IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0501

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES COLBY SMITH,

Defendant and Appellant.

ANDERS BRIEF

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County,
The Honorable Danni Coffman, Presiding

APPEARANCES:

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Introduction

Upon conscientious examination of the record below, counsel hereby advises this Court that Appellant James Colby Smith (Smith) has no non-frivolous challenges to his conviction and sentence on direct appeal. The undersigned counsel thus moves this Court to allow counsel to withdraw from representation of Smith in this appeal in accord with *Anders v. California*, 386 U.S. 738 (1967) and Mont. Code Ann. § 46-8-103(2).

Statement of the issue

Whether undersigned counsel should be permitted to withdraw from this appeal in accord with the criteria established by the United States Supreme Court in *Anders*.

Statement of the case and facts

Smith was charged by Information with Count I, criminal endangerment, a felony, in violation of Mont. Code Ann. § 45-5-207(1); Count II, criminal possession of dangerous drugs, a felony, in violation of Mont. Code Ann. § 45-9-102; and Count III, resisting arrest, a misdemeanor, in violation of Mont. Code Ann. § 45-7-301(1). (D.C. Doc. 3.)

Regarding Count I, the State alleged Smith engaged in a high-speed car chase with law enforcement and almost caused a head-on collision. (D.C. Doc. 1 at 3-4.) Regarding Count II, the State alleged a subsequent search of Smith's person produced a bag containing a clear crystalline substance that tested presumptively positive for methamphetamine. (D.C. Doc. 1 at 4.) Finally, regarding Count III, the State alleged Smith knowingly, *inter alia*, attempted to prevent peace officers from effecting arrest by creating a risk of causing physical injury to said peace officers. (D.C. Doc. 1 at 3-4.) Smith pled not guilty. (D.C. Doc. 9.)

Smith ultimately entered into a global Mont. Code Ann. § 46-12-211(1)(c) plea agreement to resolve multiple pending criminal matters. (D.C. Doc. 17.) Relevant to the instant appeal, Smith agreed to plead guilty to Counts I, II, and III of the Information. (D.C. Doc. 17 at 2.) Regarding Counts I and II, the parties agreed Smith should be committed to the Department of Corrections for a concurrent period of three years, with no time suspended. (D.C. Doc. 17 at 2.) Regarding Count III, the parties agreed Smith should be committed to the

Flathead County Detention Center for a period of six months, with all time suspended, and concurrent to Counts I and II. (D.C. Doc. 17 at 2.)

Smith proceeded to change his plea pursuant to the above-referenced plea agreement. (CoP Hrg. Tr. at 6-7.) The court accepted Smith's pleas of guilty and ordered a PSI report. (CoP Hrg. Tr. at 14.)

A Probation and Parole officer interviewed Smith. The PSI report recounted Smith's juvenile and adult criminal histories. (D.C. Doc. 18.)

Smith proceeded to sentencing on July 12, 2023. Upon inquiry from the court regarding the PSI report, Smith's counsel moved to strike Smith's juvenile criminal history from the report and argued that Probation and Parole should generate a new PSI report. (Sent. Hrg. Tr. at 20.) Counsel argued Probation and Parole did not comply with Mont. Code Ann. § 41-5-216(5)(b) in obtaining Smith's juvenile record. (Sent. Hrg. Tr. at 20-22.)

Upon inquiry from the court, Smith's counsel moved to continue Smith's sentencing in order to address the PSI report. (Sent. Hrg. Tr. at 24.) The court inquired of Smith, and Smith confirmed he wished to proceed with sentencing—"I would like to proceed today." (Sent. Hrg. Tr. at 25.) The court ultimately sentenced Smith consistent with the

plea agreement. (Sent. Hrg. Tr. at 27-28; D.C. Doc. 21, attached as Exhibit A.) It is from this judgment Smith now appeals.

Standards of review

This Court reviews a "district court's interpretation and application of a statute *de novo*." *State v. McCurdy*, 2024 MT 180, ¶ 12, 417 Mont. 517, __ P.3d __, *quoting State v. Edmundson*, 2014 MT 12, ¶ 12, 373 Mont. 338, 317 P.3d 169. This Court reviews for legality a criminal sentence imposed by a district court. *McCurdy*, ¶ 12, *citing State v. Thompson*, 2017 MT 107, ¶ 6, 387 Mont. 339, 394 P.3d 197.

Argument

I. Undersigned counsel should be permitted to withdraw from this appeal in accord with *Anders*.

In *Anders*, the United States Supreme Court concluded when counsel on appeal finds the case to be wholly frivolous after a conscientious examination, counsel should advise the court and move to withdraw. *Anders*, 386 U.S. at 744. The request to withdraw must be "accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. This brief addresses those potential matters.

Furthermore, in the realm of appellate criminal defense practice, a dilemma arises between the movant's duty of diligence to his or her client and duty of candor before the Court. The United States Supreme Court addressed this dilemma as follows:

> We interpret the discussion rule [of *Anders*] to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached rather, we view the rule as an attempt to provide the court with 'notice' that there are facts on record or cases or statutes on point which would seems to compel a conclusion of no merit.

McCoy v. Ct. of Appeals of Wisconsin, District I, 486 U.S. 429, 440 (1988).

Thus, the appellate defender, while dutifully reporting to the Court that no merit exists in the appeal, cannot argue against his or her client's position. It is a tenuous balance. Here, undersigned counsel is compelled by his duty of candor in accord with *Anders* to provide this Court with notice that diligent research has yielded just such a result. No non-frivolous issues are present in this appeal.

II. The record might arguably support certain appellate issues; specifically, whether the district court erred in including Smith's youth court records in the PSI report without an order from the Youth Court finding good cause.

The Montana Youth Court Act (Act) provides for "supervision, care, rehabilitation, detention, competency development, and community protection for youth before they become adult offenders[.]" Mont. Code Ann. § 41-5-102(2)(b). The "Youth Court Act vindicates society's heightened interest in enabling members of the younger generation 'to reach their full potential'" through such procedures as requiring that "relevant records be sealed upon [a] youth's eighteenth birthday, allowing the young person to enter adult society with a clean slate rather than forever branded by the contact with the justice system and dogged by the debilitative effects of a record." *McCurdy*, ¶ 14, *quoting In re S.G.-H.M*, 2021 MT 176, ¶ 19, 404 Mont. 531, 490 P.3d 1248 (citations omitted).

With certain exceptions not applicable here, "[f]ormal and informal youth court records, law enforcement records, and department records . . . that pertain to a youth covered by this chapter must be physically sealed on the youth's 18th birthday." Mont. Code Ann. § 41-5-216(1). After such records are sealed, "they are not open to inspection

except, on order of the youth court, for good cause to . . . adult probation and parole staff preparing a presentence report on an adult with an existing sealed youth court record[.]" Mont. Code Ann. § 41-5-216(5)(b). "A person who discloses or accesses a formal youth court record, an informal youth court record, or a department record in violation of 41-5-215 or 41-5-216 is guilty of a misdemeanor and shall be fined $500." Mont. Code Ann. § 41-5-221.

"Montana has long allowed the use of reports of presentence investigations for sentencing purposes." *McCurdy*, ¶ 16, *quoting State v. Radi*, 185 Mont. 38, 41, 604 P.2d 318, 320 (1979) (citations omitted). Juvenile records may be included in a PSI and considered by a court at sentencing because the information in a PSI is not publicly available. *McCurdy*, ¶ 16, *citing State v. Phillips*, 2007 MT 117, ¶ 21, 337 Mont. 248, 159 P.3d 1078, *citing Radi*, 185 Mont. at 44, 604 P.2d at 322.

In *McCurdy*, defendant argued that because the Youth Court did not order his juvenile records to be unsealed and released upon the requisite finding of good cause, release of the records to Probation and Parole, the inclusion of the records in the PSI report, and the district court's consideration of the records were illegal. *McCurdy*, ¶ 17.

This Court observed when ordering a PSI report, a district court acts only within the district court's jurisdiction. *McCurdy*, ¶ 22. The court had no authority in that capacity to consider a request to unseal and release McCurdy's records or to authorize their release after-the-fact. *McCurdy*, ¶ 22. Nonetheless this Court considered whether, even if the proper procedure was not followed, the release of McCurdy's youth court records affected his substantial rights or caused prejudice. *McCurdy*, ¶ 23.

This Court recognized, "[w]e will not reverse a case 'by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.'" *McCurdy*, ¶ 24, *quoting* Mont. Code Ann. § 46-20-701(1). McCurdy entered into a plea agreement with the State with the advice of counsel. In accordance with that agreement, the State recommended a six-year deferred imposition of sentence, and the district court imposed the jointly recommended sentence. This Court found no other relation to the inclusion of the records in McCurdy's PSI report to any specific harm or prejudice to McCurdy. He received the benefit for which he bargained and was not asking to be resentenced. This Court affirmed the order

denying his motion to strike the records as harmless error. *McCurdy*, ¶ 24.

Pursuant to the foregoing authorities, Smith may wish to argue the district court erred in including his youth court records in the PSI report without an order from the Youth Court finding good cause.

Conclusion

Conscientious examination of the record, along with thorough research of the statutes and cases on point, seems to compel a conclusion that Smith's appeal has no merit. This Court should grant the undersigned's motion to withdraw as counsel on direct appeal.

Respectfully submitted this 23rd day of September 2024.

/s/ *Joseph P. Howard*
Joseph P. Howard
Joseph P. Howard, P.C.

Certificate of compliance

Pursuant to Mont. R. App. P. 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this opening 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 less than 10,000 words, not averaging more than 280 words per page, excluding the certificate of compliance.

/s/ *Joseph P. Howard*
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Appendix

CERTIFICATE OF SERVICE

I, Joseph Palmer Howard, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 09-23-2024:

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