No. DA 24-57

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * * * * * *

JACE CADE ZEILER,

Petitioner/Appellant,

vs.

STATE OF MONTANA,

Respondent/Appellee.

* * * * * * * * * * * * *

APPELLANT'S REPLY BRIEF

* * * * * * * * * * * * *

On Appeal from the Thirteenth Judicial Court of the State of Montana, County of Yellowstone, Honorable Mary Jane Knisely, DV-56-2021-0432

* * * * * * * * * * * * *

APPEARANCES:

ARNDORFER LAW FIRM, P.C
Brad L. Arndorfer, Esq.
PO Box 176
Boyd, MT 59013

(406)-252-3911 FAX (866) 527-7323
brad@arndorferlaw.com

Attorney for Petitioner/Appellant

Sarah L. Hyde
Yellowstone County Attorney's Office
P.O. Box 35025
Billings, MT 59107
shyde@yellowstonecountymt.gov

Austin Miles Knudsen (Govt Attorney)
Cori Losing, Assistant AG
215 N. Sanders
Helena MT 59620
Cori.Losing@mt.gov
Attorney's for Respondent/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

I. THE COURT'S LETTING THE PETITION LANGUISH VIOLATED DUE PROCESS.

It is conceded that this issue of constitutional violation was not brought before the District Court. We ask this Court to address the issue regardless. Justice delayed is justice denied.

> "It is axiomatic that 'justice delayed is justice denied.' " *State ex rel. Carlin v. Fifth Jud. Dist. Ct.,* 118 Mont. 127, 135, 164 P.2d 155, 159 (1945); *cf. Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 816, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988) ("Perpetual litigation of any issue ... delays, and therefore threatens to deny, justice."); *Kloss v. Edward D. Jones & Co.,* 2002 MT 129, ¶ 58, 310 Mont. 123, 54 P.3d 1 (Nelson, Trieweiler, Leaphart, & Cotter, JJ., specially concurring) ("Constitutional rights that cannot be enforced are illusory. It is as if those rights cease to exist as legal rights."). Evading and delaying a decision on the merits of Plaintiffs' constitutional claims, and requiring *260 them to file seriatim challenges to "innumerable" statutes—each with the same, common legal issue—denies Plaintiffs access to justice just as clearly and as surely as if we had simply padlocked the courthouse doors.
>
> *Donaldson v. State,* 2012 MT 288, ¶ 78, 367 Mont. 228, 259–60, 292 P.3d 364, 384

The State has taken the position that the court can address facial constitutional challenges but not as applied constitutional challenges brought for the first time on appeal citing *State v. Whalen,* 2013 MT 26, ¶ 26, 368 Mont. 354,

295 P.3d 1055. That is not the status of the caselaw. The *Whalen* case cited the *Strong* case, supra, in addressing this issue. The decision States:

> Our decision in *Lenihan* permits a defendant to challenge the legality of his sentence for the first time on appeal. *State v. Ellis,* 2007 MT 210, ¶ 7, 339 Mont. 14, 167 P.3d 896. In so doing, however, we have differentiated between an "illegal" sentence and an "objectionable" sentence. For example, in *State v. Heddings,* 2008 MT 402, ¶¶ 19–20, 347 Mont. 169, 198 P.3d 242, the defendant failed to object at sentencing to the district court's imposition of polygraph testing as a condition of the defendant's probation. We rejected the defendant's contention **850 that the polygraph test amounted to an illegal condition, rather than merely an objectionable condition. *Heddings,* ¶ 20. We thus refused to review the defendant's objection raised for the first time on appeal. *Heddings,* ¶ 21.
> ¶ 12 Similarly, not all constitutional challenges to a sentence may be raised for the first time on appeal. We allowed the defendant in *Ellis* *420 to raise the constitutional challenge to the requirement that he repay the costs of his court appointed counsel. The defendant contended that the statute authorizing the repayment condition, § 46–8–113, MCA (2005), violated the Equal Protection Clause of the United States and Montana Constitutions. The defendant's facial challenge alleged, in other words, that an illegal statute supported his illegal sentence. We reviewed the defendant's equal protection challenge raised for the first time on appeal under these circumstances. *Ellis,* ¶ 7. We premised this review on the alleged illegality of the defendant's sentence.
>
> State v. Strong, 2009 MT 65, ¶¶ 11-12, 349 Mont. 417, 419–20, 203 P.3d 848, 849–50

This line of cases dealt with whether a sentence was illegal as opposed to objectionable. This is not a sentencing issue. The proper standard in this instance is

whether this Court will review the issue under the plain error doctrine. Generally, this Court does not address issues raised for the first time on appeal. However, when a defendant's fundamental rights are invoked, this Court may choose to invoke the common law plain error doctrine where failing to review the claimed 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 *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79). Plain error review is discretionary and should be applied on a case-by-case basis. *State v. Reim*, 2014 MT 108, ¶ 29, 374 Mont. 487, 323 P.3d 880).

The discretion on this matter lies squarely with the court. The petitioner's aim is not to dismantle Post Conviction Relief statutes but rather to secure fair due process for such petitions through this appeal. For a court to delay action on a petition for nearly two years, especially one filed by a pro se litigant, is a violation of due process. The petitioner's only recourse would be to seek relief from this Court, either through a writ of supervisory control or another suitable writ, to compel the court to address the petition. However, such actions are often beyond the means of most pro se litigants.

We respectfully request this Court to set forth a guideline stipulating that a court must render a decision within 60 days of the petition's filing, either by dismissing the petition or requiring a response, to prevent any infringements on due process rights.

II. THE COURT SHOULD HAVE DEFAULTED THE STATE AND GRANTED THE PETITION FOR MISSING COURT ORDERED DEADLINES

The State's response to this issue is confusing. They first claim the issue was not raised below. (Response P 28). We initially and moved for default under Rule 55 Mont. Rules of Civ. Pro. (Doc 14, P1, ¶21). It was clearly raised.

Both briefs have adequately and appropriately outlined the legal issues as to when the Rules of Civil Procedure should or should not apply in a postconviction relief petitions. The only other matter to address on this issue is a claim by the State that rule 12(a)(2), Mont. Rules of Civ. Pro. does not apply because there is no proof the petition was served. (Response P 29).

That doesn't make sense. The time does not start running until the court orders a response to the petition. The court ordered a response to the petition. (Doc. 9). The State and Attorney General were clearly served with that order as is reflected on the order and the time would begin to run when the court issued the

order. In fact, the State had been served a copy of the petition. They certainly did not request a copy in filing their response, when they eventually did so.

Finally, the State argues that Zeiler did not present sufficient evidence of a right to relief under rule 12. (Response P 31). Clearly under the statutes the court had found reasonable grounds for the granting of the petition and thus has ordered a response. That argument makes no sense.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

1. ADVISING A DEFENDANT HE HAS A RIGHT TO SUBSTITUTE A JUDGE.

The State attempts to dispute certain facts in this case. Despite everyone, including Megan Benson, confirming that Mr. Zeiler did not review the discovery until after being assigned, the State suggests the possibility that Zeiler had reviewed it earlier with the first assigned attorney, Mr. Isham. However, Mr. Isham did not testify nor provide an affidavit. Zeiler testified that he has no recollection of ever meeting Mr. Isham, and there has been no challenge to this statement. Furthermore, Mr. Zeiler testified that he was never informed of his right to request a judge substitution, a fact which no witness has contradicted.

The State further argues that Zeiler didn't substitute Knisely in the postconviction relief that he filed pro se. Perhaps because he's never been informed of his right to substitute a judge. In this case it is uncontroverted that the defendant never discussed his case with any public defender until August 2019. He was arrested in April 2019. An omnibus was held when he had never received discovery. It is imperative that this court ensure a defendant will not go past the first 10 days without meeting counsel and discussing preliminary matters such as substitution of judge. It is ineffective assistance for counsel to simply blow this off. Assigning counsel after 10 days cannot be countenanced when these vital deadlines pass.

2. WAIVING OF ALL DEFENSES AT AN OMNIBUS WITHOUT GIVING THE DEFENDANT THE DISCOVERY OR DISCUSSING THE CASE

On this issue the State argues that failing to present a certain defense is not ineffective assistance of counsel. They cite, and reference Judge Knisely's cite of *State v. Pelletier*, supra, for the proposition that it is not ineffective assistance of counsel to not use certain defenses.

> Here, Pelletier asserts on various grounds that defense counsel's failure to challenge his fitness to proceed or assert his previously noticed mental disease or disorder defense constituted IAC. However, his IAC claim is a non-record-based claim not amenable to review on

> direct appeal and in any event moot in light of the balance of this opinion.
>
> *State v. Pelletier*, 2020 MT 249, ¶ 40, 401 Mont. 454, 478, 473 P.3d 991, 1007, as amended (Oct. 27, 2020)

The case they cite doesn't stand for the proposition at all. In fact, it was never addressed. Certainly, counsel has a right to consult with his client and agree to pursue various defenses, or opt not to. It is ineffective assistance of counsel to waive all of these defenses without even meeting the client and discussing the defenses. It is ineffective assistance of counsel to not go over the discovery prior to an omnibus. There simply is no justification for holding an omnibus hearing without reviewing all discovery with the client, discussing witnesses, exhibits and defenses. There is no testimony of record that contradicts Mr. Zeiler's statement he does not remember meeting Mr. Isham and did not have the discovery until it was sent to him before his meeting with Megan Benson in August. The omnibus was in June.

3. THE WAIVER OF RIGHTS AND PLEA AGREEMENT WAS PRESENTED AT THE TIME OF CHANGE OF PLEA AND THERE WAS NEVER A DISCUSSION OF LESSER INCLUDED OFFENSES.

The State seems to indicate Megan Benson discussed lesser included offenses with Mr. Zeiler. Megan Benson never met with the defendant and

discussed lesser included offenses. (TR. P. 128). She did not know about her obligation of discussing lesser included offenses.

> Q. And would you agree that Mr. Zeiler's rights were violated if he wasn't even asked about, or discussed with -- about lesser included offenses with you or the judge?
> A. I don't know the answer to that.
> (Tr. P 130).

There is absolutely nothing in the record to indicate anything other than she didn't think about it and didn't include any lesser included offenses in the plea agreement. There is nothing in the record saying anyone discussed lesser included offenses with Mr. Zeiler. Judge Harris never discussed it at the time of the change of plea.

The State has not argued to overrule *State v. Rave*, 2005 MT 78, 326 Mont. 398, 109 P.3d 753 or its line of cases. Their argument that there are no lesser included offenses under any set of facts to the charge of kidnapping is simply without any merit. A defendant has a right, and defense counsel has an obligation, to make sure the defendant is informed of the charges and all possible alternatives at trial.

4. COUNSEL NEVER PROVIDED THE PRESENTENCE INVESTIGATION TO THE DEFENDANT NOR GAVE HIM THE OPPORTUNITY TO REVIEW AND REBUT IT.

The State has no viable defense on this issue. They say Megan Benson testified she usually goes over the PSI with her defendants. Yet she clearly testify she did not meet Mr. Zeiler prior to the change of plea, and she did not meet him prior to sentencing. She certainly had no idea if he had ever received the presentence investigation. If she didn't meet with them prior to being sentenced how could she go over it with him? The State wants to point the finger at Mr. Zeiler saying he is the one who should have gotten letters of reference and called witnesses at his sentencing. There is absolutely no testimony any of this was discussed with him. Effective Counsel lines these things out for the client.

The uncontroverted testimony is that Mr. Zeiler has never seen a copy of this presentence investigation, including up to the time of the hearing in this matter.[1] This can't be anything but ineffective assistance of counsel. *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861.

CONCLUSION

[1] He finally contacted the Department Of Corrections and received a copy during this appeal.

We ask the court to grant the Petition. Mr. Zeiler requests to withdraw his no contest plea on the kidnapping charge and for resentencing on the other charges to which he plead guilty.

RESPECTFULLY SUBMITTED this 14th day of June, 2024.

/s/ *Brad L. Arndorfer*
BRAD L. ARNDORFER

CERTIFICATE OF COMPLIANCE

The Appellant Hereby gives notice pursuant to Rule 27(d) that this Brief complies with the rules in that:

1. The document is regularly spaced using 14 point times new roman font.

2. The document contains 2595 Words by Microsoft Word count.

Dated this 14th day June, 2024.

/s/ *Brad L. Arndorfer*
BRAD L. ARNDORFER

CERTIFICATE OF SERVICE

I, Brad L. Arndorfer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-14-2024:

Sarah L. Hyde (Govt Attorney)
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Cori Danielle Losing (Govt Attorney)
215 North Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically Signed By: Brad L. Arndorfer
Dated: 06-14-2024