
STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHAWN LEE FOSTER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Kathy Seeley, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE ISSUE..... 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS2

STANDARD OF REVIEW..... 7

SUMMARY OF THE ARGUMENT 7

ARGUMENT 8

Foster’s five-year sentence is illegal because he pleaded to an
offense for which the statutory maximum is three years. 8

CONCLUSION..... 11

CERTIFICATE OF COMPLIANCE..... 13

APPENDIX..... 14

TABLE OF AUTHORITIES

Cases

<i>City of Kalispell v. Salsgiver</i> , 2019 MT 126, 396 Mont. 57, 443 P.3d 504	10, 11
<i>State v. Burch</i> , 2008 MT 118, 342 Mont. 499, 182 P.3d 66	8
<i>State v. Coleman</i> , 2018 MT 290, 393 Mont. 375, 431 P.3d 26	8
<i>State v. Day</i> , 2018 MT 51, 390 Mont. 388, 414 P.3d 267	7
<i>State v. Heafner</i> , 2010 MT 87, 356 Mont. 128, 231 P.3d 1087	10, 11
<i>State v. Lenihan</i> , 184 Mont. 338, 602 P.2d 997 (1979)	7, 8, 10
<i>State v. Ring</i> , 2014 MT 49, 374 Mont. 109, 321 P.3d 800	10, 11
<i>State v. Southwick</i> , 2007 MT 257, 339 Mont. 281, 169 P.3d 698	8, 9, 10
<i>State v. Villalobos</i> , 2024 MT 301, 419 Mont. 256, 560 P.3d 617	10, 11

Statutes

Montana Code Annotated

§ 45-6-301	1
§ 45-6-301(1)(b)	3
§ 45-6-301(2)(a)	2, 3, 4, 8
§ 45-6-301(7)(b)	1
§ 45-6-301(7)(b)(i)	passim

§ 45-6-301(7)(b)(ii)..... 1, 3
§ 46-18-101..... 10

Legislative History

S. 19, Mont. 69th Leg., Reg. Sess. (2025)..... 1

STATEMENT OF THE ISSUE

Appellant Shawn Foster entered an *Alford* plea to a \$2,500 theft, which carries a maximum sentence of three years under Mont. Code Ann. § 45-6-301(7)(b)(i) (2019). But the District Court mistakenly imposed a five-year suspended sentence. Should the Court remand Foster's sentence with instructions to amend the judgment in conformance with the three-year statutory ceiling?

STATEMENT OF THE CASE

Foster is currently serving a five-year suspended sentence for an offense that carries a maximum penalty of three years.

The State charged Foster with theft under Mont. Code Ann. § 45-6-301(1)(b), in May 2021, after Foster admitted to selling a stolen trailer for \$2,500. (District Court Document (Doc.) 3 at 2:28–3:1; Doc. 5 at 1–2.) Hoping to connect Foster to the actual theft of the trailer and other items stolen from the original owner, the State initially sought a maximum ten-year penalty under § 45-6-301(7)(b)(ii) (2019).¹ (Doc. 3

¹ The legislature substantially amended subsection (7)(b) in 2025 with an effective date of July 1. *Compare* § 45-6-301(7)(b) (2023), *with* S. 19, Mont. 69th Leg., Reg. Sess. (2025). At the time of Foster's alleged offense, the 2019 version of the statute controlled. Where the relevant portion of § 45-6-301 is unaffected by SB 19, citations are to the current version.

at 1:17–2:6; Doc. 5 at 1–2; 4/22/2024 Change of Plea Hearing Transcript (COP Tr.) at 4:8–9, 15:3–8 (attached as Appendix C.) Eventually, the State amended Foster’s charge to § 45-6-301(2)(a)—theft of property by deception—for knowingly selling one trailer he did not own for \$2,500. (COP Tr. at 3:20–4:18, 6:7–9; Doc. 62 at 2.) The maximum period of incarceration under that amended charge is three years, pursuant to § 45-6-301(7)(b)(i) (2019). (COP Tr. at 3:19–20; Doc. 62 at 2.)

On April 22, 2024, Foster entered a plea of *Alford* to the State’s amended charge, and the court advised him that the maximum sentence it could impose would be three years to the Montana State Prison. (COP Tr. at 6:10–15, 13:10–13; *see generally* Doc. 62.) At Foster’s sentencing hearing, however, the court mistakenly sentenced Foster to five years Department of Corrections (DOC), all suspended. (7/11/2024 Sentencing Hearing Transcript (Sentencing Hrg. Tr.) at 39:16–18 (attached as Appendix B); Doc. 72 at 1 (Judgment, attached as Appendix A.)) Foster timely appealed. (Doc. 78.)

STATEMENT OF THE FACTS

In December 2020, the Lewis and Clark County Sheriff’s Office was investigating a reported theft of two enclosed trailers, each

containing several four-wheelers and snowmobiles. (Doc. 3 at 1:26–2:6.) After the owner of the trailers posted about the theft on Facebook, a man named Gary contacted the owner and informed her that he purchased one of her missing trailers from Foster for \$2,500. (Doc. 3 at 2:7–19; COP Tr. at 14:21–15:1.) Sheriff’s deputies subsequently visited Foster’s residence and discovered one of the four-wheelers that the owner had also reported stolen. (Doc. 3 at 2:20–22.) Foster admitted that he sold the trailer to Gary for \$2,500 but denied any involvement in the original theft, asserting that a man named Kyle abandoned the trailer and four-wheeler on his property. (Doc. 3 at 2:25–3:1; Sentencing Hrg. Tr. at 28:6–30:22.)

The State originally charged Foster with theft of property allegedly valued at an amount exceeding \$5,000, pursuant to § 45-6-301(1)(b), (7)(b)(ii) (2019). (Doc. 5 at 1.) As initially charged, Foster faced a maximum of ten years imprisonment, a fine not to exceed \$10,000, or both. § 45-6-301(7)(b)(ii) (2019).

On April 22, 2024, the State amended Foster’s charge to theft under § 45-6-301(2)(a)—“knowingly obtain[ing] by threat or deception control over property of the owner” with “the purpose of depriving the

owner of the property”—for selling the trailer to Gary for \$2,500. (COP Tr. at 3:20–4:18 (“The State is amending to 45-6-301 . . . Essentially, it would be theft by deception . . . It would be \$2,500, Judge.”); *id.* at 6:8–9 (“The State would move to amend it to 45-6-301, subsection 2(a).”).) At the change of plea hearing, the State made an offer of proof that Foster “wrote up a false purchase and sale agreement” and “knowingly through deception sold a trailer that he knew to be stolen” for \$2,500. (COP Tr. at 14:25–15:14.) The State was clear that although the owner reported other property stolen, there was no “direct link to Mr. Foster.” (COP Tr. at 15:3–8.) Because the sale of the trailer was for less than \$5,000, the State’s amendment lowered Foster’s potential maximum penalty to three years. (COP Tr. at 3:19–20); *see* § 45-6-301(7)(b)(i) (2019) (“[A] person convicted of the offense of theft of property that exceeds \$1,500 in value and does not exceed \$5,000 in value shall be . . . imprisoned in the state prison for a term not to exceed 3 years.”).

Foster entered an *Alford* plea to the amended charge, which carried a three-year maximum. (Doc. 62 at 2 (“The Defendant will enter a plea of *Alford* to amended Count I, Theft, a felony in violation of MCA §§ 45-6-301(2)(a) and 45-6-301(7)(b)(i), for a knowing sale of one trailer,

which was not owned by the Defendant, with a maximum possible penalty of imprisonment in the state prison for a term not to exceed three years.”.) The parties jointly recommended a “[a] three-year commitment to the Department of Corrections, all suspended.” (Doc. 62 at 2–3.) At Foster’s change of plea hearing, the State was clear that under the plea agreement, it was “capped at three years Department of Corrections, all suspended.” (COP Tr. at 3:19–20.) When asked whether the value of the theft still exceeded \$5,000, the State answered, “It would be 2,500, Judge.” (COP Tr. at 4:15–18.)

During Foster’s plea colloquy, the court advised him of the lower maximum penalty under the amended charge:

The Court: You’re reducing somewhat the amount that you allege because the maximum possible penalty, as I understand it, under what they are charging you now would be three years in prison and a \$1,500 fine and restitution, correct? That’s the maximum, okay?

Mr. Foster: Yeah.

The Court: The maximum before was ten years in prison, and the charge has already been amended to a lesser penalty. Do you understand that?

Mr. Foster: Yes, ma’am.

(COP Tr. at 6:10–21.) The court repeatedly advised Foster that he was

pleading to an offense with a lesser maximum penalty of three years. (See COP Tr. at 8:8–9 (“You’ve gotten a reduction in the maximum possible penalty based on this agreement.”); *id.* at 13:3–5 (“This is an agreement where the State’s going to recommend no more than three years DOC suspended.”); *id.* at 13:10–12 (“I could say three years Montana State Prison, and you are not going to be able to withdraw this *Alford* plea.”).)

At Foster’s sentencing hearing, the State correctly recommended a three-year suspended DOC commitment. (Sentencing Hrg. Tr. at 37:21–23 (“The plea agreement was for three DOC suspended. I certainly cannot move away from that recommendation.”).) Although all parties understood Foster’s plea agreement to carry a maximum penalty of three years, the court sentenced him to a DOC commitment of five years, all suspended. (Sentencing Hrg. Tr. at 39:16–18; Doc. 72 at 1.) The District Court did not explain why it imposed a sentence above the statutory maximum. (See Sentencing Hrg. Tr. at 39:5–40:8.) Consistent with the State’s valuation of the alleged theft in the amended charge, the Court also ordered \$2,500 in restitution. (Sentencing Hrg. Tr. at 39:18–19; Doc. 72 at 3.) Foster does not challenge the restitution on

appeal.

STANDARD OF REVIEW

This Court reviews a district court’s sentence for legality “to determine if the sentence is within statutory confines.” *State v. Day*, 2018 MT 51, ¶ 6, 390 Mont. 388, 414 P.3d 267. A sentence that “strays beyond the bounds of statutory authority is illegal.” *Id.* The Court reviews the imposition of an illegal sentence without requiring a contemporaneous objection. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979).

SUMMARY OF THE ARGUMENT

The District Court imposed an illegal sentence. The statutory maximum penalty for the offense to which Foster pleaded was three years, but the court committed him to five years DOC, all suspended. Although the District Court, the State, and Foster all understood that the maximum penalty was three years at Foster’s change of plea hearing, the court erred at sentencing by pronouncing a sentence that is longer than the statutory maximum under § 45-6-301(7)(b)(i) (2019). Because the illegal portion of Foster’s sentence is severable, the Court

should remand with instructions to amend the judgment to a three-year DOC sentence, all suspended.

ARGUMENT

Foster’s five-year sentence is illegal because he pleaded to an offense for which the statutory maximum is three years.

Foster’s five-year, suspended DOC commitment is an illegal sentence, and the Court must remand with an instruction to amend the judgment to a suspended sentence of three years.

A district court’s authority to sentence a person is “defined and constrained by statute.” *State v. Burch*, 2008 MT 118, ¶ 12, 342 Mont. 499, 182 P.3d 66. “Any sentence that exceeds such authority is illegal and facially invalid.” *State v. Southwick*, 2007 MT 257, ¶ 26, 339 Mont. 281, 169 P.3d 698. A defendant may challenge an illegal sentence for the first time on appeal. *State v. Coleman*, 2018 MT 290, ¶ 7, 393 Mont. 375, 431 P.3d 26 (citing *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000). A sentencing condition is illegal if, *inter alia*, “the condition falls outside the parameters set by the applicable sentencing statutes.” *Id.*

Foster’s sentence unambiguously falls outside statutory sentencing parameters. Foster entered an *Alford* plea to theft under § 45-6-301(2)(a), for knowingly selling a trailer he did not own for

\$2,500. (Doc. 62 at 2.) Under § 45-6-301(7)(b)(i) (2019), “a person convicted of the offense of theft of property that exceeds \$1,500 in value and does not exceed \$5,000 in value shall be fined an amount not to exceed \$1,500 or be imprisoned in the state prison for a term not to exceed 3 years, or both.” The District Court’s sentence could not lawfully have exceeded three years. *See Southwick*, ¶ 26.

The Court and the State acknowledged at the change of plea hearing that Foster’s maximum sentence was three years. (COP Tr. at 3:19–20 (State conceding that its sentencing recommendation was “capped at three years”); *id.* at 6:10–15 (court advising Foster that his “maximum” sentence would be “three years in prison”); *id.* at 13:3–12 (court advising Foster that, at most, it could deviate from the State’s recommendation by sentencing him to “three years Montana State Prison”).) The State explicitly recommended a three-year suspended sentence in the written plea agreement and orally at the sentencing hearing. (*See* Doc. 62 at 2–3; Sentencing Hrg. Tr. at 37:21–23.) But the court mistakenly sentenced Foster to five years. (Sentencing Hrg. Tr. at 39:16–18; Doc. 72 at 1.) The District Court undoubtedly exceeded its statutory authority when it sentenced Foster to five years and therefore

imposed an illegal sentence. *See Southwick*, ¶ 26; *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000. The only remaining question for this Court is how to rectify the illegal sentence.

“[W]hen a portion of a sentence is illegal, the proper practice is to remand to the district court to correct the illegal conditions.” *State v. Ring*, 2014 MT 49, ¶ 33, 374 Mont. 109, 321 P.3d 800. “Remand to give the district court the opportunity to correct the illegal provision should be ordered unless, under the particular circumstances of the case, the illegal portion of the sentence cannot be corrected.” *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 44, 396 Mont. 57, 443 P.3d 504. “Correcting invalid sentence provisions when it is possible to do so protects the integrity of the judicial process and furthers the express correctional and sentencing policy of the state.” *State v. Heafner*, 2010 MT 87, ¶ 12, 356 Mont. 128, 231 P.3d 1087 (citing Mont. Code Ann. § 46-18-101).

The proper remedy here is to remand to the District Court with instructions to amend the judgment to three years DOC, all suspended—consistent with the joint recommendation—because the remainder of the court’s judgment is legal, and it is possible to correct the illegal portion of Foster’s sentence. *See, e.g., State v. Villalobos*,

2024 MT 301, ¶ 17, 419 Mont. 256, 560 P.3d 617 (remanding to district court to amend suspended sentence from one year to six months); *Salsgiver*, ¶ 45 (remanding to district court to sever illegal fees from defendant’s sentence); *Ring*, ¶ 35 (remanding to district court to strike unauthorized parole conditions); *Heafner*, ¶ 13 (same). Because the District Court exceeded the statutory cap by imposing a five-year sentence, it is clear that it would have imposed the maximum three-year sentence had it understood and correctly applied the sentencing statute. *See* § 45-6-301(7)(b)(i) (2019); *see also, e.g., Villalobos*, ¶¶ 16–17 (instructing court to reduce illegal one-year sentence to the statutory maximum of six months); *Heafner*, ¶¶ 10–13 (instructions to correct the illegal portion of a sentence are appropriate when it is possible to discern “what sentence the district court would have adopted had it correctly followed the law”).

CONCLUSION

For the foregoing reasons, Foster requests that the Court reverse and remand his sentence with instructions to amend the judgment to three years DOC, all suspended.

Respectfully submitted this 29th day of July, 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 for Windows is 2,289, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Dimitrios Tsolakidis
Dimitrios Tsolakidis

APPENDIX

Judgment.....App. A
Sentencing Hearing.....App. B
Change of Plea HearingApp. C

CERTIFICATE OF SERVICE

I, Dimitrios Tsolakidis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-29-2025:

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