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**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY**

<p>STATE OF MONTANA,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>REX WILLIAM ALLEN,</p> <p style="text-align: right;">Defendant.</p>	<p>CAUSE NO. DC 21-1604</p> <p>JUDGE: ASHLEY HARADA</p> <p><b>ORDER DENYING DEFENDANT’S MOTION TO WITHDRAW GUILTY PLEAS, DENYING MOTION TO APPOINT COUNSEL AND DENYING MOTION TO SUBPOENA PHONE RECORDS</b></p>
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Defendant, as a pro se litigant, has filed a Motion to Withdraw his Guilty in these cases. Defendant has also filed a Motion to Appoint Counsel and a Motion to Subpoena Phone Records. The State has filed a Response and Defendant has filed a Reply to the State’s Response. The Court deems this matter properly submitted and ripe for a ruling.

**BACKGROUND**

On February 18, 2022, before Judge Donald Harris (Thirteenth Jud. District – Dept. 2), Defendant Allen changed his pleas in DC 21-1392, DC 21-1466, and DC 21-1604. Allen was accompanied by his attorney, Tyler Dugger. On August 31, 2022, before Judge Ashley Harada, Allen changed his plea in cases DC 22-189 and DC 22-926. Allen was accompanied by his attorneys, Tyler Dugger and Matthew Claus. On that same day, August 31, 2022, Allen was sentenced for the following cases: DC 21-833; DC 21-1392; DC 21-1466; DC 21-1604; DC 22-189; and DC 22-926 by Judge Harada.

1 On November 3, 2022, Allen filed a pro se “Amended Motion to Withdraw Guilty Pleas with  
2 Memorandum in Support.” (There is no previously filed Motion in the Court records from Allen). On  
3 November 22, 2022, Allen filed a pro se “Motion to Appoint Counsel” and a pro se “Injunction to  
4 Subpoena Phone Records and Recording.” On February 6, 2023, the State through Scott Prudhomme,  
5 filed a Response to Allen’s motions. On February 28, 2023, Allen filed a Reply to the State’s Response.  
6

### 7 LEGAL STANDARD

8 The standard by which the Court evaluates a Motion to Withdraw a Plea of Guilty is set forth in  
9 Mont. Code Ann. § 46-16-105(2), which states,

10 (2) At any time before judgment or, except when a claim of  
11 innocence is supported by evidence of a fundamental miscarriage of  
12 justice, within 1 year after judgment becomes final, the court may, *for*  
13 *good cause shown*, permit the plea of guilty or nolo contendere to be  
14 withdrawn and a plea of not guilty substituted. A judgment becomes  
15 final for purposes of this subsection (2):

16 (a) when the time for appeal to the Montana supreme court  
17 expires;

18 (b) if an appeal is taken to the Montana supreme court, when  
19 the time for petitioning the United States supreme court for review  
20 expires; or

21 (c) if review is sought in the United States supreme court, on  
22 the date that that court issues its final order in the case. (emphasis added)

23 Additionally, Mont. Code Ann. § 46-12-204(2) mandates that the Court determine if the plea is  
24 voluntary and knowingly, and not the result of force or threats or of promises apart from the plea  
25 agreement. As a waiver of fundamental constitutional trial rights, a guilty plea is valid only if made  
26 knowingly, voluntarily, and intelligently with sufficient awareness of all relevant circumstances, any  
27 alternative courses of action open to the accused, and the likely consequences of the change of  
28 plea. *State v. Radi*, 250 Mont. 155, 159, 818 P.2d 1203, 1206 (1991) (citing *North Carolina v. Alford*,  
29 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)); *Brady v. United States*, 397 U.S. 742, 748, 90 S.

1 Ct. 1463, 1469, 25 L. Ed. 2d 747 (1970). Whether "good cause" exists for withdrawal of a guilty plea  
2 under Mont. Code Ann. § 46-16-105(2) involves consideration of an array of case-specific factors under  
3 the totality of circumstances. *State v. McFarlane*, 2008 MT 18, ¶ 17, 341 Mont. 166, 176 P.3d 1057.  
4

## 5 6 DISCUSSION

7  
8 These cases have an extensive history of continuances, negotiations between defense counsel and  
9 the State, and with two defense attorneys representing Allen across six separate dockets.

10 The basis for a properly accepted plea of guilty is that the plea is entered into voluntarily,  
11 knowingly, and intelligently. Mont. Code Ann. § 46-12-204(2). Before accepting a plea of guilty or  
12 *nolo contendere*, the court must determine that the defendant understands all the enumerated items set  
13 forth in Mont. Code Ann. § 46-12-210(1). Pursuant to subsection (2), the requirements of the advice to  
14 the Defendant in subsection (1) may also be accomplished by the Defendant filing a written  
15 acknowledgement. In this case, Defendant filed two separate written acknowledgements in these cases,  
16 and was questioned by two Judges at two separate change of plea hearings regarding the advice  
17 requirements in subsection (1).  
18

19 A review of the audio recording taken during the first change of plea hearing was done. Inquiry  
20 was made of the Defendant by Judge Donald Harris, commencing at 10:38 a.m. on February 18, 2022.  
21

22 Judge Harris: "Have you read this agreement?"

23 Defendant: "Yes, your Honor."

24 Judge Harris: "Are you confident that you understand its terms?"

25 Defendant: "Yes, your Honor."

Judge Harris: "It's my understanding what you intend to do here today is to withdraw some not  
guilty pleas and enter some guilty pleas, is that correct?"

Defendant: "Yes, your Honor."

1 Judge Harris: "And you understand that by doing that you're going to be waiving some very  
important constitutional rights?"

2 Defendant: "Yes, your Honor."

3 Judge Harris: "Those are set forth in your plea agreement on page 3, under paragraph 7. Have  
you had sufficient opportunity to discuss those rights with your counsel?"

4 Defendant: "Yes, your Honor."

Judge Harris: "Do you have questions about any of those rights at this time?"

5 Defendant: "No, your Honor."

Judge Harris: "Do you understand that this plea agreement is not binding upon the Court?"

6 Defendant: "Yes, your Honor."

7 Judge Harris: "And what that means is at the time of sentencing, if the Court were to determine  
that a harsher sentence was more appropriate you still would not be able to  
8 withdraw your pleas of guilty, do you understand that?"

9 Defendant: "Yes, your Honor."

Judge Harris: "And are you still willing to proceed?"

10 Defendant: "Yes, your Honor."

11 Judge Harris: "Have you been coerced or threatened in any way entering into this plea  
agreement?"

12 Defendant: "No, your Honor."

Judge Harris: "Are you satisfied with the services of your counsel?"

13 Defendant: "Yes, your Honor."

14 Judge Harris: "With your counsel have you been able to review both the strengths and  
weaknesses of your case, and each one of these cases?"

15 Defendant: "Yes, your Honor."

Judge Harris: "Do you believe that this plea agreement is in your best interests?"

16 Defendant: "Yes, your Honor."

17  
18 A review of the audio recording taken during the second change of plea hearing was done. Inquiry  
was made of the Defendant by Judge Ashley Harada, commencing at 2:29 p.m. on August 31, 2022.

19  
20 Judge Harada: "Now, in DC 22-189 and DC 22-926 I've received a plea agreement. And I want  
to discuss that plea agreement with you and make sure you understand all of the  
21 terms of the agreement. We will start by having you sworn in, and I will ask you  
some questions, okay? Please raise your right hand."

22 Clerk: "You do solemnly swear or affirm that your testimony in the cause now at issue  
will be the truth, the whole truth, and nothing but the truth, so help you God?"

23 Defendant: "Yes."

24 Judge Harada: "Mr. Allen, are you under the influence of any drugs or alcohol at this time?"

25 Defendant: "No, your Honor."

Judge Harada: "And are you suffering from any mental disease or illnesses?"

1 Defendant: "No, your Honor."  
2 Judge Harada: "Are you taking any prescription medications that compromise your ability to  
3 understand what is happening?"  
4 Defendant: "No, your Honor."  
5 Judge Harada: "Have you reviewed the plea agreement that was provided to me?"  
6 Defendant: "Yes, your Honor."  
7 Judge Harada: "Did you sign the agreement?"  
8 Defendant: "Yes, your Honor."  
9 Judge Harada: "Before you signed the agreement did you have a chance to ask your attorneys  
10 questions?"  
11 Defendant: "Yes, your Honor."  
12 Judge Harada: "Did they answer all your questions?"  
13 Defendant: "Yes, your Honor."  
14 Judge Harada: "Do you believe you understand the terms of the agreement?"  
15 Defendant: "Yes, your Honor."  
16 Judge Harada: "Do you have any additional questions about the agreement?"  
17 Defendant: "No, your Honor."  
18 Judge Harada: "Sir, you have the right to take these cases to trial, and at that trial you would be  
19 able to exercise your constitutional rights. If you choose to waive those rights  
20 today and enter pleas of guilty, I want to make sure you understand the  
21 constitutional rights you are waiving. You have the right to competent and  
22 effective counsel; you have the right to call witnesses on your own behalf; you  
23 have the right to utilize the Court's subpoena power to compel witnesses to appear  
24 if they were unwilling to do so voluntarily; you have the right to confront and  
25 cross-examine witnesses against you; and you have the right not to be compelled  
to incriminate yourself, which means you have the right to remain silent.  
Alternatively, if you wanted to testify on your own behalf at trial, you certainly  
could do so. You have the right to have your guilt proven beyond a reasonable  
doubt, and if you were tried by a jury the verdict would have to be unanimous.  
And that means that all twelve of the jurors would have to agree that you were  
guilty before you could be convicted. If you went to trial you would also have the  
right to present affirmative defenses, such as mistaken identity, or alibi, or  
justifiable use of force, or compulsion. Also, if you decided you wanted to go to  
trial you would have the right to offer lesser-included offense instructions. And in  
DC 22-189, I believe the lesser-included offense would be misdemeanor theft."  
Mr. Dugger: "Potentially, your Honor."  
Judge Harada: "And I don't believe there are any lesser-included offenses in DC 22-926."  
Mr. Dugger: "I believe that the amended Information, your Honor, eliminated any potential  
lesser-included offenses."  
Judge Harada: "Okay. So do you understand if you plead guilty today Mr. Allen, you are waiving  
all of the constitutional rights that I just went over?"  
Defendant: "Yes, your Honor."  
Judge Harada: "You won't be having a trial, you understand that?"

1 Defendant: "Yes, your Honor."

2 Judge Harada: "Do you also understand that you're waiving your right to appeal a finding of  
3 guilt?"

4 Defendant: "Yes, your Honor."

5 Judge Harada: "Do you understand that you are waiving your right to challenge any evidence  
6 that may have been illegally seized in violation of the Montana and United States  
7 Constitutions? And you're waiving your right to appeal any adverse pre-trial  
8 rulings?"

9 Defendant: "Yes, your Honor."

10 Judge Harada: "Do you have any questions about all of the right that I have gone over today?"

11 Defendant: "No, your Honor."

12 Judge Harada: "So, Mr. Allen, I want to make it very clear today Mr. Allen, I want to make  
13 it very clear today that I have to impose a lawful sentence when I impose  
14 sentence. I do not have to follow the recommendations of the parties; do you  
15 understand that?"

16 Defendant: "Yes, your Honor."

17 Judge Harada: "So the joint recommendation in DC 22-189 is three years in prison to run  
18 concurrently with the agreement filed in February of 2022, as well as any lawfully  
19 claimed restitution. In DC 22-926, for misdemeanor theft in Count I, the  
20 recommendation is six months in jail, and a fine of \$500, with all time, except  
21 time served, suspended, and a fine \$250, and restitution. Count II, criminal  
22 mischief, the State is going to recommend a sentence of a fine of \$500, and six  
23 months in jail, with all but ten days suspended, and restitution; do you understand  
24 that?"

25 Defendant: "Yes, your Honor."

Judge Harada: "I don't have to follow those recommendations; do you understand?"

Defendant: "Yes, Your Honor."

Judge Harada: "So for felony theft --

Mr. Duggger: "Your Honor, if I may, if I might confer with the State, I think I made a  
drafting error in this plea agreement. I do not think it was our intent, Scott --and I  
apologize for overlooking this -- but on Count I, theft, for it to be three years in  
the Montana State Prison."

Mr. Prudhomme: "That's what I understood."

Mr. Dugger: "Okay. Well, my apologies. On the theft, I was under the impression we were  
doing DOC time on all the thefts, with argument to be made on the robbery.

Judge Harada: "Would you like to take a break and discuss this outside of my presence?"

Mr. Dugger: "If we could have a moment, Your Honor. My apologies."

Judge Harada: "I think that would be best just so that I'm not part of your negotiations, so  
do what you need to do, I will be available."

**(Recess taken)**

1 Judge Harada: "Let's get back on the record. Why don't you tell me what the issue is, and I can  
2 give you this plea agreement if you need to mark it up."

3 Mr. Dugger: "I think we can do it sufficiently on the record, Your Honor. It would just be --  
4 if you go to Section 5, it indicates, "The State and Defendant agree to jointly  
5 recommend a sentence of"; how it should have been drafted is, "The State agrees  
6 to recommend a sentence of". So it's not a joint recommendation, and it permits  
7 the Defense to argue for less."

8 Judge Harada: "And maybe I just said it wrong?"

9 Mr. Dugger: "You did not, Your Honor, and actually your reciting that sentence alerted me to  
10 the problem."

11 Judge Harada: "Okay."

12 Mr. Prudhomme: "And that surprised me as well, Judge. It is always my impression that the  
13 Defense was going to argue for less."

14 Judge Harada: "I see. All right. So let me clarify, in DC 22-189, the State is going to make a  
15 recommendation, as I've outlined earlier, the Defense is also going to make a  
16 recommendation; I don't have to follow either recommendation; do you  
17 understand?"

18 Defendant: "Yes, Your Honor."

19 Judge Harada: "That also applies in DC 22-926, the State is going to make a recommendation,  
20 and I'm going to listen, and I'm going to hear your attorney's recommendation,  
21 and then I'm going to decide the sentence. It has to be a lawful sentence which  
22 means it has to fall within my statutory authority; do you understand?"

23 Defendant: "Yes, Your Honor."

24 Judge Harada: "Now, at the bottom of Page 3, there is a lot of notations about, I think,  
25 agreements that have been made and the intention to not prosecute you for other  
cases based upon investigations that have occurred and your willingness to  
accept responsibility today; did you review that with your attorneys as well?"

Defendant: "Yes, Your Honor."

Judge Harada: "So based upon your post-plea conduct, it looks like the State is recommending  
15 years to the Montana State Prison, with 7 suspended in DC 21-1392; and the  
State has changed its recommendation in DC 21-1604 to 3 years Department of  
Corrections, concurrently to your other cases. And the State also intends to  
recommend that DC 22-189, and DC 22-926 run concurrently with all of your  
other cases; do you understand that?"

Defendant: "Yes, Your Honor."

Judge Harada: "And if I'm mistaken about something, please jump in, counsel. Also, this is the  
part that I was discussing earlier, the State of Montana agrees not to prosecute  
any currently referred criminal prosecutions which identify you as a suspect,  
including bail jumping and/or escape based upon your terminated furlough at  
Rimrock and your failure to return to jail, and no additional charges will result  
from the search of your cell phone, I don't know what that would include or  
would not include, but I'm hoping you've discussed that with counsel."

1 Defendant: "I mentioned it, yes, Your Honor. I actually wanted to include in this plea  
2 agreement because I don't know what it pertains to personally myself."

3 Mr. Prudhomme: "Your Honor, I can clarify. 2210705 -- C & O number -- was actually tied to the  
4 22-189. At the time that he was charged with the theft in 22-189, I believe that  
5 CDS was discovered in the vehicle, that came to us about a month after 22-189  
6 was charged -- the case file for the CDS. I held onto the case and have been  
7 considering it this entire time, but since we were able to reach a global  
8 resolution, I'm willing to reject that case."

9 Judge Harada: "What is CDS?"

10 Mr. Prudhomme: "Controlled dangerous substance, drugs."

11 Judge Harada: "Is that clear?"

12 Defendant: "Yes, Your Honor."

13 Judge Harada: "Well, in any event, I don't have to follow the recommendation, and I think I've  
14 made that abundantly clear; do you understand?"

15 Defendant: "Yes, Your Honor."

16 Judge Harada: "If I don't follow the recommendation, you will not be able to withdraw your  
17 guilty pleas; do you understand that?"

18 Defendant: "Yes, Your Honor."

19 Judge Harada: "And has anyone threatened you or coerced you into entering into this  
20 agreement?"

21 Defendant: "No, Your Honor."

22 Judge Harada: "Are you satisfied with your attorneys?"

23 Defendant: "Yes, Your Honor."

24 Judge Harada: "Are there any extra additional promises that have been made that are not  
25 included in this plea agreement?"

Defendant: "No, Your Honor."

Judge Harada: "Have you seen all of the discovery for all of the cases?"

Defendant: "Yes, Your Honor."

Judge Harada: "And do you need to see anything else before I ask you how you plead?"

Defendant: "No, Your Honor."

19 The length of time in between the signing of the Plea Agreement, the Change of Plea hearing,  
20 the Pre-Sentence Investigation interview by Probation and Parole and sentencing is relevant when  
21 examining the intent of the Defendant. Defendant had two separate change of plea hearings  
22 encompassing his six cases. The first occurred on February 18, 2022, and the second on August 31, 2022.  
23 Allen was interviewed by PSI writer Deanna Zent on April 6, 2022, and the PSI was dated April 12,  
24 2022, and filed with the Court on April 14, 2022.

1 Allen was interviewed for his Pre-Sentence Investigation report forty-eight (48) days after his  
2 first change of plea. In response to the question, “In your own words, what did you do to get arrested?”  
3 Allen replied, “Played an active role in all cases.” In response to the question, “What reason do you have  
4 for your involvement in this offense?” Allen replied, “Not in right state of mind under the influence of  
5 mind altering substance.” In response to the question, “Give your recommendation as to what you think  
6 the Court should do in your case,” Allen responded, “Follow the plea agreement and strongly consider  
7 the steps or changes that were made to better my life by working full-time and being a full-time on-line  
8 student for bachelor’s in computer science information technology.” Notably, Allen did not indicate he  
9 wanted to withdraw his guilty plea.  
10

11 The Montana Supreme Court noted in *State v. Mohammed*, that the District Court did not err by  
12 denying a motion to withdraw a guilty plea to a sex crime under Mont. Code Ann. § 46-16-105(2)  
13 because defendant did not raise the issue when he was on release pending sentencing, and defendant  
14 received the benefit of the bargain; moreover, the plea colloquy was adequate because defendant  
15 understood and waived the applicable defenses, there was a proper factual basis for the plea, and it  
16 addressed the elements of the offense charged. *State v. Muhammad*, 2005 MT 234, ¶¶ 24-25, 328 Mont.  
17 397, 121 P.3d 521.  
18

19 The searching inquiry necessarily includes consideration of the state of mind and subjective  
20 impressions of the accused at the time of the plea, but based on the objective record facts and  
21 circumstances rather than unsupported, after the fact assertions. *State v. Humphrey*, 2008 MT 328, ¶¶  
22 22-23, 346 Mont. 150, 194 P.3d 643. An accused's subsequent assertions regarding his or her subjective  
23 state of mind or impressions at the time of a change of plea are thus sufficient for subsequent withdrawal  
24 of the plea only if the asserted state of mind or subjective impressions are both supported by substantial  
25

1 objective evidence of record, and objectively reasonable under the record circumstances. *Humphrey*, ¶  
2 23 (internal citations omitted); accord *State v. Burns*, 2012 MT 97, ¶ 15, 365 Mont. 27, 278 P.3d  
3 452 (citing *Humphrey*).

4  
5 The Court finds that the colloquies at the two Change of Plea hearing were thorough and  
6 complete. The Court also finds that by his own words, Allen voluntarily, intelligently and knowingly  
7 waived his rights by pleading guilty. Allen received a considerable benefit of the bargain pursuant to the  
8 plea agreements that encompassed six separate cases and multiple felony charges.

9 For the reasons set forth,

10 **IT IS HEREBY ORDERED** that the Defendant's motion to withdraw his guilty plea is  
11 **DENIED.**

12 **IT IS FURTHER ORDERED** that Defendant's motion to appoint counsel and motion to  
13 subpoena phone records are **DENIED.**

14 **IT IS FURTHER ORDERED** that all of Defendant's outstanding motions are rendered **MOOT**  
15 by this Order.

16 **DATED** this 14<sup>th</sup> day of March, 2024.

17  
18 /s/Ashley Harada  
19 ASHLEY HARADA  
DISTRICT COURT JUDGE

20 cc: Tyler Dugger, *Attorney for Defendant*  
21 Matthew Claus, *Attorney for Defendant*  
22 Scott Prudhomme, *YCAO*  
23 Rex W. Allen  
24 Montana State Prison  
25 400 Conley Lake Road  
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