

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0661

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NANCY JEANNE CAHOON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Jennifer B. Lint, Presiding

APPEARANCES:

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

WILLIAM FULBRIGHT
Ravalli County Attorney
205 Bedford Street, Suite C
Hamilton, MT 59840

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

JENNIFER DWYER
Avignone, Banick & Williams
3825 Valley Commons Dr., Suite 6
Bozeman, MT 59718

ATTORNEY FOR DEFENDANT
AND APPELLANT

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STATEMENT OF THE ISSUE

Whether Appellant's claim that the district court violated her right to be present at a critical stage of the proceeding is properly before this Court when Appellant pled guilty only reserving her right to appeal the denial of her suppression motion, Appellant has not challenged the district court's order denying her suppression motion, and Appellant raises her right to be present claim for the first time on appeal.

STATEMENT OF THE CASE

On September 17, 2021, the State charged Appellant Nancy Cahoon by Information with felony criminal possession of dangerous drugs, misdemeanor criminal possession of drug paraphernalia, misdemeanor driving with a suspended or revoked license, and misdemeanor failure to have liability insurance in effect. (D.C. Doc. 3.) On September 23, 2021, Cahoon appeared for her arraignment with her counsel, Jason Sillstrop, and pled not guilty to all the charges. (D.C. Doc. 7.1.) The district court scheduled an omnibus hearing for October 14, 2021. (*Id.*) Cahoon and her counsel appeared for the hearing. The district court rescheduled the hearing for October 21, 2021. (D.C. Doc. 7.2.) Cahoon's counsel appeared for the rescheduled omnibus hearing, Cahoon failed to appear for the hearing, but signed the Omnibus Hearing Memorandum on October 20, 2021. (D.C. Docs. 7.3, 11.)

On November 29, 2021, Cahoon filed a motion to suppress evidence, arguing that the trooper who conducted the traffic stop of Cahoon, unlawfully extended the scope of the stop. (D.C. Doc. 17.) Although Cahoon did not contest that she gave the trooper consent to search her vehicle, she argued that her consent occurred when the trooper had no grounds to extend the scope of the initial traffic stop. (*Id.* at 6-7.) Cahoon attached the trooper's report documenting the investigative stop to her suppression motion as well as the DVD of the trooper's in-car video. (D.C. Docs. 17.1, 18.)

The State filed a brief opposing Cahoon's motion to suppress evidence. (D.C. Doc. 25.) The State argued that the trooper had particularized suspicion to initiate a traffic stop of Cahoon because she was driving a vehicle with an expired registration. The trooper quickly learned that Cahoon did not have a valid driver's license, did not have insurance, and had an active warrant for failure to appear. (*Id.* at 2-5.) Less than 11 minutes into the traffic stop, the trooper asked Cahoon for consent to search the vehicle, and Cahoon provided consent. (*Id.* at 4-5.) Cahoon did not file a reply brief. On January 10, 2022, the district court scheduled a hearing on Cahoon's suppression motion for January 31, 2022. (D.C. Doc. 24.)

On January 20, 2022, the district court held a status hearing. (1/20/22 Transcript of Hr'g [1/20/22 Tr.].) Defense counsel appeared for the status hearing, but Cahoon did not appear. (*Id.* at 3.) Defense counsel said he had good

communication with Cahoon, Cahoon understood she needed to be at the hearing, and he did not know why she was not there. (*Id.*) The court reminded the parties that the hearing on Cahoon’s suppression motion was set for January 31, 2022. (*Id.* at 3, 5.) The district court stated that Cahoon would “need to be here on the 31st. (*Id.* at 6.)

Cahoon’s counsel appeared for the suppression hearing on January 31, 2022, but Cahoon again failed to appear. (1/31/22 Hr’g Tr. [1/31/22 Tr.] at 3.) The district court took the suppression motion under advisement. (*Id.* at 5.)

On March 5, 2022, the district court issued a written order denying Cahoon’s motion to suppress evidence. (D.C. Doc. 30, attached to Appellant’s Br. as App. 2.) In denying the suppression motion, the district court explained:

Here, Trooper Barbera had particularized suspicion to seize the Defendant during all stages of the traffic stop. First, Trooper Barbera had particularized suspicion to make the traffic stop based on the vehicle’s expired registration. Second, he lawfully requested information from Defendant and entered her information into his computer, as a routine part of the traffic stop. Third, the information he received from Defendant and dispatch gave rise to particularized suspicion that Defendant was driving while suspended, had no insurance, and had an active Justice Court warrant. The Defendant argues that at this point in the investigation, “Trooper Barbera had all the information he needed to take [Defendant] in on the warrant, but he decided to walk around the vehicle and look inside to see if he could find a reason to extend the stop.” *Motion*, 2.

At this point, Trooper Barbera was awaiting backup in the form of Trooper Heaney’s arrival. *Ex. 1*, at 4. As Defendant had an active warrant, she was not free to leave before or after Heaney’s arrival. Therefore, the Defendant was still lawfully seized when Trooper Barbera asked for consent to search Here, while Trooper Barbera indicated a suspicion of illegal drug activity, the

duration of the stop was extended due to the Defendant's active warrant rather than due to Barbera's suspicion alone. The Defendant was not further detained due to suspicion regarding drugs, but because she awaited arrest on her warrant. The Defendant does not argue that she did not voluntarily consent to the search.

(Appellant's App. 2 at 6-7.)

Cahoon moved the district court to vacate her trial and schedule a change-of-plea hearing. Cahoon indicated that there was no plea agreement so she would be entering an open plea with the understanding that the State would agree to allow her to appeal the denial of her suppression motion. (D.C. Doc. 40.) On June 16, 2022, Cahoon filed a document entitled "Guilty Plea and Waiver of Rights." (D.C. Doc. 43.) The same day, Cahoon entered guilty pleas to felony criminal possession of dangerous drugs, misdemeanor possession of drug paraphernalia, driving with a suspended or revoked license, and driving without insurance. (6/16/22 Plea Change Hr'g [6/16/22 Tr.] at 5-6.) The State agreed that Cahoon could reserve her right to appeal the district court's denial of her motion to suppress evidence. (*Id.* at 4-5.)

The district court held a sentencing hearing on September 1, 2022. (9/1/22 Sent. Tr. [Sent. Tr.].) For the felony drug offense, the district court sentenced Cahoon to the Department of Corrections for 5 years with all but 34 days suspended. (*Id.* at 22.) For the misdemeanor offenses the district court imposed 6-month suspended sentences. (*Id.* at 21-22.)

STATEMENT OF THE FACTS

I. The traffic stop¹

On September 3, 2021, at about 6:43 p.m., Trooper Barbera of the Montana Highway Patrol was driving behind a Ford Focus and noticed that according to the vehicle's plate sticker, the vehicle's registration was expired. Trooper Barbera confirmed with dispatch that the vehicle's registration was expired and initiated a traffic stop. (D.C. Doc. 17.1 at 3.) When Trooper Barbera approached the driver, who he later identified as Cahoon, he told her the reason for the traffic stop. Cahoon responded that the car was not hers. She was house sitting for a friend, and he allowed her to borrow his car. (*Id.*)

Trooper Barbera asked Cahoon for her license, the vehicle registration, and proof of insurance. Cahoon fumbled around but could not produce the vehicle registration or proof of insurance. Cahoon claimed she had a driver's license and handed Trooper Barbera a Montana Identification card. Cahoon told Trooper Barbera that she did not believe her driver's license was suspended but added "it might be." (*Id.*) Trooper Barbera noticed that the car was littered with trash and there were multiple bags in the front and rear seat. Cahoon confirmed

¹ Since Cahoon pled guilty and did not show up for her suppression hearing, the facts of the traffic stop are taken from Trooper Barbera's report dated September 3, 2021, which Cahoon attached to her suppression motion as Exhibit 1. (D.C. Doc. 17.1.)

that the contents inside the vehicle belonged to her. (*Id.*) Cahoon could not provide the address of her residence. (*Id.* at 4.)

Trooper Barbera asked Cahoon to exit the vehicle while he ran her information through his mobile computer. Trooper Barbera confirmed that Cahoon's driver's license was suspended, and that Cahoon had an active warrant for failure to appear. Cahoon volunteered that she had been convicted for driving while suspended and had three prior convictions for no proof of insurance. Cahoon had a known history of drug use. (*Id.*) Cahoon asked Trooper Barbera if she could get her cigarettes. Trooper Barbera offered to retrieve her cigarettes from the vehicle, but Cahoon said she did not want him to get her cigarettes. (*Id.*)

Trooper Heaney arrived on scene to assist. Trooper Barbera asked Cahoon for her consent to search the vehicle. Cahoon provided consent and signed a consent form. Trooper Barbera advised Cahoon that she could withdraw her consent at any time. (*Id.*) During the vehicle search, Trooper Barbera found a used, broken, glass pipe with white residue inside. He also found a plastic baggie containing a white crystalline substance that appeared to be methamphetamine. Trooper Barbera conducted a field test on the substance and it tested positive for methamphetamine. Trooper Barbera arrested Cahoon on her outstanding warrant and for possession of methamphetamine and driving with a suspended license. (*Id.*)

II. The suppression hearing

At the start of the suppression hearing, the district court questioned defense counsel concerning the whereabouts of Cahoon. Defense counsel responded:

Your Honor, I have nothing to report on my client's whereabouts today. I do see Ms. Cahoon. She works at Albertson[s] quite a lot, so I am in very good contact with her. I do not know why she's not here today, Your Honor. As the Court knows, our staff has been out for a couple of weeks. However, that excuse is running dry. So, yeah, that's all the information I have.

(1/31/22 Tr. at 3.)

The State explained that it was ready to proceed with the hearing but it had concerns about proceeding without Cahoon being present. (*Id.*) The district court gave defense counsel time to try to locate Cahoon. (*Id.* at 3-4.) Defense counsel could not find Cahoon. At the State's suggestion, the district court took the matter under advisement and it did not issue a bench warrant for Cahoon's non-appearance. Instead, the court scheduled a status hearing and cautioned that if Cahoon failed to appear for that, the district court would issue an arrest warrant. (*Id.* at 5-6) The State explained that the only evidence it would have moved to admit at the hearing was Trooper Barbera's video of the stop and arrest. The district court responded that Cahoon had already attached the video to her suppression motion. (*Id.* at 6-7.)

Cahoon appeared for the status hearing on February 3, 2022. (2/3/22 Transcript of Status Hr'g at 3.) The district court had not yet ruled on Cahoon's

suppression motion. Cahoon did not request that the court still conduct an evidentiary hearing on her suppression motion. (*Id.*)

III. Change-of-plea hearing

At the beginning of the change-of-plea hearing defense counsel informed the district court that Cahoon was entering an open plea without the benefit of a plea agreement. Defense counsel had reviewed the waiver of rights form with Cahoon and was very comfortable that she understood everything they had reviewed. (6/16/22 Tr. at 3-4.) Cahoon affirmed that she understood the rights she would be waiving by pleading guilty. (*Id.* at 4-5.)

Defense counsel then informed the court:

So, Your Honor, as the Court remembers, we had this case coming up for a jury trial and we requested a bench trial not to adjudicate the facts but simply for Ms. Cahoon to be able to reserve her one right to appeal, *the motion to suppress that was denied by this Court*. Statutorily it does require an agreement from the prosecution and that the Court agree with that agreement, is the way I read the statute.

(*Id.* at 4 (emphasis added).) The prosecutor confirmed that the State agreed to allow Cahoon to reserve her right to appeal the denial of her suppression motion, and the district court assented. (*Id.* at 5.)

SUMMARY OF THE ARGUMENT

By pleading guilty, Cahoon waived her right to argue on appeal that the district court denied her right to be present at the time scheduled for the suppression hearing. Cahoon reserved her right to appeal the district court's denial of her suppression motion, but she did not raise that issue on appeal. Cahoon has therefore abandoned any claim that the district court erred in denying her suppression motion. Also, when Cahoon failed to appear for the suppression hearing, the district court did not hold a hearing. Instead, the district court took the matter under advisement. Cahoon had already provided the court with Trooper Barbera's video of the traffic stop and arrest and his report of the events to support her suppression motion.

Even if Cahoon had not waived the right to raise her right to be present claim by pleading guilty, Cahoon cannot argue that she reserved the right to raise her right to be present claim because she raises her claim for the first time on appeal. Cahoon cannot reserve her right to appeal a claim that she never raised in the district court. Also, even if Cahoon had not waived her right to be present claim by pleading guilty, she has offered no analysis of why plain error review is warranted. Since Cahoon has abandoned any argument that the district court erred in denying her suppression motion, it is impossible for her to establish that plain error review would be warranted if she had not waived her claim by pleading guilty.

ARGUMENT

I. The standard of review

When preserved for appeal, this Court’s review of whether a district court has violated a criminal defendant’s right to be present at all critical stages of the defendant’s trial is plenary. *State v. Heavygun*, 2011 MT 111, ¶ 7, 360 Mont. 413, 253 P.3d 897. This Court reviews unpreserved claims for plain error sparingly, on a case-by-case basis, after considering the totality of the circumstances. *State v. LaFournaise*, 2022 MT 36, ¶ 17, 407 Mont. 399, 504 P.3d 486. This Court will only invoke plain error review when a criminal defendant’s fundamental constitutional rights are implicated and failure to review the alleged error may result in “a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.” *Id.*, quoting *State v. Akers*, 2017 MT 311, ¶ 13, 389 Mont. 531, 408 P.3d 142. The appealing party “bears the burden of firmly convincing this Court” of the need to invoke plain error review. *LaFournaise*, ¶ 17, quoting *State v. George*, 2020 MT 56, ¶ 5, 399 Mont. 173, 459 P.3d 854.

II. Cahoon's claim that the district court denied her right to be present at a critical stage of the proceedings is not properly before this Court.

A. Cahoon waived her right to be present claim by pleading guilty.

This Court has long recognized that when a defendant voluntarily and knowingly pleads guilty to an offense, the plea constitutes a waiver of all non-jurisdictional defects and defenses, including claims of constitutional rights violations that occurred prior to the plea entry. *State v. Watts*, 2016 MT 331, ¶ 9, 386 Mont. 8, 385 P.3d 960 citing *State v. Lindsey*, 2011 MT 46, ¶ 19, 359 Mont. 362, 249 P.3d 491; *State v. Pavey*, 2010 MT 104, ¶ 11, 356 Mont. 248, 231 P.3d 1104; *State v. Kelsch*, 2008 MT 339, ¶ 8, 346 Mont. 260, 194 P.3d 670; *State v. Rytky*, 2006 MT 134, ¶ 7, 332 Mont. 364, 137 P.3d 530; *State v. Gordon*, 1999 MT 169, ¶ 23, 295 Mont. 183, 983 P.2d 377; *State v. Turcotte*, 164 Mont. 426, 524 P.2d 787 (1974).

This Court has explained that after a defendant enters a guilty plea, he may only attack the voluntary and intelligent character of his guilty plea but may not raise independent claims relating to prior alleged violations of constitutional rights. *Watts*, ¶ 9, citing *Gordon*, ¶ 23; *State v. Wheeler*, 285 Mont. 400, 948 P.2d 698 (1997); *State v. Hilton*, 183 Mont. 13, 597 P.2d 1171 (1979), *overruled on other grounds in State v. Deserly*, 2008 MT 242, 344 Mont. 468, 188 P.3d 1057. Cahoon has never attempted to withdraw her guilty plea or suggested that she wished to do so.

Here, before Cahoon pled guilty, she was aware that the district court had set the motion for a hearing, and that she had failed to appear for the hearing, because Cahoon appeared for the status hearing *after* the scheduled suppression hearing. At the status hearing the district court informed the parties that it intended to have a ruling on the suppression motion by the end of the week.

Also, the district court did not hold an evidentiary hearing on the suppression motion after Cahoon failed to appear. Rather, the district court took the suppression motion under advisement since Cahoon had already provided the district court with Trooper Barbera's report and the video of the stop. From the record, it does not appear there were any factual disputes that the district court needed to resolve through an evidentiary hearing. Prior to entering her guilty plea, Cahoon did not object to the district court's method for deciding the suppression motion.

And, pursuant to Mont. Code Ann. § 46-12-204(3), Cahoon only reserved her right to appeal the denial of her suppression motion. On appeal, Cahoon has not argued that the district court erred when it denied her suppression motion, which is the only argument she reserved the right to make on appeal. Finally, Mont. Code Ann. § 46-12-204(3) is not applicable to the issue Cahoon raised because a defendant can only reserve her right to appeal an adverse ruling on any specified pretrial motion. The statute does not apply to matters that a defendant never raised in the district court and the district court never ruled upon.

This Court should hold that Cahoon waived her right to raise a right to be present claim on appeal by entering a voluntary guilty plea.

B. Cahoon improperly raised her right to be present claim for the first time on appeal and plain error review is not appropriate.

For the first time on appeal, Cahoon argues that when she failed to show up for the time set for the suppression hearing, the district court violated her right to be present at a critical stage of the proceeding. Even if Cahoon had not waived her claim by pleading guilty, she has failed to prove that plain error review of her claim is warranted.

The state and federal constitutions provide a defendant with the right to be present at all critical stages of the proceedings against him. U.S. Const. amend. VI; *United States v. Gagnon*, 470 U.S. 522, 526 (1985); Mont. Const. art. II, § 24; *State v. Sinz*, 2021 MT 163, ¶ 35, 404 Mont. 498, 490 P.3d 97. This Court has explained that to determine whether the right to be present has been violated, it analyzes: “(1) whether the alleged violation occurred at a ‘critical stage’ of the proceedings; (2) whether the defendant had validly waived the right to be present; and (3) whether any violation of the right to be present was harmless error.”

State v. Zitnik, 2023 MT 131, ¶ 15, 413 Mont. 11, 532 P.3d 477.

A critical stage in the proceedings is “any step of the proceeding where there is a potential for substantial prejudice to the defendant.” *Id.* ¶ 16, quoting

Ranta v. State, 1998 MT 95, ¶ 17, 288 Mont. 391, 958 P.2d 670. When a defendant is not prejudiced by his absence from an event, this Court need not determine whether that event constituted a critical stage of the proceedings. *Sinz*, ¶ 35.

It is Cahoon's burden to establish that sparingly used plain error review is appropriate in her case because her claim that the district court denied her the right to be present at her suppression hearing: (1) implicates a fundamental constitutional right; and (2) failing to review this claim may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may implicate the judicial integrity of the process.

State v. Evans, 2012 MT 115, ¶ 25, 365 Mont. 163, 280 P.3d 871. But other than citing the plain error standard of review, Cahoon makes no plain error analysis. “[A] mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a miscarriage of justice is insufficient to implicate the plain error doctrine.” *State v. Gunderson*, 2010 MT 166, ¶ 100, 357 Mont. 142, 237 P.3d 74.

Instead, Cahoon asks this Court to assume she was prejudiced by her own failure to appear at the suppression hearing, without ever acknowledging that she never raised this issue in the district court. There are several problems with Cahoon's prejudice argument, not the least of which is her failure to challenge the district court's suppression order on direct appeal. By failing to appeal the one

issue she reserved her right to appeal, she has abandoned any argument that the district court's ruling is incorrect. *See Skinner v. Allstate Ins. Co.*, 2005 MT 323, ¶ 9, 329 Mont. 511, 127 P.3d 359 (A party abandons issues on appeal that the party does not brief.). Since Cahoon has abandoned any argument that the district court erred in denying her suppression motion, Cahoon was not prejudiced by her failure to show up for the evidentiary hearing.

Another problem with Cahoon's claim of prejudice is her request of this Court to simply assume that she did not know about the hearing so that is why she failed to appear. (Appellant's Br. at 22.) Cahoon, citing to *State v. Bekemans*, 2013 MT 11, ¶ 25, 368 Mont. 235, 293 P.3d 843, acknowledges that if she voluntarily failed to appear, then she waived her right to be personally present at the suppression hearing. Since Cahoon did not raise her right to be present claim in the district court, there are no facts developed about why Cahoon failed to appear, and the State had no ability to establish in the district court that Cahoon had notice of the hearing. Similarly, there are no facts for Cahoon to rely upon concerning what she might have said or done at a suppression hearing.

Cahoon incorrectly asserts that her attorney stipulated to the admission of the video of the traffic stop without the officer laying the proper foundation. Cahoon, though, attached Trooper Barbera's video of the stop and arrest and his report as exhibits to her suppression motion. (See D.C. Docs. 17.1, 18.) The video

was in the record because Cahoon placed it in the record. She cannot now claim that she was prejudiced by something she herself wanted the district court to view. And even if Cahoon could overcome that hurdle, she cannot establish how her presence at a hearing would have prevented the State from introducing the video of the traffic stop. At the time of the suppression hearing, Trooper Barbera was available to testify. Presumably, the prosecutor and the trooper could have laid the foundation for admission of the video had that been necessary.

Cahoon further asserts that had she been present for a suppression hearing, she would have pressed defense counsel to challenge her consent to search the vehicle. (Appellant's Br. at 27.) But in Cahoon's brief in support of her motion to suppress, she conceded that she *was not* arguing that she did not provide consent to search the vehicle. Instead, she was arguing that Trooper Barbera had no grounds to extend her traffic stop. (D.C. Doc. 17 at 7.) As the district court correctly observed in its order denying Cahoon's suppression motion, there is no question that Trooper Barbera had particularized suspicion to initiate a traffic stop. Upon doing so, Trooper Barbera quickly learned that Cahoon was driving without proof of insurance, her license was suspended, and she had an outstanding warrant. Thus, Cahoon's assertion that a hearing was necessary so she could testify about whether she felt free to leave fails at the outset because she did not have a valid license to drive and she had an outstanding warrant, so she legally was not free to leave.

Importantly, if Cahoon really wanted to have an evidentiary hearing on her suppression motion, then all she had to do was ask for one at the February 3, 2022 status hearing. At that point, the district court had not yet ruled on her suppression motion. Instead, Cahoon pled guilty and only reserved her right to appeal the denial of her suppression motion. Cahoon *did not* reserve her right to appeal the issue presented here because she never raised that issue in the district court.

Even if Cahoon had not waived her right to be present claim on direct appeal by pleading guilty, she has failed to establish that plain error review of her unpreserved claim is warranted.

CONCLUSION

Cahoon waived her claim that the district court violated her right to be present at a critical stage of the proceeding by entering a voluntary guilty plea. Even if she had not waived the claim by pleading guilty, she waived the claim by not raising it in the district court and has failed to establish that the extraordinary

remedy of plain error review is warranted in her case. This Court should affirm Cahoon's convictions and the sentences the district court imposed.

Respectfully submitted this 26th day of April, 2024.

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

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

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,256 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-26-2024:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Nancy Jeanne Cahoon
Service Method: eService

William E. Fulbright (Govt Attorney)
205 Bedford St #C
Hamilton MT 59840
Representing: State of Montana
Service Method: eService

Jennifer Ann Dwyer (Attorney)
3825 Valley Commons Drive
Suite 6
Bozeman MT 59718
Representing: Nancy Jeanne Cahoon
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Tammy K Plubell
Dated: 04-26-2024