IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0703

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SETH JOSEPH JOHNSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Ninth Judicial District Court,
Teton County, The Honorable Robert G. Olson, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
CHRISTINE HUTCHISON
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
chutchison2@mt.gov

JOE W. COBLE
Teton County Attorney
JENNIFER STUTZ
Deputy County Attorney
P.O. Box 899
Choteau, MT 59422-0899

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

COLIN M. STEPHENS
Stephens Brooke, P.C.
315 West Pine
Missoula, MT 59802

ATTORNEY FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the district court correctly denied Johnson's motion to withdraw his admissions to the allegations in the petition to revoke when evidence in the record contradicted the existence of any agreement between the State and Johnson, the court previously warned Johnson it would sentence him to 15 years in prison if he violated again, and the purported agreement was only for the State to refrain from making a specific recommendation as to disposition.

2. The district court did not abuse its discretion in failing to order an evidentiary hearing on Johnson's motion to withdraw his admissions when his own motion indicated there was no additional evidence to bring before the court.

STATEMENT OF THE CASE

Appellant Seth Joseph Johnson was originally sentenced on June 6, 2007, to 25 years at the Montana State Prison (MSP) with 20 years suspended on each count, to run concurrently, for one count sexual intercourse without consent and one count aggravated burglary. (Docs. 51, 52.) The court also imposed various conditions. (*Id.*)

Johnson's sentence was subsequently revoked in 2012 and again in 2014 after he violated sentencing conditions. (Docs. 69.1, 106.2, 107.2.) On September 22, 2014, the district court sentenced Johnson to 20 years at MSP

with 15 suspended and reimposed all previously imposed conditions for the suspended portion of his sentence. (Docs. 106.2, 107.2.) The district court stated "that any further violation will bring [Johnson] zero tolerance from this court, and he will face a 15 year imprisonment with the Montana State Prison upon conviction of any violation whatsoever of the terms and conditions of this sentence." (Docs. 106.2 at 7, 107.2 at 7.)

The State filed a Petition to Revoke Johnson's sentence in June 2021 alleging five violations of Johnson's sentencing conditions: Johnson failed to provide any information on employment, Johnson failed to report to probation as required on November 17, 2020 and January 19, 2021, Johnson tested positive for methamphetamines on February 23, 2021 and every subsequent drug patch tested positive for amphetamines and methamphetamine, Johnson was terminated from the 24-7 program for continued non-compliance, and Johnson failed to re-enter sex offender treatment. (Doc. 112.3 at 12-13.)

Johnson's probation and parole officer signed an Addendum to the Report of Violation and the State filed to dismiss the Petition to Revoke without prejudice. (Doc. 130.3 at 2; Ex. C, attached to Doc. 130.3.) The State filed a new Petition for Revocation which included the Addendum to the Report of Violation (ROV). (Doc. 130.3.)

On January 27, 2023, after numerous continuances at the request of Johnson, the court held an evidentiary hearing on the petition. (Doc. 182.3.) Johnson entered admissions to some of the violations. (*Id.* at 2.)

At the disposition hearing on March 7, 2023, the district court sentenced Johnson to 15 years at MSP. (Docs. 185.3, 185.4.) The court gave Johnson credit for 44 days for time served and 2 years of elapsed time credit. (Doc. 185.3 at 2.)

On March 17, 2023, Johnson filed a Motion to Withdraw Answers/Plea asserting that he should be allowed to withdraw his admissions to the violations because Johnson entered the admissions believing there was an agreement that if he did, the State would not make a specific sentencing recommendation.

The State responded stating there was no such agreement between the parties and that the State was not even aware Johnson intended to enter admissions until he did so during the evidentiary hearing. (Doc. 189.3.)

The district court denied Johnson's Motion to Withdraw Answers/Plea. (Doc. 190.3.) The court noted that no mention was made of any agreement as to sentencing recommendations when Johnson admitted the violations of the conditions of his suspended sentence. (*Id.*) The court also stated it was unaware of any authority permitting a defendant to withdraw admissions to violations of conditions of a suspended sentence after the defendant has been resentenced. (*Id.*)

A week after the district court denied Johnson's motion, Johnson hired new counsel who filed a notice of appearance with the court. (Doc. 192.3.) Two months later, Johnson filed a reply brief regarding the motion the district court had already denied. (Doc. 193.3.) Johnson stated he was either "entitled to relief because his attorney misadvised him about the State's position or because the State breached a verbal contract made between State's counsel and Johnson's counsel." (*Id.* at 3.)

Johnson filed a petition for an out-of-time appeal in December 2023, which this Court granted. On appeal, Johnson asserts the district court erred in dismissing his motion to withdraw his admissions to the allegations in the Petition to Revoke and in failing to hold an evidentiary hearing on the matter. (Appellant's Br. at 1.)

STATEMENT OF THE FACTS

I. Facts of the offense

On June 18, 2006, Johnson "ran into" M.V. several times throughout the day in Teton County and M.V. believed he was following her. (Doc. 1.)[1] M.V. had her two children with her and Johnson offered alcohol and asked her to "hang out" with him. (*Id.* at 2.) M.V. noticed Johnson appeared intoxicated, and out of

[1] Because Johnson pleaded guilty to the charges, the State relies upon the charging documents for this recitation of the facts.

apprehension, she told Johnson that she was visiting a relative rather than going home. (*Id.*) M.V. drove around for a while before heading home. (*Id.*)

Later in the evening while she was in the bathroom, she thought she heard something. (*Id.*) Johnson had entered through her closed door and M.V. discovered him standing in her living room. (*Id.*) Johnson asked M.V. if he could hang out but she told him it was late, and that she needed to get the kids to bed. (*Id.*) M.V. repeatedly asked Johnson to leave. (*Id.*)

M.V. went to check on the children in their bedroom and believed Johnson had left. (*Id.*) While continuing to get ready for bed, M.V. discovered Johnson in the bathroom located within her bedroom. (*Id.*) M.V. again asked Johnson to leave. Johnson became angry and shut the door to the bedroom. (*Id.*) He threw M.V. onto the bed and removed her pajama pants. (*Id.*) M.V. attempted to push Johnson off her but he was too strong. (*Id.* at 2-3.)

Johnson grabbed M.V. by the hair and pushed her head and shoulders against the wall. (*Id.* at 3.) While holding M.V. by the hair and pushing his fist into the lower part of her back, Johnson forced his penis into both her vagina and anus. (*Id.*)

M.V. eventually was able to get away and ran into the bathroom. (*Id.*) Johnson followed M.V. into the bathroom and grabbed her by the hair and pushed her head into the mirror. (*Id.*) Johnson again forced his penis into M.V.'s vagina

and anus while holding her head against the mirror and bending her over the sink. (*Id.*) When M.V. believed Johnson was done she tried to run but Johnson hit her several times in the face. (*Id.*) Johnson then went into the kitchen and made himself some food before leaving. (*Id.*) M.V. reported severe pain in her neck and shoulders and bruising on her back. (*Id.*)

The State charged Appellant Seth Joseph Johnson with two counts sexual intercourse without consent, aggravated burglary, and assault. (Docs. 1, 3.) Pursuant to the plea agreement between the parties, Johnson pleaded guilty to sexual intercourse without consent and aggravated burglary and the State dismissed the remaining charges. (Doc. 46.)

On June 6, 2007, the district court sentenced Johnson to 25 years at the Montana State Prison (MSP) with 20 years suspended on each count, to run concurrently for one count sexual intercourse without consent and one count aggravated burglary. (Docs. 51, 52.) The court also imposed various conditions. (*Id.*)

II. Prior revocations

Johnson discharged the five-year custodial portion of his sentence and began serving the suspended portion of his sentence; however, Johnson violated the conditions of his sentence in September 2012 and the State petitioned to revoke his

sentence. (Doc. 56.1.) The State alleged that Johnson was found drinking alcohol in a bar in violation of his sentencing conditions. (Ex. B attached to Doc. 56.1.) Johnson admitted to the allegations. (Doc. 65.1.)[2]

On September 25, 2012, the district court revoked Johnson's original sentence and imposed a 20-year term at MSP with all 20 years suspended. (69.1.) The conditions of Johnson's original sentence were re-imposed. (*Id.*)

The State filed a second Petition to Revoke on April 24, 2014, alleging Johnson had violated numerous sentencing conditions. (Ex. B attached to Doc. 75.2.) The State alleged that Johnson failed to obtain permission or notify his probation officer regarding his residence in violation of his sentence conditions. (*Id.*) According to the petition, Johnson also admitted to entering bars with a friend that he claimed was suicidal, so Johnson was transporting him around to bars and keeping him company in violation of conditions that prohibited him from entering bars, consuming alcohol, and from associating with individuals who abuse alcohol. (*Id.*) The State also alleged that Johnson was terminated from sexual offender treatment on April 16, 2014, for continued violations of treatment rules. (*Id.*)

On September 22, 2014, Johnson's sentence was again revoked after he admitted to four of the five alleged violations of his sentencing conditions.

[2] Justice McKinnon, then district court judge, presided over Johnson's first revocation proceedings.

(Docs. 106.2, 107.2.) The district court sentenced Johnson to 20 years at MSP with 15 years suspended and reimposed all previously imposed conditions for the suspended portion of his sentence. (*Id.*) The district court expressly warned Johnson "that any further violation will bring him zero tolerance from this court, and he will face a 15 year imprisonment with the Montana State Prison upon conviction of any violation whatsoever of the terms and conditions of this sentence." (Docs. 106.2 at 7, 107.2 at 7.)

Johnson discharged his custodial portion of the sentence and began serving the suspended portion of his sentence. (Doc. 112.3.)

III. Current petition to revoke

On June 1, 2021, the State filed a third Petition to Revoke alleging Johnson violated five of his sentencing conditions: Johnson failed to provide any information on employment; Johnson failed to report to probation as required on November 17, 2020 and January 19, 2021; Johnson tested positive for methamphetamines on February 23, 2021 and every subsequent drug patch tested positive for amphetamines and methamphetamine; Johnson was terminated from the 24-7 program for continued noncompliance; and Johnson failed to re-enter sex offender treatment. (*Id.* at 12-13.)

On July 7, 2021, after attempting to contact Johnson the day prior through his girlfriend, a Teton County deputy spoke to Johnson, informed him there was a warrant for his arrest, and told him to turn himself in. (Doc. 127.3 at 1.) Johnson agreed to turn himself in on July 9, 2021, but failed to do so. (*Id.*)

Johnson was arrested by U.S. Marshals on July 28, 2021. (*Id.* at 2; Doc. 116.3 at 4.) Johnson appeared before the district court for his initial appearance on the Petition to Revoke on August 24, 2021. (Doc. 122.3.) The court advised Johnson of his rights and he confirmed he understood those rights. (*Id.*) Johnson filed a motion asking the court to dismiss the Petition to Revoke arguing that the 28-day delay between arrest and initial appearance was an unnecessary delay in violation of Mont. Code Ann. § 46-18-203(4). (Doc. 124.3.) The State responded, stating that the 28-day delay was well within the 60-day maximum contemplated by the 2017 amendment to Mont. Code Ann. § 46-18-203(4). (Doc. 127.3 at 2-4.)

The same day the State filed its response, Johnson's probation and parole officer signed an Addendum to the Report of Violation. (Doc. 130.3 at 2; Ex. C, attached to Doc. 130.3.) The Addendum to the Report of Violation noted that Johnson had been found at his father's residence and that he refused to exit the residence and was belligerent with the officers. (Ex. C at 6, attached to Doc. 130.3.) The probation officer additionally reported that while Johnson was being

transported to the Chouteau County jail, he told the sheriff that "he was not going to follow the rules of the Department of Corrections." (*Id.*)

The following day, September 16, 2021, the State filed a motion asking the court to dismiss the Petition for Revocation without prejudice. (Doc. 128.3) The State filed a new Petition for Revocation that same day which included the probation officer's Addendum to the Report of Violation. (Doc. 130.3.)

A. Initial appearance

At Johnson's initial appearance on the Petition to Revoke, the district court advised Johnson of his rights and Johnson confirmed he understood his rights. (Doc. 136.3.) Johnson denied all allegations in the petition and the court set the matter for an evidentiary hearing. (*Id.*)

B. Adjudicatory/evidentiary hearing

At the beginning of the evidentiary hearing held on January 24, 2023, Johnson's counsel stated that his "client w[ould] be answering true with probably an explanation for most of the things in the Report of Violation." (1/24/23 Evidentiary Hr'g Tr. at 3.)

The court confirmed that Johnson was not under the influence of any drugs or alcohol before proceeding. (*Id.* at 5-6.) The court orally reviewed the procedural history of the case noting that the State filed a Petition to Revoke the suspended portion of his sentence and that Johnson denied the allegations at his initial

appearance. (*Id.* at 6.) The court reminded the parties that they were in court that day for an evidentiary hearing but that based on Johnson's counsel's assertion, Johnson "now wish[ed] to admit some or all of these allegations." (*Id.*) Johnson confirmed that was correct. (*Id.*)

The district court proceeded to address each individual allegation in the petition. The court outlined Johnson's sentencing condition which required him to seek and maintain employment approved by his probation officer, to obtain permission from his probation officer prior to any change in employment, and to inform his employer of his probationary status. (*Id.* at 6-7.) The petition alleged that at the time Johnson's probation officer wrote the ROV, Johnson had failed to provide any information on his employment and that he had been unemployed for a number of months. (*Id.* at 7.)

Johnson's counsel assisted, asking Johnson if he "would admit that [he] did not report that [employment] information[.]" (*Id.*) Johnson agreed that he did not. (*Id.*) Upon further questioning by counsel, Johnson explained that he was working for an individual and being paid under the table and that the two had "had a falling out[.]" (*Id.*) Johnson said he did not recall ever providing any of this information to his probation officer. (*Id.* at 7-8.) The court confirmed that Johnson's admission established that he violated his sentencing condition that required Johnson to keep his probation officer apprised of his employment. (*Id.* at 8.)

Addressing the second alleged violation, the court noted that Johnson's sentence required him "to personally report to [his] probation officer as directed and submit written monthly reports on forms provided, and make [him]self available to [his] probation officer as requested." (*Id.*) The petition alleged that Johnson failed to report on November 17, 2020, and January 19, 2021. (*Id.*)

Johnson admitted that he failed to report those two dates but said he missed November 17, 2020, because he was burying his puppy and that he had COVID and was quarantined by the health department on January 19, 2021. (*Id.* at 8-9.) Johnson said he reported his quarantine status to his probation officer. (*Id.* at 9.) The court found that Johnson violated his sentence condition by missing his November 14, 2020, scheduled reporting date. (*Id.*)

The court addressed the third allegation. One of Johnson's probation conditions prohibited him from possessing or using illegal drugs or possessing drug paraphernalia. (*Id.*) The petition alleged that on February 23, 2021, Johnson tested positive for methamphetamine. (*Id.*) Johnson denied the allegation. (*Id.*) The court noted that the petition stated the sample was sent to the State crime lab and confirmed positive for methamphetamine on March 31, 2021. (*Id.*) The court asked Johnson if he still denied the allegation. (*Id.*) Johnson said he still denied the allegation. (*Id.* at 10.)

The court noted that Johnson was placed on a drug patch on March 30, 2021, as part of an intervention hearing. (*Id.*) The petition alleged that every patch Johnson had from that point forward tested positive for amphetamines and methamphetamines. (*Id.*) The court noted the dates of those patches were April 9, April 16, April 25, and May 17. (*Id.*) The court also noted that the petition said Johnson reported losing his patch between April 25 and May 17 so that patch was not tested. (*Id.*) Johnson's counsel said that Johnson would admit to the missing patch but deny the rest of the allegations regarding positive patch results. (*Id.*)

The court addressed allegations that Johnson violated his sentencing conditions that required him to participate on a regular basis and complete programming as ordered by the court and the board of pardons and parole. (*Id.*) This included regular chemical dependency counseling, regular sex offender counseling, and compliance with court ordered conditions. (*Id.*) The petition alleged that Johnson was terminated from the 24/7 Teton County Sheriff's Office program "due to [Johnson's] continued noncompliance." (*Id.* at 11.) The petition stated that Johnson was "late on 19 occasions and failed to show up on May 26, 2021." (*Id.*)

Johnson said he misunderstood what time he was supposed to report. (*Id.* at 11.) Johnson admitted he never showed up on May 26, 2021, but said he tried to call in. (*Id.* at 11-12.) The court asked, "And after 19 attempts, you never got that

squared away?" (*Id.* at 12.) Johnson said it was about a month of him reporting at the incorrect time before a deputy brought it to his attention. (*Id.*) The court asked Johnson if he admitted there was a violation and Johnson confirmed he was admitting he violated. (*Id.*)

The court addressed the allegation that Johnson violated his sentencing condition that required him to reenter sex offender treatment after it was deemed appropriate by his probation officer and therapist. (*Id.*) At an October 7, 2020 intervention hearing, Johnson was told to contact Shawn Abbott to reengage with sex offender treatment. (*Id.*) On March 30, 2021, another intervention hearing was held and Johnson was again told to reengage in sex offender treatment. (*Id.* at 13.) The petition alleged that according to Shawn Abbott, she never heard from Johnson. (*Id.*)

Johnson's counsel advised that Johnson would admit he did not get into treatment but would deny that he did not attempt to contact Abbott. (*Id.*) Johnson's counsel advised that while Johnson had not reengaged with sex offender treatment, he was participating in other counseling which Johnson's counsel said he would address later. (*Id.*)

The court asked the State if it wished to continue with the evidentiary hearing. (*Id.*) The State said, "even though there are lots of excuses, we do have some admissions, and it only takes one, Your Honor, to revoke." (*Id.*)

The district court found that Johnson had violated the terms of his sentence and stated that it would revoke his sentence. (*Id.*) The court asked what time remained on Johnson's sentence. (*Id.* at 13-14.) Johnson's counsel said there were 15 years remaining. (*Id.* at 14.) The court acknowledged that meant "Fifteen years Montana State Penitentiary" and asked if Johnson wished to proceed to disposition. (*Id.*) Johnson asked to set disposition for a later date so Johnson could address some back issues prior to disposition. (*Id.*)

C. Disposition hearing

At the disposition hearing on March 7, 2023, Johnson presented testimony from three witnesses.[3] Johnson's father testified that Johnson seemed calmer than he used to, that his wife was a good influence on him, and that since he had COVID there were things he needed Johnson to help him with on his land. (3/7/23 Disposition Hr'g Tr. at 5-6.) Johnson provided copies of letters from various individuals as well. (*Id.* at 8.)

The State noted that throughout the long history of the case and its revocations, Johnson repeatedly had excuses and violated court orders, resulting in this, the third revocation. (*Id.* at 9.) The State asked the district court to impose the full 15 years of prison without "certain street time" credit. (*Id.*) The court clarified,

[3] As Johnson notes in his opening brief, a portion of the audio is missing, and the record begins partway through Johnson's second witness. (3/7/23 Disposition Hr'g Tr. at 4.)

asking the State if it believed Johnson should not get street time. (*Id.*) The State responded, "I don't think he should. If he should, I'm told that it's 335 days from the time that he was released from—" (*Id.* at 10.) Before the State finished, Johnson's counsel interjected and said, "Judge, just so the record's clear, when I talked to Mr. Coble, I thought he was going to leave this to the Court's discretion if my client answered true, in terms of recommendation." (*Id.*)[4]

The prosecutor for the State indicated that was not her understanding because the evidentiary hearing was held. (*Id.*) The district court noted that Johnson had entered admissions at the evidentiary hearing. (*Id.*)

Johnson's counsel said he understood the "kind of[] sordid history [his] client has had" but emphasized that Johnson had been in the community for nearly two years since his most recent release from prison and asserted that he had been a good and productive member of the community during that time. (*Id.* at 10-11.) Johnson's counsel noted Johnson's marriage as well as his health issues. (*Id.* at 11.) He noted that Johnson's father had testified to seeing a change in Johnson and that he had said he needed Johnson's help after his own illness. (*Id.*)

The district court asked Johnson if he wished to address the court and Johnson replied, "Yes, Your Honor. I'm kind of shooting from the hip here. I

[4] Jennifer Stutz represented the State at both the evidentiary hearing and the disposition hearing, not the County Attorney Joe Coble.

wasn't planning on this, but, I mean, I know I'm an idiot. I've made a lot of mistakes in life[.]" (*Id.* at 12.) Johnson said he had "hurt other people, and [he] underst[oo]d, um, you know, how just a little thing can affect many people." (*Id.*) Johnson said he agreed with his counsel's characterization that as people get older they grow wiser and grow out of the "dumb crap that we do at young ages[.]" (*Id.* at 12-13.) Johnson asked the court for an opportunity to live on the farm and ranch with his family. (*Id.* at 13.)

The court asked the prosecutor if she was aware of any matter with Johnson during the last two years while the Petition to Revoke was pending. (*Id.*) The State said that he was still unenrolled in sex offender treatment. (*Id.*)

Addressing Johnson, the district court reminded him of the heinous nature of his crime and the fact that this was his third revocation. (*Id.* at 14.) The court told Johnson that it could not understand how, with a father, wife, and mother-in-law who need him, why he is still violating. (*Id.* at 15.) The court noted that it had been an ongoing situation with Johnson violating whenever he was not in prison. (*Id.*)

Nonetheless, the court told Johnson he was "going to stretch it and give [him] credit for 2 years." (*Id.*) Effectively awarding elapsed-time credit, the court reduced Johnson's available 15-year term to 13 years and committed him to MSP. (*Id.*)

IV. Motion to withdraw plea/admissions

Ten days after the disposition hearing, Johnson filed a Motion to Withdraw Answers/Plea and brief in support. (Docs. 187.3, 187.33.) Johnson's counsel asserted that based on discussions with County Attorney Joe Coble, he was under the impression that the State would leave the sentencing terms up "to the discretion of the court." (Doc. 187.33 at 1.) Johnson's counsel assumed this information was not relayed to Jennifer Stutz who represented the State at both the evidentiary and disposition hearings. (*Id.*) Johnson's counsel stated he thought some of these discussions were in writing but said he was unable to find any such written documentation. (*Id.*)

Citing to Mont. Code Ann. §§ 46-12-210, 46-16-105 and case law regarding withdrawal of guilty pleas to criminal charges, Johnson claimed he should be permitted to withdraw his admissions to the allegations in the Petition to Revoke because his admissions were not knowing or voluntary. (*Id.* at 2-4.) Johnson's counsel claimed that whether the prosecutor was unaware of the agreement or if counsel misunderstood and misinformed Johnson, either way, Johnson's admissions could not have been knowing or voluntary because Johnson entered them believing that in turn the State would leave the disposition up to the court. (*Id.* at 4.) Johnson claimed that although the alleged plea agreement did not contain any recommended term, Johnson was still deprived of the benefit of having the

court determine his sentence without a recommendation from the State. (*Id.* at 6.) Johnson requested that he be allowed to withdraw his admissions and proceed to a hearing on the revocation. (*Id.*)

Before the State filed its response, Johnson's counsel filed a Motion to Withdraw as Counsel stating that Johnson "ha[d] fired [counsel] and no longer want[ed] his representation." (Doc. 188.3.)

The State responded to Johnson's motion to withdraw admissions and contested Johnson's factual assertion about the existence of some sort of agreement between the parties. (Doc. 189.3.) The State said there had never been any indication that Johnson intended to forego an evidentiary hearing and admit to the allegations until Johnson indicated he would enter admissions at the beginning of the hearing. (*Id.* at 1-2.) The State pointed to its repeated efforts to coordinate with witnesses as documented in the record. (*Id.*)

Joe Coble indicated he searched through the emails sent between himself and Johnson's counsel. (*Id.* at 2.) Coble did not find any documentation of such an agreement. (*Id.*) Coble indicated that he recalled making it clear to Johnson's counsel, on at least two separate occasions, that he would not suggest that the district court impose anything less than an MSP commitment for whatever time that remained on Johnson's sentence. (*Id.*) Coble included email correspondence

between himself and Johnson's probation officer Tim Hides which was consistent with such an intention.

On May 26, 2021, Hides sent Coble an email informing him that he would "be doing a report of violation on Mr. Johnson. I do not know what else to do with him." (*Id.* at 2.) On June 8, 2021, Coble sent Hides an email following a discussion with Johnson's partner. (*Id.*) The email stated:

> Angie McCarthy, apparent girlfriend of Seth Johnson, would like you to consider whether he can do house arrest instead of a revocation. I told her I would pass it on, though doubtful given that he's been given about every possible opportunity and can't seem to comply. If you are interested in that possibility, let me know. Otherwise, I've filed our petition to revoke and had a warrant issued. I'm ready to go unless you advise otherwise.

(*Id.*)

Hides responded, "Not interested. We have tried everything. He knows how much trouble he is in and I hadn't heard from him before I left for vacation." (*Id.*)

In another email exchange from August 26, 2021, Hides informed Coble that while transporting Johnson back to jail after court, Johnson told the sheriff he was not going to follow the DOC's or the court's conditions again. (*Id.* at 3.) Hides said that "If that is his choice guess we can't supervise him." (*Id.*) Coble responded:

> Thanks Tim, How much time can he be sentenced to? My intent is to ask that he be sentenced to MSP for whatever time he has remaining on his sentence, then give credit for time served and street time out of that sentence.

(*Id.*)

The court denied Johnson's motion. (Doc. 190.3, attached to Appellant's Br. as App. A.) The court noted that Johnson entered admissions at the evidentiary hearing and that "[n]o mention was made of any agreement as to sentencing recommendations." (*Id.*) The court also asserted that it was unaware of any authority permitting the withdrawal of admissions to violations of conditions of a suspended sentence after a defendant had been resentenced. (*Id.*) The court also granted Johnson's counsel's motion to withdraw. (Doc. 191.3.)

After the court denied Johnson's motion, new counsel filed a notice of appearance on Johnson's behalf. (Doc. 192.3.) Two months later, Johnson's new counsel filed a reply brief regarding his Motion to Withdraw Answers/Plea and the State's response. (Doc. 193.3.)

In the reply, Johnson argued he was misadvised about what position the State would take if Johnson entered admissions. (*Id.* at 2.) Johnson claimed there was a factual dispute created by his opening brief and the State's response regarding whether an agreement as to disposition existed between the parties. (*Id.*) Johnson said the dispute would "likely" "require an evidentiary hearing." (*Id.*)

Johnson argued he had the right to both effective assistance of counsel and due process at his revocation proceeding. (*Id.* at 2-3.) Johnson asserted that he was entitled to relief either because his attorney misadvised him about the State's

position or because the State breached a verbal contract. (*Id.* at 3.) Johnson claimed that either way, the matter required a hearing. (*Id.*)

SUMMARY OF THE ARGUMENT

The district court did not err in denying Johnson's motion to withdraw his admissions to the violations in the petition to revoke. Johnson's motion indicated he had no evidence to support the existence of any agreement between the parties and the State included evidence in its response that undercut the existence of any such agreement. Johnson claims he entered admissions solely based on his belief that the State would refrain from making any specific sentencing recommendation. The purported agreement had little to no value, particularly because the district court expressly warned Johnson in 2014 that if he violated again it would sentence him to 15 years in MSP, which is precisely the sentence the court imposed. The record undercuts Johnson's claim that he would not have waived the hearing and entered admissions if he knew there was not an agreement that the State would make no specific recommendation.

The district court did not abuse its discretion by failing to hold an evidentiary hearing on Johnson's motion when Johnson did not request one and his own motion indicated there was no evidence to put before the court that would support the existence of any agreement between the parties. Even if the court was

incorrect in its belief that there was no precedent for permitting the withdrawal of admissions to a petition to revoke, Johnson failed to cite this Court's precedent supporting such withdrawal in his motion and the court correctly noted that the evidence in the record did not support Johnson's claim.

ARGUMENT

I. Standard of review

Whether a court violated a probationer's constitutional right of due process involves a question of law and this Court's review is plenary. *State v. Finley*, 2003 MT 239, ¶ 10, 317 Mont. 268, 77 P.3d 193. "Discretionary rulings, including rulings relating to whether to hold an evidentiary hearing, are reviewed for abuse of discretion." *State v. Evert*, 2007 MT 30, ¶ 12, 336 Mont. 36, 152 P.3d 713.

This Court reviews a district court's determination that a defendant voluntarily, knowingly, and intelligently waived his rights under the clearly erroneous standard. *State v. Lawrence*, 285 Mont. 140, 148-49, 948 P.2d 186, 191 (1997).

II. The district court did not err when it denied Johnson's motion to withdraw his admissions because there was evidence no agreement ever existed, the value of the alleged agreement was minimal, and Johnson was on notice that the court intended to sentence him to 15 years in prison regardless of what the State recommended.

As an initial matter, relying on this Court's precedent in *State v. Jones*, 2008 MT 331, 346 Mont. 173, 194 P.3d 86, Johnson advances legal precedent analyzing Mont. Code Ann. § 46-16-105 which governs the withdrawal of a guilty plea. The inapplicability of Mont. Code Ann. § 46-16-105 to revocations was not raised by either party in *Jones*, however, the plain language of the statute indicates it is inapplicable to revocation proceedings.

Montana Code Annotated § 46-16-105(1) provides that "Before or during trial, a plea of guilty must be accepted" when certain conditions are met. A "court may, for good cause shown," permit a defendant to withdraw his guilty plea "[a]t any time before judgment or, ... within 1 year after judgment becomes final[.]" Mont. Code Ann. § 46-16-105(2). Montana Code Annotated § 46-16-105 does not address the withdrawal of admissions to allegations that a defendant violated his sentencing conditions but rather, per the plain language of the statute, only addresses guilty pleas entered before or during trial.

On the other hand, Mont. Code Ann. § 46-18-203 governs the revocation of suspended or deferred sentences. *See, e.g., State v. Adams*, 2013 MT 189, 371 Mont. 28, 305 P.3d 808 (sentencing upon revocation of a suspended or deferred

sentence governed by Mont. Code Ann. § 46-18-203, not Mont. Code Ann. § 46-18-401); *State v. Larson*, 2023 MT 236, 414 Mont. 200, 39 P.3d 655 (criminal sentencing statutes such as Mont. Code Ann. § 46-18-201 apply to initial sentence imposed after conviction or plea while Mont. Code Ann. § 46-18-203(7)(b) applies once a court determines a probationer violated the original terms imposed under Mont. Code Ann. § 46-18-201); *State v. Claassen*, 2012 MT 313, 367 Mont. 478, 291 P.3d 1176 (Change from Level 1 to Level 3 offender upon revocation of suspended sentence upheld because Mont. Code Ann. § 46-18-203 does not require a new presentence investigation report of psychosexual evaluation).

Montana Code Annotated § 46-18-203 provides certain due process rights to probationers before their sentences may be revoked. Mont. Code Ann. § 46-18-203(4)-(5). The United States Supreme Court has also elaborated the following minimum due process requirements for a probation revocation: "(1) written notice of the claimed probation violation; (2) disclosure of the evidence against the defendant; (3) the opportunity to be heard in person and present testimonial and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral arbiter; and (6) a written statement of the evidence relied upon by the arbiter and the reason for revoking probation." *Finely*, ¶ 31 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)).

"A hearing is required before a suspended or deferred sentence can be revoked or the terms or conditions of the sentence can be modified unless the offender admits the allegations and waives the right to a hearing." Mont. Code Ann. § 46-18-203(5)(a). This Court has held that waiver of a probationer's right to a revocation hearing must be knowing, intelligent, and voluntary. *Finley*, ¶ 33.

In determining whether there was an effective waiver of a right, this Court looks to "the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *State v. Wilson*, 2011 MT 277, ¶ 15, 362 Mont. 416, 264 P.3d 1146 (waiver of right to counsel). This Court has also noted that the "more stringent criminal procedures" are not required when determining waiver in civil matters. *In re L.F.R.*, 2019 MT 2, ¶ 16, 394 Mont. 61, 432 P.3d 1030 (citing *In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000).

In *Finley*, this Court held that Finley did not knowingly, intelligently, and voluntarily waive his right to a revocation hearing when the court accepted his counsel's representations that Finely admitted to violating the terms and conditions of his probation without engaging in any colloquy with Finley. *Finley*, ¶ 35.

In *Jones*, Jones was on probation for a felony DUI charge out of Hill County when he was arrested for a subsequent DUI in Silver Bow County. *Jones*, ¶¶ 2-3. Jones entered into a plea agreement with the Silver Bow County Attorney which, in relevant part, stated: "The State also will recommend that the sentence imposed

in this matter run concurrently with any sentence imposed upon the Defendant as the result of pending cases in Hill County, Montana, or Yellowstone County, Montana." *Id.* ¶ 4. The Silver Bow County court ordered the sentence to run concurrently with any sentence imposed in Hill or Yellowstone County, but the Hill County District Court could not bind the other district courts. *Id.* ¶¶ 5-6, 18. The Hill County District Court ordered its sentence upon Jones's revocation to run consecutively to the Silver Bow County sentence. *Id.* ¶ 6.

This Court found that Jones did not "know or appreciate" that the Silver Bow County District Court could not bind the Hill County District Court, and that Jones "understandably relied upon the assurances contained in the Silver Bow County plea agreement and ensuing judgment" when he entered his admissions to the allegations in the petition to revoke in Hill County. *Id.* ¶ 18. Because Jones did not know that the Silver Bow County proceedings had no actual value in Hill County and he then received a five-year consecutive sentence rather than concurrent as he believed would be imposed, this Court found he had not voluntarily entered his admissions in Hill County. *Id.* ¶ 20.

The Ninth Circuit has similarly analyzed whether an offender's waiver of a revocation hearing was knowing, intelligent, and voluntary. *United States v. Stocks*, 104 F.3d 308 (9th Cir. 1997). In *Stocks*, the court found that Stocks' waiver of a

hearing and his right to counsel was knowing, voluntary, and intelligent based on the facts and circumstances of the case:

> That Stocks knew what he was doing is apparent from his earlier agreement to modify the terms of his probation, a modification which had led to his subsequent placement in a community correction center different from the center he had been in. By the same token, his waiver was intelligent. He had had the experience of having the conditions of his probation changed.

Id. at 312.

Here, Johnson was advised of his rights at his initial appearance, and he confirmed he understood them. When Johnson appeared at the scheduled evidentiary hearing and his counsel informed the court that he intended to enter admissions, the court reviewed the procedural posture of the case, reminded Johnson they were there for an evidentiary hearing on the matter, and asked Johnson if counsel was correct that he wished to enter admissions. Johnson confirmed that he did.

Johnson asserts that the court "should" have to advise offenders that they are also waiving their constitutional right to remain silent when they waive a revocation hearing and enter admissions. (Appellant's Br. at 18.) Such an admonishment is not required by Mont. Code Ann. § 46-18-203 and Johnson offers no authority supporting such a requirement. This Court does not "conduct legal research on appellant's behalf, [] guess as to his precise position, or [] develop legal analysis that may lend support to his position." *State v. Hicks*, 2006 MT 71,

¶ 22, 331 Mont. 471, 133 P.3d 206 (internal quotations and citation omitted); *see* M. R. App. P. 12(1)(g) (requiring the argument section of an appellant's brief to contain "citations to the authorities, statutes, and pages of the record relied on").

This also was not Johnson's first revocation proceeding. In Johnson's first revocation hearing, the district court advised him of his rights, and he confirmed that he understood them. (Doc. 65.1 at 1.) When Johnson admitted he violated the terms of his probation, the court confirmed that he was doing so under the advice of counsel and that he understood he was waiving his right to an evidentiary hearing. (*Id.)* The second time the State filed a Petition to Revoke, Johnson—just as he did in the instant revocation—admitted to some of the alleged violations while denying one. (Doc. 106.2.) The court sentenced Johnson to a 20-year term at MSP with 15 suspended. (*Id.* at 7; 107.2.)

When Johnson confirmed that he wished to enter admissions at the evidentiary hearing for the revocation he now appeals, he had been advised of his rights several times, confirmed he understood his rights, had been through the entire process twice before, had previously been resentenced to MSP, and was well aware waiving the hearing and entering admissions would result in the court resentencing him to MSP for the remainder of his suspended term even if the State made no specific recommendation. Unlike in *Jones* where the offender entered into an illusory plea agreement which promised a recommendation for a concurrent

term rather than a consecutive one, here, Johnson claims the alleged agreement was for no specific recommendation at all. The alleged agreement did not offer an agreed upon recommendation for a reduced sentence, a suspended portion, or any other conceivable benefit that would support Johnson's assertion that he only waived the hearing because of the benefit he believed he would receive under the purported agreement.

The district court stated that it sentenced Johnson to MSP because of the heinous nature of the underlying crimes, the fact that this was third time his sentence had been revoked, and because despite having support and numerous reasons to comply, Johnson continued to violate his sentence. The district court had explicitly warned Johnson at his second revocation disposition in 2014 that if he committed any other violations, he would get no tolerance from the court and would face a 15-year commitment to MSP. The court imposed the sentence it warned Johnson it would impose in 2014 if he ever violated again.

Even if Johnson truly believed there was an agreement that the State would not make a recommendation for any specific term, he already knew the court intended to sentence him to 15 years. The record in this matter undercuts any claim by Johnson that he only chose to waive the right to an evidentiary hearing and enter admissions because he believed the State would not make a recommendation. Johnson previously entered admissions with no agreement between himself and the

State and he was already on notice that the court intended to sentence him to the maximum possible term.

Johnson knowingly, intelligently, and voluntarily waived his right to a hearing to determine whether the State could prove by a preponderance of the evidence that he violated the terms of his sentence. The district court did not err in denying Johnson's motion to withdraw his admissions.

III. The district court did not abuse its discretion in failing to sua sponte hold an evidentiary hearing regarding Johnson's motion to withdraw his admissions because Johnson's motion established there was no other evidence to be presented.

The district court did not abuse its discretion by failing to sua sponte hold an evidentiary hearing to determine whether there was an agreement between the parties or whether Johnson believed there was an argument and waived the revocation hearing based upon such belief. Johnson did not request a hearing to put forth evidence supporting the existence of the supposed agreement between the parties because, as his motion to withdraw his admissions indicates, there was no evidence such an agreement existed. Holding a hearing on the matter would not provide the court with any further insight into the matter than the briefing and supplemental affidavits. The State included email correspondence between the prosecution and Johnson's probation officer that indicated the State never intended

to ask for anything less than Johnson serving the remainder of his sentence in MSP.

In its order dismissing Johnson's motion, the district court stated it was unaware of any precedent permitting the withdrawal of admissions to a petition to revoke after resentencing. On appeal, Johnson faults the district court for not recognizing this Court's precedent in *Jones* which recognized the potential for an offender—at least under the "unique and anomalous facts" presented in *Jones*—to withdraw his admissions to violations. However, Johnson failed to cite *Jones* in his motion to withdraw admissions in the district court. *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 207 (it is fundamentally unfair to fault a trial court for something it was never given the opportunity to consider).

Even though the district court did not consider Johnson's motion under this Court's precedent in *Jones*, the court noted facts that undercut Johnson's claim that he only entered his admissions based upon a belief that the State would not recommend any particular sentence. Even though the district court incorrectly concluded there was no legal precedent for permitting withdrawal of admissions to a petition to revoke, the district court's denial of Johnson's motion was correct given the facts in the record. *State v. Daffin*, 2017 MT 76, ¶ 34, 387 Mont. 154, 392 P.3d 150 (This Court will affirm a district court when it reaches the right result, even if it reaches the right result for the wrong reason.).

The alleged agreement had minimal value and Johnson was already on notice following his 2014 revocation that the district court intended to sentence him to 15 years at MSP if he violated again. As the district court noted in its order, when Johnson entered his admissions to the violations, he did not mention any agreement between himself and the State. Further, review of the record demonstrates that Johnson repeatedly delayed both his evidentiary hearing and disposition hearing to address medical issues. Johnson's repeated delays support a conclusion that Johnson was aware he would be headed back to MSP. Nothing in the record nor the alleged terms of the purported agreement support any claim that Johnson only agreed to waive the adjudication hearing and enter admissions because he believed the State would not make any specific recommendation for disposition.

The district court did not abuse its discretion in failing to sua sponte hold an evidentiary hearing when there were no additional facts to be brought forward and the record was sufficient to deny Johnson's motion.

CONCLUSION

This Court should affirm the district court's denial of Johnson's motion to withdraw his admissions to the violations in the petition to revoke.

Respectfully submitted this 12th day of April, 2024.

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

By: */s/ Christine Hutchison*
CHRISTINE HUTCHISON
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 7,672 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Christine Hutchison
CHRISTINE HUTCHISON

CERTIFICATE OF SERVICE

I, Christine M. Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-12-2024:

Colin M. Stephens (Attorney)
315 W. Pine
Missoula MT 59802
Representing: Seth Johnson
Service Method: eService

Jody (Joe) W. Coble (Govt Attorney)
PO Box 899
Choteau MT 59422
Representing: State of Montana
Service Method: eService

Electronically signed by Wendi Waterman on behalf of Christine M. Hutchison
Dated: 04-12-2024