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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

FILED Case Number: 24-0582

OCT - 2 2024

Bowen Greenwood
Clerk of Supreme Court
State of Montana

Benny Stewart
#3007159
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722

IN THE SUPREME COURT OF THE STATE OF MONTANA

No: DP 24 - 6582

Benny Stewart,
Petitioner,

v.

PETITION FOR WRIT OF HABEAS
CORPUS

Warden Jim Salmonsens,
Respondent.

I, Benny Stewart, am representing myself, and I believe that I am entitled to a Writ of Habeas Corpus under §46-22-101, MCA, for the following reasons:

My sentence is illegal because, (1) the Second Judicial District Court for the County of Butte-Silver Bow lacked Subject Matter Jurisdiction to pronounce judgment and sentence on Benny Stewart in Cause No. DC-09-194 because; (2) the jury's verdict is void, due to the Second Judicial District Court's lack of Subject Matter Jurisdiction to seat a jury in Cause No. DC-09-194 because; (3) the court's actions were not invoked by proper pleadings and the Second Judicial District Court lacked or exceeded its jurisdiction by acts that exceeded the defined power of the court as defined by

constitutional provisions and expressed statutory declarations, divesting the Second Judicial District Court of Subject Matter Jurisdiction in Cause No. DC-09-194.

Benny Stewart is incarcerated under a facially invalid sentence and has not been found guilty in a court of record that had Subject Matter Jurisdiction to adjudicate Cause No. DC-09-194 which is a grievous wrong that should be addressed through a petition for Writ of Habeas Corpus.

This Honorable Court has the record or has access to the electronic record which includes trial transcripts.

State V. Abe, 2001 MT 260
HN6 - Lack of Subject Matter Jurisdiction can be raised at anytime. Rule 12 (h)(3) M.R.CIV.P.

Lee V. Lee, 2000 MT 67

[*P20] HN2 In order for a court to act within its jurisdiction, it must have: (1) cognizance of the subject matter; (2) presence of the proper parties; and (3) the courts action must be invoked by proper pleadings and the judgment within the issues raised.
State ex rel. Porter V. First Judicial Dist. (1950), 123 Mont. 447, 454, 215 P.2d 279, 283. A court lacks or exceeds such jurisdiction by any acts which exceed the defined power of a court in any instances, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis.

At trial, Detective Lester on cross examination was questioned on how and by what method the recordings were made. Lester stated that he removed Stewart's telephone from the hard line and installed

his telephone with recording device on Stewart's telephone hard line and recorded the telephone calls, (see trial transcripts).

Non-Consensual Wiretapping is not permitted in Montana and any such evidence obtained in Montana by public officials is not admissible in this State's Courts, (State v. Lynch, 1998 MT 308). State v. Lynch, has not been over ruled and is controlling.

State v. Lynch, 1998 MT 308

[P14] We commence our analysis by noting that nearly two decades ago this court ruled that since Montana had failed to adopt a statutory scheme permitting electronic surveillance which is at least as restrictive as that required by the regulations of Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968, 1968 U.S.C.C.A.N. (82 Stat.) 2112, 2153 (Title III), state officials are prevented from non-consensual electronic monitoring or oral and wire communications.

State v. Hanley, (1979) 185 Mont. 459, 467-68, 605 P.2d 1087, 1091-92 (Hanley 1). Accord State v. Hanley, 1980 186 Mont. 410, 419, 608 P.2d 104, 109 (Hanley 11).

In Hanley 1, we also determined that neither the subsection (1)(c) exception to §45-8-213 MCA, defining the criminal offense of violating privacy in communications, nor §46-5-202, MCA now [§46-5-221, MCA], setting forth the grounds for issuance of a search warrant, constituted a "statutory scheme" for electronic surveillance at least as restrictive as that required by the Title III regulations. Hanley 1, 185 Mont. at 467-68, 605 P.2d at 1091-92.

[P15] To date, the Montana Legislature still has not adopted a statutory scheme at least as restrictive as the regulations of Title III for the non-consensual electronic monitoring of oral and wire communications.

Accordingly, the proscription against the use of this investigative tool and evidence obtained therefrom as articulated in Hanley 1, remains the settled law of this State. HN2 Non-Consensual wiretapping is not permitted in Montana and any such evidence obtained in Montana by public officials is not admissible in this State's Courts.

The Non-Consensual wiretapping of Stewart's telephone hard line without a wiretap warrant cannot be used in any court in the State of Montana. The recorded telephone calls were used for probable cause in the affidavit in support of motion for leave to file an information. Therefore, the charges brought against Benny Stewart are invalid, divesting the Second Judicial District Court of Subject Matter Jurisdiction. The record is void of any wiretap warrant, (see court docket record - case register of actions).

The court exceeded its defined power by not complying with M.C.A. 46-5-310. The application for search warrant, search warrant, return of search warrant, inventory and all other papers in connection with the warrant is not filed with the issuing court. (See court docket record - case register report), Violating Due Process of Law and Equal Protection of the Law.

46-5-310 Filing of Return

(1) The application on which the warrant is issued must be retained by the judge but is not required to be filed with the clerk of court or with the court, if there is no clerk, until the warrant has been served or has been returned "not served."

(2) The judge before whom the warrant is returned shall attach to the warrant a copy of the return, the inventory and all other papers in connection with the warrant and shall file them with the issuing court.

The court exceeded its defined power by not complying with M.C.A. § 1-2-101 and M.C.A. § 1-2-102. The court inserted in the record what has been omitted from the record. The application for Search Warrant, Search Warrant, Return of Search Warrant, Inventory

and all other papers in connection with the warrant including the wire tap taken under the search warrant and the search of the computers were omitted from the record. The court inserted what has been omitted in all court proceedings from M.C.A. § 46-11-201 Leave To File Information through the trial its self, divesting the court of Subject Matter Jurisdiction violating Due Process of Law and Equal Protection of the Law which is a structural error that requires reversal. (See court docket record - case register report).

46-11-201 Leave To File Information

(1) The prosecutor may apply directly to the district court for permission to file an information against a named defendant. If the defendant named is a district court judge, the prosecutor shall apply directly to the supreme court for leave to file the information.

(2) An application must be by affidavit supported by evidence that the judge or chief justice may require. If it appears that there is probable cause to believe that an offense has been committed by the defendant the judge or chief justice shall grant leave to file the information, otherwise the application is denied.

Dunphy V. Anaconda Co., 151 Mont. 76 (1968);
State V. Roberts, 194 Mont. 189 (1981).

A.M. Trucking & Transp. Ins. Co. V. Travelers Prop. Cas. of Ann. 2015 U.S. Dist. Lexis 99864, Opinion by Dana L. Christensen.
Under Montana Law the court may not "insert what has been omitted" [15] Mont. Code Ann § 1-2-101.

Confederated Salish & Kootenai Tribes V. Roberts 1996 Mont. Salish & Kootenai Tribe, Lex 23.
Our role in construing statutes is clear, we must "ascertain and declare what is in terms or in substance contained therein," we may not insert what has been omitted or omit what has been inserted, Section 1-2-101 M.C.A.. The intention of the legislature is to be pursued, Section 1-2-102 M.C.A., if that intention can be determined from the plain meaning of the words used, a

court may not go further and apply other means of interpretation. State V. Hubbard, (1982) 200 Mont. 106, 111, 649 P.2d 1331, 1333 (citation omitted). Where the statutory language is plain, unambiguous direct and certain, the statute speaks for itself and there is nothing left for the court to construe: Hubbard 649 P.2d at 1333.

The intention of the legislature is to be pursued, M.C.A. 1-2-101, M.C.A. 1-2-102, M.C.A. § 46-11-201 and M.C.A. 46-5-310 Statutory Language is plain, unambiguous, direct and certain, the statute speaks for itself.

The court did not have Subject Matter Jurisdiction to proceed to trial.

The State of Montana cannot dispute Stewart's claims of error which is supported by the record. The record speaks for itself.

If the State of Montana claims that Stewart's claims are now procedurally barred because Stewart was adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal (46-22-101(2) MCA), Benny Stewart has shown, by the court docket record, that Benny Stewart was not adjudged guilty of an offense in a court of record having Subject Matter Jurisdiction to pronounce judgment and sentence on Benny Stewart in Cause No. DC-09-194. Petition for Writ of Habeas Corpus, therefore is proper.

Benny Stewart's sentence is illegal.

As relief, Benny Stewart requests the following:

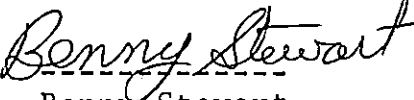
Vacate the judgment of the State of Montana with prejudice and my immediate release from prison.

VERIFICATION

State of Montana)
 :SS.
County of Powell)

I believe I am being incarcerated illegally. I certify that the contents of this petition are true and accurate to the best of my knowledge.

Dated this 30th day of September, 2024.

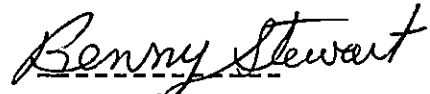


Benny Stewart

CERTIFICATE OF MAILING (SERVICE)

I hereby certify that on September 30th, 2024, I have mailed the Petition for a Writ of Habeas Corpus to the following attorney by placing a copy in the United States Mail, postage prepaid:

Office of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401


Benny Stewart