

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT DUNKERSON,

Defendant and Appellant.

ANDERS BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John Parker, Presiding

APPEARANCES:

TAMMY A. HINDERMAN
Division Administrator
GREGORY HOOD
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
Gregory.Hood@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOSHUA RACKI
Cascade County Attorney
MICHELE R. LEVINE
Cascade Deputy County Attorney
121 4th Street North
Great Falls MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

| | |
|--|-----|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES..... | iii |
| MEMORANDUM ACCOMPANYING MOTION TO WITHDRAW | 1 |
| SUMMARY OF PROCEDURAL HISTORY | 1 |
| DISCUSSION OF APPELLANT’S CLAIMS THAT MIGHT ARGUABLY SUPPORT AN APPEAL..... | 10 |
| I. The district court abused its discretion by imposing a \$50 surcharge..... | 10 |
| A. Pertinent Facts..... | 10 |
| B. Pertinent Law | 11 |
| II. The district court erred when it imposed restitution in the amount of \$7253.62..... | 12 |
| A. Pertinent Facts..... | 13 |
| B. Pertinent Law | 13 |
| III. Mr. Dunkerson’s trial counsel was ineffective for failing to establish any communication with Mr. Dunkerson for nearly four months..... | 14 |
| A. Pertinent Facts..... | 15 |
| B. Pertinent Law | 16 |
| IV. The district court abused its discretion when it ignored Mr. Dunkerson’s request for new counsel. | 18 |
| A. Pertinent Facts..... | 18 |
| B. Pertinent Law | 19 |
| CONCLUSION | 20 |

| | |
|--------------------------------|----|
| CERTIFICATE OF COMPLIANCE..... | 21 |
|--------------------------------|----|

TABLE OF AUTHORITIES

Cases

| | |
|---|--------|
| <i>Anders v. California</i> , 386 U.S. 738 (1967)..... | 10 |
| <i>State v. Aragon</i> , 2014 MT 89, 374 Mont. 391, 321 P.3d 841 | 14 |
| <i>State v. Brown</i> , 263 Mont. 223, 867 P.2d 1098, (1994) | 14 |
| <i>State v. Clary</i> , 2012 MT 26, 364 Mont. 53, 270 P.3d 88..... | 16, |
| <i>State v. Johnson</i> , 2019 MT 34, Mont. 245, 435 P.3d 64..... | 19, 20 |
| <i>State v. Kirn</i> , 2012 MT 69, 364 Mont. 356, 274 P.3d 746..... | 14 |
| <i>State v. Kotwicki</i> , 2007 MT 17, 335 Mont. 344, 151 P.3d 892..... | 11, 12 |
| <i>State v. McLeod</i> , 2002 MT 348, 313 Mont. 358, 61 P.3d 126..... | 11 |
| <i>State v. Novak</i> , 2005 MT 294, 329 Mont. 309, 124 P.3d 182 | 16, 17 |
| <i>State v. Reynolds</i> , 2017 MT 317, 390 Mont. 58, 408 P.3d 503..... | 12 |
| <i>State v. Steger</i> , 2021 MT 321, 406 Mont. 536, 501 P.3d 394 | 12 |
| <i>State v. Tellegen</i> , 2013 MT 337, 372 Mont. 454, 314 P.3d 902..... | 17 |

| | |
|--|----|
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984) | 17 |
|--|----|

Statutes

| | |
|---|-----------|
| Mont. Code Ann. § 45-4-101 | 2 |
| Mont. Code Ann. § 45-5-503 | 1 |
| Mont. Code Ann. § 45-7-206(1)(b) | 2 |
| Mont. Code Ann. § 45-7-207(1)(a) | 2 |
| Mont. Code Ann. § 46-8-103(2)..... | 10 |
| Mont. Code Ann. § 46-8-113(4)..... | 12 |
| Mont. Code Ann. § 46-18-201(5)..... | 13 |
| Mont. Code Ann. § 46-18-231 | 11, 12 |
| Mont. Code Ann. § 46-18-231(3)..... | 11 |
| Mont. Code Ann. § 46-18-232(2),..... | 11 |
| Mont. Code Ann. §46-18-236(1)(c)..... | 9, 10, 12 |
| Mont. Code Ann. § 46-18-236(2)..... | 12 |
| Mont. Code Ann. § 46-18-243(1)(a) | 14 |
| Mont. Code Ann. § 46-20-104(2)..... | 12 |

Constitutional Authorities

Montana Constitution

| | |
|---------------------|--------|
| Art. II, § 24 | 16, 19 |
|---------------------|--------|

United States Constitution

| | |
|----------------|--------|
| Amend. VI..... | 16, 19 |
| Art. II..... | 16 |

MEMORANDUM ACCOMPANYING MOTION TO WITHDRAW

SUMMARY OF PROCEDURAL HISTORY

On January 26, 2022, the State filed an Information charging Robert Dunkerson with two counts of Sexual Intercourse Without Consent (SIWC) in violation of Mont. Code Ann. § 45-5-503. D.C. Doc. 3. One count alleged a victim under the age of twelve and one count alleged a victim under the age of 16. D.C. Doc. 3. Mr. Dunkerson appeared the very same day before the district court for his initial appearance. D.C. Doc. 5. Bail was set at \$250,000 with the added condition that Mr. Dunkerson be monitored by a wearable GPS device. D.C. Doc. 5. Mr. Dunkerson posted bond and was released having spent seven days in jail. D.C. Doc. 9.

On February 7, 2022, Mr. Dunkerson's arraignment was continued by his counsel, Amanda Gordon. D.C. Doc. 10. Mr. Dunkerson was not present. D.C. Doc. 10. The district court arraigned Mr. Dunkerson on February 28, 2022. D.C. Docs. 13, 14.

On April 1, 2022, the State moved to revoke Mr. Dunkerson's bond on the basis that he allegedly contacted the alleged victim's mother in

violation of the conditions of his release. D.C. Doc. 15. The district court issued an arrest warrant on March 31, 2022. D.C. Doc. 16.

Also on April 1, 2022, the State filed an Amended Information charging Mr. Dunkerson with two counts of Solicitation of Tampering with Witnesses or Informants in violation of Mont. Code Ann. §§ 45-4-101, 45-7-206(1)(b), and 45-7-207(1)(a). D.C. Doc. 18. Mr. Dunkerson appeared with his counsel that same day for his initial appearance on the two additional charges and plead not guilty. D.C. Doc. 19.

On May 11, 2022, the State filed a motion to continue the Omnibus hearing and trial dates. D.C. Doc. 21. The State made clear in its motion that the reason for the motion was that Amanda Gordon, the attorney appointed by the public defender's office to represent Mr. Dunkerson, had not filed a notice of appearance or a request for discovery in the case and that any delay should be attributed to the Defense. D.C. Doc. 21. The district court granted the motion the same day. D.C. Doc. 22.

Also on May 11, 2022, nearly five months after the date of the Information, the public defender's office filed a notice of appearance

indicating that Amanda Gordon would be representing Mr. Dunkerson. D.C. Doc. 23.

On June 2, 2022, Mr. Dunkerson's counsel filed a motion to amend bail as Mr. Dunkerson had not been able to afford to post the bond issued on April 1. D.C. Doc. 24.

Mr. Dunkerson's counsel failed to appear for the bond hearing on June 20, 2022. D.C. Doc. 26. Although Mr. Dunkerson was present, the State moved for a continuance of the hearing as the parties could not proceed in Ms. Gordon's absence, and the district court granted the continuance. D.C. Doc. 26.

The omnibus order was filed on June 27, 2022. D.C. Doc. 28. Mr. Dunkerson was not present. D.C. Doc. 28. No affirmative defenses or motions were preserved. D.C. Doc. 28.

On July 18, 2022, the parties appeared for Mr. Dunkerson's arraignment on the Amended Information. D.C. Doc. 33. This arraignment was set at the State's request. D.C. Doc. 29. Counsel for Mr. Dunkerson failed to appear. D.C. Doc. 34.

On the same day as his second arraignment, Mr. Dunkerson sent a written request directly to the district court judge through the

Cascade detention center's 'kite' system. D.C. Doc. 34. In it, Mr.

Dunkerson expresses that he had not communicated with his attorney in the four months she had represented him:

Your Honorable Judge Best

As you are well aware, two times in a row my attorney has not shown up for court proceedings on 6/20/22, and today 7/18/22. Nor has she gotten in contact with me the entire time I have been incarcerated at the C.C.D.C. for almost 4 months now. Even after I have mailed numerous letters to her and the conflict office to get to my attorney.

I have lost all faith & communications with my attorney and am asking the courts to appoint me New Counsel, please. Thank you.
Robert A. Dunkerson

D.C. Doc. 34.

The district court never addressed Mr. Dunkerson's request for new counsel despite his claim, which was supported by the record, that he had never established any communication with his counsel.

Two days later, on July 20, 2022, the parties filed a joint motion to continue the trial. D.C. Doc. 35. The basis for the motion, filed by the State, was a family emergency requiring Ms. Gordon's presence out of state, a professional conference making the prosecution unavailable, and the State's concern that "the victim is making progress in counseling and is recalling more details. A second forensic interview is

anticipated in the very near future.” D.C. Doc. 35. The district court granted the motion. D.C. Doc. 36.

On August 29, 2002, the parties appeared for the bond hearing that Ms. Gordon missed in June. D.C. Doc. 40. The State called two witnesses that provided sworn testimony: Detective Kevin Lake of the Great Falls Police Department and Amie Houtz, the mother of the alleged victim. D.C. Doc. 40. The district court denied the motion to reduce the amount bail. D.C. Doc. 40.

Counsel for Mr. Dunkerson filed another motion to continue the trial on September 15, 2022¹. D.C. Doc. 42. The basis for this motion to continue was that counsel was set for a jury trial in another jurisdiction during the time set for the final pretrial hearing in this case. D.C. Doc. 42.

Counsel for Mr. Dunkerson requested yet another continuance on November 23, 2022, on the basis of a crowded trial schedule. D.C. Doc. 43. The district court granted the request and set the trial for April 2023. D.C. Doc. 44.

¹ No order granting the request for continuance was in the record.

Mr. Dunkerson bonded out again on December 4, 2022. D.C. Doc. 45.

On December 6, 2022, the State moved to amend the bail conditions seeking a condition that Mr. Dunkerson stay 1500 feet away from “the victim, her family, and the State’s witnesses in this case.” D.C. Doc. 46.

On December 19th, Mr. Dunkerson appeared with counsel before the district court and the court reiterated its condition that he stay at least 1500 feet away from the victim, including home and school. D.C. Doc. 48.

On March 20, 2022, the same day as the scheduled pre-trial conference in the case, counsel for Mr. Dunkerson requested another trial continuance on the basis that she had a hearing in another jurisdiction that day and additional time was needed to prepare for trial. D.C. Doc. 50. The district court granted the motion, moving the trial back to June, 2023. D.C. Doc. 51.

Three days before the final pre-trial conference, Ms. Gordon again filed a motion to continue, this time for the stated reason that the parties were negotiating a resolution and “additional time is needed for

Mr. Dunkerson to start treatment with an MSOTA provider.” D.C. Doc. 52. The district court granted the motion, setting trial back to September, 2023. D.C. Doc. 53.

Ms. Gordon filed another motion to continue on August 7, 2023 on the basis that she was in trial in other jurisdictions. D.C. Doc. 54. For the first time, the State objected to the motion “due to speedy trial purposes.” D.C. Doc. 54. The district court granted the continuance and reset trial for October, 2023.

On the day set for the final pre-trial conference, the parties appeared personally in court and requested a change of plea hearing. D.C. Doc. 56.

The district court held the change of plea hearing on October 2, 2023. D.C. Doc. 59. Mr. Dunkerson entered a “Guilty by Alford” plea to Count II of the Information (SIWC, victim less than 16). By agreement, the State moved to dismiss the remainder of the charges and the district court did so. 10/2/23 Hrg. Trans. at 13.

At the change of plea hearing Mr. Dunkerson testified under oath that he reviewed and agreed to waive his rights, that he had a full opportunity to consult with his counsel, that he was satisfied with his

counsel's availability to him, and that he had no complaints about counsel. 10/2/23 Hrg. Trans. at 5. Mr. Dunkerson testified that he believed it was in his best interest to change his plea pursuant to the plea offer and that it was reasonably likely that the State would obtain a conviction given the evidence available to them were the case to go to trial. 10/2/23 Hrg. Trans. at 10. The fully executed plea agreement and acknowledgment and waiver of rights were filed on the day of the change of plea hearing. D.C. Doc. 60.

The terms of the plea agreement the parties entered allowed for an Alford plea to Count II in return for the motion to dismiss the remaining charges, for Mr. Dunkerson to get evaluated by an MSOTA evaluator and if the provider recommended a tier 1 designation, the State would refrain from any sentencing recommendation, but if the evaluation results recommended a tier 2 or tier 3 designation, then the State would be free to recommend any lawful sentence. 10/2/23 Hrg. Trans. at 7. The MSOTA provider recommended a tier 1 designation. 10/2/23 Hrg. Trans. at 7. The plea agreement did not reserve any issues for appeal. On November 20, 2023, Mr. Dunkerson was sentenced in open court with all parties personally present. D.C. Doc. 66. Through

counsel, Mr. Dunkerson objected to the section of the PSI that indicated “chemical use,” explaining that neither drugs nor alcohol was involved at all in this case. 11/20/23 Hrg. Trans. at 6. The district court overruled the objection. 11/20/23 Hrg. Trans. at 6.

At the sentencing hearing, the State called five witnesses while Mr. Dunkerson relied on the reports and letters already filed in the case. 11/20/23 Hrg. Trans. at 7.

Mr. Dunkerson, through counsel, expressly agreed to the full amount of restitution requested. 11/20/23 Hrg. Trans. at 49, 55. The presentence investigation report indicated Mr. Dunkerson owned assets—five vehicles—worth over \$20,000. D.C. Doc. 63.

The district court sentenced Mr. Dunkerson to 50 years in prison with no eligibility for parole for the first 25 years and credited him with 260 days of time served. 11/20/23 Hrg. Trans. at 63; D.C. Doc. 69. The judge ordered restitution per the parties’ stipulation in the amount of \$7253.62 for the cost of medical treatment, tests, and counseling, as set forth in the receipts attached to the PSI. 11/20/23 Hrg. Trans. at 63; D.C. Doc. 63. The judge ordered Mr. Dunkerson to pay a surcharge for victim and witness advocate programs of \$50 pursuant to Mont. Code

Ann. §46-18-236(1)(c). D.C. Docs. 63, 69; 11/20/23 Hrg. Trans. at 63.

No objection was made to this surcharge. The judge, *sua sponte*, waived all other fees and costs “based on indigence.” 11/20/23 Hrg. Trans. at 63.

Mr. Dunkerson timely appealed. D.C. Doc. 71.

DISCUSSION OF APPELLANT’S CLAIMS THAT MIGHT
ARGUABLY SUPPORT AN APPEAL

Pursuant to Mont. Code Ann. § 46-8-103(2) and *Anders v. California*, 386 U.S. 738, 744 (1967), undersigned counsel informs the Court that the record might arguably support the following claims on appeal.

I. The district court abused its discretion by imposing a \$50 surcharge.

A. Pertinent Facts

The judge ordered Mr. Dunkerson to pay a surcharge for victim and witness advocate programs of \$50 pursuant to Mont. Code Ann. §46-18-236(1)(c). D.C. Docs. 63, 69; 11/20/23 Hrg. Trans. at 63. Defense counsel did not object despite the court having waived all other costs, fees and fines due to Mr. Dunkerson’s inability to pay.

B. Pertinent Law

This Court reviews sentences for whether the sentence falls within the statutory parameters. *State v. Kotwicki*, 2007 MT 17, ¶ 5, 335 Mont. 344, 151 P.3d 892.

Courts are statutorily mandated to inquire into and determine defendants' ability to pay before assessing fines in sentencing. Mont. Code Ann. § 46-18-231. Prior to the imposition of fines, courts "shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose." Mont. Code Ann. § 46-18-231(3). Specifically, courts are required to demonstrate a "serious inquiry and separate determination" regarding defendants' ability to pay. *State v. McLeod*, 2002 MT 348, ¶ 34, 313 Mont. 358, 61 P.3d 126.

"Prior to the imposition of the costs of jury service, costs of prosecution, costs of pretrial, probation, or community service, a district court 'shall take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose.' Section 46-18-232(2), MCA. Prior to the imposition of the costs incurred by the office of state public defender, the court 'shall take into account the financial resources of the

defendant and the nature of the burden that payment of costs will impose.’ Section 46-8-113(4), MCA.” *State v. Reynolds*, 2017 MT 317, ¶ 20, 390 Mont. 58, 408 P.3d 503.

Montana Code Annotated § 46-18-236(1)(c) requires a court to impose a \$50 surcharge for each felony charge in addition to other court costs, fees, or fines. However, “[i]f a convicting court determines under 46-18-231 and 46-18-232 that the person is not able to pay the fine and costs or that the person is unable to pay within a reasonable time, the court shall waive payment of the charge imposed by [Mont. Code Ann. § 46-18-236(1)(c)].” Mont. Code Ann. § 46-18-236(2).

Fines, fees, or costs levied without an ability to pay determination are an “objectionable sentence, not an illegal sentence.” Thus, an objection in district court is required in order for this Court to review it. Mont. Code Ann. § 46-20-104(2); *State v. Steger*, 2021 MT 321, ¶ 11, 406 Mont. 536, 501 P.3d 394 (citing *State v. Kotwicki*, 2007 MT 17, ¶ 21, 335 Mont. 344, 151 P.3d 892).

Mr. Dunkerson could argue that the district court wrongly imposed the \$50 victim/witness fee.

II. The district court erred when it imposed restitution in the amount of \$7253.62.

A. Pertinent Facts

The judge ordered restitution per the parties' stipulation in the amount of \$7253.62 for the cost of medical treatment, tests, and counseling, as set forth in the receipts attached to the PSI. 11/20/23 Hrg. Trans. at 63; D.C. Doc. 63. Mr. Dunkerson, through counsel, expressly agreed to the full amount of restitution requested. 11/20/23 Hrg. Trans. at 49, 55. The presentence investigation report indicated Mr. Dunkerson owned assets—five vehicles—worth over \$20,000. D.C. Doc. 63. The plea agreement did not reserve any issues for appeal and expressly stated that the “State may recommend restitution to any victim...” D.C. Doc. 60. No petition was filed seeking to modify or waive the alleged victim's requested amount of restitution at any time pertinent to this appeal.

B. Pertinent Law

District courts must require payment of full restitution when any victim suffers a pecuniary loss. Montana Code Annotated § 46-18-201(5). Pecuniary loss means “all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities, including without

limitation out-of-pocket losses, such as medical expenses, loss of income..., expenses reasonably incurred in attending court proceedings related to the commission of the offense.” Mont. Code Ann. § 46-18-243(1)(a).

The State holds the burden to prove restitution by a preponderance of the evidence. *State v. Aragon*, 2014 MT 89, ¶ 16, 374 Mont. 391, 321 P.3d 841.

While supporting documentation is not required to support a restitution order, there must be evidence sufficient to support the amount awarded. *Aragon*, ¶ 14. Where the testimony or affidavit of the party claiming restitution is insufficient to support the request, reversal of the restitution award is required. *Aragon*, ¶ 21; *State v. Kirn*, 2012 MT 69, ¶ 8, 364 Mont. 356, 274 P.3d 746; *State v. Brown*, 263 Mont. 223, 226, 867 P.2d 1098, 1100, (1994).

Mr. Dunkerson could argue that the district court erred when it ordered restitution.

III. Mr. Dunkerson’s trial counsel was ineffective for failing to establish any communication with Mr. Dunkerson for nearly four months.

A. Pertinent Facts

Mr. Dunkerson wrote the judge directly through the Cascade detention center's 'kite' system. D.C. Doc. 34. In it, Mr. Dunkerson expressed that he had not communicated with his attorney in the four months she had represented him:

Your Honorable Judge Best

As you are well aware, two times in a row my attorney has not shown up for court proceedings on 6/20/22, and today 7/18/22. Nor has she gotten in contact with me the entire time I have been incarcerated at the C.C.D.C. for almost 4 months now. Even after I have mailed numerous letters to her and the conflict office to get to my attorney.

I have lost all faith & communications with my attorney and am asking the courts to appoint me New Counsel, please. Thank you.
Robert A. Dunkerson

D.C. Doc. 34.

The district court never addressed Mr. Dunkerson's request for new counsel despite his claim, which was supported by the record, that he had never established any communication with his counsel.

Mr. Dunkerson testified under oath at the change of plea hearing that he reviewed and agreed to waive his rights, that he had a full opportunity to consult with his counsel, that he was satisfied with his counsel's availability to him, and that he had no complaints about counsel. 10/2/23 Hrg. Trans. at 5. Mr. Dunkerson testified that he

believed it was in his best interest to change his plea pursuant to the plea offer and that it was reasonably likely that the State would obtain a conviction given the evidence available to them were the case to go to trial. 10/2/23 Hrg. Trans. at 10.

B. Pertinent Law

Claims of ineffective assistance of counsel present mixed issues of law and fact that this Court reviews de novo. *State v. Clary*, 2012 MT 26, ¶ 12, 364 Mont. 53, 270 P.3d 88.

The Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee the right to effective assistance of counsel. Ineffective assistance of counsel claims fall into two categories: record-based and non-record based. *State v. Novak*, 2005 MT 294, ¶ 18, 329 Mont. 309, 124 P.3d 182. This Court hears only record-based ineffective assistance claims on direct appeal. *Novak*, ¶ 18. This Court determines whether the record discloses why counsel took, or failed to take, the action in controversy when determining whether an ineffective assistance of counsel claim is appropriate for direct, record-based review. *Novak*, ¶ 18. A claim of ineffective assistance of counsel must be raised in a petition for post-

conviction relief if the allegation cannot be documented from the record. *Novak*, ¶ 18.

If the ineffective assistance of counsel claim can be documented in the record, this Court uses the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). *State v. Tellegen*, 2013 MT 337, ¶ 15, 372 Mont. 454, 314 P.3d 902. “Under this test, the defendant must demonstrate (1) that counsel’s performance was deficient, and (2) that counsel’s deficient performance prejudiced the defendant.” *Tellegen*, ¶ 15. Under the first part of this test, this Court examines whether counsel’s conduct fell below an objective standard of reasonableness in the context of all circumstances and according to prevailing professional norms. *Tellegen*, ¶ 16. Under the second part of the *Strickland* test, this Court examines whether there is a reasonable probability that counsel’s lack of reasonable professional conduct renders the results unreliable or the proceedings fundamentally unfair. *Tellegen*, ¶ 16.

Mr. Dunkerson could potentially argue that counsel was ineffective for failing to establish communication with him for almost four months.

IV. The district court abused its discretion when it ignored Mr. Dunkerson's request for new counsel.

A. Pertinent Facts

Mr. Dunkerson's note to the judge sent through the Cascade detention center's 'kite' system explained that he had not communicated with his attorney in the four months she had represented him:

Your Honorable Judge Best

As you are well aware, two times in a row my attorney has not shown up for court proceedings on 6/20/22, and today 7/18/22. Nor has she gotten in contact with me the entire time I have been incarcerated at the C.C.D.C. for almost 4 months now. Even after I have mailed numerous letters to her and the conflict office to get to my attorney.

I have lost all faith & communications with my attorney and am asking the courts to appoint me New Counsel, please. Thank you.
Robert A. Dunkerson

D.C. Doc. 34.

The district court never addressed Mr. Dunkerson's request for new counsel despite his claim, which was supported by the record, that he had never established any communication with his counsel.

Mr. Dunkerson testified under oath at the change of plea hearing that he reviewed and agreed to waive his rights, that he had a full opportunity to consult with his counsel, that he was satisfied with his counsel's availability to him, and that he had no complaints about counsel. 10/2/23 Hrg. Trans. at 5.

B. Pertinent Law

Defendants have a constitutional right to effective assistance of counsel. U.S. Constitution amendment VI; Montana Constitution article II, § 24. While defendants do not have the right to choose particular counsel, they are entitled to effective representation. So, when a breakdown of the attorney-client relationship is severe enough to prevent effective representation, a right to substitute counsel arises. *State v. Johnson*, 2019 MT 34, ¶ 18, 394 Mont. 245, 435 P.3d 64.

Defendants are entitled to substitute counsel upon presenting facts that show: “(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.

Trial courts must conduct an “adequate initial inquiry” upon a request for substitution counsel to determine whether the complaints are “seemingly substantial.” *Johnson*, ¶ 21. An “adequate initial inquiry” is one where the judge thoroughly inquires into the factual basis of the complaint. *Johnson*, ¶ 21. After “consider[ing] a defendant’s factual complaints together with counsel’s specific explanations addressing the complaints,” trial courts must

subsequently conduct a hearing if the complaints are seemingly substantial. *Johnson*, ¶ 22.

Mr. Dunkerson could argue that the district court abused its discretion when it ignored his plea for new counsel.

CONCLUSION

Undersigned counsel has not identified any non-frivolous issues to raise in this appeal, and, therefore, requests this Court to allow counsel to withdraw from this representation.

Respectfully submitted this 23rd day of May, 2025.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Gregory Hood
GREGORY HOOD
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* 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 for Windows is 3,826, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Gregory Hood
Gregory Hood

APPENDIX

| | |
|------------------------------------|--------|
| Sentencing Order and Judgment..... | App. A |
|------------------------------------|--------|

CERTIFICATE OF SERVICE

I, Gregory Nelson Hood, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 05-23-2025:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Robert Arnold Dunkerson AO#3035618
Saguaro Correctional Center
1252 E. Arica Rd.
Eloy AZ 85131
Service Method: Conventional

Electronically signed by Kat J. Hahm on behalf of Gregory Nelson Hood
Dated: 05-23-2025