) Black was 24 years old at the time of the revocation hearing. (*Id.* at 24, 63.) By then, Black had approximately 7 years of experience living under the rules of probation. (*See* Doc. 56.) Black had previously been sanctioned for “Failing to Report” in 2018. (Doc. 61 at 5.) Black’s claims of ignorance of his probation requirements, including maintaining contact with his probation officer, filing monthly reports, providing contact information, and reporting to Officer Plowman when requested, are not supported by the record, and the district court was in the best position to judge the credibility of Black’s assertions. “[B]ecause an assessment of testimony is best made upon observation of the witness’s demeanor and consideration of other intangibles that are only evident during live testimony, the fact finder is uniquely in the best position to judge the credibility of witnesses.” *Ditton v. DOJ Motor Vehicle Div.*, 2014 MT 54, ¶ 33, 374 Mont. 122, 319 P.3d 1268 (citing *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 31, 365 Mont. 405, 282 P.3d 687; *State v. Worrall*, 1999 MT 55, ¶ 50, 293 Mont. 439, 976 P.2d 968). This Court “defer[s] to the trial court regarding the credibility of witnesses and the weight to be accorded their testimony.” *Id.* (citing *State v. Lally*, 2008 MT 452, ¶ 24, 348 Mont. 59, 199 P.3d 818).

The State presented sufficient evidence that Black absconded. But, even assuming this Court were to conclude that Black did not abscond, as set forth below, it was still appropriate for the district court to revoke Black's deferred imposition of sentence and sentence him to prison for his admitted compliance violations.

III. The district court had authority to revoke Black's deferred imposition of sentence regardless of whether he absconded.

To the extent that the district court did not specifically and explicitly find that Black would be unresponsive to further efforts under the MIIG, the finding was implied and consistent with the record. This Court has adopted the doctrine of implied findings for purposes of reviewing findings of fact. *State v. Gable*, 2015 MT 200, ¶ 18, 380 Mont. 101, 354 P.3d 566 (citation omitted); *Interstate Brands Corp. v. Cannon*, 218 Mont. 380, 384, 708 P.2d 573, 576 (1985). This doctrine provides that where "findings are general in terms, any findings not specifically made, but necessary to the [determination], are deemed to have been implied, if supported by the evidence." *Interstate Brands*, 218 Mont. at 384, 708 P.2d at 576.

As the record demonstrates, the district court adhered to the statutory requirements at Mont. Code Ann. § 46-18-203. First, the court properly set a revocation hearing given that Officer Plowman's ROV documented the efforts

probation had made to exhaust incentives and interventions required under the MIIG. *See* Mont. Code. Ann. § 46-18-203(1) (“Upon the filing of a petition for revocation showing probable cause that the offender has violated any condition of a sentence . . . and describing the exhaustion and documentation in the offender’s file of appropriate violation responses according to the incentives and interventions grid adopted under 46-23-1028, the judge may issue an order for a hearing on revocation.”).

A violation of any condition of probation is a compliance violation. *Oropeza*, ¶ 6 (citing Mont. Code Ann. § 46-18-203(8)(a)). For a compliance violation, the district court may revoke an offender’s suspended sentence upon first finding that, “the offender has violated the terms and conditions of the suspended or deferred sentence.” Mont. Code Ann. § 46-18-203(8). If the district court has revoked a suspended or deferred sentence, and finds that “the offender’s conduct indicates that the offender will not be responsive to further efforts under the incentives and interventions grid,” the court may impose the disposition allowed under Mont. Code Ann. § 46-18-203(7)(a)(i), (ii), or (iii). Mont. Code Ann. § 46-18-203(8)(c).

At the revocation hearing, the State presented overwhelming evidence that Black had violated the terms of his sentence. *See* Mont. Code Ann. § 46-18-203(6)(a)(i). “A single violation of the conditions of a suspended sentence is

sufficient to support a district court’s revocation of that sentence.” *State v. Sebastian*, 2013 MT 347, ¶ 24, 372 Mont. 522, 313 P.3d 198 (citation omitted).

Next, the district court conducted a dispositional hearing where it incorporated the entire record as part of its determination of the proper disposition for Black under Mont. Code Ann. § 46-18-203(8)(c), which provided that “[i]f the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence, that the violation is a compliance violation, and that the offender’s conduct indicates that the offender will not be responsive to further efforts under the incentives and interventions grid, the judge may sentence the offender as provided in subsection (7).”

Here, because of the numerous compliance violations and the history of the case, the record demonstrated that Black would “not be responsive to further efforts under the incentives and interventions grid,” so the court had the authority to impose a disposition pursuant to subsection (7)(c). Mont. Code Ann. § 46-18-203(8)(c). The district court graciously deferred imposition for some of Black’s offenses not just once, but twice, to no avail. Relevant to Black’s proceedings, Mont. Code Ann. § 46-18-203(7)(a)(iii) authorizes a court to “require the offender to serve either the sentence imposed or any sentence that could have been imposed” that is not longer than the original period.

In this case, the district court was presented with substantial details about the efforts to rehabilitate Black through case management under the MIIG. (*See* Doc. 61, Ex. 1; Doc. 85.1.) Black's violations were numerous, consistent, and blatant enough that his conduct amounted to a complete failure on probation. The record on which the district court based its decision contained documented behavior that indicated Black would not be responsive to further efforts under the MIIG.

This district court judge was quite familiar with Black, having sentenced him on the original offenses in 2015 (Doc. 56), and having presided over his previous revocation proceedings in 2018 (Doc. 81). The record detailed Black's extensive history, which indicated he would not be responsive to further efforts under the MIIG, including: failing to report and illegal drug use (Doc. 61, Ex. 1); being placed on the Enhanced Supervision Program (*id.*); being terminated from that program for failing to follow the program rules (*id.*); picking up a new felony charge of Assault with a Weapon (*id.*); making no effort to maintain steady employment (*id.*); being placed at Pine Hills Correctional Facility (Doc. 85.1); being placed at the Connection Corrections Program in Warm Springs (*id.*); being removed from that program as a result of a disciplinary hearing (*id.*); being placed at Montana State Prison in 2019 (*id.*); continuing to use methamphetamine (*id.*); leaving his sober living facility without permission (*id.*); being kicked out of his

residence, with his landlord reporting to probation that he had been using alcohol while living there (*id.*); showing up to the probation office under the influence of methamphetamine and THC (*id.*); telling his probation officer he would not comply with the ISP (*id.*); and being terminated from employment for failing to show up to work, without informing his probation officer (*id.*).

The district court specifically set forth its reasons for this sentence. (Doc. 109 at 3.) The court noted that Black’s sentence was guided by the State of Montana’s sentencing policy. (Doc. 109 at 3 (citing Mont. Code Ann. § 46-18-101).) The court further concluded that this sentence was consistent with the overall record in this matter, which was “lengthy and complex.” (*Id.*) The district court considered the details of Black’s original crimes, and, importantly, his failure to complete either of the first two sentences in this matter. (*Id.*)

The district court acknowledged that Black was a young man, who had spent significant spans of his life in some form of detention (*Id.*) The court also acknowledged that Black had uncontrolled chemical dependency issues, which required “intensive treatment” if Black hoped to “build and live a sober, law-abiding life.” (*Id.* at 4.)

Finally, the district court concluded that this sentence provided “an appropriate blend of punishment” for Black’s crime, as well as “potential punishment” to motivate Black’s progress and deter further criminal behavior, and

an opportunity for Black to “benefit from the many treatment programs offered by DOC followed by a term of prelease.” (*Id.*)

Given Black’s wholesale failure on probation, the totality of the circumstances in this matter, and the district court’s specifically stated reasons for revoking his sentence, it is clear the district court followed the appropriate statutory guidelines and issued a sentence based upon the unavoidable conclusion that Black would not be responsive to further efforts under the MIIG.

CONCLUSION

The district court’s revocation of Black’s sentence based upon the noncompliance violation of absconding should be affirmed. Alternatively, the revocation should be affirmed based upon Black’s multiple compliance violations and the district court’s implied finding that Black would not be responsive to further efforts under the MIIG.

Respectfully submitted this 23rd day of January, 2024.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Tammy K Plubell
TAMMY K PLUBELL
Assistant Attorney General

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 6,865 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-23-2024:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Brandon Lee Black
Service Method: eService

Kent M. Sipe (Govt Attorney)
801 W. Broadway
Lewistown MT 59457
Representing: State of Montana
Service Method: eService

Penelope S. Strong (Attorney)
2517 Montana Ave.
Billings MT 59101
Representing: Brandon Lee Black
Service Method: eService

Electronically signed by Janet Sanderson on behalf of Tammy K Plubell
Dated: 01-23-2024