IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0096

STATE OF MONTANA,

Plaintiff and Appellee,

v.

HARLAN GERALD VASKA,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, the Honorable Robert Whelan, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Laws

Constitution Authorities

Other Authorities

STATEMENT OF THE ISSUES

1. *Whether the 21-day delay between initial appearance and a probable cause determination was reasonable?*

2. *Whether the District Court imposed an illegal parole condition?*

3. *Whether the mandatory minimum $5,000 fine is unconstitutional?*

STATEMENT OF THE CASE

This matter began in Lake County Justice Court. (DC Doc. 1). Charged with a fourth or subsequent Driving Under the Influence (DUI), on June 2, 2021, Lake County Justice Court advised Vaska of his rights and set a preliminary hearing for June 28, 2021. (DC Doc. 1).

On June 21, 2021, the Lake County Attorney moved for leave to file an Information in Lake County District Court, (DC Doc. 2), with the District Court granting leave the following day, (DC Doc. 3). On June 23, 2021, the Lake County Attorney charged Mr. Vaska by Information with DUI, fourth or subsequent, a felony in violation of Mont. Code Ann. § 61-8-401 (2019).[1] (DC Doc. 4).

This matter stagnated for the next six months, largely due to Montana State Prison being unable to accommodate either a remote

[1] Repealed by Sec. 44, Ch. 498, L. 2021.

appearance for Vaska in Lake County District Court or facilitate communications between Vaska and his attorney. (DC Doc. 10, 19, 20, 24, and 28; *Tr. 2/3/2022*, p. 2). Eventually, Vaska was relocated back to Lake County Detention Center to allow in-person appearances. (DC Doc. 28). On February 3, 2022, Vaska pled not guilty in person. (*Tr. 2/3/2022*, p. 4).

On November 7, 2022, at a dispositional hearing, the District Court denied Vaska's motion to dismiss for lack of speedy trial and no preliminary hearing. (DC Doc. 79-80). Later that month, a jury found Vaska guilty of felony DUI. (DC Doc. 86).

On January 13, 2023, the District Court sentenced Vaska to the Department of Corrections for a five-year term, a $5,000 fine, and that Vaska "be required to have a SCRAM monitor for the full term of his sentence if released from custody." (DC Doc. 90 (attached hereto as App. A); *Sentencing Tr.*, p. 19). The District Court awarded Vaska 590 days of credit for time served, from the date of his initial appearance until sentencing. (App. A).

Vaska timely appeals. (DC Doc. 95).

STATEMENT OF THE FACTS

THE STOP

Outside Pablo, MT within the Flathead Indian Reservation, in the early morning hours of May 16, 2021, Deputy Livingston of Lake County Sheriff's Office was following Vaska on Light Road, a gravel road filled with potholes. (DC Doc. 43, 5-24-22 *Tr.*, p. 11, 13). There were no fog lines or road edges beside where the road meets the grass. (5-24-22 *Tr.*, p. 12). Deputy Livingston had a "hunch" the driver of the vehicle may be intoxicated because the vehicle was traveling below the posted speed limit with its "passenger side with the tires off of the road." (5-24-22 *Tr.*, p. 8, 21). Deputy Livingston thought such was sufficient particularized suspicion for a DUI stop. (5-24-22 *Tr.*, p. 18). No dash cam video evidence exists. (5-24-22 *Tr.*, p. 16).

As Vaska approached the intersection at Light Road and Skyline Drive, Vaska signaled, making a right turn, and pulled over onto the side of the road. (DC Doc. 43; 5-24-22 *Tr.*, p. 13). There was no evidence of mechanical failure of the vehicle, nor a medical emergency. (5-24-22 *Tr.*, p. 17-18). Deputy Livingston stopped to check on the driver to see if "everything was okay." (5-24-22 *Tr.*, p. 9, 15-17, and 20).

Vaska stated that he was "just trying to get home." (5-24-22 *Tr.*, p. 9, 16). Deputy Livingston thought Vaska "appeared intoxicated." (5-24-22 *Tr.*, p. 18). Vaska made admissions to drinking prior, but refused sobriety or breath testing, and Deputy Livingston eventually arrested Vaska. (*Jury Trial Tr.*, p. 85-89). Deputy Livingston later obtained a search warrant for Vaska's blood, collected a couple hours after the stop and showing a .195 BAC. (*Jury Trial Tr.*, p. 90, 141; State's Exhibit 5).

THE CHARGING PROCESS

At the initial appearance, Lake County Justice Court provided a "conditional appointment" of an attorney and set a preliminary hearing for June 28, 2021. (DC Doc. 1). The justice court released Vaska on his own recognizance with conditions. (DC Doc. 1). That same day, Vaska's probation and parole officer reported that Vaska violated the conditions of release because of his arrest on this current DUI charge. (DC Doc. 88, p. 7). Vaska remained in custody for the probation violation. Despite the simplicity of the common DUI charge, the State waited until June 21 to request leave to file the DUI charge against Vaska. (DC Doc. 4).

The delay in seeking a probable cause determination from a neutral magistrate was intentional. Lake County has created an unusual practice for timing its charging for felonies based on whether the defendant was incarcerated, specifically reading Mont. Code Ann. § 46-10-105 with § 46-11-203 for the opinion that it is "presumptively reasonable" to file an Information after an Initial Appearance within 10 days for criminal defendants held on bond and 30 days for non-custodial defendants. (DC Doc. 77, p. 3-4). Lake County Justice Court sets Preliminary Hearings within the timelines proscribed by Lake County Attorney's Office. (DC Doc. 77, p. 3-4). Despite the legal fiction that Vaska was "released" on this charge and no finding of probable cause at the Initial Appearance, the District Court found the 21-day delay between Initial Appearance and filing of Information as reasonable. (*Motions Hearing Tr.*, p. 10-11). *See also* (DC Doc. 81, p. 2-3).

STANDARD OF REVIEW

The grant or denial of a motion to dismiss in a criminal case is a question of law which this Court reviews de novo. *State v. Robison*, 2003 MT 198, ¶ 6, 317 Mont. 19, 75 P.3d 301 (citing *State v. Diesen*, 2000 MT 1, ¶ 11, 297 Mont. 459, 992 P.2d 1287). However, this Court

has held previously that a "determination of a 'reasonable time' pursuant to § 46-10-105, MCA, is within the discretion of the district court." State v. *McElderry*, 284 Mont. 365, 370, 844 P.2d 230, 233 (1997) (citing rather generally to *State v. Higley*, 190 Mont. 412, 621 P.2d 1043 (1980) for the rule).

Criminal sentences are reviewed for legality. *State v. Burch*, 2008 MT 118, ¶ 12, 342 Mont. 499, 182 P.3d 66 (citing *State v. Hicks*, 2006 MT 71, ¶ 41, 331 Mont. 471, 133 P.3d 206). This Court determines the retroactivity of a constitutional rule as a matter of law. *Beach v. State*, 2015 MT 118, ¶ 4, 379 Mont. 74, 348 P.3d 629 (citing *State v. Reichmand*, 2010 MT 228, ¶ 6, 358 Mont. 68, 243 P.3d 423).

SUMMARY OF THE ARGUMENT

The 21-day delay between his initial appearance in Lake County Justice Court and the State's filing of its Information in Lake County District Court was not reasonable. Vaska was entitled to a prompt probable cause determination by a neutral magistrate, especially for a simple DUI charge. Lake County's unique procedure is not reasonable, ensuring individuals in custody will receive delayed probable cause determinations.

In the alternative, the District Court lacked statutory authority to impose continuous and expensive alcohol monitoring as a condition of parole. Remand to strike the illegal provision is the proper remedy. Likewise, mandatory minimum DUI fines have been recently held unconstitutional by this Court. Since Vaska was found to have an inability to pay other fines, Vaska additionally has an inability to pay the mandatory minimum $5,000 fine. Vaska is entitled to retroactive application of the new constitutional rule found in recent Montana case law.

ARGUMENT

I. The 21-day delay between initial appearance and filing of information because of local practice was unreasonable while Vaska was in custody.

The Fourth Amendment of the United States Constitution guarantees the "right of the people to be secure in their persons . . . against unreasonable [] seizures[.]" *See also* Mont. Const. art. II, § 11. Warrantless arrests may be made only upon probable cause, *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)), but for the Fourth Amendment to "furnish meaningful protection from unfounded interference with liberty[,]" the

constitutional right "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein*, 420 U.S. at 114. Following a warrantless arrest, "the Fourth Amendment gives a criminal defendant . . . *the right to a prompt probable cause determination* by a neutral and detached magistrate." *State v. Haller*, 2013 MT 199, ¶ 6, 371 Mont. 86, 306 P.3d 338 (citing *Gerstein*, 420 U.S. at 124-25, 95 S.Ct. at 868-69) (emphasis added). Specifically, the Supreme Court of the United States requires a probable cause determination by an independent magistrate to be completed within 48 hours of arrest, *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), but has ultimately left criminal procedure to the States so long as a "fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty[]" is "made by a judicial officer either before or promptly after arrest." *Gerstein*, 420 U.S. at 125.

For Montana, criminal prosecutions require an "information, after examination and commitment by a magistrate or after leave granted by the court[.]" Mont. Const. art. II, § 20(1). "The only [procedural] requirement is that there is an independent judicial determination of

probable cause[.]" *State v. Higley*, 190 Mont. 412, 419, 621 P.2d 1043, 1048 (1980) (*citing Gerstein v. Pugh*, 420 U.S. 103, 120, 95 S.Ct. 854, 866, 43 L.Ed.2d 54, 69 and *State v. Dunn*, 155 Mont. 319, 325, 472 P.2d 288, 292 (1975)). Within "a reasonable time" following an initial appearance, a justice court is required to hold a preliminary examination for "all cases in which the charge is triable in district court[]" unless, applicable here, "the district court has granted leave to file an information[.]" Mont. Code Ann. § 46-10-105(2). *See also State v. Haller*, 2013 MT 199, ¶ 8 (citing *State v. Higley*, 190 Mont. 412, 419 (1980) in stating that a "flexible standard" permits different charging procedure in district court so long as done within "a reasonable time"). The State carries the burden of demonstrating that a delay was reasonable. *State v. Gatlin*, 2009 MT 348, ¶ 36, 353 Mont. 163, 219 P.3d 874 (citing *Robison*, ¶ 9) (Nelson, J., concurring). A "prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial[.]" *Gerstein*, 420 U.S. at 118-19. What is a "reasonable time" is "determined by the facts of the case[,]" and

> may include consideration of such factors as length of the delay, reasons for the delay, whether the defendant has been incarcerated or prejudiced, whether the defendant has

> counsel, the seriousness or complexity of the charge, and other relevant matters.

Robison, ¶ 12 (citing *McElderry*, 284 Mont. at 370, 944 P.2d at 233). "Dismissal of the charges is required if a preliminary examination is not conducted and a 'reasonable time' expires prior to the filing of an information in the district court." *Robison*, ¶ 7 (*McElderry*, 284 Mont. at 368, 944 P.2d at 231). Here, the State carries the burden that the delay under its local practice was reasonable. Vaska first appeared in Lake County Justice Court on June 2, 2021. (DC Doc. 1). No probable cause determination was made. Lake County intentionally delayed getting a probable cause determination until it filed its Information 21-days later on June 23, 2021. (DC Doc. 4).

This Court has previously found both a 10-day delay in determining probable cause reasonable, *Higley*, 190 Mont. at 420, 621 P.2d at 1048, and a 11-day delay unreasonable, *Robison,* ¶ 15. *C.f.*, *Haller*, ¶ 13 (no opinion on 19-day delay); and *McElderry*, 284 Mont. at 370, 944 P.2d at 233 (no opinion on 12-day delay). In *Higley*, the delay was reasonable based upon the State moving to continue the preliminary hearing following short notice of Higley's demand for a hearing, and Higley bonding out shortly thereafter with the State filing

its Information the following week. 190 Mont. at 420, 621 P.2d at 1048. Unlike *Higley*, Lake County's 21-day delay is more than double, despite Vaska being detained while fictionally "released" in this matter.

On the other hand, in *Robison*, the Court found a proper use of discretion by Lake County District Court in concluding that an 11-day was unreasonable because the prosecution "failed to contest the issue of reasonableness" and "why the delay occurred or was necessary." ¶¶ 14-15. In other words, a lack of reasoning was unreasonable. Notably, the Court found prejudice – specifically "sustained prejudice" *from incarceration* "during the time in question" – a "proper consideration when determining reasonableness of the delay." *Robison*, ¶ 12.

Here, the State itself defined what was reasonable under its own practice instead of arguing why a 21-day delay was necessary. Putting the Information cart before the Probable Cause horse, under the State's logic Mont. Code Ann. § 46-10-105 and 46-11-203 make it "presumptively reasonable" to file an Information for defendants "not being held on bond[.]" (DC Doc. 77, p. 3). Mont. Code Ann. § 46-10-105 ("Preliminary Examination – When Held") requires a probable cause determination for felonies by avenue of a preliminary hearing,

information, or indictment, "within a reasonable time" after any initial appearance. Mont. Code Ann. § 46-11-203 ("Time for Filing Information"), on the other hand, requires an Information "within 30 days" following "a finding of probable cause[.]" Mont. Code Ann. § 46-11-203 "does not establish 30 days as a presumptively reasonable time for obtaining a probable cause determination after the initial appearance in justice court." *Haller*, ¶ 12. Lake County relies on a faulty and conflated reading of Montana Code to justify the warrantless arrest and detainment of individuals for up to thirty days post-initial appearance without any probable cause determination. The District Court abuses its discretion by rubber stamping this procedure.

Additional *Robison* factors further show that the State cannot justify the delay. First, the idea that Vaska was released without bond is a legal fiction. Regardless of being released on his own recognizance in this matter, Vaska has been in custody on a separate sentence since his initial appearance in Lake County Justice Court. These new charges formed the basis for a probation hold or sentence revocation. Vaska was never going to be released before trial. As Lake County concedes as part of its practice, the ten-day time frame would have been

a reasonable time to file the Information. *See Robison*, ¶ 12. Second, there is nothing complicated about this charge. Vaska was charged with a simple DUI based solely upon "reports supplied" by a single deputy out of the Lake County Sheriff's Office. (DC Doc. 2). Factual disputes were wrapped up in a single day jury trial. (*See Jury Trial Tr. 11/21/22*). With Vaska readily accessible in State custody, there was no reason a probable cause determination could not have been accomplished sooner while in the State's custody. Third, the reason for the delay was intentional. In Lake County, the State chooses to time its ability to seek out the required finding by a neutral magistrate based on the defendant's custodial status. The State then helped create the fiction that Vaska was released on his own recognizance, even though it knew he would remain in custody.

This matter should have been dismissed.

II. The district court was not authorized by statute to impose alcohol monitoring as a costly parole condition.

At sentencing, the State requested a "recommendation" to the Department of Corrections from the District Court that in the event of release that Vaska wear a "SCRAM unit to monitor him for alcohol for

the entirety of his sentence." (*Sentencing Tr.*, p. 16). At sentencing, the District Court ordered:

> [i]t is the sentence and judgment of the Court that the sentence imposed would be a commitment to the Montana Department of Corrections for a period of five years with none of that time suspended. The defendant will get credit for 590 days time served. The Court will order that this sentence run concurrent with any outstanding sentences that Mr. Vaska has.
>
> The Court will issue a $5,000 fine and will require the defendant to be fitted with a SCRAM unit if he is released prior to the five-year sentence.
>
> The Court finds that this is appropriate given the history that is involved, it provides protection to the community, punishment and hopefully an opportunity for rehabilitation.

(*Sentencing Tr.*, p. 18-19.) In the District Court's written judgment, the sentence was provided as a fourth or subsequent DUI in violation of Mont. Code Ann. § 61-8-401 (2019), with Vaska "committed to the Department of Corrections for a period of 5 years" and "be required to have a SCRAM monitor for the full term of his sentence if released from custody." (DC Doc. 90).

"[S]entencing authority of sentencing judges is constrained and defined by § 46-18-201, MCA." *State v. Burch*, 2008 MT 118, ¶ 24, 342 Mont. 499, 182 P.3d 66. No general authority exists for a sentencing

court to impose parole restrictions. *State v. Heafner*, 2010 MT 87, ¶ 5, 356 Mont. 128, 231 P.3d 1087 (citing *Burch*, ¶ 36). Instead, a specific grant from the Legislature is required for a sentencing court to impose parole conditions, *Burch*, ¶ 23 (citations omitted), such as Mont. Code Ann. § 46-18-241(1) (restitution), § 46-18-206 (satellite monitoring for sexual offenders), and § 46-18-255(1)-(3) (employment and residency restrictions, as well as contacting their victims, for sexual or violent offenders). Here, the District Court lacked any specific grant of authority to impose alcohol monitoring upon release.

Mont. Code Ann. § 61-8-442(2)(b) (2019) provides that upon a second or subsequent DUI conviction, "regardless of disposition, the [sentencing] court shall", *inter alia*, "require the person to participate in the 24/7 sobriety and drug monitoring program provided for in 44-4-1203[.]"[2] Mont. Code Ann. § 44-4-1203(c) considers "transdermal alcohol monitoring devices" (*i.e.*, SCRAM) as an appropriate "[h]ardship testing methodolog[y]" available if "[p]rimary testing methods" are not appropriate under the circumstances.

[2] Mont. Code Ann. § 61-8-1010(2)(a) (2023) imposes a similar requirement but omits the "regardless of disposition" language.

Since Mont. Code Ann. § 46-18-201 describes general sentencing court authority for deferred impositions and suspended execution of sentence "upon a verdict of guilty or a plea of guilty or nolo contendere[,]" "Disposition" likely means "a final settlement or determination[.]" *Black's Law Dictionary*, Bryan A. Garner (11th ed. 2019). Here, "disposition" in the context of Mont. Code Ann. § 61-8-442(2)(b) considers the conviction procedure of the case (*i.e.*, conviction by plea or trial), not the disposition of sentence (*i.e.*, a deferred, suspended, or custodial sentence). Even if "regardless of disposition" is found ambiguous, "doubts are resolved in favor of the defendant." *State v. Goodwin*, 249 Mont. 1, 23-24, 813 P.2d 953, 967 (1991) (quoting *United States v. Bass*, 404 U.S. 336, 347-48, 92 S.Ct. 515, 522-23, 30 L.Ed.2d 488, 496 (1971)).

Regardless, Mont. Code Ann. § 61-8-442(2)(b) provides no explicit indication that a sentencing court has the authority to impose alcohol monitoring as a condition of parole. Unlike Mont. Code Ann. § 46-18-241, § 46-18-206, and § 46-18-255, there is no express language stating that alcohol monitoring may be a "condition of parole." Here, the District Court lacked authority to require Vaska to be subject to

monitoring if released prior to the expiration of his Department of Corrections commitment.

Remand to the District Court to strike the illegal parole condition is the proper remedy here.

III. Under *Gibbons*, the mandatory minimum $5,000 fine is unconstitutional.

Recently, this Court held Mont. Code Ann. § 61-8-731(3) (2019) as facially unconstitutional in violation of Article II, Section 22, of the Montana Constitution whenever a sentencing court imposes a mandatory minimum $5,000 fine without consideration of proportionality factors protecting convicted persons from excessive fines. *State v. Gibbons*, 2024 MT 63, ¶¶ 64, 66, ____ P.3d ____. Any decisions providing a "new rule of criminal procedure is applicable to all cases still subject to direct review[.]" *State v. Waters*, 1999 MT 229, ¶ 20, 296 Mont. 101, 987 P.2d 1142 (citing *State v. Egelhoff*, 272 Mont. 114, 125-26, 900 P.2d 260, 267 (1995)). The proper remedy for illegal sentence provisions that cannot be corrected requires remand to the district court to strike the illegal condition. *Heafner*, ¶ 11.

Here, Vaska was convicted of DUI under Mont. Code Ann. § 61-8-401 (2019) and sentenced to "pay a fine of $5,000." (DC Doc. 90). The sentencing court also waived "OPD fees and trial fees due to the Defendant's inability to pay." (DC Doc. 90). On direct appeal, Vaska is entitled to the "new rule" under *Gibbons*, specifically in that the $5,000 is an excessive fine in violation of Article II, Section 22, of the Montana Constitution because it was imposed separate from any consideration of his ability to pay. Since the sentencing court found that Vaska is unable to pay the "OPD fee" ($1330.71) under Mont. Code Ann. § 46-8-113 and various "trial fees" ($1867.78) under Mont. Code Ann. § 46-18-232, 236; § 25-10-201; and § 3-1-317 (DC Doc. 88, p. 12), it follows that Vaska is also unable to pay the mandatory minimum $5000 fine. In other words, the $5000 fine is an illegal sentence provision that cannot be corrected by assessing Vaska's ability to pay.

Remand to the District Court to strike the illegal fine is the proper remedy here.

CONCLUSION

Because it was unreasonable to delay a probable cause determination for 21 days, this matter should have been dismissed by the District Court.

In the alternative, this matter should be remanded for sentencing to strike two illegal conditions: 1) alcohol monitoring on parole; and 2) $5,000 mandatory fine. First, the District Court was not authorized by the Montana Legislature to impose SCRAM as a condition of parole. Second, Vaska is entitled to this Court's recent decision in *Gibbons* holding the mandatory minimum $5,000 fine unconstitutional if an offender does not have an ability to pay.

Respectfully submitted this 18th day of April, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,684, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Joshua James Thornton
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APPENDIX

CERTIFICATE OF SERVICE

I, Joshua James Thornton, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-18-2024:

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