
STATE OF MONTANA

Plaintiff and Appellee,

v.

JONAH MICAH WARR

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

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

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INTRODUCTION

The Defendant/Appellant (“Jonah”) argued in his opening brief that the district court violated Mont. Code Ann. § 46-12-211(4) when it denied him the opportunity to withdraw his plea after it rejected an appropriate disposition plea agreement a second time.¹ The State agrees that the district court must grant a defendant the opportunity to withdraw his plea after the court rejects an appropriate disposition plea agreement. (Appellee’s Response Br. at 16, 20). However, the State argues that once a plea agreement is initially rejected and a plea is withdrawn, any subsequent plea later in the proceedings is no longer bound by the requirements of Mont. Code Ann. § 46-12-211(4). (Appellee’s Response Br. at 17, 20-21). The State’s position appears to be that since Mont. Code Ann. § 46-12-211(4) is silent regarding the possibility that a court could reconsider and re-reject an appropriate disposition plea agreement, the statute must be interpreted to only allow a defendant to withdraw his plea the first time the appropriate disposition plea agreement is rejected.

¹ “Appropriate disposition plea agreements” refers to plea agreements specified in § 46-12-211(1)(b), in which a prosecutor agrees that a specific sentence is the appropriate disposition of the case.

SUMMARY OF THE ARGUMENT

Jonah plead no contest to the offense of Assault on a Peace Officer two separate times via an appropriate disposition plea agreement. The district court rejected the appropriate disposition plea agreement two separate times. These were two separate plea entries and rejections, not a continuation of one single plea.

When this type of plea agreement is rejected, the court is required to afford the defendant an opportunity to withdraw his plea and advise the defendant of the consequences if he persists in the plea. If the legislature intended to allow the defendant only one chance to withdraw his plea, it could have specified so in the statute.

The State suggests two alternative methods by which Jonah could withdraw his plea. Neither method is necessary when the face of the statute already provides Jonah the right to withdraw his plea.

ARGUMENT

I. Jonah entered a no contest plea two separate times to this offense. Each time it was via an appropriate disposition plea agreement. The court rejected the agreement two separate times.

In its Response Brief, the State admits that there was a “second” change of plea and a “second” motion to withdraw. (Appellee’s Response

Br. at 9, 16, 17, 20, 26, 34.) However, the State suggests that the court only rejected the plea agreement one time. (Appellee's Response Br. at 20, 21, 26.) The procedural history of this case, along with the statements made at the May 10th and July 28th hearings, clearly demonstrate that the district court rejected the plea agreement two separate times.

Jonah first entered a plea of no contest to Assault on a Peace Officer on September 1, 2021. (D.C. Doc 35.1.) This was accompanied by the submission of a plea agreement that stated it was an appropriate disposition agreement pursuant to § 46-12-211(1)(b), MCA. (D.C. Doc 35.) The court rejected the plea agreement on December 1, 2021 at the first sentencing hearing. (D.C. Doc 43.1.) At this hearing, the court stated:

“I am just informing the parties that the Court will not follow the Plea Agreement” (12/1/2021 Tr. at 3.)

The court did not advise Jonah that he had the right to withdraw his plea. Nor did it advise Jonah that if he persisted in his plea the disposition of the case may be less favorable to him than what was contemplated in the plea agreement. Both advisements are required under MCA § 46-12-211(4). When a district court departs from the plea

agreement without providing the defendant a full advisory as required under § 46-12-211(4), MCA, the sentence must be vacated. *State v.*

Zunick, 2014 MT 239, ¶ 16, 376 Mont. 2983, 339 P.3d 1228

Instead of issuing the proper advisement, the court allowed the parties to continue the hearing, stating:

“So with all that information, probably the parties want some time to talk and to decide how they are going to go forward. So I’m suggesting that we continue the sentencing for two weeks.” (12/1/2021 Tr. at 5.)

This sentencing hearing was continued twice and eventually held on March 16, 2022. At this hearing, Jonah formally requested to withdraw his plea along with his admissions on a petition to revoke.

(3/16/22 Tr. at 3.) The court asked the State if it would object to Jonah withdrawing his plea. The State responded:

“Your Honor, given the appropriate disposition nature of the plea agreement, I don’t believe we have a basis on which we can object to that withdrawal.” (3/16/22 Tr. at 3-4.)

The court granted the request and both the plea and admissions were formally withdrawn on March 16th. (3/16/22 Tr. at 4.)

Three more court hearings occurred in the interim period in which the matter was scheduled for trial and a jury was drawn. (See D.C. Docs 51.1, 54.1, and 57.1.) Then, during a May 10, 2022 status hearing, a

lengthy discussion was heard in court regarding the previously submitted plea agreement and whether the exception to the mandatory minimum should or should not apply. (5/10/22 Transcript and D.C. Doc 58.1.) At the end of this hearing, Jonah reentered his no contest plea to Assault on a Peace Officer.

There are two significant takeaways from the May 10th hearing. First, the plea entered on this date was made via an appropriate disposition plea agreement pursuant to MCA § 46-12-11(1)(b). Secondly, the court *did not* eliminate the possibility that it would accept the plea agreement and allow an exception to the mandatory minimum. Analysis is provided herein:

a. At the May 10th hearing, the plea entered by Jonah was made via an appropriate disposition plea agreement.

There are only two types of plea agreements available under Montana law. A § 46-12-211(b) agreement contains a specific sentence and is sometimes called an appropriate disposition plea agreement or a “binding” agreement.² The other type is a § 46-12-211(c) agreement that includes a recommended sentence and is sometimes called a

² See <https://www.greatfallstribune.com/story/news/2019/02/26/plea-agreements-keep-wheels-justice-turning/2989816002/>

“nonbinding” agreement”³. A third option is an open plea, which is not defined, but is understood to mean a plea made without an agreement.

At the May 10th hearing, Jonah reentered a no contest plea pursuant to § 46-12-211(b). This is an appropriate disposition plea agreement or “binding” agreement. This is clear because there was absolutely no mention that the plea was made “open” or “straight” or anything of the sort. There also was no mention of the kind of agreement explained in § 46-12-211(c). Instead, the record makes direct reference to the plea agreement that was already filed with the court. This was the only plea agreement submitted and it was clearly labeled as an appropriate disposition plea agreement (D.C. Doc 35.) Jonah, through counsel, spoke in favor of following the plea agreement, stating:

“I hope that with what I have provided to the Court and what the Court has seen thus far, that the Court will consider sentencing Mr. Warr in accordance to the Plea Agreement.” (5/10/22 Tr. at 5.)

The State also spoke in support of the plea agreement, stating:

“I think we are seeing it very similar. The State reached this agreement with a long history with the Defendant.” (5/10/22 Tr. at 6.)

³ One could argue that MCA § 46-12-211(1)(a), in which a prosecutor recommends to dismiss charges in exchange for a plea, is another type of plea agreement. However, it is treated the same as § 46-12-211(1)(b) under § 46-12-211(4).

The district court also referenced the plea agreement in its colloquy with Jonah when it stated:

“And in entering that plea, we reviewed the Plea Agreement, and also the potential maximum sentence and the potential mandatory minimum sentence.” (5/10/22 Tr. at 15.)

Therefore, the record clearly shows that the no contest plea entered by Jonah on May 10th was made pursuant to Mont. Code Ann. § 46-12-211(b).

b. The district court did not eliminate the possibility that it would accept the plea agreement.

At the May 10th hearing, the district court expressed its reluctance to follow the terms of the plea agreement and allow an exception to the mandatory minimum. However, it did not reject the possibility that it could be persuaded to accept the plea agreement. The district court made the following statements at the inception of the May 10th hearing:

“The Court had previously indicated that it was not inclined to accept the Plea Agreement because it called for a waiver of the mandatory minimum. I think the parties want to talk to me about that more today.” (5/10/22 Tr. at 3.)

The court then allowed the parties to make statements. Both parties spoke in support of following the plea agreement. Jonah’s defense counsel stated that an affidavit had been filed just prior to the

hearing in support of the exception to the mandatory minimum and that at least one more affidavit would be submitted at a later date.

Jonah's counsel even concluded his statement by asking the court to let the parties know at today's hearing if the Court would accept the Plea Agreement, stating:

“... we would ask the Court to consider, and maybe even let the parties know today whether there had been sufficient information given to the court to eventually accept the Plea Agreement at a sentencing hearing, Your Honor.” (5/10/2022 Tr. at 6.)

The court responded by asking questions regarding the alleged drug use of the defendant. The court then elaborated on why it was reluctant to allow an exception to the mandatory minimum. In particular, the court discussed the parties' arguments that a mental health issue was the cause of the offense, stating:

“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 not information that has come before me at this point.” (5/10/22 Tr. at 10.)

Jonah's defense counsel then stated that the court might not have all the information, stating:

“Because the Court has not heard all the facts on this case, that might have been something that the Court was not aware of and that I had failed to bring to the Court’s attention... I’m not going to try to convince the Court right now, but if the Court would allow me a short time to brief the issue...” (5/10/22 Tr. at 11.)

The district court then affirmatively stated it would allow briefing:

“Certainly I will allow you to brief the issue and present whatever evidence you want.” (5/10/22 Tr. at 12.)

After private discussion, Jonah’s counsel then requested to reenter the plea and admissions:

“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... There is a lot information that is out there that I want to get to the Court, so I would ask for a little bit of time...” (5/10/22 Tr. at 13.)

Next, the court had a colloquy with Jonah to allow the reentry of his plea and admissions. During this colloquy, the court made the following statements in reference to the plea agreement and mandatory minimum:

“And just as a reminder, the Court is not a party to the Plea Agreement and is not bound by that;” (5/10/22 Tr. at 14.)

“And in entering that plea, we reviewed the Plea Agreement, and also the potential maximum sentence and the potential mandatory minimum sentence.” (5/10/22 Tr. at 15.)

“...you also know that the Court has been reluctant to set aside the mandatory minimum to this point” (5/10/22 Tr. at 17.)

“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?” (5/10/22 Tr. at 17, in colloquy with Jonah)

Finally, the court scheduled a two-hour sentencing/evidentiary hearing for later in the summer.

By allowing Jonah to brief the issue, submit affidavits in support, and conduct a two-hour evidentiary hearing, the court was clearly not rejecting the plea agreement. Nor was the court holding steadfast to its previous rejection it had made on Dec. 1, 2021. Stating that it is “reluctant” or “disinclined” is not the same thing as stating that something is rejected. It was only at the July 28, 2022 hearing that the district court rejected the plea agreement a second time. This rejection on July 28th even surprised the State, which is evidenced by its statement in court: “Judge, until the very end here, I hadn’t really contemplated it.” (7/28/2022 Tr. at 38.)

Furthermore, if the court truly wished to hold to its previous rejection of the plea agreement it should have informed Jonah at the May 10th hearing that if he wished to reenter his plea the disposition of

the case may be less favorable to him. This would have been in accordance with the requirements of MCA § 46-12-11(4). The court did nothing of this sort. In fact, during the entirety of these proceedings the district court never provided the full advisement as required under MCA § 46-12-11(4).

This Court has previously discussed whether a district court must recite all the requirements set forth in MCA § 46-12-11(4) or whether a partial recitation of the requirements at different hearings is adequate. *State v. Zunick*, 2014 MT 239, ¶ 16. This Court determined that the full advisory must be given on the record at the time the plea agreement is rejected. *Id.*, at ¶ 16. The district court in this case did not give the advisory at any point; not during the December 1, 2021 hearing, the May 10, 2022 hearing, nor at the July 28, 2022 hearing. When a district court departs from the plea agreement without providing a full advisory, the sentence must be vacated. *Zunick*, at ¶ 19.

II. When this type of plea agreement is rejected, the defendant must be given the opportunity to withdraw his plea and be advised of the consequences if he persists. This opportunity must be afforded on second or subsequent rejections since the statute does not specify that it should only apply once.

The State argues that Jonah makes his argument “[w]ithout citing authority”, but in the same sentence references the authority that supports Jonah’s argument, which is Mont. Code Ann. § 46-12-211(4). (Appellee’s Response Br. at 20.) For the Court’s review, the statutory language in question is quoted again below:

“If the court rejects a plea agreement of the type specified in subsection (1)(a) or (1)(b), 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.”

(MCA § 46-12-211(4)). There is nothing ambiguous about the language referenced above. If a court rejects a (1)(b) plea agreement, it shall afford the defendant an opportunity to withdraw the plea and advise him of the consequences if he persists in the plea. The language does not state that this opportunity is only allowed the first time a plea is rejected. Therefore, it should not be interpreted to impose such a limitation. “When interpreting a statute, we first consider the plain meaning of the statutory language.” *Mitchell v. State*, 2015 MT 120, ¶ 9, 379 Mont. 127, 347 P.3d 1278.

The State attempts to shift this burden to Jonah by arguing that the statute does not specify that this right also applies on second or subsequent plea agreement rejections. (Appellee's Response Br. at 26.) This is a fallacious argument that could be applied to any unique element one desires. The statute also does not specify that this right to withdraw a plea applies when the underlying charge is Assault on a Peace Officer. Must we then assume that this right does not apply for such a charge? The statutory language does not state that this opportunity to withdraw a plea applies even if the parties brief the issue and hold an evidentiary hearing. Must we then assume that if the parties brief the issue and the court decides to reject the plea agreement, that the defendant cannot then withdraw his plea? Such conclusions would dilute the statute's effect and lead to absurd results. Therefore, this argument must be rejected.

Furthermore, if the legislature wished to limit the ability to withdraw a plea to the first time the plea agreement is rejected, it could have specified so. The Montana Legislature has done precisely so on other issues of criminal procedure. In Montana, if you are convicted of a felony offense, the district court may defer your sentence. However, this

can only be applied to one's first felony conviction, not to a second or subsequent felony. This language is written directly into the statute of Mont. Code Ann. § 46-18-201(b), which reads as follows (emphasis added):

“(b) Except as provided in 46-18-222, imposition of sentence in a felony case may not be deferred in the case of an offender who has been convicted of a felony on ***a prior occasion***, whether or not the sentence was imposed, imposition of the sentence was deferred, or execution of the sentence was suspended.”

The language in MCA § 46-18-201(b) referenced above shows that if the legislature intended to limit a benefit to a specific number, it can do so and has done so in the past. However, under MCA § 46-12-211(4), there is no such language that limits the opportunity to withdraw to only one time. Therefore, a plain reading of the statute necessitates that the right to withdraw applies whenever an appropriate disposition plea agreement is rejected. *Mitchell v. State*, 2015 MT 120, ¶ 9.

III. The alternative methods of withdrawing a plea suggested by the State are unnecessary for these circumstances.

Finally, the State suggests two other methods by which Jonah could withdraw his plea. One method is under Mont. Code Ann. § 46-16-105(2), which allows a court, for good cause shown, to permit a plea to

be withdrawn. (Appellee's Response Br. at 17.) The other method suggested by the State is for voluntariness under Mont Code Ann. § 46-16-502(2)(a)-(c)(Appellee's Response Br. at 34.)

Under Mont. Code Ann. § 46-16-105(2), the time to withdraw is allowed within 1 year after judgment becomes final, which is defined to mean when the time for appeal to the Montana Supreme Court expires, or if an appeal is taken to the Montana supreme court, when the time for petitioning the United States supreme court for review expires. (Mont. Code Ann. § 46-15-105(2)(a)-(b)) Accordingly, Jonah is still within the time allowed to request his plea withdrawn under this statute. Jonah has good cause to request his plea be withdrawn. The "good cause" is due to the statute that allows him to withdraw a plea which is submitted via an appropriate disposition plea agreement when such an agreement is rejected by the court. Therefore, the argument remains the same and will not be restated here. If this Court deems it necessary, Jonah hereby requests to withdraw his plea for good cause shown. However, Jonah maintains that this additional step is unnecessary since Jonah already had a right to withdraw his plea under MCA § 46-12-211.

Finally, the State suggests that if Jonah wishes to challenge voluntariness of his plea, he can do so under Mont. Code Ann. § 46-16-502(2). (Appellee's Response Br. at 34.) Appellate counsel believes this is a typo since MCA § 46-16-502 deals with "View of relevant place or property", not voluntariness. Counsel is unclear which statute the State intended to reference. Accordingly, Jonah does not wish to challenge the voluntariness of his plea under this statute.

CONCLUSION

At the time of this briefing, Jonah has already served the two years in prison that were the subject of this dispute. He is currently serving the remainder of his sentence on probation. The time served in prison is time he cannot get back. Jonah's desire to withdraw his plea is based on his wish to correct the legal record on this issue and allow him to pursue his other options to resolve the charges, whether that is continued plea negotiations or a trial by jury.

Jonah respectfully requests the Court reverse the district court's denial of Jonah's motion made in open court to withdraw his plea of no contest. The face of the statute granted Jonah the right to withdraw his

plea when it was made via an appropriate disposition plea agreement and the court rejected said plea agreement.

If the State maintains that the plea agreement was still rejected at the time Jonah reentered his no contest plea, then the district court should have advised Jonah that the agreement was rejected and given him the full advisement as required under MCA § 46-12-211(4).

Furthermore, since the plea was withdrawn after the initial rejection, a subsequent reentry of the plea would nevertheless require another rejection of the plea agreement.

If the State maintains that the statute only allows Jonah to withdraw the plea one time, this argument fails because the statute makes no distinction to this effect. Therefore, such a limitation should not be read into the statute. Briefing on this matter is now concluded and ready for the Court's ruling.

Respectfully submitted this 30th day of March, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook 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 is 3,651, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Karl Pitcher
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