

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0142

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHEYENE LEILANI-AMBER ZIELIE,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Eighth Judicial District Court,  
Cascade County, The Honorable David Grubich, Presiding

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## **STATEMENT OF THE ISSUES**

1. Whether the district court erred when it denied Zielie's motion to dismiss her revocation proceeding.
2. Whether Zielie is entitled to 66 days of credit for time she served prior to her original sentence.

## **STATEMENT OF THE CASE**

Pursuant to a plea agreement, Appellant Cheyene Leilani-Amber Zielie pleaded guilty to Criminal Possession of Dangerous Drugs, a felony, in violation of Mont. Code Ann. § 45-9-102.<sup>1</sup> (Docs. 2, 20, 23, 25.) At that time, the district court committed Zielie to the Department of Corrections (DOC) for a suspended three-year term subject to the conditions imposed in First Judicial District Court, Lewis and Clark Cause No. DDC-14-022. (Docs. 23, 25.) The district court did not grant credit for any of the days Zielie served during her criminal proceeding. (Doc. 25.)

Nearly 18 months later, the State petitioned to revoke Zielie's sentence, but after Zielie regained contact with her probation officer, the State filed a motion to dismiss with prejudice asserting that "the petition to revoke is no longer

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<sup>1</sup> In exchange for Zielie's guilty plea, the State dismissed the two other charges: Criminal Possession of Drug Paraphernalia, a misdemeanor, in violation of Mont. Code Ann. § 45-10-103 and Obstructing a Peace Officer or Other Public Servant, a misdemeanor, in violation of Mont. Code Ann. § 45-7-302. (Docs. 2, 20.)

necessary.” (Docs. 26, 27, 30 at 1.) The district court subsequently dismissed “the above-captioned case” with prejudice. (Doc. 31.)

Less than a month later, the State petitioned to revoke Zielie’s suspended sentence. (Docs. 33, 34.) After Zielie admitted true to various violations, her counsel filed a motion to dismiss, arguing *res judicata* precluded the district court from revoking Zielie’s sentence since Zielie’s case had been dismissed with prejudice. (1/4/23 Tr. at 3-4; Doc. 90.) The district court disagreed with Zielie, denying her motion, revoking her sentence, and sentencing Zielie to DOC for 3 years with credit for time served during the revocation proceeding and elapsed time. (1/4/23 Tr. at 7-11; Docs. 95, 96.) The district court’s dispositional order did not reference the 66 days Zielie previously served. (Doc. 96.) Zielie timely appeals. (Doc. 101.)

### **STATEMENT OF THE FACTS**

On March 3, 2021, the State petitioned to revoke Zielie’s suspended sentence, alleging that Zielie had violated the conditions of her suspended sentence by absconding and not staying in contact with her probation officer for a period of time. (Docs. 26, 27.) Three weeks later, however, the State moved the district court for an “order dismissing the above-captioned case with prejudice in the interests of justice” because Zielie had “regained contact and compliance with probation and

parole and the petition to revoke is no longer necessary.” (Doc. 30.) Based on the State’s motion, the district court issued its order dismissing “the above-captioned case . . . with prejudice, in the interests of justice.” (Doc. 31.)

Although Zielie continued to report to her probation officer, she violated her probation by committing several new offenses in May 2021. (*See* Doc. 33.) The State petitioned to revoke Zielie’s suspended sentence when she was arrested for criminal possession of dangerous drugs, aggravated driving under the influence (DUI), DUI, and open container. (Doc. 33 at 2.) Over the next 14 months, the State filed 5 additional reports of violation, all alleging additional violations of her suspended sentence. (Docs. 41, 51, 72, 77.) Ultimately, Zielie admitted true to several of these violations. (5/18/22 Tr. 4 at 10-15; Doc. 76.)

Prior to the disposition hearing, Zielie asserted that her case had been dismissed with prejudice in April 2021. (11/2/22 Tr. at 3-4.) At the hearing, Zielie argued that “the State said she was in compliance and moved to dismiss, but instead of moving to dismiss the petition, they sought and obtained an order dismissing the case with prejudice.” (*Id.* at 3.) Although Zielie “underst[oo]d that what the State likely sought was simply to dismiss the petition,” Zielie argued that “we’re stuck with the papers we have, and the order says dismissing the case with prejudice” so Zielie requested time to file a formal motion to dismiss. (*Id.* at 4, 5-6.)

In response, the State explained that the grounds for dismissal were clearly that Zielie regained compliance with her conditions rendering the petition to revoke unnecessary. (*Id.* at 4.) The State further argued that it did not believe that the district court, after a conviction, had the authority to dismiss that conviction with prejudice. (*Id.* at 5.)

Zielie filed her formal motion to dismiss<sup>2</sup> on December 2, 2021. (Doc. 90.) Zielie argued that *res judicata* precluded the State from filing a subsequent petition to revoke after the district court's order dismissed Zielie's case with prejudice. (Doc. 90 at 1-2.) As Zielie explained "[t]he effect of the State obtaining a prejudicial dismissal is that this litigation is now a nullity, and there is no valid legal basis for the Court to maintain jurisdiction on this Petition or [Zielie]." (Doc. 90 at 2-3.)

At the hearing on Zielie's motion, Zielie reiterated her argument that the pending revocation petition has no effect, and further argued:

had the State intended to seek correction of an order, either because they filed the motion with improper words and phrases, or because they felt that an undue injustice was being performed, they had the time to do that, to seek a correction within 120 days, or to appeal the order. They did not[.]

(1/4/23 Tr. at 4.) In response, the State argued that the error was a clerical error, explaining the order "should have said motion and order to dismiss the petition for

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<sup>2</sup> The State did not respond in writing to Zielie's motion to dismiss. (1/4/23 Tr. at 3-4.)



revocation, not to dismiss the case.” (*Id.* at 5.) Further, the State challenged whether the court had authority to issue an order that effectively dismissed a conviction and judgment and sentence. (*Id.* at 5-6.)

The district court explained that it was “looking for . . . a true reflection of what the [c]ourt intended to do here.” (*Id.* at 7.) Relying on *State v. Winterrowd*, 1998 MT 74, 288 Mont. 208, 957 P.2d 522, the district court explained that it had the authority to issue an order nunc pro tunc modifying a judgment so long as the “error [is] apparent on the face of the record.” (*Id.* at 8.) After reviewing the State’s motion to dismiss, the district court explained that it reflects the “true intent of what was going on,” and that “intent was that this petition to revoke wasn’t necessary because she’s regained contact and is in compliance.” (*Id.* at 8-9.) To the district court, then, the true intent of the district court’s order is that the *petition* was being dismissed, not the “case.” (*Id.* at 10-11.) The district court further found that this was supported by the fact that Zielie had appeared multiple times without raising the dismissal issue, making it appear that “everyone in this case proceeded with the understanding that it hadn’t been dismissed.” (*Id.* at 10.)

### **SUMMARY OF THE ARGUMENT**

The district court did not err when it denied Zielie’s motion to dismiss her revocation proceeding. The record clearly supports that the State’s, and

correspondingly the district court's, intent was to dismiss with prejudice the March petition to revoke, not to dismiss Zielie's case with prejudice. Nor did the district court have the authority to dismiss Zielie's case with prejudice, at that stage of the proceedings, because doing so would have effectively dismissed Zielie's conviction and sentence. Because the district court had the authority to preside over the State's subsequent, and different, petition to revoke, the district court correctly denied Zielie's motion to dismiss.

Without agreeing to all the arguments and facts advanced by Zielie, the State concedes that this matter should be remanded to the district court with instructions to amend Zielie's original judgment to reflect credit for 66 days Zielie served during her underlying criminal proceeding.

### **STANDARD OF REVIEW**

This Court reviews *de novo* a district court's denial of a motion to dismiss. *In re A.D.T.*, 2015 MT 178, ¶ 10, 379 Mont. 452, 351 P.3d 682.

This Court employs *de novo* review “[w]hen the issue presented is whether the district court had authority to take a specific action.” *State v. Ellsworth*, 2023 MT 8, ¶ 7, 411 Mont. 213, 523 P.3d 527 (quoting *State v. Tippetts*, 2022 MT 81, ¶ 9, 408 Mont. 249, 509 P.3d 1). Similarly, this Court reviews *de novo* a

challenge to the district court's jurisdiction. *State v. Martz*, 2008 MT 382, ¶ 16, 347 Mont. 47, 196 P.3d 1239.

This Court reviews a criminal sentence for legality. *State v. Southern*, 2022 MT 203, ¶ 6, 410 Mont. 330, 519 P.3d 1.

### **ARGUMENT**

**I. The district court did not err when it denied Zielie's motion to dismiss the revocation proceeding.**

**A. Zielie's claim is not appropriate for appellate review because she presented a different legal theory in support of her claim to the district court.**

On appeal, Zielie, equating the dismissal of a revocation petition to the dismissal of a criminal information, argues that the district court lacked jurisdiction to reinstate Zielie's revocation proceeding after the district court had dismissed Zielie's case with prejudice. Before the district court, however, Zielie argued that the district court lacked jurisdiction to revoke Zielie's sentence based on *res judicata*. Allowing a party to raise new arguments or change its legal theory on appeal "is fundamentally unfair" to the district court, which would be faulted for failing to rule on an issue it never had the opportunity to consider. *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 207.

Zielie seemingly raises her different legal theory under the guise of being able to raise jurisdictional issues for the first time on appeal. Even so, this Court

should decline to review Zielie's claim on appeal. Zielie did raise jurisdiction before the district court. Zielie merely changes her legal theory in support of her appellate claim. Because she did not present the theory she presents on appeal to the district court, Zielie has waived appellate review of her claim. *See Martinez*, ¶ 17.

**B. The district court correctly denied Zielie's motion to dismiss her revocation proceeding.**

The district court did not err when it denied Zielie's motion to dismiss. First, the district court correctly determined that the intent of the dismissal order was to dismiss the revocation petition with prejudice, not the entire case with prejudice. Although the State's motion included reference to dismissing the "above-captioned case," it specified that the pending petition to revoke was no longer necessary because Zielie had regained contact with her probation officer. As the district court observed, Zielie also believed that her probationary sentence remained in effect as she continued to report to her probation officer.

The record, therefore, clearly demonstrates the State intended to dismiss the petition with prejudice. The district court accordingly did not err when it concluded that it could correct the district court's order and proceed with the revocation petition before it because the record supported that the district court "actually decided" that the revocation petition was dismissed with prejudice. *Winterrowd*, ¶ 14.

The district court's interpretation that the order intended to dismiss the revocation petition, and not the entire case, is further supported by Mont. Code

Ann. §§ 46-18-203(9) and -208(1)(b), which specifies the sole means to dismiss the remainder of a probationary sentence. Montana Code Annotated § 46-18-208(1)(b) allows, upon motion, the district court to terminate the remaining portion of a suspended sentence if:

- (i) the defendant has served 3 years or two-thirds of the time suspended, whichever is less; and
- (ii) the defendant has been granted a conditional discharge from supervision under 46-23-1011 and has demonstrated compliance with the conditional discharge for a minimum of 12 months.

Here, neither Zielie, the State, nor her counsel petitioned for such relief. Nor can the State's motion to dismiss be construed as such a petition.

At the time the motion to dismiss was filed, Zielie would have had to have served 2 years of her sentence. *See* Mont. Code Ann. § 46-18-208(b)(1). Even including the 66 days of credit that the State concedes below Zielie is entitled to on her original sentence, Zielie would not have served 2 years of her suspended sentence until July 6, 2021, which was months after the district court issued its order dismissing the March 2021 petition to revoke. Zielie, therefore, did not satisfy the threshold requirement. But, even if she had, the district court did not make the required findings, nor was that evidence presented for it to do so.

Other than through Mont. Code Ann. § 46-18-208(b)(1), a district court is precluded, unless ordered to do so by this Court on remand with instructions, from terminating a suspended portion of the sentence. At most, the district court can

dismiss the *petition*, either upon motion or when the State fails to meet its burden. *See* Mont. Code Ann. § 46-18-203(9). But such a dismissal would never nullify a probationer's conviction and sentence.

Zielie's reliance on cases that held that the district court was without jurisdiction to reinstate *criminal* proceedings after an *information* was dismissed with prejudice do not alter that the district court had jurisdiction, here, to preside over a subsequent revocation petition. (Appellant's Br. at 8.) First, "[r]evocation proceedings are civil matters and fundamentally differ from underlying criminal conviction statutes." *Southern*, ¶ 9. Indeed, revocation proceedings are "purely administrative action[s]," that are not "designed to punish a criminal defendant for violation of a criminal law." *State v. Haagen*, 2010 MT 95, ¶ 15, 356 Mont. 177, 232 P.3d 367. In other words, "a revocation proceeding is not a criminal adjudication." *Id.* ¶ 16 (internal quotations and citation omitted).

Second, unlike the dismissal of an Information, an order dismissing the above caption of this case did not act "as a final adjudication of the case and is [not] as conclusive of the rights of the parties as is a final judgment." *State ex rel Torres v. Montana Eighth Judicial Dist. Court*, 265 Mont. 445, 452, 877 P.2d 1008, 1012 (1994). This is because an order that dismissed Zielie's case with prejudice, when it meant to dismiss the revocation petition with prejudice, did not, nor can it, alter the fact that Zielie had been adjudicated of a criminal offense and

received a sentence subject to conditions. At any time during Zielie's suspended sentence, the State was free to petition to revoke the sentence upon meeting the required burdens of proof that Zielie had violated those conditions. The district court had no authority, based on this record, to terminate Zielie's sentence early or to dismiss Zielie's conviction with prejudice, which is what would have occurred if the district court truly was able to dismiss with prejudice Zielie's case.

Moreover, the dismissal of an Information with prejudice would not necessarily preclude a person from being charged again. It would just preclude a person from being charged with the same offenses based on the same facts that were charged in the dismissed Information. Similarly, here, the dismissal of a revocation petition with prejudice precluded the State from proceeding on *that petition*. It did not preclude the State, as it did here, from petitioning to revoke a sentence based on different violations of that person's conditions.

Finally, Zielie argues that the district court erred when it did not analyze Zielie's motion to dismiss pursuant to the dismissal statute, Mont. Code Ann. § 46-13-402. However, Mont. Code Ann. § 46-13-402 offers nothing for the district court to analyze as it provides "If the court directs the action to be dismissed, the defendant must, if in custody, be discharged and, if admitted to bail, have bail exonerated or money deposited instead of bail refunded to the defendant." Nor does Mont. Code Ann. §§ 46-13-401 and -402 apply to revocation

proceedings at all. First, these provisions are located in the *pretrial* motions section. Second, as Mont. Code Ann. § 46-13-401, in relevant part, contemplates only dismissal of a “complaint, information, or indictment.” Absent from the statute, therefore, is dismissal of a revocation petition.

In sum, the district court had jurisdiction to preside over a timely filed petition to revoke despite the district court mistakenly ordering the case be dismissed with prejudice instead of the March petition being dismissed with prejudice. Accordingly, the district court did not err when it denied Zielie’s motion to dismiss and revoked Zielie’s suspended sentence.

## **II. The State concedes that Zielie is entitled to credit for 66 days she served during the underlying criminal action.**

Zielie argues that she is entitled to credit for time served for 66 days that she spent in jail from March 26, 2019 to May 30, 2019 on her underlying charges, that she did not receive credit for when the district court imposed Zielie’s original sentence. (Appellant’s Br. at 18.)

Montana Rule of Appellate Procedure 4(5)(b)(i) affords a defendant 60 days from the entry of judgment to file an appeal challenging a sentence. A defendant’s decision to not appeal generally precludes the defendant from later challenging the legality of the sentence. *State v. Adams*, 2013 MT 189, ¶ 15, 371 Mont. 28, 305 P.3d 808. An exception exists if the illegal sentence “is challenged while the



defendant is serving the sentence, the court has the authority to correct the sentence by imposing a sentence that was statutorily authorized.” *Adams*, ¶ 18 (citing *State v. Seals*, 2007 MT 71, ¶ 9, 336 Mont. 416, 156 P.3d 15). “If, however, the illegal sentence is challenged during a revocation proceeding held while the defendant is serving the suspended portion of the illegal sentence, the court, upon sentencing in the revocation proceeding, is constrained by the particulars of § 46-18-203(7), MCA.” *Id.* (emphasis omitted).

Here, Zielie’s appellate claim does not challenge the legality of her revocation sentence, the only sentence she is entitled to challenge in the instant appeal, but instead challenges her original sentence that she did not appeal. As the district court could not consider the challenge, even if raised, to Zielie’s original sentence during the revocation proceeding, so, too, is this Court technically without jurisdiction to review the legality of Zielie’s original sentence in the instant appeal. Recently, however, this Court has converted revocation appeals into petitions for writs of habeas corpus to correct credit calculations on original sentences. *See State v. Little Coyote*, 2023 MT 243, ¶ 10, 414 Mont. 299, 539 P.3d 1142.

Accordingly, based on judicial efficiency and without agreeing to all the arguments and facts raised in Zielie’s brief, the State concedes that this Court should remand this matter to the district court with instructions to amend Zielie’s original sentencing order to reflect credit for the 66 days.

## **CONCLUSION**

This Court should affirm the district court's denial of Zielie's motion to dismiss and grant of the State's revocation petition. This Court should remand this matter to the district court with instructions to amend Zielie's original sentence to provide Zielie with credit for 66 days served.

Respectfully submitted this 25th day of September, 2024.

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## **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 3,176 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Cori Losing  
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## **CERTIFICATE OF SERVICE**

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-25-2024:

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