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STATE OF MONTANA
Case Number: DA 24-0178

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0178

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CRAIG ALLEN MCCREA,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable Robert L. Deschamps III, Presiding

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Whether the district court erred when it granted McCrea's motion to dismiss based on constitutional double jeopardy grounds only on Count I and not Count II.

Whether the written judgment and sentence conflicted with the orally pronounced sentence.

STATEMENT OF THE CASE

Craig Allen McCrea was charged with Count I, felony criminal possession of dangerous drugs (fentanyl), and Count II, criminal possession of dangerous drugs (methamphetamine), after officers discovered those drugs in McCrea's vehicle following a traffic stop on May 5, 2022. (Docs. 1-4, 18-20.)

In August 2022, McCrea was indicted in the United States District Court on Count I, conspiracy to possess with intent to distribute fentanyl, and Count II, possession of fentanyl with intend to distribute, that were alleged to have occurred between December 8, 2021, and May 5, 2022. (Doc. 39, Ex. 1 (hereinafter, Indictment); Doc. 41, Ex. 3 (hereinafter, Report).

After pleading guilty to Count II of the federal indictment, McCrea filed a motion to dismiss his charges in state district court on double jeopardy grounds.

(Docs. 39, 45, 48.) The district court granted McCrea's motion as to Count I (possession of fentanyl) but denied the motion as to Count II (possession of methamphetamine). (7/23/23 Tr. (Hr'g) at 10-18; Doc. 53.)

The district court denied McCrea's motion to suppress, finding the officers had probable cause to initiate a traffic stop based on their knowledge that a passenger in McCrea's vehicle had an active warrant for her arrest. (Docs. 41, 46, 49; Hr'g at 22-27.)

McCrea pleaded guilty to Count II pursuant to a plea agreement that called for the parties to jointly recommend a two-year term of imprisonment. (10/31/23 Tr.; Doc. 55.) The court sentenced McCrea in accordance with the plea agreement. (1/24/241 Tr.) The court did not order that his sentence should run concurrently with, or consecutive to, any other sentence, but included that language in its written judgment and sentence. (*Id*.; Doc. 61.)

STATEMENT OF THE FACTS

I. The investigative stop

On May 5, 2022, Lake County Sheriff's Office Detective Scott Sciaretta was working with three tribal investigators on the local drug task force. (Report; Doc. 41, Ex. 1, Ex. 2 (hereinafter SWA-1) and Ex. 3 (hereinafter SWA-2).) Detective Sciaretta and Tribal Investigator William Mesteth were in an unmarked

patrol vehicle patrolling the Pablo area. (*Id*.) Tribal Investigators Vern Fisher and Christian Haynes were patrolling the Pablo area in a different vehicle. (*Id*.)

At about 11:30 a.m., Investigator Mesteth observed a silver Chevy Impala in the driveway of a known drug house on Clairmont Road. (Report; SW-1; SW-2.) He communicated his observations to Investigators Fisher and Haynes who were familiar with the silver Impala and knew it was frequently, and had recently been, driven by McCrea. (*Id*.) McCrea was known to local law enforcement as a drug user and drug trafficker. (*Id*.)

Investigators Fisher and Haynes drove by the parked Impala and confirmed that McCrea was in the driver's seat. (Report; SW-1; SW-2.) They could not identify the backseat passengers, but believed Cassidy Muth (Muth) was in the front passenger seat. (*Id*.) The investigators communicated their observations to Detective Sciaretta and Investigator Mesteth. (*Id*.) Detective Sciaretta used his cell phone to call Lake County Dispatcher Monica to inquire about any active warrants for Muth. (Doc. 46.) The dispatcher reported that there was an active warrant, explaining that Muth had a "history of drugs, 15,000, failure to appear criminal possession of dangerous drugs through district court." (*Id*.) In reply, Detective Sciaretta advised, "Copy, were [sic] going to be going traffic." (*Id*.)

While talking with the dispatcher on his cell phone, Detective Sciaretta and Investigator Mesteth saw McCrea drive out on Ashley Spur Road and continue

south towards Salish Kootenai College. (Report; SW-1; SW-2.) Because the only way to get to Ashley Spur Road from where the car was parked on Clairmont Road was to drive through the back yard, McCrea appeared to be trying to avoid law enforcement. (*Id*.) Investigator Mesteth and Detective Sciaretta conducted a "soft tail" on the Impala. (*Id*.) Detective Sciaretta advised Investigators Haynes and Fisher that McCrea was heading south towards the college and he asked them to get in a position to confirm Muth was a passenger because he had confirmed that she had an active warrant for her arrest. (*Id*.)

Investigators Fisher and Haynes traveled south on Highway 93 and turned left onto Silver Fox Lane, traveling eastbound. (Report; SW-1; SW-2.) The investigators met the Impala that was westbound on Silver Fox Lane. (*Id*.) As they passed the Impala, the investigators confirmed Muth was the front seat passenger. (*Id*.) They were unable to identify the two backseat passengers. (*Id*.) The investigators relayed what they had observed to Detective Sciaretta. (*Id*.) McCrea turned left onto Highway 93, traveling southbound. (*Id*.)

After learning Muth was indeed a passenger, Detective Sciaretta and Investigator Mesteth followed McCrea southbound until Pablo Pass (mile marker 51) where Investigator Mesteth initiated a traffic stop. (Report; SW-1; SW-2.) When the patrol lights were activated, Detective Sciaretta saw Muth throw an object out the side window that landed on the shoulder of the road a few feet away.

(*Id*.) Once they stopped, Detective Sciaretta went right to the object and discovered it was a syringe. (*Id*.)

Deputy Sciaretta arrested Muth on the warrants and advised her of her rights. (Report; SW-1; SW-2.) Muth volunteered that when the patrol lights came on, McCrea rolled Muth's window down, handed her a syringe, and told her to throw it out the window. (*Id*.) Muth further explained that McCrea tried to throw blue pills out his window, she but was not sure if he was successful. (*Id*.)

McCrea gave Investigator Mesteth consent to search the Impala. (Report; SW-1; SW-2.) The officer discovered two blue fentanyl pills on the driver's side floorboard along with burned foil and a melted pen tube. (Report; Doc. 2, 18; SW-1.) Officers obtained a search warrant for the Impala and discovered a used syringe lodged between the driver's door and seat and a baggie containing a substance later identified as methamphetamine. (Doc. 18.)

II. The charges

McCrea faced charges in both Lake County District Court and United States District Court.

A federal grand jury indicted McCrea for: Count I, conspiracy to possess with intent to distribute fentanyl in violation of 21 U.S.C. § 846; and Count II, possession with intent to distribute fentanyl in violation of 21 U.S.C. § 841(a)(1)

and 18 U.S.C. § 2.[1] (Indictment; Doc. 39, Ex. 3 (hereinafter, Fed-PSI). These charges were based on 2 traffic stops: one on January 4, 2022, in Mineral County, when fentanyl pills totaling 33.1 grams were seized; and the May 5, 2022 stop, when 2 fentanyl pills totaling .22 grams were seized. (*Id*.; Fed-PSI at ¶ 42.)

In Lake County District Court, an Amended Information charged McCrea with Count I, criminal possession of dangerous drugs (fentanyl) in violation of Mont. Code Ann. § 46-9-102(1), and Count II, criminal possession of dangerous drugs (methamphetamine) in violation of Mont. Code Ann. § 46-9-102(1). Relative to Count II, the State alleged that during the subsequent search of McCrea's Impala, Investigator Mesteth discovered a "baggie of methamphetamine." (Doc. 18.)

In federal district court, McCrea pled guilty to Count II and for the purposes of sentencing, the PSI stated that McCrea "was determined to be responsible for 33.32 grams of fentanyl." (Fed-PSI at ¶ 47.) The only reference to methamphetamine in the federal case was in the PSI description of the May 5, 2022 traffic stop. (Fed-PSI at ¶ 38.)

[1]21 U.S.C. § 841(a)(1) states: "Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

III. Relevant criminal proceedings

Based on his conviction in federal district court, McCrea filed a motion to dismiss the Amended Information asserting double jeopardy violations under Mont. Const., art. II, § 25 and Mont. Code Ann. § 46-11-504. (Doc. 39.)

McCrea also filed a motion to suppress, challenging the basis for the traffic stop.[2] (Doc. 41.) McCrea alleged the dispatch remarks listed at the end of Detective Sciaretta's report indicated the officers stopped the Impala before being advised of Muth's warrants. (*Id*.)

In its response to the motion to suppress, the State explained that Detective Sciaretta had used his cell phone to call the Lake County dispatch and quoted from the recording which established the officers did not conduct the traffic stop until after they learned Muth had a $15,000 warrant out for her arrest. (Doc. 46.) In his reply, McCrea argued the dispatch recording should not be considered because, in his opinion, the State had not timely disclosed the dispatch recording. (Doc. 49.) McCrea did not dispute the quoted portion of the recorded call between dispatch and Detective Sciaretta. (*Id*.)

[2]McCrea had been charged with multiple counts of felony arson in Lake County Cause No. DC-22-126. (Hr'g.) McCrea filed identical motions to suppress evidence resulting from the May 5, 2022 investigative stop. (Doc. 41; DC-22-126, Doc. 49.)

On July 23, 2023, the district court held a combined motions hearing for Cause Nos. DC-22-124 and DC-22-126. (Hr'g.) When considering McCrea's motion to dismiss on double jeopardy grounds, there was open-court discussions about the federal prosecution. (*Id*. at 10-18.) The State agreed the federal charge included the two pills from the May 5th stop, but argued those pills should not be considered as the drugs McCrea intended to distribute, but rather they were for personal use. (Hr'g at 16-17.) The State also noted that the methamphetamine found in McCrea's vehicle (which formed Count II of the Amended Information) was not included in the federal indictment. (*Id*.)

The district court agreed with the State regarding Count II, concluding that "the methamphetamine is a standalone offense and there's no former jeopardy involving that methamphetamine count." (Tr. at 17.) The court delayed ruling on whether Count I was barred under double jeopardy until it could review the federal charges more closely. (*Id*. at 17-18.)

Next, the court addressed McCrea's motions to suppress. (Hr'g at 22-27.) The court asked McCrea if an evidentiary hearing was necessary to bring the officers in to testify what was in the reports that McCrea had filed with his motion. (*Id*.) McCrea replied by asserting the dispatch notes at the end of the report indicated the officers found out about Muth's warrants after they stopped the Impala. (*Id*.) The court again asked McCrea if he wanted a hearing. (*Id*.) McCrea

told the court a hearing was not needed because the court could interpret the officers' reports and reconcile any inconsistencies. (*Id*.) The court then ruled on the motion, finding that the officers' report and affidavits "prove that the officers knew she was a wanted person well before the stop." (*Id*. at 27.)

On August 28, 2023, the court issued a written order granting, in part, McCrea's motion to dismiss on double jeopardy grounds. (Doc. 53.) First, the court reiterated that it had orally denied the motion as to Count II (possession of methamphetamine). (*Id*.) Next, the court dismissed Count I (possession of fentanyl), based on both Mont. Const. art. II, § 25 and Mont. Code Ann. § 46-11-504, given McCrea's guilty plea in federal district court to Count II of the indictment (possessing fentanyl with the intent to distribute), which included the two pills found on May 5, 2022, in his vehicle. (*Id*.)

On October 31, 2023, pursuant to a plea agreement that allowed McCrea to appeal the court's rulings on his pretrial motions, McCrea pleaded guilty to Count II. (10/31/23 Tr.; Doc. 55.) The agreement called for the parties to jointly recommend a two-year prison sentence. (*Id*.)

At sentencing, the court questioned the description of McCrea's May 19, 2023 sentence in the United States District Court that McCrea had been sentenced to "14 months incarceration, concurrent to any sentence imposed on Lake County DC-22-124 and consecutive to any sentence imposed in DC-22-126 followed by

3 years' supervised release." (Doc. 59 at 4; 1/24/24 Tr.) McCrea's counsel (who had also represented him in the federal case) explained that the federal district court judge believed federal courts were allowed to impose consecutive sentences on anticipated, but not yet imposed, sentences. (Tr. at 16.)

The court followed the plea agreement and sentenced McCrea to prison for a period of 2 years with credit for 629 days. (1/24/24 Tr. at 21-22.) The court did not declare that McCrea's sentence should run concurrently or consecutively to any other sentence. (*Id*.) However, in the written judgment and sentence, the following language was included: "The Sentences shall run Concurrent To his Federal sentence for Possession With Intent to Distribute Fentanyl and Consecutive to any sentence that might be imposed in DC-22-126." (Doc. 61 at 1.)

STANDARD OF REVIEW

This Court reviews a district court's grant or denial of a motion to suppress to determine whether the court's findings are clearly erroneous and whether those findings were applied correctly as a matter of law. *State v. Schlichenmayer*, 2023 MT 79, ¶ 11, 412 Mont. 119, 529 P.3d 789 (citation omitted). This Court reviews a finding that particularized suspicion existed for clear error. *State v. Pham*, 2021 MT 270, ¶ 11, 406 Mont. 109, 497 P.3d 217 (citation omitted). A finding is clearly erroneous if it is not supported by substantial evidence, if the

lower court has misapprehended the effect of the evidence, or if this Court's review of the record leaves a firm conviction that a mistake has been made. *Schlichenmayer*, ¶ 11 (citation omitted).

This Court exercises plenary review over constitutional questions, and orders granting or denying motions to dismiss are reviewed *de novo* to determine whether the court's conclusions of law are correct. *State v. Severson*, 2024 MT 76, ¶ 6, 416 Mont. 201, 546 P.3d 765 (citations omitted).

Sentences beyond one year of incarceration are reviewed for legality, which is a question of law reviewed for correctness. *State v. Johnson*, 2024 MT 152, ¶ 23, 417 Mont. 221, 552 P.3d 683 (citations omitted).

SUMMARY OF THE ARGUMENT

The district court correctly denied McCrea's motion to suppress based on its determination that Detective Sciaretta learned from dispatch that there was an active warrant for Muth before the stop was initiated. McCrea's reliance upon his interpretation of the "dispatch remarks" set out at the end of the detective's report does not overcome the logical sequence of events in the detective's narrative, which was supported by the quoted conversation between Detective Sciaretta and the dispatcher. McCrea asked the court to make its ruling based upon the pleadings and agreed the dispatch audio was inconsistent with his claim. His

acquiescence to not holding an evidentiary hearing undermines his claim on appeal that the State did not meet its burden. The district court's finding was not clearly erroneous given the substantial evidence that the officers confirmed Muth had an active warrant for her arrest and was also McCrea's passenger before the stop was initiated. The district court did not err when it denied McCrea's motion to suppress.

The district court was also correct when it concluded that Count II did not constitute an improper charge under Montana's constitutional double jeopardy protections. This Court has already rejected McCrea's argument that the "same conduct test" should apply to Montana's double jeopardy provision. The district court properly noted that McCrea's federal conviction (possession of fentanyl with intend to distribute) involved a different drug than the charge at issue here, possession of methamphetamine. Based on the language enacted by Montana's Legislature that criminalized possession of any dangerous drug as defined by the Legislature, this Court has determined that each distinct "dangerous drug" constitutes an "allowable unit of prosecution."

Finally, the State agrees that the district court's written judgment and sentence improperly included language that had not been orally pronounced and the matter should be remanded with instructions to issue an amended order that comports with the oral pronouncement.

ARGUMENT

I. The district court correctly denied McCrea's motion to suppress the drugs found in McCrea's vehicle.[3]

Montanans are entitled to be free from unreasonable searches and seizures by the constitutions of both Montana and the United States. U.S. Const. amend. IV; Mont. Const. art. II, § 11. While generally government searches and seizures are unlawful under the state and federal constitutions absent a judicial warrant being issued for probable cause, law enforcement officers are permitted to stop an individual for a limited investigation when circumstances create a "particularized suspicion" that the person is or has been engaged in the commission of a crime. *Schlichenmayer*, ¶ 15 (citing Mont. Code Ann. § 46-5-401(1)).

Particularized suspicion for an investigative stop requires the peace officer to have: "(1) objective data and articulable facts from which he or she can make certain reasonable inferences; and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense." *Pham*, ¶ 21. The existence of particularized suspicion is determined by looking at the totality of the circumstances, but the related question of whether the circumstances

[3]On Appeal, McCrea asserts that nine pieces of evidence were obtained as the result of the allegedly improper stop. (Opening Brief (Br.) at 8-9.) This case deals only with the first two items (illegal drugs and drug paraphernalia). McCrea's arguments regarding the legality of the collection of the remaining pieces of evidence (Br. at 28-33) will not be addressed by the State herein as they were not at issue in the drug possession case.

indicated illegal activity is a question of law. *Pham*, ¶ 21. This standard does not require that an officer be certain, or even correct, that a person is engaged in criminal activity, but it does require more than mere generalized suspicion or an undeveloped hunch of criminal activity. *Pham*, ¶ 21.

There is no dispute that Detective Sciaretta called the local dispatcher on his cell phone to confirm that Muth did have an active warrant for her arrest. Police officers "may rely on information conveyed by a reliable third person . . . in forming the basis for a particularized suspicion to justify an investigative stop." *State v. Pratt*, 286 Mont. 156, 162, 951 P.2d 37, 41 (1997).

It is also undisputed that the officer was advised that Muth had a $15,000 active warrant for her arrest. Knowledge of an active arrest warrant is sufficient probable cause for the occupant of a vehicle and constitutes particularized suspicion. *City of Billings v. Costa*, 2006 MT 181, ¶¶ 18-21, 333 Mont. 84, 140 P.3d 1070; *State v. Kriesel*, 2000 MT 144, ¶ 12, 300 Mont. 44, 2 P.3d 831 (stop properly initiated to detain Kriesel under the authority of a valid outstanding warrant satisfying the probable cause requirement of Mont. Code Ann. § 46-6-201).

The crux of McCrea's argument was *when* officers learned Muth had active warrants for her arrest. McCrea relied solely upon his interpretation of the "dispatch remarks" at the end of Detective Sciaretta's report. (Doc. 41; Br. at 7-8.) According to McCrea, these "remarks" established the following timeline of

events: at 11:35:29 a.m., the traffic stop was initiated; at 11:41:05 a.m., Detective Sciaretta advised dispatch that there were four officers on scene and McCrea and Muth had been detained; and at 11:41:33 a.m., the dispatcher advised Detective Sciaretta about Muth's warrants. (Doc. 41 at 5; Br. at 8.) McCrea's version of the timeline is not compelling for several reasons.

First, McCrea's interpretation ignores the detective's report narrative and logical sequence of events. Detective Sciaretta's report states that he was on patrol with Investigator Mesteth at approximately 11:30 a.m. (Report at 5.) The detective contacted dispatch as soon as Investigators Fisher and Haynes confirmed Muth was in the Impala, which was before McCrea drove through the backyard to Ashley Spur Road. Detective Sciaretta reported:

> [Investigators Haynes and Fisher] observed [McCrea] was in the drivers [sic] seat and the front passenger was believed to be Cassidy Muth. Two other occupants were observed in the back seat but could not be identified. I know Cassidy Muth to also be a drug user and dealer. I made contact with Lake County 911 dispatch and was informed Cassidy had active drug warrants for her arrest.
>
> While checking on Cassidy [sic] warrants, the vehicle was observed by Inv. Mesteth coming out on Ashley Spur towards the college.

(Report at 5.) Detective Sciaretta and Investigator Mesteth "continued at this time to conduct a soft tail of the vehicle" and coordinated with Investigators Haynes and Fisher so they could intersect with the Impala on Silver Fox Lane and confirm Muth was the passenger. (*Id*. at 6.)

Unless the detective had already learned from dispatch that there were active warrants for Muth's arrest, there would have been no reason to ask the other investigators to confirm that Muth was the passenger and coordinate how they could accomplish that.

Second, as Detective Sciaretta explained, he was on the phone with dispatch learning about Muth's warrants before McCrea began driving on to Ashley Spur Road. McCrea drove for about a mile to Silver Fox Lane and, after turning southbound on Highway 93, then drove for over another mile before the officers initiated the traffic stop. In the amount of time it took those vehicles to reach the overpass south of Pablo, the dispatcher would have had more than sufficient time to report to Detective Sciaretta that there was an active warrant for Muth.

Lastly, McCrea's interpretation of the dispatch remarks requires the presumption that the notation "ADV 1512 of MUTHS 29" was the first time that information was passed along to the officers. The notation McCrea relies upon may be a second or subsequent explanation of Muth's warrant status. Nothing in "dispatch remarks" establishes that notation was the only advisement about warrants. In contrast, Detective Sciaretta's narrative clearly states that he confirmed there was an active warrant for Muth before he asked the others to confirm she was a passenger and before the traffic stop was initiated. The recorded

conversation between the detective and dispatch also supports the progression of events described by the detective in his report.

McCrea's interpretation of the dispatch remarks was directly refuted by the undisputed excerpt of the recorded conversation between Dispatcher Monica and Detective Sciaretta. After the State submitted its response that included a direct quote from the relevant conversation, McCrea did not challenge its accuracy and instead replied that the recording should be excluded from the court's consideration because it was not disclosed to him sooner. The court did not grant that relief, and McCrea has not appealed that ruling. Alternatively, in his reply, McCrea asserted the "new evidence is inconsistent with the written reports" and the district court "must resolve the inconsistency." (Doc. 2.) McCrea reiterated this position at the hearing when he advised the court that an evidentiary hearing was not necessary. The record supports that McCrea admitted the dispatch audio undermined his claim that the officers learned about Muth's warrant after the stop.

After advising McCrea that the reports attached to his motion to suppress established the officers knew there was an active warrant for Muth before stopping the vehicle, the court asked if McCrea wanted the court to set a hearing where he could offer additional evidence. At this point, McCrea was on notice that the court had determined his motion failed to establish facts that showed the evidence should be suppressed. *See* Mont. Code Ann. § 46-13-302(2) (court only required to hear

merits of suppression motion "[i]f the motion states facts that, if true, would show that the evidence should be suppressed"). Absent a statutory mandate, courts have "discretion to conduct a hearing on the merits of a motion." Mont. Code Ann. § 46-13-104(2).

Despite this determination, McCrea declined the court's offer to hold an evidentiary hearing and invited the court to weigh the evidence as presented in the briefs. The district court properly exercised its discretion to not hold a hearing when the defendant explicitly stated there was no need to do so. It would have been a waste of judicial resources to conduct a hearing when McCrea did not dispute Detective Sciaretta's report narrative or the quoted conversation between the detective and the dispatcher. "An evidentiary hearing is unnecessary when facts are uncontested and the court is asked to make a decision as a matter of law." *State v. Schulke*, 2005 MT 77, ¶ 28, 326 Mont. 390, 109 P.3d 744 (citing *State v. Shook*, 2002 MT 347, ¶ 19, 313 Mont. 347, 67 P.3d 863).

McCrea effectively requested the court make a decision as a matter of law when he declined the opportunity to present evidence in support of his interpretation of the dispatch remarks and explicitly invited the court to resolve any perceived inconsistencies without the State presenting witness testimony. McCrea cannot now complain the court erred because the State failed to meet its burden.

A bedrock in Montana jurisprudence is the maxim that "[a]cquiescence in error takes away the right of objecting to it." Mont. Code Ann. § 1-3-207. Accordingly, this Court will not place a "court in error 'for an action to which the appealing party acquiesced or actively participated.'" *Horn v. Bull River Country Store Props*., 2012 MT 245, ¶ 25, 366 Mont. 491, 288 P.3d 218; *State v. Gardner*, 2003 MT 338, ¶ 44, 318 Mont. 436, 80 P.3d 1262 *cert. denied*, 541 U.S. 1034, 124 S. Ct. 2105, 158 L. Ed. 2d 718 (2004); *In re A.A.*, 2005 MT 119, ¶¶ 26-28, 327 Mont. 127, 112 P.3d 993 (Court will not find reversible error for an error or omission that an appellant participated in, acquiesced in, or failed to object, particularly in the absence of a showing that the error or omission materially prejudiced the appellant's substantial rights). The district court did not abuse its discretion when it accepted McCrea's decision not to request an evidentiary hearing. *Schulke*, ¶ 10.

McCrea is effectively asking this Court to review the same information he agreed the district court could review, but come to an opposite conclusion. However, this Court "will not, on appeal, reweigh the evidence or substitute our evaluation of the evidence for that of the district court." *State v. Geno*, 2024 MT 142, ¶ 18, 417 Mont. 135, 552 P.3d 51 (citation omitted).

The "dispatch remarks" relied upon by McCrea did not nullify the undisputed language from Detective Sciaretta's report or his recorded conversation

that established that before the stop was initiated, the officers knew that: (1) there was an active warrant for Muth; and (2) Muth was a passenger in the Impala.

The district court did not misapprehend the effect of the substantial evidence that established the officers had confirmed Muth had warrants before initiating the traffic stop. *Schlichenmayer*, ¶ 11. The district court's findings were not clearly erroneous, and the court correctly applied the law when it denied McCrea's motion to suppress. *Id*.

II. The district court correctly denied McCrea's motion to dismiss on constitutional double jeopardy grounds.

McCrea asserts only that the district court erred by not dismissing Count II, criminal possession of methamphetamine, based on Mont. Const. art. II, § 25. McCrea explicitly abandoned any challenge to the court's ruling based on Mont. Code Ann. § 46-11-504. (Br. at 4 n.1.)[4]

McCrea alleges that his conviction for Count II caused him to "suffer[] twice for the single act allegedly committed on May 5, 2022, possession of dangerous drugs (fentanyl and methamphetamine)." (Br. at 34.) McCrea further asserts he

[4]*See State v. Becker*, 2005 MT 75, 326 Mont. 364, 110 P.3d 1 (double jeopardy challenges pursuant to the United States Constitution, Montana's Constitution, and Montana's statutory protections are distinct and separate); *Buchanan v. Spaulding*, 2022 Mont. LEXIS 909, 410 Mont. 543, 517 P.3d 903 (Mont. 2022) (Montana's statutory protections against multiple prosecutions were enacted apart from constitutional jurisprudence regarding double jeopardy).

was "punished a second time for offenses which arose out of a single transaction." (Br. at 34.) McCrea urges this Court to grant him relief applying the "same conduct" test from *Grady v. Corbin*, 495 U.S. 508, 510 (1990). (*Id*. at 35-41.) McCrea's arguments are not compelling.

First, the United States Supreme Court overruled *Grady* in *United States v. Dixon,* 509 U.S. 688, 704 (1993). Second, this Court has already rejected McCrea's argument that the "same conduct" test from *Grady* should apply to Montana's constitutional double jeopardy provision. *Miller v. First Judicial Dist. Court*, Case No. OP-21-0475, 405 Mont. 541, 495 P.3d 424 (Order, Sept. 29, 2021). Miller, a commercial truck driver, was cited and convicted for failing to properly maintain his truck's suspension system in Missoula County and was charged in Lewis and Clark County for negligently causing the death of another driver when the axel of his truck came loose and struck another vehicle. *Id*. Both charges alleged the same offense date. *Id*. Miller sought a writ of supervisory control to prohibit the State from prosecuting him for negligent homicide, alleging it constituted multiple prosecutions for a single act.

Just like McCrea, Miller relied on "selected comments made during the 1972 Constitutional Convention [to argue] that the Court should honor a greater protection under the Montana Constitution and apply [the *Grady*] 'same conduct' test for double jeopardy to prohibit a second prosecution on a new charge arising

from a single 'transgression against society.'" *Miller*, *4. Also like McCrea, Miller relied on this Court's decision in *State v. Guillaume*, 1999 MT 29, ¶ 16, 293 Mont. 224, 975 P.2d 312, that recognized article II, section 25, of the Montana Constitution provides greater protection against multiple punishments for the same offense than the Fifth Amendment to support his argument. *Id*. *5.

This Court found neither of Miller's arguments compelling and reiterated that the test from *Blockburger v. United States*, 284 U.S. 299, 304 (1932), is the appropriate test in determining whether multiple convictions based on the same transaction are barred under article II, section 25, of the Montana Constitution. *Miller*, *3 (citation omitted).

The *Blockburger* test addresses two distinct scenarios where double jeopardy may be infringed. The "elements test" from *Blockburger* states that

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Blockburger, 284 U.S. at 304. The second part of the *Blockburger* test concerns multiple violations of the same statute and provides that:

> Each of several successive sales constitute a distinct offense, however closely they may follow each other . . . when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.

Blockburger, 284 U.S. at 302.

As this Court has explained, "[t]he *Blockburger* test is a 'test of statutory construction . . . to determine whether [the legislature] intended the same conduct to be punishable under two criminal provisions.'" *State v. Valenzuela*, 2021 MT 244, ¶ 14, 405 Mont. 409, 495 P.3d 1061 (citing *Ball v. United States*, 470 U.S. 856, 861 (1985); *State v. Crowder*, 248 Mont. 169, 178, 810 P.2d 299, 305 (1991)). Thus, the germane issue is "whether the legislature intended to provide for multiple punishments," with the "*Blockburger* test [being] merely one rule of statutory construction to aid in the determination of legislative intent . . . The ultimate question remains one of legislative intent." *Valenzuela*, ¶ 14 (citation omitted).

Here, McCrea must establish that his federal conviction for possession of fentanyl with the intent to distribute prohibited the State from prosecuting him for possessing methamphetamine. This Court has found that a person cannot be convicted of both possession of a dangerous drug with the intent to sell and possession of that *same drug*. *State v. Peterson*, 227 Mont. 503, 741 P.2d 392 (1987). But here, as the district court observed, the same drug was not at issue.

This Court has already addressed whether Montana's Legislature meant to allow prosecution for possession of two different dangerous drugs. *See State v. Meadors*, 177 Mont. 100, 580 P.2d 903 (1978). Meadors was charged with felony possession of marijuana and felony possession of amphetamine pursuant to Rev. Codes Mont. 1947 § 54-133. *Id*. Citing *Bell v. United States*, 349 U.S. 81, 83

(1955), Meadors argued he could not be charged and convicted of two separate offenses for each type of dangerous drug. *Id*. In *Bell*, the United States Supreme Court considered what "the allowable unit of prosecution," applied to the statute prohibiting transporting females across state lines for immoral purposes. *Bell*, *supra*. The Court thus turned to the statutory language to determine Congress' intent. *Id*. The Court found the statute was not clear and resolved the ambiguity in Bell's favor, concluding that he could be charged only with one offense although he trafficked two women across state lines. *Id*.

Applying *Bell* in *Meadors*, this Court considered "whether the Montana Legislature intended to treat the drugs prohibited by section 54-133, R.C.M.1947, as a generic group thereby outlawing possession of the entire group as a whole, or whether it intended to provide a distinct crime as to each of the prohibited drugs." *Meadors*, 177 Mont. at 107, 580 P.2d at 906. This Court then examined the relevant statutory language. *Id*. Revised Code of Montana 1947 § 54-133(a) provided that "[a] person commits the offense of criminal possession of dangerous drugs if he possesses any dangerous drug as defined in this act." *Id*. Next, this Court observed that "any dangerous drug as defined in this act" meant any drug listed at Rev. Codes Mont. 1947 § 54-301 and further noted the legislature had provided for varying penalties based on the type and quantity of drugs. *Id*.

This Court did not find that the statutes at issue were ambiguous as occurred in *Bell* and instead noted that the legislature "specifically spelled out what kinds or types of drugs were prohibited; provided different penalties for possession of these different types or kinds; and, provided different penalties for possession of specific drugs based on the quantity or amount possessed." *Meadors*, 177 Mont. at 107, 580 P.2d at 906. Thus, this Court concluded that "the legislature did not intend to treat all prohibited drugs as a generic group or unit, but meant to provide a distinct crime for possessing each different kind of prohibited drug." *Id*.

In *Meadors*, this Court cited with approval *State v. Adams*, 364 A.2d 1237 (Del. Super. 1976), where the court found the defendant was not placed in double jeopardy when he was charged with four separate counts of possession of drugs with the intent to deliver for four different types of drugs. *Meadors*, 177 Mont. at 108, 580 P.2d at 907. This Court included the following rationale from the Delaware court:

> there is no requirement that each substance be dealt with in a separate section of the statute in order for a separate crime to be created. Nor is it required that there be language specifically stating that each separate substance which is possessed or delivered shall constitute a separate offense. The essential requirement is that it fairly appear that the legislature intended that each substance be dealt with separately for purpose of delineating a crime and that the language express it.

Id.

This Court has affirmed its rationale from *Meadors.* In *State v. Meader*, 184 Mont. 32, 37, 601 P.2d 386, 389 (1979), this Court held that a defendant may be charged with three separate counts of possession of three different dangerous drugs because the legislature intended to provide a distinct crime for possessing each of the drugs listed in Schedules I through IV. In *Crowder*, this Court held that a person may be charged with two separate counts of possession of dangerous drugs when the defendant possessed drugs on his person and his property.

In *Crowder*, this Court looked to the second issue in *Blockburger* which held that two successive sales of morphine in a short period of time to the same person could be charged as two counts because the intent behind the statute was to penalize any sale, not someone engaged in the business of selling dangerous drugs. *Id*. Citing *Blockburger, supra,* and *Bell, supra*, this Court explained that "[t]o determine the 'allowable unit of prosecution,' courts look to legislative intent since discretion is with the legislature to impose punishments, subject only to constitutional limitations." *Id*. Relative to the statute at issue—possession of dangerous drugs—this Court concluded that "the statutory language clearly demonstrates that the legislature intended to punish each separate 'possession' of dangerous drugs." *Id*. *See also, United States v. Vargas-Castillo,* 329 F.3d 715, 720, 722 (9th Cir. 2003) ("charging a defendant with separate counts [of

'possession with intent to distribute'] for different controlled substances is not multiplicitous and does not violate double jeopardy").

The same rationale applies here. While possession of fentanyl with intent to distribute and possession of fentanyl (the same drug) is barred by double jeopardy—as the district court correctly determined when it dismissed Count I—the court also correctly determined that possession of fentanyl with the intent to distribute did not bar prosecution for possession of methamphetamine (a different drug). As this Court has held, a person may be charged with possession of dangerous drugs for each different type of drug they possess.

McCrea's reliance on *State v. Henderson*, 213 Mont. 221, 689 P.2d 1261 (1984), is also not compelling as that case is distinguishable. In *Henderson*, this Court found that the defendant could not be charged with stealing coins and later possessing the same coins that were stolen. Here, there are two different dangerous drugs at issue which this Court has determined were intended by the legislature to constitute different offenses. *See Meadors, supra; Meader, supra; Crowder, supra*.

Finally, the federal indictment for possession of fentanyl with intent to distribute explicitly included the two pills found in McCrea's vehicle and made no reference to methamphetamine found in McCrea's vehicle pursuant to the search warrant. To prove possession with intent to distribute, the prosecutor must

establish the drugs were of such a quantity or were packaged in such a way as to demonstrate the intent to sell. Here, the officers found only "a baggie of methamphetamine," which would not be sufficient to establish McCrea intended to distribute methamphetamine.

The district court correctly determined that Montana's constitutional double jeopardy protections did not prohibit the State from prosecuting McCrea for possession of methamphetamine based on his conviction in federal court with possession of fentanyl with the intent to distribute it. *Severson*, ¶ 6.

III. The district court's oral imposition of sentence controls.

McCrea is correct that when orally imposing the sentence, the district court did not order that McCrea's sentence would run consecutively to a future sentence. (Br. at 42.) McCrea is also correct to note the district court could not order his sentence to run consecutive to a sentence that had not been imposed.

Since the court's written judgment and sentence erroneously included a provision that the court could not, and did not, orally impose, the State agrees that this matter should be remanded with instructions to strike the inappropriate portion of the judgment and sentence. *See State v. Lane*, 1998 MT 76, ¶ 40, 288 Mont. 286, 957 P.2d 9 (if the orally pronounced sentence conflicts with the written judgment, the oral pronouncement controls).

CONCLUSION

This Court should affirm McCrea's conviction. This court should remand this matter with instructions to strike the portion of the judgment and sentence that does not match the oral pronouncement.

Respectfully submitted this 31st day of October, 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 6,631 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-31-2024:

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