IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0612

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JONAH MICAH WARR,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Howard F. Recht, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
tplubell@mt.gov

BILL FULBRIGHT
Ravalli County Attorney
205 Bedford, Suite C
Hamilton, MT 59840

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

KARL PITCHER
Attorney at Law
P.O. Box 7842
Missoula, MT 59807

ATTORNEY FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the district court complied with Mont. Code Ann. § 46-12-211(4) when it instructed Appellant it did not intend to follow the plea agreement because it did not believe an exception to the mandatory minimum sentence was applicable, and thereafter allowed Appellant to withdraw his no contest plea only to later reenter his no contest plea, without any commitment from the district court that it would follow the plea agreement.

2. Whether the district court properly exercised its discretion in concluding that Appellant had failed to establish that an exception to the mandatory minimum sentence for assault on a peace officer was applicable to the circumstances of his case.

3. Whether the district court violated Appellant's constitutional right to a jury trial by instructing Appellant, after he voluntarily reentered a no contest plea, to file a written motion to withdraw his no contest plea, which Appellant never filed.

STATEMENT OF THE CASE

On August 12, 2020, the State charged Appellant Jonah Warr (Warr) with assault on a peace officer in violation of Mont. Code Ann. § 46-11-201, which has a mandatory minimum sentence of two years. (D.C. Doc. 5.) On September 2,

2020, the State moved to revoke Warr's bail, set at $5,000, because Warr violated a condition of his release by removing a drug patch. (D.C. Docs. 9, 11.) The district court issued an arrest warrant and set bail at $15,000. (D.C. Doc. 10.)

On August 30, 2021, Warr moved the district court to set his case for a change-of-plea hearing. (D.C. Doc. 33.) The court scheduled the plea change hearing for September 1, 2021. (D.C. Doc. 34.) On August 31, 2021, the parties filed an executed plea agreement with the district court. (D.C. Doc. 35, attached to Appellant's Br. as App. B.) The terms of the agreement also resolved a pending revocation proceeding. (*Id*. at 1.) Pursuant to the plea agreement, Warr agreed to admit to his probation violations in Case No. DC-03-199, apart from one violation that the State agreed to dismiss from the revocation petition. In the instant case, Warr agreed to plead guilty or no contest to the offense of assault on a peace officer. The State agreed to dismiss a justice court case. (*Id*.)

Relevant to this appeal, the plea agreement provided that for the offense of assault on a peace officer the parties agreed to a five-year commitment to the Department of Corrections (DOC), to run consecutively to the sentence imposed in the revocation proceeding. The parties also agreed that Mont. Code Ann. § 46-18-222(2) and/or (3) applied to the circumstances of Warr's case and provided an appropriate basis for the district court to find an exception to the mandatory minimum sentence. (*Id*. at 2.) The plea agreement provided:

> This is an appropriate disposition of the cases pursuant to the provisions of § 46-12-211(1)(b), MCA, and Defendant understands that Defendant may withdraw Defendant's pleas in the event the court rejects this *Plea Agreement*[.]

(*Id*. at 3:4.)

On September 1, 2021, the district court accepted Warr's no contest plea to assault on a peace officer. The court ordered a presentence investigation (PSI) and scheduled sentencing for October 27, 2021. (D.C. Doc. 35.1.) The PSI author filed the PSI with the court on October 14, 2021. (D.C. Doc. 39.) The PSI author concurred with the terms of the plea agreement. (*Id*. at 9.)

After the court postponed the sentencing hearing numerous times, it held the sentencing hearing on December 1, 2021. (D.C. Doc. 43.1.) The court informed the parties that it would not be following the plea agreement. It allowed a two-week postponement for Warr to consider how he wished to proceed. (*Id*.) At a hearing on March 16, 2022, the court allowed Warr to withdraw his no contest plea. (D.C. Doc. 48.1.) It rescheduled Warr's jury trial for May 23, 2022. (D.C. Doc. 49.)

On May 10, 2022, Warr reentered his no contest plea to assault on a peace officer and asked the court to schedule a sentencing hearing. (D.C. Doc. 58.1.) The court scheduled the sentencing hearing. (D.C. Doc. 61.) Prior to the sentencing hearing, Warr filed a sentencing memorandum in which he advocated that the court find an exception to the mandatory minimum sentence of two years, arguing that his mental capacity was significantly impaired at the time he committed the

offense. (D.C. Doc. 66.) In the sentencing memorandum, Warr acknowledged that he voluntarily consumed pills and alcohol prior to assaulting the officer, but claimed that his mental health crisis caused him to do so. (*Id*. at 3.) Warr attached a clinical assessment from Western Montana Mental Health Center dated July 28, 2020, to his sentencing memorandum. (D.C. Doc. 67.)

After the court considered everything in the record and concluded that the exception to the mandatory minimum sentence did not apply, the court committed Warr to the DOC for ten years with eight years suspended. Warr asked whether he would be allowed to withdraw his guilty plea. The court advised that Warr would need to file a motion and brief and that it would allow the State an opportunity to respond. Warr moved the court to stay his sentence for one week. The court denied the motion to stay and remanded Warr into custody. (D.C. Docs. 67.1, 69.)

Warr did not file a written motion to withdraw his guilty plea.

STATEMENT OF THE FACTS

I. The offense[1]

On July 29, 2020, at about 10 p.m., Deputy Gregoire of the Ravalli County Sheriff's Office responded to a report that a person in a parked vehicle was

[1] Since Warr entered a no contest plea and there was no trial, the State has taken these facts from the State's motion and affidavit seeking leave to file an Information. (D.C. Doc. 1.)

attempting suicide through an overdose. Deputy Gregoire found the vehicle around Stevensville, with Warr inside. Initially, Warr was unresponsive, but when he became responsive, he threatened to stab himself in the chest with a knife he possessed. Deputy Gregoire opened the vehicle door and instructed Warr to exit the vehicle. Warr got out of the vehicle holding a four-inch knife in his hand, and advanced on Deputy Gregoire, brandishing the knife. Deputy Gregoire deployed his taser, which disarmed Warr of his knife. Officer Ellington of the Stevensville Police Department had also arrived on scene and had to deploy his taser to stop Warr from throwing punches at Deputy Gregoire. (D.C. Doc. 1 at 2.)

II. First change-of-plea hearing and sentencing

The district court held a change-of-plea hearing on September 1, 2021, after Warr executed and filed a waiver of rights with the court. (9/1/21 Tr. at 3.) Warr informed the court that he had reviewed all his rights with his attorney and understood the rights he would be waiving by pleading guilty. (*Id*.) Warr assured the court that he was not suffering from any mental or physical condition that would interfere with his ability to understand the proceedings. (*Id*. at 4.) He also stated that he was satisfied with the services of his attorney. (*Id*.)

The district court explained the charge of assault on a peace officer and the penalty. Warr indicated that he understood the charge and the potential

consequences if he pled guilty. (*Id*. at 5.) He entered a no contest plea to the charge of assault on a peace officer. He acknowledged that he believed if he proceeded to a trial, he would be found guilty. (*Id*. at 6.) He acknowledged that the State had sufficient facts to prove his guilt. (*Id*. at 6-7.)

The district court accepted Warr's no contest plea to assault on a peace officer, explaining:

> Well, I do find there are sufficient facts to support the charge and that there's strong evidence of guilt. I find that the Defendant's choice to plead no contest is voluntary, knowing and intelligent. I note that the Defendant is able to communicate with counsel and with the Court, and understand the English language, and has the cognitive ability to understand the charges and the allegations, and I find it to be in the best interests of the Defendant to plead no contest. The Prosecutor consents to a guilty plea without admission and the Court consents to a guilty plea without admission, so a no contest plea will be ordered entered.

(*Id*. at 7.)

Regarding Warr's revocation proceeding in DC-03-199, Warr admitted that he violated the conditions of his probationary sentence by consuming drugs and alcohol on July 29, 2020, possessing drug paraphernalia on July 6, 2020, and using methamphetamine on July 7, 2020. War also admitted that he had assaulted a peace officer on July 29, 2020. (*Id*. at 10.)

The State placed the terms of the plea agreement in the record as follows:

> In this case the Plea Agreement calls for the Defendant to enter a guilty or no contest plea to the single felony charge of assault on a peace officer in regard to DC-20-103; and to enter admissions to the

remaining allegations in the Third Petition for Revocation in regard to DC-03-199.

The parties will jointly recommend in regard to DC-03-199 that the Defendant receive a ten-year commitment to the Department of Corrections; that all of that time be suspended; that it run concurrently with the sentence imposed in DC-07-193 in the Fourth Judicial District Court. The Defendant, in that case, will also receive 16 days credit for jail time served and three years credit for street time served.

In regard to DC-20-103, the parties will jointly recommend a five-year fully suspended commitment to the Department of Corrections with that to run consecutive to the sentence imposed in DC-03-199.

The standard conditions would apply, and I recognize that he is already under conditions, but the one that the State feels is of primary importance is the chemical dependency assessment, mental health assessment and continued treatment, which I understand the Defendant is doing now.

Also, this is an appropriate disposition Plea Agreement, meaning the Defendant would be given an opportunity to withdraw his admissions or no contest plea if the Court goes outside the bounds of the Plea Agreement and sentences him to something different.

(*Id*. at 12-13.)

Warr confirmed the terms of the plea agreement as the State had summarized for the court. (*Id*. at 15.)

At the December 1, 2021 sentencing hearing, the district court informed the parties that it would not follow the plea agreement. (12/1/21 Tr. at 3.) The court explained:

The Global Plea Agreement includes, for DC-20-103, a provision that the mandatory minimum would not apply. I am just

informing the parties the Court will not follow the Plea Agreement. I have reviewed the PSI and other documentation in this matter. I am not convinced that the parties can satisfy the requirements of 46-18-222, which provides for exceptions to the mandatory minimum. Under subparagraph (2), the mandatory minimum may not be imposed if the offender's mental capacity at the time of the commission of the offense was significantly impaired, but it says that a voluntarily induced intoxicated or drugged condition may not be considered an impairment for the purposes of this subsection. The information before the Court is that preceding the incident the Defendant was using meth, and at the time of the incident was intoxicated and using drugs voluntarily.

Subparagraph (3) provides an exception if, at the time of the commission of the offense, the offender was acting under unusual and substantial duress. There's no facts that I've been able to ascertain to indicate that anyone was placing the Defendant under duress. "Duress" is defined as threats, violence, constraints or other action brought to bear on someone to do something against their will or better judgment.

I understand that the Defendant may have been experiencing a mental health crisis, but if I were to accept that as qualifying under No. 3, that would essentially negate what, to me, is the clear language of No. 2, and I don't believe that that was the legislative purpose.

I'll also indicate that the Plea Agreement essentially requires the Defendant to be supervised by Probation and Parole, and I am not convinced that under the present law that that supervision would be effective. Essentially, present law allows the Defendant to violate the conditions repeatedly without consequences of being brought back before the Court if those conditions are labeled "compliance violations," and, at least in other cases that have come before the Court, Probation and Parole has characterized meth use as a compliance violation, even though possession of meth is a crime, and the commission of a crime is a noncompliance violation. So under the current law, we could easily see ourselves in a circumstance where Defendant returns to using meth, has a mental health crisis, puts

himself and others at serious risk without the supervising agency revoking him.

(*Id*. at 3-5.)

The district court postponed sentencing to allow Warr an opportunity to decide how he wished to proceed. (*Id*. at 5-6.) At the rescheduled sentencing hearing, the district court granted Warr's request to withdraw his guilty plea to assault on a peace officer. (3/16/22 Tr. at 3-4.) The parties agreed to postpone the disposition hearing. (*Id*. at 5-6.)

III. Second change of plea hearing and sentencing

On May 10, 2022, the district court held a hearing to discuss the mandatory minimum sentence for assault on a peace officer. (5/10/22 Tr. at 3.) The parties both encouraged the district court to accept the terms of the plea agreement and find that an exception to the two-year mandatory minimum sentence for assault on a peace officer did not apply based on Warr's mental capacity at the time he committed the offense. (*Id*. at 3-7.)

After a discussion between the parties and the district court, the court explained:

> Okay. So under 46-18-222(2), which is, I think, the applicable exception if one applies, it says, "The offender's mental capacity at the time of the commission of the offense." So we have to look at that point in time—not in the days before, not in the days afterwards, at that point—"was significantly impaired." And I accept that the

> evidence is that his mental capacity was significantly impaired. But it says, "A voluntarily induced intoxicated or drugged condition may not be considered an impairment."
>
> So the information that I have at this point is that I don't see any behaviors that would amount to an assault on a peace officer having occurred before or after while the Defendant had a mental health issue but was not under the influence of substances he was taking on that day. So it seems to me that the evidence would support the conclusion that the Defendant had a mental health issue. But I don't know that the evidence supports that mental health issue being the cause of the commission of the offense.
>
> Now, if there 's information that would suggest otherwise, I would hear that and consider it. But that's just not information that has come before me at this point.
>
> And I also have to say that I'm concerned if this argument, as I see it being used, is accepted, that it essentially would make this exception nearly universal. People who claim to be using substances to self-medicate a mental health issue, I mean, it's as common as dirt; and it would seem like every person would claim that exception. And I think it would put the Prosecution and the Court in a difficult circumstance to try and differentiate when I would allow that exception to apply and when I wouldn't if I open it up to anyone who claims that they are dealing with a mental health issue by voluntarily taking substances.

(*Id*. at 9-10.)

Defense counsel recognized that based on the district court's observations, applying the exception could be a "slippery slope," but asked for the opportunity to brief the applicability of the exception. (*Id*. at 11-12.) The district court stated that it would allow defense counsel to brief the issue and present any evidence he wished to present. (*Id*. at 12.) The court noted the trial was scheduled for May 23,

2022, and asked how Warr wished to proceed. After defense counsel consulted privately with Warr, he informed the court:

> So, Your Honor, at this point in time, now knowing the specific concerns that the Court has and knowing that the substance abuse issue has been clarified a little bit, we would ask that the pleas and the admissions be reentered and trial to be vacated and a sentencing date be set.

(*Id*. at 13.) The district court clarified that Warr wanted to reenter his no contest plea and admissions to probation violations and proceed to sentencing. Defense counsel answered affirmatively. (*Id*.)

The district court confirmed with Warr that he had been present during all the discussions and inquired:

> I want to make sure that you feel that you've had sufficient opportunity to talk to your attorney about this matter and the implication of reentering the pleas that were previously entered. That would essentially amount to a conviction in DC-20-103 and admissions of violating the terms of the suspended sentence in DC-03-199. Do you understand that?

(*Id*. at 14.) Warr responded, "Yes, sir." The court further inquired of Warr whether he understood that the court was not a party to the plea agreement. Warr answered, "Yes, sir." Warr informed the court that he was satisfied with the services of his attorney and did not need more time to talk with his attorney. (*Id*.)

Warr asked the court to reenter his no contest plea to assault on a peace officer and his admissions to the specified probation violations. (*Id*. at 15-16.) Warr acknowledged he was doing so of his own free will and choice and after

discussing the matter with his attorney. The following dialogue between the court and Warr then occurred:

> THE COURT: Now, in doing so, you also know that the Court has been reluctant to set aside the mandatory minimum at this point?
>
> THE DEFENDANT: I understand, Your Honor.
>
> THE COURT: Do you understand, also, that the Court will allow you to present evidence and make arguments at sentencing if you are still looking to set aside the mandatory minimum?
>
> THE DEFENDANT: Yes, sir.

(*Id*. at 17.) The district court then reentered Warr's no contest plea to assault on a peace officer and his probation violation admissions in DC-03-199. (*Id*.)

Before recessing the hearing, the court informed the parties:

> Well, I think I've made it clear what my thinking is and where my issues are, so the parties can direct whatever evidence or argument they want to those issues.

(*Id*. at 19.)

The district court held the sentencing hearing on July 28, 2022. (7/28/22 Tr. [Sent. Tr.].) Warr called one witness, Debora Heavner (Heavner). (*Id*. at 6.) Heavner is the Medication Assisted Treatment RN Care Coordinator at Western Montana Mental Health Center. (*Id*.) Heavner has a Bachelor of Science in Nursing. She is not a licensed addiction counselor. Heavner does not work as a therapist. (*Id*. at 7.)

Warr contacted Western Montana Mental Health Center in May 2020 because he was having some mental health issues. He began receiving services in July 2020. (*Id*. at 7-8.) Heavner believed that Warr had a prior diagnosis of post-traumatic stress disorder (PTSD). (*Id*. at 8.) Heavner set Warr up for a mental health evaluation and a chemical dependency evaluation. Warr also began seeing an agency physician for medication assisted treatment. (*Id*.) Heavner reviewed mental health documentation for mid-July through July 28, 2020, and stated that it appeared Warr had been having a mental health crisis on July 28, 2020. (*Id*. at 10.)

On that day, Warr reported suffering from insomnia, hypervigilance, and paranoia. He was reportedly hallucinating. He was agitated and had rapid speech and an elevated heart rate. He demonstrated hostility as well as fear and anxiety. According to the clinician's report, Warr had a moderate risk of suicidal ideation, but not at a level that required immediate intervention. (*Id*. at 11-12.) He admitted he had drunk hard liquor and taken Gabapentin, she thought "to try and kill himself." (*Id*. at 13.) Heavner believed that Warr had been having a mental health breakdown. (*Id.* at 13-14.)

Both the State and Warr recommended the sentence set forth in the plea agreement. (*Id*. at 17-20.) Regarding the mandatory minimum sentence of two years, defense counsel stated:

> But Mr. Warr did drink alcohol and Mr. Warr did take pills. As we heard from Miss Heavner, as we have seen throughout this process, Mr. Warr did that in reaction to a mental health break, Your Honor.
>
> So for the exception of a mandatory minimum sentence, we would ask the Court to specifically find that his impairment was a mental health impairment . . . .

(*Id*. at 20-21.) Warr provided his own statement to the court. (*Id*. at 21-25.)

For the revocation proceeding, the district court followed the parties' recommendations and sentenced Warr to the DOC for ten years, all suspended. (*Id*. at 30.)

For assault on a peace officer, the district court sentenced Warr to the DOC for ten years, with eight years suspended. The district court concluded that no exception to the mandatory minimum sentence applied to Warr's circumstances. In so doing, the court explained:

> Under the statute, a voluntarily induced intoxication or drugs condition falls outside of the impairment. So there's no evidence that's been presented to the Court that Defendant's intoxicated and drugged condition was other than voluntary. Prior to this, Defendant exhibited the mental capacity to recognize he needed assistance and to seek assistance.
>
> If drinking alcohol or taking drugs as a response to life's stressors or mental health concerns were to be used to justify an exception to a mandatory minimum, the exception would swallow the rule, placing Defendants and others at serious risk.
>
> . . . .
>
> So Defendant was not lucid at the time that he made a call to 911, but that was not because of a mental crisis, but because he

> consumed alcohol and drugs. And his confusion, if that's the explanation for his assault on a peace officer, was due to his consumption of alcohol and drugs, not his mental crisis.

(*Id*. at 32-33.)

The district court later elaborated:

> The Court has not intended at any time to sentence the Defendant less severely than required by the mandatory minimum sentence. The mandatory minimum is appropriate because it reflects the serious nature of the charge and the risk it caused others, but also reflects the Defendant's efforts to address his mental health and chemical dependency issues subsequent to this issue. That's the reason that I have not imposed a more severe unsuspended period of commitment to the Department of Corrections. Imposing less than the mandatory minimum would lend credence to the Defendant's tendency to not fully take responsibility, but instead to blame his behavior on factors for which he should not be held [responsible]; and if accepted and reinforced, such an attitude would continue to place the Defendant and others at serious risk.

(*Id*. at 34-35.)

Defense counsel requested that Warr be allowed to withdraw his no contest plea since the court would not follow the terms of the plea agreement. (*Id*. at 36.) The district court responded that Warr would need to file a motion to withdraw his plea and support it with a brief that included the factual and legal arguments supporting his request. The court would then give the State the opportunity to respond. (*Id*. at 37.) Defense counsel inquired:

> So the last couple times we had come in front of the Court, the Court had specifically told Mr. Warr before moving forward to sentencing that they were not going to follow the Plea Agreement specifically on both times. So what I'm asking is, is the Court considering those

> prior acknowledgements that the Court was not going to follow the Plea Agreement sufficient for the hearing today, Your Honor?

(*Id*. at 37-38.) The district court responded, "Well, I think the Defendant has been on notice for quite awhile that the Court was disinclined to follow the Plea Agreement, if that's what you are asking." (*Id*. at 38.)

Defense counsel then requested a one-week stay of Warr's sentence. (*Id*.) The district court denied the stay of sentence, explaining:

> So the motion to stay is denied. The reasons for that are that the Defendant has been on notice for quite some time that the Court was disinclined to follow the Plea Agreement. There is strong evidence of guilt in this matter, and I have seen nothing that has been apparent to me to indicate that he has received deficient representation.

(*Id*. at 38.)

SUMMARY OF THE ARGUMENT

Because the State and Warr had entered into a specific plea agreement, the district court properly allowed Warr to withdraw his no contest plea after informing him that it did not intend to follow the plea agreement. Warr voluntarily reentered his no contest plea a second time, already knowing that the court did not intend to follow the plea agreement. Warr took his chances that he could convince the court at the sentencing hearing that an exception to the mandatory minimum sentence applied to his circumstances. The district court had been forthright with Warr and did not trick him into reentering his no contest plea a second time. When

the district court imposed the mandatory minimum sentence, and Warr asked to withdraw his plea again, the district court properly informed Warr that if he wished to withdraw his no contest plea a second time, he would have to establish cause under Mont. Code Ann. § 46-16-105.

The district court imposed a legal sentence and correctly sentenced Warr to the mandatory minimum sentence for assault on a peace officer. The district court properly considered Warr's argument that he suffered from a mental impairment so an exception to the mandatory minimum sentence applied, but the court correctly concluded that because Warr committed his crime after voluntarily ingesting drugs and alcohol, Warr failed to prove that the exception applied to his circumstances. The district court never intended to sentence Warr to less than the mandatory minimum sentence and supported the sentence based on the record before it. Warr has not argued that the district court did not follow the statutory procedure for considering an exception or that the district court's factual findings are clearly erroneous, and his claim that the court erred by not applying the mental impairment exception to the mandatory minimum sentence fails.

The district court did not deny Warr his constitutional right to a jury trial by not allowing him to automatically withdraw his reentered no contest plea. Warr waived his right to a jury trial by voluntarily reentering his no contest plea while

knowing the court did not intend to follow the plea agreement. If Warr wishes to withdraw his guilty plea, he can do so under Mont. Code Ann. § 46-16-105(2).

ARGUMENT

I. The standard of review

The appeal of an order denying a motion to withdraw a plea presents a question of law that this Court reviews de novo. *State v. Langley*, 2016 MT 67, ¶ 12, 383 Mont. 39, 369 P.3d 1005. This Court's review of mandatory minimum exceptions requires it to analyze whether a district court correctly applied the law. *State v. Hamilton*, 2018 MT 253, ¶ 15, 393 Mont. 102, 428 P.3d 849.

This Court reviews a district court's findings of fact on whether to apply an exception to the mandatory minimum for clear error. Findings of fact are clearly erroneous if they are not supported by substantial evidence, the court has misapprehended the effect of the evidence, or a review of the record convinces this Court that a mistake has been made. *Id*.

/ / /

II. The district court did not violate Mont. Code Ann. § 46-12-211(4) by not allowing Warr to withdraw his no contest plea a second time, without establishing good cause, after it had previously complied with Mont. Code Ann. § 46-11-211(4) and, before reentering Warr's no contest plea, had made it clear that it did not believe an exception to the mandatory minimum sentence applied.

The parties entered into a plea agreement pursuant to Mont. Code Ann. § 46-12-211(1)(b), agreeing to a specific sentence as the appropriate disposition for the case, which included an agreement that an exception to the mandatory minimum sentence applied. Consequently, if the district court rejected the plea agreement, it was required to follow the procedure in Mont. Code Ann. § 46-12-211(4), which provides that

> the court shall, on the record, inform the parties of this fact and advise the defendant that the court is not bound by the plea agreement, afford the defendant an opportunity to withdraw the plea, and advise the defendant that if the defendant persists in the guilty or nolo contendere plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Here, the record conclusively establishes that the district court followed the procedure set forth above. Warr changed his plea to a nolo contendere plea the first time on September 1, 2021. After accepting Warr's plea, the district court held a sentencing hearing on December 1, 2021. The district court immediately informed the parties that it would not be following the plea agreement and detailed its concern about the lack of an exception to avoid imposing the mandatory minimum sentence. The district court postponed the sentencing hearing to give Warr an

opportunity to consider how he wished to proceed. At the rescheduled sentencing hearing, the district court granted Warr's request to withdraw his nolo contendere plea. The district court undisputedly complied with Mont. Code Ann. § 46-12-211(4).

Warr is really arguing that when he made the decision to reenter his nolo contendere plea, while fully knowing that the district court did not believe an exception to the mandatory minimum applied, the whole process began anew. Without citing any authority, Warr claims that at the second sentencing hearing, after he reentered his nolo contendere plea, and after the court reiterated its concerns about the exception to the mandatory minimum sentence, the district court had to comply with Mont. Code Ann. § 46-12-211(4) a second time, inform Warr it was rejecting the plea agreement, allow Warr the opportunity to withdraw his nolo contendere plea again, and start the entire process over. Warr has cited no statutory language or case law that supports his position. This Court will not consider unsupported arguments, "locate authorities or formulate arguments for a party in support of positions taken on appeal." *State v. Kearney*, 2005 MT 171, ¶ 16, 327 Mont. 485, 115 P.3d 214, quoting *State v. Flowers*, 2004 MT 37, ¶ 44, 320 Mont. 49, 86 P.3d 3.

Although Warr cites to *Langley*, ¶ 17, and *State v. Zunick*, 2014 MT 239, 376 Mont. 293, 339 P.3d 1228, to support his claim, in *Langley*, this Court

concluded that the district court erred in determining that the plea agreement at issue was not a binding plea agreement so the provisions of Mont. Code Ann. § 46-12-211(4) were not applicable. *Langley*, ¶ 25. And in *Zunick*, the Court held that Mont. Code Ann. § 46-12-211(4) requires a district court to give the advisory on the record at the time the district court rejects the plea and not before. Consequently, advising a defendant at a change of plea hearing that if the district court rejects the plea agreement, the court will give him an opportunity to withdraw his guilty plea, does not comply with the statute. *Zunick*, ¶¶ 16-17. Finally, the statute itself does not provide that this process must be repeated if a defendant withdraws his guilty plea but later reenters it.

At the May 10, 2022 hearing, after defense counsel made a statement to the court about why the exception to the mandatory minimum applied, defense counsel asked the court to consider sentencing Warr in accordance with the plea agreement the parties had reached. (5/10/22 Tr. at 5.) Importantly, at this point in the process the district court had already rejected the plea agreement. The district court explained that it had no doubt that Warr did have mental health issues at the time he committed the crime, but the court also did not think the evidence supported a conclusion that the mental health issues caused the criminal conduct. Rather, the court believed that Warr's ingestion of alcohol and drugs had caused his criminal conduct. The court then stated, "Now, if there's information that would suggest

otherwise, I would hear that and consider it. But that's just not information that has come before me at this point." (*Id*. at 10.)

The district court then elaborated:

> And I also have to say that I'm concerned if this argument, as I see it being used, is accepted, that it essentially would make this exception nearly universal. People who claim to be using substances to self-medicate a mental health issue, I mean, it's as common as dirt; and it would seem like every person would claim that exception. And I think it would put the Prosecution and the Court in a difficult circumstance to try and differentiate when I would allow that exception to apply and when I wouldn't if I open it up to anyone who claims that they are dealing with a mental health issue by voluntarily taking substances.

(*Id*.)

Defense counsel then responded:

> Your Honor, I do—I have thought about what the Court had just said, and I do see the possibility of this being a slippery slope. I have not briefed specifically the 46-18-222 exception to the statutory minimum—or the mandatory minimum, that specific subsection, so I have not done, I guess, further research into what the case law is . . . . And without getting into too much of an argument on Mr. Warr's behalf about exactly what happened on that day, I think the significance of the mental health break was shown by Mr. Warr trying to take his own life through law enforcement.

(*Id*. at 11.) Defense counsel stated that he was "not going to try to convince the Court right now," but asked for an opportunity to brief the issue. (*Id*.) The district court responded:

> Certainly I will allow you to brief the issue and present whatever evidence you want. I do recognize progress that Mr. Warr has made since these incidents. And I don't want to make it appear

> that I'm just callous and don't recognize that. But I'm still bound by the law.

(*Id*. at 12.)

The district court informed the parties there was a trial scheduled for May 23 and asked how Warr wished to proceed. (*Id*.) After Warr and his counsel consulted, defense counsel stated:

> Thank you, Your Honor. So, Your Honor, at this point in time, now knowing the specific concerns that the Court has and knowing that the substance abuse issue has been clarified a little bit, we would ask that the pleas and admissions be reentered and trial to be vacated and a sentencing date set.
>
> There is a lot of information that is out there that I want to get to the Court, so I would ask for a little bit of time, Your Honor.

(*Id*. at 13.) The district court clarified:

> So on the 16th of March of this year the Court ordered the guilty pleas to be withdrawn and the admissions that were previously entered were withdrawn. So procedurally, Mr. Sillstrop, you are suggesting that your client wants to reenter the same pleas and admissions that were entered prior to them being withdrawn and proceed to sentencing, correct?

(*Id*.) Defense counsel answered affirmatively. (*Id*.)

The district court addressed Warr:

> THE COURT: So, Mr. Warr, you've been present in the courtroom during these discussions; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I want to make sure that you feel that you've had sufficient opportunity to talk to your attorney about this matter

and the implication of reentering the pleas that were previously entered. That would essentially amount to a conviction in DC-20-103 and admissions of violating the terms of the suspended sentence in DC-03-199. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And just a reminder, the Court is not a party to the Plea Agreement and is not bound by that; do you remember that also?

THE DEFENDANT: Yes, sir.

(*Id*. at 13-14.)

Warr then confirmed for the court that he was satisfied with the services of his attorney. The district court again informed Warr that the penalty for assault on a peace officer is not less than two years or more than ten years and a fine not to exceed $50,000. The district court asked, with all that in mind, if Warr wished to reinstate his no contest plea to assault on a peace officer. Warr responded, "Yes, sir." (*Id*. at 15.)

The following dialogue occurred before the district court reentered Warr's no contest plea:

THE COURT: Now, in doing so, has anyone made any promises to you or issued any threats or done anything else of a coercive nature to cause you to reenter the plea in DC-20-103 and the admissions in DC-03-199?

THE DEFENDANT: No, sir.

THE COURT: You are doing so of your own free will and choice?

THE DEFENDANT: Yes, sir.

THE COURT: And you are doing so after you've discussed this matter with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Now, in doing so, you also know that the Court has been reluctant to set aside the mandatory minimum to this point?

THE DEFENDANT: I understand, Your Honor.

THE COURT: Do you understand, also, that the Court will allow you to present evidence and make arguments at sentencing if you are still looking to set aside the mandatory minimum?

THE DEFENDANT: Yes, sir.

(*Id.* at 16-17.)

At this point, the district court had already notified the parties that it did not intend to follow the plea agreement, and the court had already allowed Warr to withdraw his no contest plea. Warr suggests that the district court somehow misled him into believing that it intended to change its mind on the issue of the mandatory minimum sentence because it had agreed to listen to arguments at the sentencing hearing and any information that Warr wished to present. Warr claims that this statement encouraged defense counsel to prepare a sentencing memorandum and schedule witness testimony. But it was at defense counsel's request that the district

court agreed that defense counsel could present evidence, and that the court would consider all information relevant to sentencing.

The district court was transparent with Warr, and neither the statute nor case law required it to reject the plea agreement it had already rejected a second time. Rather, Warr reentered his no contest plea knowing that the court had rejected the plea agreement, and that he would have to take his chances at sentencing to convince the court that an exception to the mandatory minimum sentence applied. The court did not mislead Warr and defense counsel but rather told them that it would listen to whatever evidence they had to offer at sentencing. It is Warr's burden to establish that the district court erred, and Warr cannot meet that burden in the absence of legal authority. *State v. Bailey*, 2004 MT 87, ¶ 26, 320 Mont. 501, 87 P.3d 1032.

If Warr believed that defense counsel did not prepare him for the possibility the district court would not find an exception to the mandatory minimum or that he did not voluntarily enter his no contest plea, he should have filed a motion to withdraw his no contest plea pursuant to Mont. Code Ann. § 46-16-105(2). The district court instructed Warr that he could do so. Warr had a remedy, he just did not have the remedy he wanted—to withdraw his no contest plea a second time under Mont. Code Ann. § 46-12-211(4). And, as set forth below, the district court

correctly concluded that no exception to the mandatory sentence applied to Warr's circumstances.

III. The district court correctly applied Mont. Code Ann. § 46-18-222, and its findings of fact supporting its decision not to apply an exception to the mandatory minimum sentence are not clearly erroneous.

The district court imposed a legal sentence because it sentenced Warr within statutory parameters. *See* Mont. Code Ann. § 45-5-210(2)(a)(i); *State v. Garrymore*, 2006 MT 245, ¶ 9, 334 Mont. 1, 145 P.3d 946. Warr does not challenge the district court's findings for not applying the exception to the mandatory minimum set forth in Mont. Code Ann. § 46-18-222(2), which provides:

> [T]he offender's mental capacity, at the time of the commission of the offense for which the offender is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution. However, a voluntarily induced intoxicated or drugged condition may not be considered an impairment for purposes of this subsection.

Warr also does not allege that the district court failed to follow the statutory procedure for considering an exception to the mandatory minimum sentence. Instead, Warr argued to the district court, and argues to this Court, that the district court should have ignored the last sentence of the exception. There is no dispute that Warr was voluntarily intoxicated and drugged when he assaulted the peace

officer. Warr urged, however, that because he had underlying mental health issues, the district court did not need to concern itself with his voluntarily induced intoxicated or drugged condition.

The district court correctly observed that adopting Warr's reasoning would mean that when crimes take place with co-occurring mental health issues and voluntary alcohol and drug intoxication, the exception would always apply. The district court's observations and concerns were accurate and legitimate. This Court adopted the same reasoning in *State v. Keith*, 2000 MT 23, 298 Mont. 165, 995 P.2d 966.

A jury convicted Keith of criminal endangerment. The district court sentenced Keith to ten years in prison with an additional ten years for the use of a weapon. *Id*. ¶ 1. The facts presented at trial established that on the date of the offense, Keith, her boyfriend Dean Yates (Yates), and a mutual friend, Richard Wolde (Wolde), went out to a local tavern and returned to Keith's apartment around midnight. Keith was very intoxicated. She took a nap. When she awoke, she was angry and hostile towards Yates. According to Wolde, Keith was illogical and irrational. Keith told Yates she wanted him out of her life and ordered him to leave her apartment. Yates agreed. Keith went into her bedroom and locked the door. *Id*. ¶ 5.

As Yates and Wolde were leaving, they heard a gun shot from Keith's bedroom. Then, as Yates was attempting to break the lock on the bedroom door, they heard a second shot. When Yates and Wolde entered the bedroom, Keith was sitting in the corner holding a .357 caliber handgun. Before they could reach her, Keith fired the gun a third time in the direction of the window and then a fourth shot that went into a wall separating Keith's apartment from her next-door neighbor. The neighbor awoke to the sounds of gunshots and muffled screams and called 911. While the neighbor was talking to the dispatcher, the fourth shot hit her bedroom wall. When officers arrived and arrested Keith, she screamed obscenities at the officers. *Id*. ¶¶ 6-7.

During trial, Keith presented testimony from her medical expert, Dr. Hoell. Dr. Hoell testified that Keith had been under a great deal of stress in the prior year because her daughter had been molested and there was a trial concerning her daughter's molestation. Dr. Hoell testified that Keith had been suffering from anxiety, depression, and overall emotional turmoil at the time of the crime. Dr. Hoell also testified that he had prescribed numerous medications for Keith, including Prozac, Doxepin, and Valium. Dr. Hoell further testified about the physiological effects of taking these drugs in conjunction with alcohol. *Id*. ¶¶ 12-14.

At sentencing, defense counsel argued that the mandatory minimum sentence should not apply because Keith had been under a great deal of stress, and she had ingested drugs and alcohol prior to committing the criminal endangerment. The district court responded that for the court to consider the mental impairment exception to the mandatory minimum sentence, there would have to be some evidence that Keith's mental capacity was significantly impaired. The court also explained that it could not give Keith the benefit of any type of voluntarily induced intoxicated or drugged state. *Id*. ¶ 16.

Keith's counsel requested a postponement to bring Dr. Hoell back to testify again. The district court denied the request since it had already heard Dr. Hoell's testimony at trial. The district court concluded that there was no evidence of mental impairment sufficient to require waiving the mandatory minimum sentence. The court sentenced Keith to 10 years in prison for criminal endangerment and an additional 10 years for the use of a weapon in committing the criminal endangerment. The court suspended 15 years of the sentence.

On appeal, Keith argued that the district erred in not applying the mental impairment exception to the mandatory minimum sentence because she was mentally impaired due to physical pain, mental anguish, high levels of stress, and her use of prescription drugs and alcohol. *Id*. ¶¶ 21-22. Keith also argued that the

court erred by not conducting a hearing on the applicability of the exception to the mandatory minimum. *Id*. ¶¶ 22, 25.

This Court held that because the district court sentenced Keith to more than the mandatory minimum the statute concerning the exceptions to the mandatory minimum did not apply. *Id*. ¶ 24. This Court also rejected Keith's claim that the district court erred by not conducting a hearing on the applicability of the exception to the mandatory minimum and by denying her request for a continuance. *Id*. ¶¶ 25-29.

In addressing Keith's claim that the district court erred by not postponing her sentencing hearing, this Court explained:

> Keith maintains that she wanted Dr. Hoell to explain how stress, combined with drugs and alcohol, could have impaired her mental capacities. However, as expressly stated in § 46-18-222, MCA, "a voluntarily induced intoxicated or drugged condition may not be considered an impairment" for the purposes of applying the exceptions under this statute. Therefore, the District Court would not have been able to consider Dr. Hoell's opinion regarding the impairment of Keith's mental capacity because her impairment was based in part on the alcohol and drugs she voluntarily consumed.

Id. ¶ 30. The same rationale applies to Warr's circumstances.

The district court correctly ruled, after considering all the evidence that Warr presented, as follows:

> In reviewing this issue, the question is whether there was a significant impairment of mental capacity, because a significant impairment is required. But a person is presumed to have mental capacity when they are of age. Defendant is not contending that his

> mental capacity was so impaired that the impairment constituted a complete defense to the crime charged.
>
> Under the statute, a voluntarily induced intoxication or drugs condition falls outside of the impairment. So there's no evidence that's been presented to the Court that Defendant's intoxicated and drugged condition was other than voluntary. Prior to this, Defendant exhibited the mental capacity to recognize he needed assistance and to seek assistance.
>
> If drinking alcohol or taking drugs as a response to life's stressors or mental health concerns were to be used to justify an exception to a mandatory minimum, the exception would swallow the rule, placing Defendants and others at serious risk.
>
> Prior to drinking alcohol and taking pills, no evidence was presented that Defendant threatened anyone, committed a crime, attempted to commit a crime or threatened to commit a crime.
>
> . . . .
>
> The suggestion is today that mental health and substance abuse may be behind this particular event, but from what I've been able to determine from the PSI and other information filed with the Court, those same issues are behind a rather extensive and concerning history of serious crimes, and I find that supervision by the Department of Corrections is the best way to go forward to help the Defendant stay compliant with the law to manage his mental health and addiction issues.

(Sent. Tr. at 32-34.)

The district court also explained that the sentence it imposed was reasonably related to both the crime and Warr's criminal history. The sentence promoted public safety and provided Warr an opportunity to rehabilitate himself. (*Id.*) The district court found that Warr's "extensive history of serious criminal behavior has

placed the community at risk for a number of years since the Defendant was a youth." (*Id.*) Finally, the district court explained:

> The Court has not intended at any time to sentence the Defendant less severely than required by the mandatory minimum sentence. The mandatory minimum is appropriate because it reflects the serious nature of the charge and the risk it caused to others, but also reflects the Defendant's efforts to address his mental health and chemical dependency issues subsequent to this issue. That's the reason that I have not imposed a more severe unsuspended period of commitment to the Department of Corrections. Imposing less than the mandatory minimum would lend credence to the Defendant's tendency to not fully take responsibility, but instead to blame his behavior on factors for which he should not be held [responsible]; and if accepted and reinforced, such an attitude would continue to place the Defendant and others at serious risk.

(*Id*. at 34-35.)

Here, the district court would have been justified in imposing more than the mandatory minimum, but it showed Warr grace and did not do so. Also, even *if* Warr had been eligible for an exception to the mandatory minimum sentence, that does not mean he was entitled to one. *State v. Novak*, 2008 MT 157, ¶ 8, 343 Mont. 292, 183 P.3d 887. This is not a circumstance where the district court wanted to sentence Warr to less than the mandatory minimum but legally did not think it could do so. Instead, the district court made it very clear that it believed the mandatory minimum sentence, followed by a probationary sentence, was the correct sentence.

The district court correctly applied the statutes governing exceptions to the mandatory minimum sentence, and Warr has not demonstrated that its findings of fact are clearly erroneous.

IV. Warr waived his right to a jury trial by voluntarily entering a no contest plea.

Warr finally argues that the district court denied his constitutional right to a jury trial. Because, as argued above, the district court was not required to allow Warr to withdraw his no contest plea a second time after he had reinstated his withdrawn no contest plea, knowing fully well that the district court did not intend to follow the plea agreement, Warr waived his right to a jury trial by voluntarily entering his no contest plea a second time. *State v. Prindle*, 2013 MT 173, ¶ 17, 370 Mont. 478, 304 P.3d 712.

Additionally, if Warr wishes to challenge the voluntariness of the no contest plea he entered the second time, he can do so under Mont. Code Ann. § 46-16-502(2). *Prindle*, ¶ 17. He can file a motion to withdraw his no contest plea within one year of when his judgment became final. Mont. Code Ann. § 46-16-502(2)(a)-(c).

CONCLUSION

For the reasons argued above, the State respectfully requests that this Court affirm Warr's conviction for felony assault on a peace officer and the sentence the district court lawfully imposed.

Respectfully submitted this 18th day of February, 2025.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Tammy K Plubell*
TAMMY K PLUBELL
Assistant Attorney General

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 8,621 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-18-2025:

William E. Fulbright (Govt Attorney)
205 Bedford St #C
Hamilton MT 59840
Representing: State of Montana
Service Method: eService

Karl Pitcher (Attorney)
PO Box 7842
Missoula MT 59802
Representing: Jonah Micah Warr
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Jonah Micah Warr
Service Method: eService

Electronically signed by Janet Sanderson on behalf of Tammy K Plubell
Dated: 02-18-2025