

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0101

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ZACHARY M. NIELSEN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Jennifer B. Lint, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court correctly impose \$1,050 of the challenged fees and costs as conditions of the Appellant's deferred imposition of sentence?
2. The State concedes that the Appellant is entitled to credit for time served, and this Court should remand so the district court can make the factual findings necessary to determine credit for time served.
3. The State concedes the \$1,277 in jail diversion costs and the audit hearing requirement should be struck from the written judgment because they conflict with the oral pronouncement of sentence.

STATEMENT OF THE CASE

On October 13, 2022, the Appellant, Zachary Nielsen (Nielsen), pleaded guilty to felony drug possession and misdemeanor possession of drug paraphernalia. (District Court Documents (Docs.) 76-77.1, 79.) In the agreement, he agreed to make a \$250 contribution to the Montana Highway Patrol drug fund. (Doc. 76 at 2.) On November 29, 2022, the State filed a document that included Nielsen's criminal history and proposed conditions of probation. (Doc. 83.) The State included numerous proposed conditions, including an obligation that Nielsen pay the costs of his assigned counsel in the amount of \$800 for one or more felony charges. (*Id.* at 3.)

The district court sentenced Nielsen on December 1, 2022. (Doc. 82.1.) The district court did not make any factual findings regarding credit for time served because it deferred the imposition of Nielsen’s sentence for count one. (12/1/22 Tr. at 11.) The district court expressly imposed the \$250 contribution to the Montana Highway Patrol drug fund. (*Id.* at 10-11.) It imposed the conditions in the plea agreement, it specifically addressed Nielsen’s request to amend two of the State’s proposed conditions, and it amended a third condition that neither party had addressed. (*Id.* at 11-12.) In the written judgment, the district court included various fees and costs. (Doc. 83 at 3.) Nielsen has challenged \$2,327 of those fees and costs and requests this Court to remand to the district court to make factual findings regarding credit for time served. (Appellant’s Brief (Br.) at 15-34.)

STATEMENT OF THE FACTS

I. The offense

On January 24, 2022, a Montana Highway Patrol trooper stopped Nielsen in a vehicle for various equipment violations and his observation of a female seated on top of a male in the front passenger seat. (Doc. 1 at 2.)¹ The trooper contacted the occupants of the vehicle and discovered all of them were subject to active

¹ Nielsen pleaded guilty, so the facts of the offense are based primarily on the State’s affidavit in support of the Information. (Doc. 1.)

arrest warrants. (*Id.*) The trooper searched Nielsen’s vehicle, pursuant to his consent, and found a used glass pipe with burnt white residue, and a small case with a second used glass pipe with burnt white residue, a glass vile with residue, a tourniquet, a used syringe, a cut orange straw, a metal pick, and cotton filters. (*Id.*) The trooper field tested the glass pipes, and both tested positive for methamphetamine. (*Id.*) Nielsen admitted that he did not have insurance for the vehicle. (*Id.*)

The trooper arrested Nielsen and transported him to the Ravalli County Detention Center. (Doc. 25, Ex A at 6.) He posted a \$2,500 bond to the justice court the same day of his arrest—January 24, 2022. (Doc. 14.)²

II. Procedural history

On February 3, 2022, the State charged Nielsen with felony drug possession, in violation of Mont. Code Ann. § 45-9-102(3), misdemeanor possession of drug paraphernalia, in violation of Mont. Code Ann. § 45-10-103, misdemeanor failure to have liability insurance, in violation of Mont. Code Ann. § 61-6-301, and misdemeanor failure to wear a seatbelt, in violation of Mont. Code Ann. § 61-13-103. (Docs. 1-3.)

² The district court record does not include any record from the justice court regarding his release on January 24, 2022, other than the bail bond documents in Docs. 13-15.

Nielsen repeatedly tested positive for drug use during the pretrial proceedings. (Docs. 6.1-8, 12-15.1, 18.1, 21-23, 40-41, 46-51.) The district court issued multiple arrest warrants, ordered Nielsen to enroll in the Ravalli County Jail Diversion Program for pretrial supervision, and increased bail until Nielsen remained in custody on a \$20,000 bond. (*Id.*) The documents in the district court record provide an incomplete picture of the exact dates of Nielsen's arrests and releases. (*Id.*)

Based on the documents in the district court record, on January 27, 2022, Nielsen reported after hours for a urinalysis. (Doc. 7.) Shane Fisher (Fisher), Nielsen's pretrial probation officer, told Nielsen that he could still provide a sample, but Nielsen was unable. (*Id.*) On February 3, 2022, Nielsen posted a \$5,000 bond with the justice court. (Doc. 13.) On February 8, 2022, Nielsen failed to report for a urinalysis. (Doc. 7.) On February 10, 2022, Nielsen did not appear at the time scheduled for his initial appearance, and the district court ordered someone to get in touch with Nielsen. (Doc. 6.1.) Nielsen eventually appeared, and the district court ordered him to report downstairs for a urinalysis. (*Id.*) The court informed Nielsen that if the results were positive, Fisher could arrest him, and bond would be set at \$10,000. (*Id.*) Nielsen admitted to Fisher that he had injected methamphetamine two days before and drank alcohol. (Doc. 7.) Nielsen's

urinalysis tested positive for methamphetamine, and Fisher arrested him.

(Docs. 7-8.) The court rescheduled the initial appearance. (Doc. 6.1.)

On February 17, 2022, Nielsen appeared by video, in custody, pleaded not guilty, and requested a bond reduction to \$5,000. (Doc. 11.1.) The district court reduced the bond, and Nielsen posted it the same day. (Docs. 11.1, 15.)

On March 10, 2022, Nielsen personally appeared at the omnibus hearing. (Doc. 15.1.) After the district court accepted the omnibus form, it ordered Nielsen to provide a urinalysis and report back to the court if it was positive. (*Id.*) Nielsen reported back because the test was positive. (*Id.*) The district court revoked Nielsen's release, set bail at \$10,000, ordered him to be taken into custody, and filed amended conditions of release and bond. (Docs. 15.1-16.) During a bail hearing on March 17, 2022, Nielsen informed the court that he wanted to seek treatment. (Doc. 18.1.)

On March 27, 2022, Nielsen posted \$10,000 bond and was released. (Doc. 23.) On March 28, 2022, Nielsen's urinalysis tested positive for methamphetamine and amphetamine. (Doc. 21.) On April 4, 2022, the State filed its second motion to revoke his bond, and the district court issued an arrest warrant. (Docs. 21-22.1.) On May 3, 2022, Nielsen filed a motion to quash the warrant. (Doc. 34.) He said he had entered a 60-day inpatient treatment program in Columbia Falls with an anticipated graduation date of June 1, 2022. (Docs. 34, 49.)

On May 11, 2022, the sheriff's office returned the arrest warrant as unserved, and the district court quashed it. (Docs. 38-39.) The district court specified that Nielsen must provide a release of information so pretrial services could confirm his compliance with treatment. (Doc. 39.)

On June 6, 2022, the State filed its third motion to revoke bond. (Doc. 46.) The State alleged that Nielsen graduated from the Columbia Falls treatment center on May 14, 2022, and returned to Ravalli County without reporting to the local recovery center. (Docs. 46, 49.) When Nielsen reported on May 19, 2022, his urinalysis tested positive for methamphetamine and THC. (*Id.*) On June 1, 2022, Nielsen was discharged from the recovery center for using methamphetamine and fentanyl, and he absconded. (*Id.*) The district court issued an arrest warrant and set bond at \$20,000. (Docs. 47-47.1.) On June 6, 2022, Nielsen reported to pretrial diversion, and Fisher arrested him. (Doc. 49.) The district court quashed the arrest warrant. (Doc. 50.)

On July 26, 2022, Nielsen moved for release to a treatment facility in Columbia Falls. (Doc. 59.) After a hearing, the district court filed a furlough order that released Nielsen to the treatment facility subject to numerous conditions. (Doc. 63.) The conditions worked in conjunction with the previously imposed bail conditions. (*Id.*)

On September 14, 2022, the district court denied Nielsen’s motions to dismiss and suppress evidence on various grounds.³ (Docs. 20, 25, 27, 42, 53.1-53.2, 64-69, 71.)

On October 13, 2022, the State filed an Amended Information, and Nielsen pleaded guilty to felony drug possession, in violation of Mont. Code Ann. § 45-9-102(3), and misdemeanor possession of drug paraphernalia, in violation of Mont. Code Ann. § 45-10-103. (Docs. 76-77.1, 79.) The State recommended a deferred imposition of sentence for three years for the felony drug possession conviction. (Doc. 76 at 2.) The State recommended as conditions of the deferral period for Nielsen to successfully complete the treatment court program in Missoula County or Ravalli County and that he “shall contribute \$250 to the Montana Highway Patrol Drug Fund.” (Doc. 76 at 2.) The agreement also specified that Nielsen “will be subject to the conditions of probation imposed by the Adult Probation and Parole Office and/or this Court” and included several general conditions. (*Id.* at 2-3.) On November 29, 2022, the State filed a criminal history for Nielsen and numerous additional proposed probation conditions. (Doc. 82.)

The district court sentenced Nielsen on December 1, 2022. (Doc. 82.1.) The parties informed the district court of various issues they had encountered getting

³ On appeal, Nielsen does not challenge the order denying these motions. (Br. at 2-13.)

Nielsen into a treatment court as required by the plea agreement. (12/1/22 Tr. at 3-9.) Nielsen informed the district court about his success with a treatment facility in Kalispell, and the parties agreed that it was in his best interest to continue his treatment and stay away from the poor relationships he had in Ravalli County. (*Id.*) Based on these issues, the district court indicated that it would deviate from the treatment court requirement in the plea agreement. (*Id.*)

The district court asked for any further recommendations from the parties. (*Id.* at 9.) Nielsen's counsel addressed the special conditions recommended by the State. (*Id.* at 9-10; Doc. 82.)

[MS. ANDERSON]: Yes. So just for the recommended special conditions, Number 19, Mr. Nielsen has already done that and is currently following all the treatment recommendations provided by his CDE. I don't know if getting a second one at this juncture would show any new information. So we just ask that that be struck from the conditions that the state has recommended.

Otherwise, there is no—

And I would just inquire. Mr. Nielsen, do you have your GED or high school diploma?

THE DEFENDANT: Yes, ma'am.

MS. ANDERSON: We also ask for Condition 28 to be struck as well, Your Honor.

THE COURT: Mr. Lakin, any thoughts?

MR. LAKIN: I think you can do that by consent, Your Honor. And I could get up and go down a totally different path, but I

think I know where the Court is going, and we're fully supportive of that.

(12/1/22 Tr. at 9-10.)

The district court deferred the imposition of Nielsen's sentence on count one for three years.⁴ (12/1/22 Tr. at 10.) The district court specified that, as conditions of his deferred imposition of sentence, he must stay at the Kalispell treatment facility and comply with his treatment for 90 days, and he must make "a \$250 contribution to the Highway Patrol drug fund," as specified in the plea agreement. (*Id.* at 10-11; *see also* Doc. 76 at 2.) For count two, the district court imposed 14 days jail time concurrently and reduced the sentence by 14 days for credit for time served. (*Id.* at 11.) The district court asked the State for total jail credit, but it abandoned that request once it realized it ordered a deferred imposition of sentence. (*Id.*) The district court did not impose any fine. (*Id.* at 10.) It imposed "the minimum surcharges." (*Id.* at 11.) The district court said, "in light of the contribution to the drug fund, I will not impose the \$100 cost of prosecution." (*Id.*)

The district court imposed various conditions for Nielsen's deferral period. (*Id.* at 10-12; Doc. 82 at 2-5.) It addressed Nielsen's recommendations regarding

⁴ On count two, the district court imposed 14 days in jail with 14 days of credit for time served to run concurrently to Nielsen's sentence on count one. (12/1/22 Tr. at 11; Doc. 83 at 3.) Nielsen does not challenge that sentence.

the State’s proposed probation conditions and had the following exchange with the parties. (12/1/22 Tr. at 11; Doc. 82 at 2-5.)

[THE COURT]: I will impose the conditions as set forth in the Plea Agreement.

As far as the conditions of probation, I will amend Condition 19 to say that you have already obtained a chemical dependency evaluation. If something happens and you have a slipup and your probation officer thinks you need to have another one, that will be at their discretion to do so.

Twenty-six, I will amend that. If you’re prescribed any new prescriptions, you have 72 hours where you have to inform your probation officer of that.

Twenty-eight I will strike.

So any clarifications, Mr. Lakin?

MR. LAKIN: No.

THE COURT: Ms. Anderson?

MS. ANDERSON: No, Your Honor.

(12/1/22 Tr. at 11-12.)

The district court filed its written judgment on December 14, 2022. (Doc. 83.) The district court included the State’s recommended probation conditions as amended during the sentencing hearing. (Docs. 82-83; 12/1/22 Tr. at 11-12.) It listed the following financial obligations in a table format:

Total Crime Victim Surcharge Fee:	\$100.00
Total Statutory Surcharge Fee:	\$35.00

Total Court Technology Fees:	\$10.00
MT Highway Patrol Drug Fund	\$250.00
Ravalli County Jail Diversion, Pre-Trial Services:	\$1,277.00
Repayment of Public Defender Fees:	\$800.00

(Doc. 83 at 3.) The total amount of these obligations was \$2,472. (*Id.*)

SUMMARY OF THE ARGUMENT

The district court correctly imposed \$1,050 of the fees and costs that Nielsen has challenged. The district court had statutory authority to impose any reasonable condition to Nielsen’s deferral period, and he has failed to explain how the \$250 contribution to the Montana Highway Patrol drug fund is unreasonable.

Nielsen cannot support his argument that the \$800 public defender fee conflicts with the oral pronouncement of sentence, because that fee was included in the State’s recommended probation conditions that Nielsen, the State, and the district court directly addressed during the sentencing hearing. Everything in the record supports the conclusion that the district court imposed the \$800 fee by incorporating the State’s proposed conditions, as amended during its oral pronouncement of sentence.

Moreover, Nielsen agreed in the plea agreement to make the \$250 contribution and to be subject to probation conditions imposed by the district court.

The State has since performed its obligations, and this Court has consistently rejected offenders' efforts to avoid their obligations of a plea agreement after they have accepted its benefits. This Court should affirm the district court's imposition of these disputed fees and costs.

The State concedes that the \$1,277 jail diversion costs and the audit hearing should be struck from the written judgment because they conflict with the oral pronouncement of sentence.

The State concedes to Nielsen's request to remand this case to the district court to make the factual findings necessary to determine credit for time served.

ARGUMENT

I. Standard of review

This Court reviews a sentence for legality. *State v. Brendal*, 2009 MT 236, ¶ 11, 351 Mont. 395, 213 P.3d 448. Legality is determined “by considering only ‘whether the sentence falls within the statutory parameters, whether the district court had statutory authority to impose the sentence, and whether the district court followed the affirmative mandates of the applicable sentencing statutes.’” *State v. Steger*, 2021 MT 321, ¶ 7, 406 Mont. 536, 501 P.3d 394 (quoting *State v. Ingram*, 2020 MT 327, ¶ 8, 402 Mont. 374, 478 P.3d 799). A district court's findings of fact are reviewed for clear error. *Brendal*, ¶ 11.

II. The district court lawfully imposed \$1,050 of the financial obligations that Nielsen has challenged.

The district court had statutory authority to impose the \$250 contribution to the Montana Highway Patrol drug fund and the \$800 in public defender fees as conditions of Nielsen's probation as contemplated in the plea agreement.⁵

A. The district court properly imposed the \$250 contribution to the Montana Highway Patrol drug fund because it is a reasonable condition that Nielsen agreed to pay in the plea agreement.

A sentencing court "may impose on the offender any reasonable restrictions or conditions during the period of the deferred imposition or suspension of sentence." Mont. Code Ann. § 46-18-201(4). Nielsen offers no argument as to why the \$250 financial contribution to the Montana Highway Patrol drug fund is an unreasonable condition, and he does not otherwise support his argument that the condition is illegal.

Nielsen ignores the significance of his express agreement to make the \$250 payment in the plea agreement. The law specifically allows offenders who are charged with drug offenses to agree to the forfeiture of property in a plea agreement. Mont. Code Ann. § 44-12-207(2). Nielsen was contractually bound to pay the \$250 payment as soon as he signed the agreement. *See State v. White*,

⁵ Nielsen does not challenge the \$100 crime victim charge, the \$35 statutory charge, or the \$10 technology fee. (Br. at 21-23.)

2004 MT 103, ¶ 25, 321 Mont. 45, 88 P.3d 1258 (“A plea bargain agreement between a defendant and the State is a contract which is subject to contract law standards.”) (internal quotations omitted); *State v. Martin*, 2004 MT 288, ¶ 23, 323 Mont. 320, 100 P.3d 146 (“[P]lea agreements are enforceable from the moment they are entered into with both sides receiving the benefit of their bargain from the moment of signing.”). The State met its obligations, and this Court has long held that it will not lend its assistance to an accused criminal in escaping the obligations of a plea bargain after accepting its benefits. *See, e.g., State v. Bowley*, 282 Mont. 298, 310, 938 P.2d 592, 599 (1997); *State v. Sattler*, 170 Mont. 35, 37, 549 P.2d 1080, 1081 (1976); *State v. Nance*, 120 Mont. 152, 166, 184 P.2d 554, 561 (1947).

The district court had statutory authority to impose the \$250 contribution to the Montana Highway Patrol drug fund, and this Court should affirm Nielsen’s contractual obligation to pay it.

B. The district court properly imposed the \$800 public defender fee when it adopted the State’s recommended probation conditions.

In the plea agreement, Nielsen agreed that he “will be subject to the conditions of probation imposed by the Adult Probation and Parole Office and/or this Court.” (Doc. 76 at 2.) The plea agreement included several general conditions. (*Id.* at 2-3.) Prior to sentencing, the State filed a document that included Nielsen’s criminal history and proposed conditions of probation. (Doc. 82.) In those proposed

conditions, the State included a recommendation for Nielsen to pay \$800 for the costs of assigned counsel in a felony case. (*Id.* at 3.) The record shows that the district court imposed that fee as a condition of Nielsen's sentence, and that the parties understood the imposition of the probation conditions as modified during the sentencing hearing.

Both parties and the district court directly addressed the State's proposed probation conditions during the sentencing hearing. In response to the district court's request for recommendations, Nielsen's counsel asked that Conditions 19 and 28 be struck. She specifically addressed the content of the State's proposed conditions and argued Nielsen had completed a chemical dependency evaluation (Condition 19) and completed his GED (Condition 28). The State responded, "I think you can do that by consent, Your Honor." (12/1/22 Tr. at 10.)

The district court expressly adopted the conditions in the plea agreement and then broadly referred to the conditions of probation. It struck Condition 28, as Nielsen requested. It modified Condition 19 to partially accommodate Nielsen's request. It modified, without solicitation, Condition 26 to allow Nielsen 72 hours to report prescription changes as opposed to the preapproval requirement proposed by the State. In the written judgment, the district court included the State's proposed conditions, as amended during the sentencing hearing. Those conditions included the \$800 public defender fee.

Nielsen cannot support his argument that the \$800 fee conflicts with the district court's oral pronouncement of sentence. *State v. Hamilton*, 2018 MT 253, ¶ 51, 393 Mont. 102, 428 P.3d 849 (“[I]n the event of a conflict between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement controls.”) (internal quotations omitted). Everything in the record supports the conclusion that the district court imposed the \$800 fee by incorporating the State's proposed conditions, as amended during its oral pronouncement of sentence. Nielsen agreed in the plea agreement to be subject to the probation conditions imposed by the district court, both parties and the district court directly addressed the conditions during the sentencing hearing, and he cannot avoid those obligations after accepting the benefits of the agreement. *See Bowley*, 282 Mont. at 310, 938 P.2d at 599; *Sattler*, 170 Mont. at 37, 549 P.2d at 1081; *Nance*, 120 Mont. at 166, 184 P.2d at 561.

This Court should affirm the district court's imposition of the \$800 public defender fee.

III. The State concedes the district court did not address the \$1,277 jail diversion costs or an audit hearing during the sentencing hearing, and those conditions should be struck from the written judgment because they conflict with the oral pronouncement of sentence.

“[I]n the event of a conflict between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement controls.”

Hamilton, ¶ 51 (internal quotations omitted).

The written judgment conflicts with the oral pronouncement of sentence regarding the \$1,277 imposed for jail diversion costs. (Doc. 83 at 3.) Nothing in the record reflects the district court’s intention to impose these costs during the sentencing hearing. The only reference to these costs in the record prior to the written judgment is the order for conditions of release and bond. (Doc. 12 at 3.) Because the district court did not reference these costs during the sentencing hearing or otherwise incorporate them as a probation condition, the written judgment conflicts with the oral pronouncement of sentence and these costs should be struck from the written judgment. *See Hamilton*, ¶ 51.

The written judgment conflicts with the oral pronouncement of sentence regarding the audit hearing. (Doc. 83 at 7.) The district court did not mention an audit hearing during the sentencing hearing and nothing in the conditions that the district court incorporated refer to an audit hearing. The State concedes that the

inclusion of this hearing for the first time in the written judgment conflicts with the oral pronouncement of sentence and must be struck. *See Hamilton*, ¶ 51.

IV. The State concedes to Nielsen’s request to remand for the district court to make factual findings to determine his credit for time served.

In *Killam v. Salmonsens*, 2021 MT 196, ¶¶ 17-19, 405 Mont. 143, 492 P.3d 512, this Court held pretrial and presentencing credit for jail time served is governed by Mont. Code Ann. § 46-18-201(9). That statute provides: “When imposing a sentence under this section that includes incarceration in a detention facility or the state prison, as defined in 53-30-101, the court shall provide credit for time served by the offender before trial or sentencing.” *Id.* In *Killam*, ¶ 17, this Court explained that Mont. Code Ann. § 46-18-201(9) requires a district court to calculate time served based “solely on the record of the offense for which the defendant is being sentenced . . . without considering other criminal proceedings or DOC incarcerations or holds.”

An offender is entitled to a credit for time served reduction from the period of a deferred imposition of sentence. *State v. Ellsworth*, 2023 MT 8, ¶ 11, 411 Mont. 213, 523 P.3d 527. For purposes of credit for time served, “incarceration includes time spent in a residential treatment facility under the order of a court.” Mont. Code Ann. § 46-18-403(1)(b).

The State does not dispute that Nielsen spent numerous days incarcerated during the proceedings below, including time spent in a residential treatment facility, that would entitle him to a sentence reduction for credit for time served. *See Killam*, ¶ 17; *Ellsworth*, ¶ 11; Mont. Code Ann. § 46-18-403(1)(b). However, the record is insufficient to determine the precise number of days that Nielsen served. Based on the incomplete factual findings, the State does not concede to the credit calculations in Nielsen's brief. It does, however, concede to Nielsen's request to remand to the district court to make factual findings and determine the number of days Nielsen served that entitle him to a credit reduction.

CONCLUSION

The State respectfully requests this Court affirm Nielsen’s sentence as outlined above. The State concedes, in part, to remand this case and order the district court to strike from the written judgment the \$1,277 in jail diversion costs and the audit hearing requirement, and to make the record necessary to determine the amount of credit for time served that Nielsen should receive.

Respectfully submitted this 6th day of November, 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 4,168 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Brad Fjeldheim
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CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-06-2024:

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