

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0568

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JORY JERAE SONGER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Mike Menahan, Presiding

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STATEMENT OF THE ISSUES

1. The State concedes that Songer is entitled to a new trial in his attempted deliberate homicide case because the State presented testimony through a videotaped deposition without demonstrating that the witness was unavailable for trial.

2. Was Officer Guerrero's seizure of Songer supported by particularized suspicion when Officer Guerrero saw Songer and two other males hunched over in a car in the parking lot of a motel known for criminal activity, they froze when he drove by, Officer Guerrero knew that people commonly use drugs in cars in motel parking lots, Officer Guerrero knew that one of the men had a pending arrest warrant, one of the men displayed signs of drug use, and Songer appeared to take items out of the car before starting to walk away.

3. Did the court err when it denied Songer's request for a substitution of counsel when Songer refused to meet with his counsel or counsel's investigator, but Songer did not demonstrate that he could not effectively communicate with his counsel if he attempted to do so?

4. Does the reversal of Songer's convictions in the attempted deliberate homicide case require reversal of the revocation of Songer's sentences in another case if this Court affirms his drug convictions when the revocation was based on the court taking judicial notice of his convictions in both cases?

STATEMENT OF THE CASE

Appellant Jory Jerae Songer has three cases that have been consolidated on appeal. He was charged in Montana First Judicial District Court, Lewis and Clark County Cause No. ADC-2022-464 with criminal possession with intent to distribute, criminal possession of drug paraphernalia, and obstructing a peace officer. (Drug Doc. 4.)¹ Songer was convicted by a jury on all three counts on March 27, 2023. (Drug Doc. 55.)

In ADC-2022-476, Songer was charged with two counts of attempted deliberate homicide and two counts of assault with a weapon. (Homicide Doc. 4.) Songer was convicted by a jury on all four counts on May 4, 2023. (Homicide Doc. 83.)

At the time of both offenses, Songer was on probation because he had been convicted of attempted accountability to burglary, obstructing a peace officer, and tampering with or fabricating physical evidence in ADC-2018-88. (Revocation Docs. 18, 29.) The State petitioned to revoke Songer's suspended sentences based on his charges in the other two cases. (Revocation Docs. 29, 33.) The court took judicial notice of his convictions in those two cases and revoked the two sentences Songer had not yet discharged. (Revocation Doc. 48.)

¹ The State refers to the documents from ADC 2022-464 as "Drug Doc. #," the documents from ADC-2022-476 as "Homicide Doc. #," and the documents from ADC-2018-88 as "Revocation Doc. #."

STATEMENT OF THE FACTS

I. Suppression issue

Songer moved to suppress evidence seized from his backpack, including drugs and a mask, after he was detained by police on September 9, 2022. (Drug Docs. 12, 13.) Songer filed the motion in his drug case, but he noted that the motion also applied to the attempted deliberate homicide case. (2/9/23 Tr. at 4.) The State responded, arguing that law enforcement had particularized suspicion to justify seizing Songer. (Drug Doc. 22.)

The following evidence was presented at a suppression hearing on February 9, 2023. Officer Jose Guerrero was patrolling the parking lots of hotels and casinos near the interstate in Helena on September 9, 2022. (2/9/23 Tr. at 14, 43.) Based on his experience with the Helena Police Department, he had often seen criminal activity outside of America's Best Motel, including observing stolen vehicles, individuals with warrants, and drug activity. (*Id.* at 42-43.)

When he drove through the America's Best Motel parking lot on September 9, 2022 in the early evening, he saw three people inside a silver BMW sedan backed into a parking spot in a back parking lot next to an immobile car. (*Id.* at 15, 17, 23; Def.'s Ex. A1 at 0:30-0:40.) Officer Guerrero was aware that two months earlier a silver BMW had reportedly been involved in dealing drugs at a different business in the area. (2/9/23 Tr. at 12, 27-28, 29.)

Officer Guerrero noticed that the three people in the BMW were hunched over. (*Id.* at 15.) He saw that they leaned forward and then froze as he drove by. (*Id.* at 16.) Officer Guerrero suspected that they were smoking illegal drugs based on the occupants being hunched over in a parked vehicle, the occupants freezing as he drove by, and his past experiences of seeing people in hotel and casino parking lots using drugs in cars. (*Id.* at 17-18, 30-31, 38-39.) Officer Guerrero recognized the occupant in the middle of the backseat as Shay McPhee. Officer Guerrero knew an arrest warrant had been issued for McPhee and that McPhee was a suspect in a shooting. (*Id.* at 16, 19, 23, 25.)

Officer Guerrero continued driving past the BMW to see how the occupants would react, and then he turned his patrol vehicle around. (*Id.* at 15, 39.) As he was turning around, the occupants all got out of the BMW. (*Id.* at 24.) McPhee walked over to a grassy area past the parking lot with his dog before trying to go up the stairs toward the motel rooms. (Def.'s 2/9/23 Hr'g. Ex. A1 (Ex. A1) at 0:30-1:20.) The other two occupants, Songer and Tyler Blackwell, initially remained with the car. (Def.'s 2/9/23 Hr'g. Ex. A (Ex. A) at 0:17-0:35.)

As Officer Guerrero was driving toward the BMW, Songer was standing by the opened passenger door, moving around objects in the passenger side of the car. (*Id.* at 0:17-0:30.) Songer then walked around the back of the car with a black backpack and approached Blackwell on the driver's side, which was the side

farthest from Officer Guerrero. (*Id.* at 0:28-0:50.) Songer and Blackwell both started to walk away, and as Songer did so, he put on the backpack. (*Id.* at 0:39-0:55.)

Officer Guerrero approached Songer and Blackwell and asked them, “What’s going on?” and asked whether the BMW was their car. (Ex. A1 at 0:32-0:43.) Blackwell initially looked at the ground while walking away, and his speech was slurred. (*Id.*; 2/9/23 Tr. at 20.) Neither Songer nor Blackwell provided a clear answer about the ownership of the BMW. (Ex. A1 at 0:32-0:43.) During Officer Guerrero’s interactions with Blackwell, he observed that Blackwell had slightly slurred speech, he repeatedly scratched his skin, and he fidgeted excessively, which are all signs of drug use. (2/9/23 Tr. at 20.)

Because McPhee was a shooting suspect, Officer Guerrero decided to try to make contact with and apprehend McPhee rather than staying to talk to Songer and Blackwell. (2/9/23 Tr. at 24.) Officer Guerrero told Songer and Blackwell to hang out by the BMW while he went to apprehend McPhee. (*Id.* at 32-33, 40.)

McPhee tried to walk away from Officer Guerrero despite Officer Guerrero’s efforts to speak with him. (Ex. A1 at 0:55-1:35.) Officer Guerrero caught up with and detained McPhee. (*Id.*) As Officer Guerrero walked McPhee back to the patrol car, McPhee ditched an object, later determined to be drug paraphernalia, into the bed of a white truck. (*Id.* at 1:40-2:30, 8:50-9:05.)

After Officer Guerrero arrested McPhee and other officers arrived, he resumed speaking to Songer and Blackwell. (*Id.* at 24-25.) Officer Guerrero observed a new roll of foil in the car, which is commonly used to consume fentanyl. (*Id.* at 21-22.)

Officer Guerrero also noticed that Songer kept picking up a backpack. (*Id.* at 21.) Songer asked Officer Guerrero if he was being detained, and Officer Guerrero told him he was. (*Id.* at 34.) Officer Guerrero asked Songer who the backpack belonged to, and Songer stated that it was his. (*Id.*) Songer eventually ran off with the backpack but he was apprehended nearby. (Ex. A1 at 14:30-18:10.) The backpack was later searched pursuant to a probation search. (2/9/23 Tr. at 36.) The backpack contained Songer's cell phone, various drugs and drug paraphernalia, and a mask. (*Id.*)

The court concluded that Officer Guerrero's seizure of Songer was supported by particularized suspicion and denied Songer's motion to suppress. (Homicide Doc. 25 at 6-7, available at Appellant's App. at 76-77.)

II. Procedural history concerning Songer's motion to substitute counsel

A final pretrial conference in the attempted homicide case was scheduled for February 22, 2023, less than five months after Songer was charged with attempted homicide. (Homicide Doc. 12.) The parties indicated that they had reached an

agreement, so the trial was vacated. (*Id.*) At the next hearing, however, the State informed the court that Songer was not going to change his plea in the homicide and drug cases, so trial dates needed to be reset. (3/1/23 Tr. at 4.) Songer's counsel, Steven Scott, informed the court that Songer wanted a speedy trial and objected to a continuance of his trial. (*Id.* at 4-5.) The court explained that the trial date in the homicide case had been vacated because Songer was going to change his plea, so a new date had to be set. (*Id.* at 5.) The court scheduled the trial for May 1, 2023, which was seven months after Songer was charged. (*Id.*)

On March 10, 2023, Scott filed a request for a hearing to determine whether Songer was entitled to new counsel. (Homicide Doc. 15.) Scott stated that Songer "wants a new attorney assigned to his case and it appears there is a breakdown in the attorney-client relationship." (*Id.*)

The court held a hearing on the motion on March 15, 2023. (3/15/23 Tr.) Scott informed the court that Songer was refusing to meet with Scott's investigator, Bill Emerson. (*Id.* at 4.) Scott explained that he learned from the prosecution that Songer had requested an interview with the lead detective without consulting with Scott. (*Id.*) Scott subsequently learned that Songer no longer wanted to meet with the detective. (*Id.* at 5.) Scott sent Emerson to talk to Songer to learn what was going on. (*Id.*) When Emerson went to the jail, Songer refused to meet with him. (*Id.*)

Songer then filed a request for a different attorney with the Office of the State Public Defender (OSPD). The OSPD denied Songer's request. (*Id.* at 6.)

Songer left a message with the OSPD saying that he had information about the case but he was uncomfortable sharing that information with his attorney. (*Id.*)

Scott concluded that Songer did not trust him and, as a result, they had a total breakdown of the attorney/client relationship. (*Id.*) Scott stated that "when the client refuses to meet with a member of his defense team . . . , and then Mr. Songer refuses to convey information to me about his case, basically doesn't trust me, I think that that relationship has been severed." (*Id.* at 6-7.) Scott continued, "I don't believe that it can be salvaged. His refusal to engage with me basically goes to the very essence of a breakdown in the attorney-client relationship." (*Id.*) Scott opined that it would be in Songer's "best interests" to be assigned new counsel and that it would not be good for Scott to continue as counsel. (*Id.*)

The court expressed concerns, however, that allowing a defendant to obtain new counsel simply by refusing to meet with their counsel "would put the defendants in charge of picking their own attorney." (*Id.* at 7.) The court then asked Songer why he believed that he needed new counsel. (*Id.* at 8.)

THE DEFENDANT: I just feel like I won't get a fair trial, and I want new Counsel that I feel comfortable with. And there's been stuff that's already happened that I don't agree with.

THE COURT: Like what?

THE DEFENDANT: Like the whole speedy trial, me waiving my speedy trial. I'm pretty sure I spoke up in court and I did not want to change my plea, but I'm still waiving my speedy trial. I wasn't informed that that would have happened.

(Id.)

The court explained that the jury trial had been vacated because Songer indicated that he was going to change his plea, so another trial date had to be set when he decided not to change his plea. *(Id.)* The court informed Songer that he could still object on speedy trial grounds, but the court also noted that it would deny such a motion because the case was not old. *(Id. at 9.)*

The court inquired about Songer's other complaints. *(Id.)* Songer said, "There's been people make statements, and I want to subpoena them, I want—there's stuff in my phone that severely helps me in my case, and their Detective's hiding that. I don't feel like that should be going on." *(Id. at 9.)* The court speculated, and Scott confirmed, that Songer's phone was in the possession of the State and the information on it had been downloaded. *(Id. at 9-10.)*

Scott explained that he and Emerson had been talking to Songer for months and had asked him whether there was any information on his phone that could be used, but he just recently became upset about his phone. *(Id. at 10.)* Scott also said Emerson had contacted every person Songer asked them to contact, and he had informed Songer of the results of every investigation. *(Id.)*

The court denied Songer's request for new counsel, concluding that he had a dispute with his attorney about trial tactics, which is not a ground for the substitution of counsel. (*Id.*) The court informed Songer that he had "a competent attorney who has spent months delving into this case." (*Id.*) The court explained that Songer had two cases scheduled for trial in the next six weeks, and he could not obtain the appointment of new counsel simply by refusing to communicate with his attorney. (*Id.* at 11.)

Songer's jury trial in the drug case was held March 27, 2023. (Drug Doc. 47.)

On April 11, 2023, Scott filed a motion to continue the attempted deliberate homicide trial because Songer had hired Nick Brooke to represent him and Songer did not want Scott to do any further work on this case. (Homicide Doc. 41.) At the final pretrial conference the next day, the court denied the motion and ordered the case to proceed to trial on May 1, 2023. (Homicide Doc. 38.)

III. Procedural history concerning the deposition of Patience Davis

A month and a half before trial in the attempted deliberate homicide case, the State filed a motion for an order directing the deposition of Patience Davis, a material witness, to preserve her testimony for use at trial. (Homicide Doc. 18.) The State explained in its motion that it was concerned that she would be

unavailable for trial for two reasons. First, the State was concerned for her safety because other inmates had threatened her for testifying against the defendant. Second, the State said Davis, who was addicted to methamphetamine, had been admitted to treatment at Rimrock in Billings starting on April 26, 2023. (*Id.*) The State said Davis would “likely be unavailable and attending intensive outpatient treatment at Rimrock during the May 1, 2023 trial.” (*Id.* at 1.) The State indicated that it did not want to interfere with Davis’s treatment and requested a preservation deposition of Davis. (*Id.*)

Songer objected to the motion for the deposition. He argued that the State had not provided sufficient information about the threats to Davis or what had been done about them. (Homicide Doc. 32.) Songer argued that Davis could be transported to a different jail if she was in danger. (*Id.*) Songer argued that her bed date for treatment was also insufficient to require a deposition because bed dates can be changed. (*Id.*) Songer argued that he had a right to confront Davis at his trial. (*Id.*)

The court ordered Davis’s deposition. (Homicide Doc. 34.) The deposition was held April 12, 2023. (Homicide Docs. 37, 67 (available at Appellant’s App. at 2-61).)

At the start of the trial, there were no further objections and there was not any discussion about the deposition being played during trial. Before the

deposition was played at trial, the State represented that it had redacted references to Songer being in prison, which Songer had objected to during the deposition. (Homicide Trial Day 1 at 208-09; Homicide Trial Days 3&4 at 6.) The State accidentally failed to redact one of the references to prison, however, and that statement was played for the jury. (Homicide Trial Days 3&4 at 22-23, 46.) Songer requested a mistrial based on the reference to him being in prison. (*Id.* at 23.) The court recognized that the statement was “problematic,” but the court also noted that members of the public often do not know the difference between prison and jail and may have simply thought that Davis was referring to his incarceration on the charges in the underlying case. (*Id.* at 23-26.) Accordingly, the court denied the motion for a mistrial. (*Id.*)

IV. Evidence presented at Songer’s drug trial

Songer was tried for the drug offenses on March 27, 2023. The evidence demonstrated that Songer’s backpack was searched following his seizure in the America’s Best Motel parking lot. (3/27/23 PM Tr. at 24, 43-45.) His backpack contained a clear bag containing methamphetamine, a white crystalline substance that resembled, but was not, methamphetamine, two used syringes, ten unused syringes, foil containing a dark residue, and a scale. (*Id.* at 45-52, 68, 73.) The State opined that the clear substance that was not methamphetamine was a cutting

agent that Songer would use to increase the weight of methamphetamine that he sold. (*Id.* at 52-54, 62.) The State presented Songer’s text messages in which he appeared to be selling methamphetamine and fentanyl to other people. (*See id.* at 13-23.)

V. Evidence presented at Songer’s attempted deliberate homicide trial

Songer’s trial for two counts of attempted deliberate homicide and assault with a weapon was held May 1-4, 2023. The evidence demonstrated that on the evening of August 17, 2022, Brandon Marion was hanging out with neighbors and friends outside of his home in the Stewart Homes housing complex. (Homicide Trial Day 2 at 12-18.) Around 1 a.m., Marion and three others sat down on his porch. (*Id.* at 18-20.) When they sat down, they noticed a man wearing dark clothing and a mask standing in the dark near a tree. (*Id.* at 20-21, 31, 96-97.) One witness described the mask as a skull mask. (*Id.* at 96, 104-06; State’s Ex. 82.)

Marion and the others stood up and walked toward the man and asked him, “What’s up?” (Homicide Trial Day 2 at 21-22.) The man began shooting at them, firing six shots. (*Id.* at 21, 23-24, 97-99, 106.) Marion and his friend, Anthony Peek, were struck by the shots. (*Id.* at 24-29, 100.) Two juveniles near Marion and Peek had bullets pass close to them, but they were not shot. (*Id.* at 24,

29, 55, 65-79.) Marion and Peek both suffered long-term damage that impacted their ability to work. (*Id.* at 39-40, 90-91, 107-09.)

Video cameras at Stewart Homes depicted a distinctive white Hyundai Sonata that had been reported stolen driving through Stewart Homes around the time of the shooting. (Homicide Trial Day 1 at 203-05; Homicide Trial Day 2 at 130-43.) Video also showed the shooter running. (Homicide Trial Day 2 at 141.)

A day later, the stolen Sonata was recovered. (*Id.* at 144-51.) Law enforcement located a chicken wing package from Walmart in the vehicle with a label indicating that it had been packaged on August 17, 2022, in the afternoon. (*Id.* at 173.) An officer was able to obtain security footage from Walmart that showed Patience Davis stealing those wings from Walmart on August 17. (*Id.* at 172-73.) Davis admitted that she had stolen the car and had gone to Stewart Homes on the night of the shooting. (*Id.* at 173.)

When law enforcement interviewed Davis, she said Songer and her boyfriend were in the car when they drove to Stewart Homes, and Songer exited the car. (*Id.* at 179.) Officers observed that Songer's height and build were consistent with the descriptions of the shooter that the victims had given. (*Id.* at 180-81.) Based on Davis's statements, Songer became the prime suspect in the shooting. (*Id.* at 180.)

Davis's deposition was played at trial, and she did not testify in person. (Homicide Trial Days 3&4 at 22.) In the deposition, Davis said she drove from East Helena into Helena in a stolen car on the night of the shooting with her boyfriend and Songer in the car. (Appellant's App. 2 at 8-11.) Davis and Songer both used fentanyl, methamphetamine, and alcohol regularly at that time. (*Id.* at 11.) Davis said that around 1 a.m., Songer asked her to drive him to the Stewart Homes housing complex. (*Id.* at 14.) Her understanding was that he was going to "deal with some problems that he had with some people there." (*Id.*) Davis said she dropped Songer off near Stewart Homes and believed she was going to pick him up later at the gas station nearby. (*Id.* at 16-18.) When she dropped him off, he was wearing dark clothing and had a black backpack. (*Id.* at 18-19.)

Davis said that she saw Songer running down the street a couple of minutes later and picked him up. (*Id.* at 20, 40.) When he was getting in the car, she heard something hit the ground and make a clanking noise. (*Id.* at 23-24.) Whatever it was, Songer picked it up and got in the car. (*Id.* at 24.) Songer told Davis to drive "the back way," and he said he "got them niggas." (*Id.*) Davis said later that night Songer said again that he "got them niggas" and motioned four times, which was when she realized that there had been more than just a fight. (*Id.* at 27, 60.)

Davis said that weeks later she went to Bozeman with Songer and others. (*Id.* at 28-29.) On that trip, Songer told her that there had been three people present during the shooting, but the newspaper had only mentioned two. (*Id.* at 29, 34.)

Before testifying in the deposition, Davis had entered into a plea agreement with the State in which she agreed to testify against Songer and to plead guilty to less serious offenses in exchange for having accountability to attempted deliberate homicide charges dismissed. (*Id.* at 31, 55-56.)

Davis also said she had been called a rat and other names in jail, which she believed was intended to get her to change her testimony. (*Id.* at 36.) Her paperwork was also posted on a Facebook page called Rats On Blast. (*Id.* at 37.)

Other evidence demonstrated that Songer had a black backpack containing a skeleton mask when he was detained in the motel parking lot the following month. (Homicide Trial Day 2 at 230-48; State's Ex. 85.)

When law enforcement interviewed Songer, he did not admit to being the shooter, but he also did not disagree when an officer said he knew Songer was present at the shooting. (State's Ex. 128 at 3:35-3:50.) He shook his head when an officer asked him if it was a planned hit, indicating that he was aware of it. (*Id.* at 3:50-4:05.) He then made vague statements and did not deny that he was involved for several minutes. (*Id.* at 4:05-6:30.) Instead, he first said he did not think it was

something that he would do before later saying he did not do it. (*Id.* at 5:20-6:30.)

He later said it was not a planned hit, but he was not there. (*Id.* at 8:40-8:46.)

After the shooting, Marion immediately suspected that his ex-wife, Savannah, was responsible for the shooting because he had just obtained full custody of their child in a contested case. (Homicide Trial Day 2 at 41-43, 49.) Songer's cell phone records demonstrated that he had multiple calls with Savannah the week before the shooting, including several on the evening of the shooting. (Homicide Trial Days 3&4 at 77-79.) Songer's text messages also indicated that he met with Savannah earlier that day, and then he exchanged messages with her the morning after the shooting. (*Id.* at 83-84.) Law enforcement later learned from Savannah that Songer was at her house in the morning hours after the shooting. (*Id.* at 87.)

Songer's cell phone records demonstrated that he looked up articles about the shooting. (*Id.* at 91-93.) He also sent a message two weeks after the shooting saying someone "should ask the last crew talking shit about me. They were on the news late last week. Ha-ha," followed by a devil emoji. (*Id.* at 99.) He then said, "Pass me a pole," which is slang for a gun, "so I don't have to drive back to Havre for mine." (*Id.* at 100.) Songer also complained on jail calls that people were "telling on me" and that Davis had "ratted." (*Id.* at 121.)

SUMMARY OF THE ARGUMENT

The State concedes that Songer is entitled to reversal of his convictions in the attempted deliberate homicide case because the State did not demonstrate at trial that Davis was unavailable to testify. Playing the videotaped deposition without demonstrating that Davis was unavailable violated Songer's right to confront the witnesses against him.

That error did not affect Songer's convictions in his drug case. Songer's drug convictions should be affirmed because the district court correctly denied his motion to suppress evidence obtained from his backpack after he was seized in the motel parking lot, and the court did not abuse its discretion when it denied Songer's request for a substitution of counsel before his trial in his drug case.

Officer Guerrero seized Songer when he told Songer to stay by the BMW while he pursued McPhee, but the seizure was permissible based on his particularized suspicion that Songer had been or was about to engage in criminal activity. As Officer Guerrero explained, Songer and the other two males were hunched down and then froze when he drove by. They were in a motel parking lot known for regular criminal activity, and Officer Guerrero knew that drug users commonly use drugs in cars in motel parking lots. Further, Officer Guerrero was aware of a report of a silver BMW dealing drugs in the area, he knew that McPhee had a pending arrest warrant, and Officer Guerrero observed that Blackwell slurred

his speech, picked at his skin, and fidgeted, displaying signs of drug use. Songer appeared to remove items from the BMW before he started to walk away. Based on the totality of the circumstances, Officer Guerrero had particularized suspicion of criminal activity that authorized him to ask Songer and Blackwell to stay by the car while he apprehended McPhee. Accordingly, the court correctly denied Songer's motion to suppress evidence that was subsequently seized from his backpack.

The court also did not abuse its discretion when it denied Songer's request for a substitution of counsel after inquiring into his complaints. Although Songer had refused to meet with Scott, there was no evidence that Songer could not communicate effectively with Scott if he chose to do so. There was also not any evidence that Scott had a conflict with Songer. The complaints Songer raised demonstrated that he had disagreements with Scott's representation of him that did not establish a valid ground for the substitution of counsel. Accordingly, the court's denial of Songer's request for a substitution of counsel was not an abuse of discretion.

Finally, the revocation of Songer's suspended sentences in ADC-2018-88 should be affirmed, despite the reversal of his convictions in the attempted deliberate homicide case. The court revoked Songer's suspended sentences in ADC-2018-88 based on judicial notice that Songer had been convicted of new

offenses in the other two cases. Songer’s convictions in the drug case should be affirmed, and they provided a basis for the revocation of Songer’s suspended sentences.

ARGUMENT

I. Standard of review

An appellate court reviews a trial court’s 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. Nelson*, 2017 MT 237, ¶ 6, 389 Mont. 1, 402 P.3d 1239. A district court’s finding that particularized suspicion exists is a question of fact, which is reviewed for clear error. *City of Missoula v. Moore*, 2011 MT 61, ¶ 10, 360 Mont. 22, 251 P.3d 69. “A finding is clearly erroneous if it is ‘not supported by substantial evidence, if the court has misapprehended the effect of the evidence, or if this Court’s review of the record leaves us with the firm conviction that a mistake has been made.’” *Id.* (quoting *State v. Roberts*, 1999 MT 59, ¶ 11, 293 Mont. 476, 977 P.2d 974).

A request to substitute counsel is within the sound discretion of the district court, and is reviewed for an abuse of discretion. *State v. Johnson*, 2019 MT 34, 394 Mont. 245, 435 P.3d 64. A district court abuses its discretion if it acts

arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Id.*

This Court reviews a district court's revocation of a suspended sentence to determine whether the court abused its discretion and whether the decision was supported by a preponderance of the evidence in favor of the State. *State v. Beam*, 2020 MT 156, ¶ 6, 400 Mont. 278, 465 P.3d 1178.

II. The State concedes that Songer is entitled to a new trial in the attempted deliberate homicide case.

The State concedes that the district court erred when it allowed the State to play a deposition from Davis in lieu of in-person testimony as there was not a showing at the time of trial that Davis was unavailable. In the State's motion for a deposition, the State explained that it was concerned that Davis might be unavailable for trial because she had received threats in jail and she was scheduled to begin treatment a week before the trial. (Homicide Doc. 18.) The State did not provide additional information on the record, however, indicating that Davis was further impacted by threats or entered treatment and was actually unavailable when the trial began. Even if it was appropriate to order the deposition to preserve Davis's testimony for trial, and despite this issue not being raised at the time of trial by the court or the parties, the deposition should not have been played at trial without a showing that Davis was unavailable for trial. *See State v. Norquay*,

2011 MT 34, ¶ 20, 359 Mont. 257, 248 P.3d 817. Given the significance of Davis’s testimony, the State, in consultation with the Lewis and Clark County Attorney’s Office, concedes that Songer is entitled to reversal of his convictions in ADC-2022-476. That case should be remanded for a new trial.

III. The district court correctly denied Songer’s motion to suppress evidence obtained after he was seized in the motel parking lot.

Songer was temporarily detained for investigative purposes when Officer Guerrero asked Songer and Blackwell to stay with the BMW. That temporary detention was permissible because Officer Guerrero had particularized suspicion to believe that Songer possessed or had consumed illegal drugs.

The Fourth Amendment to the United States Constitution and article II, section 11, of the Montana Constitution prohibit unreasonable searches and seizures. A “seizure” “occurs when a government officer ‘in some way’ restrains a person’s liberty by means of physical force or show of authority that, under the totality of the circumstances, would cause an objectively reasonable person to believe that the person is not free to leave the presence of the officer.” *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 10, 391 Mont. 457, 419 P.3d 1208. To comply with the constitutional provisions, government seizures must generally occur pursuant to a judicial warrant issued on probable cause. *Id.* Warrantless

seizures are per se unreasonable unless an exception to the warrant requirement applies. *Id.*

An exception to the warrant requirement allows officers to temporarily seize individuals to investigate an offense. Under this exception, an officer may briefly stop and detain a person for investigative purposes “if, based on the *specific and articulable facts known to the officer*, including rational inferences therefrom based on the officer’s training and experience, the officer has an objectively reasonable, particularized suspicion that the person is engaged, or about to engage, in criminal activity.” *Kroschel*, ¶ 11 (emphasis in original). “The State must show: (1) objective data from which an experienced officer could make certain inferences, and (2) a resulting suspicion that the [suspect] in question is or has been engaged in some wrongdoing.” *State v. Schlichenmayer*, 2023 MT 79, ¶ 15, 412 Mont. 119, 529 P.3d 789. An officer need not be certain that an offense has been committed. *Id.* “Rather, courts must look at the totality of the circumstances to determine if the officer had the objective data necessary to justify the stop.” *Id.*

Officer Guerrero had a particularized suspicion that Songer was involved in illegal drug activity based on the totality of the circumstances when he directed Songer to stay by the BMW. Officer Guerrero knew based on his training and experience that crime commonly occurs in the parking lot where Songer was located, and that drug users commonly consume drugs together in vehicles in hotel

and casino parking lots. (2/9/23 Tr. at 18, 42-43.) While Songer's presence in a high crime area alone would not have been sufficient to support his seizure, *see State v. Laster*, 2021 MT 269, 406 Mont. 60, 497 P.3d 224, Officer Guerrero observed additional facts that provided him with particularized suspicion that criminal activity had occurred or was about to occur. Officer Guerrero observed that the three men in the BMW were hunched down in a way that led him to believe they were using illegal drugs, and then they "froze" when they saw him. (2/9/23 Tr. at 15-16.) Officer Guerrero knew that one of the three men, McPhee, had an outstanding warrant and was a suspect in a shooting. (*Id.* at 16, 19.)

By the time Officer Guerrero turned his car around, the three men had exited the car, and McPhee had walked away from the BMW. (Ex. A1 at 0:30-1:20.) Songer appeared to remove items from the passenger side of the car and place them in a backpack, and he appeared to be trying to conceal his movements by keeping his back to Officer Guerrero and then walking around to the far side of the car. (Ex. A at 0:17-0:50.) Additionally, Blackwell displayed signs of drug use, including slurred speech, fidgeting, and sores that he picked. (Ex. A1 at 0:32-0:43; 2/9/23 Tr. at 20.)

Officer Guerrero's observations of the suspicious behavior in the BMW, which was parked in a location where drugs are commonly used, combined with the suspicious behavior and signs of drug use that Officer Guerrero observed after

McPhee, Songer, and Blackwell exited the BMW, provided Officer Guerrero with particularized suspicion to believe that all occupants of the car were involved in the use or distribution of drugs. Because Officer Guerrero wanted to pursue McPhee, who had a warrant, he reasonably requested that Songer and Blackwell stay by the car. The temporary detention of Songer was supported by Officer Guerrero's particularized suspicion that he was engaged in criminal activity. As a result, the district court correctly denied Songer's motion to suppress evidence seized from his backpack following the stop.

IV. The court did not abuse its discretion when it denied Songer's request for a substitution of counsel before his trial in the drug case.

A. Applicable law concerning the substitution of counsel

Criminal defendants have a fundamental right to effective assistance of counsel, but they do not have the right to counsel of their choice. *State v. Aguado*, 2017 MT 54, ¶ 23, 387 Mont. 1, 390 P.3d 628; Mont. Const. art. II, § 24; U.S. Const. amend. VI. "A defendant may not demand substitute counsel simply because he lacks confidence in, or does not approve of, his counsel; he only has the right to substitute counsel in a few instances." *Johnson*, ¶ 14.

When a defendant raises a complaint about counsel and requests the appointment of new counsel, the court must conduct an "adequate initial inquiry"

in order to determine whether the defendant's complaints are "seemingly substantial." *State v. Khongwiset*, 2020 MT 215, ¶ 27, 410 Mont. 142, 471 P.3d 51. "A district court's inquiry is adequate when the court considers the defendant's factual complaints together with counsel's specific explanations addressing the complaints." *Id.* (internal quotation marks and citation omitted). A district court's inquiry is inadequate, requiring remand, if the court "fails to conduct even a cursory inquiry into the defendant's complaints." *Id.* (internal quotation marks and citation omitted).

If the court determines after an initial inquiry that the defendant has failed to present seemingly substantial complaints, the court does not need to conduct a hearing to address the complaints. But if the court concludes that the defendant's complaints are seemingly substantial, the court must hold a hearing to address the validity of the complaints. *Johnson*, ¶ 22.

"[A] defendant is entitled to substitute counsel if he presents material facts showing good cause for the substitution as demonstrated by: (1) an actual conflict of interest; (2) an irreconcilable conflict between counsel and the defendant; or (3) a complete breakdown in communication between counsel and the defendant." *Johnson*, ¶ 19. "The trial court must focus its inquiry on the alleged conflict or breakdown and determine whether the defendant demonstrated good cause justifying substitute counsel." *Johnson*, ¶ 20. If the communication between

counsel and the defendant is so strained that mounting a defense is impossible, the defendant is not receiving the effective assistance of counsel. *Johnson*, ¶ 18. A defendant’s right to substitute counsel thus “arises only when a breakdown of the attorney-client relationship becomes so great that the principal purpose of the appointment—to provide the defendant with the effective assistance of counsel—is frustrated.” *Id.*

In *Johnson*, this Court clarified that a “defendant is not entitled to substitute counsel based on a general claim of ineffective assistance of counsel.” *Johnson*, ¶ 19. This Court explained that allowing a defendant to obtain substitute counsel based on a general ineffective assistance of counsel claim incorrectly causes the court to inquire into matters such as defense counsel’s strategy, when those claims are more properly raised on direct appeal, if record-based, or in a postconviction proceeding. *Johnson*, ¶ 16.

To avoid delving into ineffective assistance of counsel claims when assessing a request for substitute counsel, *Johnson* directs district courts to “focus not on specific disagreements between counsel and defendant regarding trial strategy or on whether defense counsel’s chosen techniques are effective, but instead . . . on whether the defendant presented material facts showing good cause for his substitution request as demonstrated by” the three grounds for substituting counsel. *Johnson*, ¶ 20. *Johnson* explained that focusing “on the alleged conflict

or breakdown between counsel and defendant permits the court to adequately inquire into the defendant's substitution request while only examining issues protected by the attorney-client privilege to the degree those issues resulted in an actual conflict, irreconcilable conflict, or complete breakdown in communication.” *Id.*

To demonstrate that a conflict is preventing counsel from mounting an adequate defense, “the defendant must demonstrate more than his feeling that his communication with counsel is unsatisfactory. Instead, the defendant must present material facts showing that the attorney-client relationship has deteriorated to the point where the irreconcilable conflict or breakdown in communication prevents the mounting of an adequate defense.” *Johnson*, ¶ 23 (citation omitted).

In *Johnson*, this Court held that a court did not abuse its discretion when it denied Johnson's request for a substitution of counsel where he complained that counsel did not file pretrial motions he had requested, did not interview witnesses, and visited Johnson “less than two times,” but counsel explained that he was not willing to file frivolous motions, he had spoken to the two witnesses Johnson had provided, and Johnson had cut their second meeting short. *Johnson*, ¶¶ 25-30. The Court explained that a “defendant's complaints about his attorney's chosen trial strategy or specific defense tactics must be reserved for an ineffective assistance of counsel claim raised on direct appeal or in a postconviction proceeding.” *Johnson*,

¶ 27. The Court further concluded that there was no evidence that the communication had deteriorated to the point where the conflict prevented the mounting of an adequate defense. *Johnson*, ¶ 30.

B. The court appropriately inquired into Songer’s concerns about counsel and did not abuse its discretion when it denied his request for substitute counsel.

The district court properly held a hearing to inquire into Songer’s complaints about counsel. The court gave Songer an opportunity to inform the court of his complaints about counsel at that hearing. The court did not abuse its discretion when it denied Songer’s request for a substitution of counsel after hearing from Songer and Scott.

Scott explained to the court that there was a breakdown in communication because Songer had refused to meet with Scott or his investigator. (3/15/23 Tr. at 5-6.) But the court was reasonably concerned that allowing a defendant to obtain a substitution of counsel simply by refusing to meet with his counsel “would put the defendants in charge of picking their own attorney.” (*Id.* at 7.) Criminal defendants are entitled to effective counsel, but are not entitled to counsel of their choice. *Aguado*, ¶ 23.

The court appropriately inquired into Songer’s complaints about counsel to determine whether Songer had any basis for a substitution of counsel outside of his refusal to meet with Scott or his investigator. Songer’s responses failed to

establish any valid basis for substituting counsel. Songer raised a vague complaint that “there’s been stuff that’s already happened that I don’t agree with.” (3/15/23 Tr. at 8.) When the court asked for an example, Songer complained that he did not want to waive his right to a speedy trial. (*Id.*) But the record demonstrates that Scott had specifically objected to a continuance and had told the court that Songer wanted a speedy trial. (3/1/23 Tr. at 4-5.) Songer’s trial had to be reset because the trial date had been vacated when it was believed that he was going to plead guilty. (3/15/23 Tr. at 8.) Scott asserted Songer’s right to a speedy trial when the trial was reset.

Songer complained that he wanted to subpoena witnesses and that there was information in his phone. (*Id.* at 9.) But Scott explained that his investigator had contacted every person Songer had asked them to contact, and Scott or the investigator had informed Songer of the results of every investigation. (*Id.* at 10.) Further, Scott explained that the contents of Songer’s phone had been downloaded. Scott had asked Songer whether there was helpful information on his phone, but Songer had just recently become upset about his phone. (*Id.*)

Similar to Johnson, Songer failed to demonstrate any basis that entitled him to new counsel. Songer raised complaints about his counsel’s performance, but those complaints need to be raised in a petition for postconviction relief, rather

than a motion for substitute counsel. *See Johnson*, ¶ 27. Further, Scott provided responses that demonstrated he was taking appropriate actions in Songer's cases.

The only significant issue was Songer's failure to communicate with Scott and his investigator. But there was no indication that Songer had a valid reason for refusing to cooperate or that he could not have a productive conversation with Scott and his investigator if he chose to do so. Significantly, there was no evidence there was a conflict of interest or an irreconcilable conflict between Songer and Scott, or that there was a complete breakdown in communication. Songer's refusal to communicate, by itself, does not establish an inability to communicate.

Based on the record that existed before the court at the March 15, 2023 hearing, the court did not abuse its discretion when it denied Songer's request for a substitution of counsel. The court noted that Songer had "a competent attorney who has spent months delving into this case" and that Songer's dispute about trial tactics was not a reason to remove counsel. (3/15/23 Tr. at 10.) That conclusion is supported by this Court's case law and is not an abuse of discretion. Songer did not raise any additional complaints about counsel before his trial in the drug case, so he was not entitled to a substitution of counsel.

Furthermore, Songer's reliance on *State v. Hendershot*, 2007 MT 49, 336 Mont. 164, 153 P.3d 619, is misplaced. *Hendershot* did not hold that a failed change of plea was evidence of a breakdown in communication. Rather, in

Hendershot, counsel had scheduled a change of plea hearing without discussing a change of plea with Hendershot, which provided evidence of a breakdown in communication. *Hendershot*, ¶¶ 14, 25. And there was significant additional evidence in *Hendershot* that supported the Court’s conclusion that the district court erred in denying Hendershot’s motion for a substitution of counsel. Hendershot repeatedly complained about counsel, including complaints that his counsel had not attended two substantive hearings and had not responded to Hendershot’s request for a visit. *Hendershot*, ¶¶ 25, 29. In addition, Hendershot complained that counsel’s associate performed deficiently in Hendershot’s revocation case, setting the stage for Hendershot’s dissatisfaction with counsel in the underlying case. *Id.* And counsel’s associate requested that the firm be removed because communication had broken down “to such an irreparable state that we wouldn’t be able to go forward from this point.” *Hendershot*, ¶ 12; *see also id.* ¶¶ 26, 29. This Court concluded that the court erred in denying Hendershot’s request for a substitution of counsel based on all of these factors. *Hendershot*, ¶¶ 25-30.

Unlike *Hendershot*, there is no evidence that Scott scheduled a change of plea without determining that Songer wished to plead guilty. There is no evidence in the record explaining why Songer did not ultimately plead guilty, there is no indication that Scott was at fault when Songer changed his position, and there is no evidence that Scott’s performance was deficient or caused a conflict with Songer.

Instead, the record demonstrates that Songer chose not to communicate with Scott or his counsel, but fails to demonstrate that he had any valid basis for his refusal. The court did not abuse its discretion when it denied his request when the lack of communication was caused by Songer's refusal to communicate with counsel.

V. The revocation of Songer's suspended sentences should be affirmed.

Because the court did not err in denying Songer's motion to suppress or his request for a substitution of counsel, his convictions for drug offenses in ADC-2022-464 should be affirmed. Similarly, the revocation of Songer's sentences in ADC-2018-88 should be affirmed. The district court revoked Songer's suspended sentences in ADC-2018-88 based on his convictions in the other two cases. (7/19/23 Tr. at 45.) Although the State is conceding that Songer's convictions in the attempted deliberate homicide case should be reversed, his convictions in the drug case should be affirmed. Because Songer's convictions for drug offenses, including possession with the intent to distribute, violated the condition of his suspended sentences in ADC-2018-88 requiring him to remain law abiding (Revocation Doc. 18 at 5), the revocation of his suspended sentences can be affirmed on appeal.

CONCLUSION

Songer's convictions in ADC-2022-476 for attempted deliberate homicide and assault with a weapon should be reversed, and that case should be remanded for further proceedings. Songer's convictions in ADC-2022-464 should be affirmed, and the revocation of his suspended sentences in ADC-2018-88 should be affirmed.

Respectfully submitted this 3rd day of January, 2025.

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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 7,930 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, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-03-2025:

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