

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 24-0628

STATE OF MONTANA,

Plaintiff and Appellee,

vs.

KEISHA JOANN BARNES,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

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

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STATEMENT OF THE ISSUES

1. Whether the district court violated Mont. Code Ann. § 46-18-203(7)(a)(iii) by imposing, upon revocation, sentences that exceeded the length of the original suspended sentences.
2. Whether the district court erred by failing to award additional credit for time served on Count 2, which was concurrent to the DOC commitment on Count 1.
3. Whether defense counsel rendered ineffective assistance.

STATEMENT OF THE CASE

Appellant Keisha Joann Barnes (“Barnes”) appeals from the revocation of her suspended sentences in the First Judicial District Court, Lewis and Clark County. See Order Revoking Defendant’s Sentence and Amended Judgment and Commitment (Doc. 88), attached as App. A.

Barnes was convicted of theft, two counts of criminal possession of dangerous drugs (“CPDD”), criminal possession with intent to distribute (“CPWID”), and evidence tampering. (Doc. 36 at 2–3.) She received a total net sentence of 10 years to the Department of Corrections (“DOC”), with 7 years suspended. (*Id.*) After Barnes discharged the 3-year DOC

commitment, the district court twice revoked her suspended sentences, each time imposing a net sentence of 10 years. (Doc. 61 at 1–2; Doc. 88 at 1–2.)

Both revocation sentences exceeded the original suspended term of 7 years and were therefore illegal under Mont. Code Ann. § 46-18-203(7)(a)(iii). The district court also failed to properly credit Barnes with time served on Count 2, which was concurrent with the DOC commitment imposed on Count 1. Defense counsel did not object to either the illegal sentences or the improper credit for time served calculation.

Barnes timely appealed. (S.C. Doc. 1.) She asserts that (1) the revocation sentences exceeded statutory limits, (2) she is entitled to additional credit for time served on Count 2, and (3) she was denied effective assistance of counsel.

STATEMENT OF THE FACTS

Underlying Case

On October 18, 2022, the State charged Barnes in Cause No. CDC-2018-536 with:

- Count 1 – Theft (F);

- Count 2 – CPDD (mushrooms) (F);
- Count 3 – CPWID (F);
- Count 4 – Evidence Tampering (F);
- Count 5 – CPDD (methamphetamine) (F);
- Count 6 – CPDD (clonazepam) (F);
- Count 7 – CPDD (marijuana) (M); and
- Count 8 – Criminal Possession of Drug Paraphernalia (M).

(Doc. 2.)

The conduct for all of these charges occurred on October 3, 2018¹.

(*Id.*) Barnes also faced a pending Theft charge in Cause No. CDC-2018-432. (Doc. 14 at 1–2.)

On January 22, 2019, Barnes filed an Acknowledgment of Waiver of Rights by Plea of Guilty. (Doc. 14.) Although not signed by the prosecutor or captioned a plea agreement, the Acknowledgment outlined the terms of Barnes’ guilty pleas, as follows:

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¹ There were no substantive amendments by the Legislature to any of the applicable laws for this appeal.

5. Pursuant to section 46-12-204, MCA, and conditioned upon the understandings specified herein, I agree to plead guilty. In consideration for this plea of guilty, the parties have entered into the following understanding:

The State and Defendant have agreed, pursuant to section 46-12-211(1)(b) and (4), MCA, that the State will recommend, with respect to:

CDC -2018-432 This case will be dismissed if the defendant does the following:

- (1) She must make restitution in the matter.
- (2) She must make a proffer prior to the change of plea regarding accomplices / co-conspirators.
- (3) She must testify truthfully for the prosecution in any trials or hearings or resulting cases brought against co-conspirators. Truthfulness will be in the sole discretion of the prosecution.
- (4) Failure of the defendant to do the above will result in the original charges being reinstated.

IN CDC 2018-536

Count I, the Court sentence Defendant to 3 years in the Department of Corrections.

Count II, the Court sentence Defendant to 5 years in the Department of Corrections.

Count III, the Court sentence Defendant to 5 years in the Department of Corrections.

Count IV, the Court sentence Defendant to 5 years in the Department of Corrections.

Count VI, the Court sentence Defendant to 5 years in the Department of Corrections.

Counts II and III will run consecutive to each other for a total of 10 years in the Department of Corrections with 7 years suspended. Count I, IV and VI will run concurrently to each other and concurrently with Count II.

Counts V, VII, VIII will be dismissed with prejudice.

(Doc. 14 at 3-4.)²

² The district court did not follow the sentencing recommendations in the Acknowledgment, except insofar as it imposed a net sentence of 10 years DOC, with 7 years suspended. (See Doc. 36 at 2-3.)

Barnes pled guilty on January 24, 2019. (Docs. 18, 36 at 2, lns. 2–15.) On April 18, 2019, the district court sentenced her as follows:

- Count 1 (Theft) – 3 years DOC;
- Count 2 (CPDD) – 5 years DOC, all suspended;
- Count 3 (CPWID) – 5 years DOC, all suspended;
- Count 4 (Evidence Tampering) – 5 years DOC, all suspended;
- Count 6 (CPDD) – 5 years DOC, all suspended.

(Doc. 36 at 2–3.)

Counts 1 and 2 were concurrent. (Doc. 36 at 3, lns. 16–19.) Counts 3, 4, and 6 were concurrent with one another but consecutive to Counts 1 and 2. (*Id.*) The resulting net sentence was 10 years DOC with 7 years suspended. (*Id.*; see also Docs. 33–35.) The remaining counts were dismissed, as was the Theft charge in CDC-2018-432. (Doc. 36 at 2, lns. 4–7.)

The court awarded Barnes 135 days of credit for time served, which included 2 days from CDC-2018-432, calculated as follows:

The defendant is granted credit for time served prior to sentencing for the following:
August 3, 2018 – August 4, 2018; October 3, 2018 – January 24, 2019; and March 31, 2019 – April 18, 2019.

(Doc. 36 at 3, lns. 13–16.)

First Revocation

Barnes discharged her 3-year DOC commitment on December 3, 2021, and began serving the suspended portion of her sentences. (Doc. 41, Report of Violation at 1.)

On July 28, 2022, the State petitioned to revoke Barnes' suspended sentences. (Doc 41.) On February 9, 2023, Barnes admitted the probation violations and the district court revoked her suspended sentences. (Doc. 57; Doc. 61 at 1.)

The court imposed 5-year suspended DOC sentences on each count. (Doc. 61 at 1–2.) Counts 3, 4, and 6 were concurrent with each other but consecutive to Count 2. (*Id.* at 2, lns. 26–28.) The result was a net 10-year suspended sentence, which exceeded the original 7-year term. (*Id.*)

The court awarded 146 days of jail credit and 67 days of street time, as follows:

Credit for time served: Defendant is given credit for the following date ranges:

August 3, 2018 – August 4, 2018; October 3, 2018 – January 24, 2019; March 31, 2019 – April 18, 2019; December 8, 2022 – December 15, 2022; and February 7, 2023 – February 9, 2023.

Credit for street time: Defendant is given credit for the following date ranges:

67 days.

(Doc. 61 at 2, lns. 19–23.)³

Second Revocation

On November 28, 2023, the State again petitioned to revoke Barnes’ suspended sentences, alleging new criminal offenses, drug use, absconding, failure to maintain employment, and failure to pay supervision fees. (Doc. 62.) An amended petition was filed on May 10, 2024, alleging that Barnes absconded again and continued to use drugs. (Doc. 75.)

The evidentiary hearing was held on June 25, 2024. Thomas Kissell (“Kissell”), Barnes’ probation officer, testified that Barnes violated her probation conditions by using drugs and alcohol, absconding, failing to maintain employment, and failing to pay supervision fees. (6/25/24 Tr. at 8:18–17:3.) Kissell recommended that Barnes be committed to the DOC with placement at the Elkhorn Treatment Center, followed by Prerelease. (6/25/24 Tr. at 17:4–18:3.) He also recommended that Barnes receive 19 days of street time credit. (6/25/24 Tr. at 18:15–19.)

³ 135 days of this credit had already been applied to the DOC sentence on Count 1. That said, Barnes was entitled to 3 years of credit towards Count 2, because Count 2 was concurrent to Count 1.

Barnes testified on her own behalf. She admitted to most of the alleged probation violations and explained that many of her difficulties stemmed from ongoing mental health and substance abuse struggles. (6/25/24 Tr. at 27:5–40:5).

The district court found, by a preponderance of the evidence, that Barnes violated her probation conditions and set the case for sentencing on August 1, 2024. (6/25/24 Tr. at 40:21–44:10.)

At the beginning of the sentencing hearing on August 1, Barnes' counsel informed the court that she wanted new counsel and requested a *Gallagher* hearing⁴. (8/1/24 Tr. at 3:11–17.) The court granted the hearing and cleared the courtroom. (*Id.*)

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⁴ When a defendant raises complaints seeking substitution of counsel, the district court must make an adequate initial inquiry into the nature of those complaints and determine if they are seemingly substantial. *State v. Khongwiset*, 2020 MT 215, ¶ 27, 401 Mont. 142, 471 P.3d 51. This inquiry is adequate if the court considers a defendant's factual complaints together with counsel's specific explanations addressing the complaints. *State v. Johnson*, 2019 MT 34, ¶¶ 17–18, 394 Mont. 245, 435 P.3d 64. If the district court determines the defendant's complaint is seemingly substantial, the court must conduct a hearing to address the complaint's validity, commonly referred to as a *Gallagher* Hearing. *Johnson*, ¶ 22; *State v. Gallagher (II)*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817.

Barnes stated that her counsel did not present the correct evidence at the evidentiary hearing, failed to effectively negotiate a plea agreement, and did not appropriately communicate with her. (8/1/24 Tr. at 4:5–5:8; 7:22–8:22.) Counsel responded that there were no irreconcilable differences or communication breakdowns with Barnes. (8/1/24 Tr. at 5:11–7:21.) The court found insufficient evidence of an actual conflict and denied the request for new counsel. (8/1/24 Tr. at 8:23–12:18.)

The case proceeded to sentencing, where Kissell testified that although Barnes had made some improvements since the evidentiary hearing, she continued to struggle with addiction and violate her probation conditions. (8/1/24 Tr. at 13:20–15:23.) He affirmed his recommendation for DOC commitment with placement at Elkhorn. (8/1/24 Tr. at 15:24–16:15.)

The State recommended a total sentence of 10 years DOC, with 5 years suspended, along with 157 days of jail time credit and 19 days of street time. (8/1/24 Tr. at 17:24–20:5; 18:8–19:2.) Defense counsel argued for fully suspended sentences but did not oppose the State's request for a net sentence of 10 years. (8/1/24 Tr. at 20:7–21:13.)

Counsel likewise did not object to the State’s recommendations regarding jail and street time credit. (*Id.*)

Based on Barnes’ continued struggles, the district court adopted the State’s recommendation, imposing a 5-year DOC sentence for Count 2, with a “strong” recommendation for placement at Elkhorn. (8/1/24 Tr. at 23:11–24:2; Doc. 88 at 1, lns. 23–26.) For Counts 3, 4, and 6, the court imposed 5-year suspended sentences to run concurrently with one another but consecutively to Count 2, resulting in an aggregate sentence of 10 years DOC with 5 years suspended. (8/1/24 Tr. at 24:2–7; Doc. 88 at 2, lns. 1–21.)

The court awarded Barnes 157 days of jail time credit and 19 days of street time credit, as follows:

Credit for time served: Defendant is credited with the following date ranges: August 3, 2018 – August 4, 2018; October 3, 2018 – January 24, 2019; and March 31, 2019 – April 18, 2019; December 13, 2022 - December 15, 2022; February 7, 2023 - February 9, 2023; and May 15, 2024 - May 30, 2024.

Credit for street time: Defendant is given credit for 19 days, the number of days she was violation free after her previous revocation.

(8/1/24 Tr. at 24:7–11; Doc. 88 at 2, lns. 12–18.)⁵

STANDARDS OF REVIEW

Revocation proceedings are reviewed for abuse of discretion. *State v. Jardee*, 2020 MT 81, ¶ 5, 399 Mont. 459, 461 P.3d 108. Legal conclusions are reviewed de novo, and factual findings for clear error. *State v. Charles*, 2025 MT 58, ¶ 10, 421 Mont. 210, 565 P.3d 1191.

This Court generally will not review issues the appellant failed to raise in the district court. *State v. Kotwicki*, 2007 MT 17, ¶ 8, 335 Mont. 344, 151 P.3d 892. Under the *Lenihan* exception, however, the Court may review any sentence alleged to be illegal or in excess of statutory authority, even absent objection. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 999–1000 (1979).

Credit for time served is a legal requirement, not discretionary, and is reviewed de novo. *State v. Parks*, 2019 MT 252, ¶¶ 7, 9, 397 Mont. 408, 450 P.3d 889 (citations omitted).

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⁵ Again, 135 days of this credit had already been applied to the discharged DOC commitment Barnes received on Count 1. Barnes should have received 3 years credit time served for Count 2, because it was concurrent to Count 1.

Ineffective assistance of counsel claims are also reviewed de novo as mixed questions of law and fact. *State v. Hatfield*, 2018 MT 229, ¶ 18, 329 Mont. 509, 426 P.3d 569.

SUMMARY OF ARGUMENT

Barnes' original net sentence was 10 years DOC with 7 suspended. After discharging her 3-year DOC commitment, she had 7 years suspended remaining. In both revocations, the district court imposed sentences exceeding that limit – first, 10 years suspended; then, 10 years DOC with 5 suspended. Both sentences were illegal under Mont. Code Ann. § 46-18-203(7)(a)(iii).

The court also misapplied credit for time served. Count 2 was concurrent with Count 1, yet Barnes received only 157 days of jail credit and 67 days of street credit, rather than the 3 years she had already served on Count 1.

Finally, defense counsel was ineffective for failing to object to the illegal sentences and the denial of proper credit. These errors had no strategic justification, and they caused prejudice to Barnes by unlawfully extending the overall length of her sentences.

ARGUMENT

Revocation proceedings are civil in nature and exist solely to supervise probation and enforce previously imposed penalties – not to punish a defendant. *State v. Howard*, 2020 MT 279, ¶ 13, 402 Mont. 54, 475 P.3d 392; *State v. Haagenson*, 2010 MT 95, ¶ 16, 356 Mont. 177, 232 P.3d 367.

General criminal sentencing provisions do not apply to revocations. *State v. Seals*, 2007 MT 71, ¶ 15, 336 Mont. 416, 156 P.3d 15; *State v. Roberts*, 2010 MT 110, ¶¶ 11–12, 356 Mont. 290, 233 P.3d 324. Rather, Mont. Code Ann. § 46-18-203 “particularly and expressly” governs a court’s authority after a suspended sentence is revoked. *Roberts*, ¶ 12; *State v. Osborn*, 2015 MT 48, ¶ 13, 378 Mont. 244, 343 P.3d 1188. Once a suspended sentence is revoked, the district court must strictly comply with the statute when imposing new sentences or reimposing suspended time. *Id.*

I. BARNES RECEIVED ILLEGAL SENTENCES IN BOTH REVOCATIONS.

Mont. Code Ann. § 46-18-203(7)(a)(iii) states:

If the judge finds that the offender has violated the terms and conditions of the suspended . . . sentence . . . the judge may . . . revoke the suspension of sentence and require the offender to

serve either the sentence imposed or any sentence *that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence*

(Emphasis added).

This statute limits the revocation sentence to the parameters of the original sentence, and a revoked suspended sentence may not be longer than the original term. *State v. Wolfblack*, 2024 MT 166, ¶¶ 12–14, 417 Mont. 376, 553 P.3d 9; *State v. Frazier*, 2001 MT 210, ¶ 15, 306 Mont. 358, 34 P.3d 96. Any portion of a sentence that exceeds the original terms is “illegal and facially invalid.” *State v. Southwick*, 2007 MT 257, ¶ 26, 339 Mont. 281, 169 P.3d 698 (citations omitted).

Barnes bargained for and received an initial net sentence of 10 years DOC with 7 years suspended. (Doc. 14 at 3–4; Doc. 36 at 2–3.) The sentences imposed by the district court in both revocations were illegal because they exceeded the statutory cap of the original 7-year term. Any cumulative sentence greater than 7 years violated § 46-18-203(7)(a)(iii).

This Court should remand Barnes’ case for resentencing to ensure the total term of her sentences does not exceed 7 years, less credit for time served.

II. THE DISTRICT COURT MISAPPLIED CREDIT FOR TIME SERVED.

Mont. Cod Ann. § 46-18-203(7)(b) governs credit for time served in revocations. *State v. Souther*, 2022 MT 203, ¶ 10, 410 Mont. 330, 519

P.3d 1. The statute provides:

If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time, consult the records and recollection of the probation and parole officer, and allow all of the elapsed time served without any record or recollection of violations as a credit against the sentence. If the judge determines that elapsed time should not be credited, the judge shall state the reasons for the determination in the order. Credit must be allowed for time served in a detention center or for home arrest time already served.

Mont. Code Ann. § 46-18-203(7)(b).

In *State v. Tracy*, 2005 MT 128, ¶ 28, 327 Mont. 220, 113 P.3d 297, this Court explained that when multiple sentences are ordered to run concurrently, a defendant is entitled to credit for time served on each sentence because “concurrent” means the sentences run at the same time. In practical terms, concurrent sentences are considered “merged,” and the time served counts toward all of them. *State v. Youpee*, 2018 MT 102, ¶ 8, 391 Mont. 246, 416 P.3d 1050. By contrast, when sentences are ordered consecutively, the defendant may only receive credit for time served once against the total of the consecutive

sentences, because those terms do not merge. *Souther*, ¶ 13. Mont. Code Ann. § 46-18-203(7)(b) does not allow credit to be applied multiple times for consecutive sentences, only concurrent ones. *Id.*

The district court erred by failing to apply credit properly to Count 2, which merged with the DOC commitment on Count 1. (Doc. 88 at 2, lns. 19–21.) Barnes received only 157 days of jail credit and 67 days of street time credit on the second revocation, rather than approximately 1,095 days (3 years) already served.

Mont. Code Ann. § 46-18-116(3) permits a district court to correct a “factually erroneous sentence or judgment at any time.” Courts also possess inherent authority to correct record-based errors. *State v. Lane*, 1998 MT 76, ¶ 46, 288 Mont. 286, 957 P.2d. 9.

If the Court declines to remand for a new sentencing hearing, it should at minimum modify the sentence on Count 2 to reflect three years of credit for time served, plus all additional jail credit from both revocations and all accrued street time.

III. DEFENSE COUNSEL WAS INEFFECTIVE.

The Sixth and Fourteenth Amendments and Article II, § 24 of the Montana Constitution guarantee effective assistance of counsel. *State v.*

Kougl, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095. Montana follows *Strickland*'s two-prong test: (1) counsel's performance must meet an objective standard of reasonableness; and (2) the defendant must show a reasonable probability that, but for counsel's deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *State v. Roundstone*, 2011 MT 227, ¶ 32, 362 Mont. 74, 261 P.3d 1009.

Counsel's performance is presumed reasonable unless the record demonstrates no plausible justification. *State v. Santoro*, 2019 MT 192, ¶ 16, 397 Mont. 19, 446 P.3d 1141; *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032.

Here, counsel failed to object to illegal sentences in both revocations and did not ensure proper application of credit for time served. This was not a strategic choice but a clear misapplication of § 46-18-203. The prejudice is clear, because Barnes is serving a 10-year sentence when she should be serving 7 years or less.

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CONCLUSION

Barnes respectfully requests that this Court:

1. Remand for resentencing with a total sentence not exceeding 7 years, less credit for time served;
2. Alternatively, modify the sentence for Count 2 to award full credit for all time served; or
3. Find that defense counsel was ineffective and remand for a new revocation proceeding entirely.

Respectfully submitted this 19th day of August, 2025.



Britt Cotter
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately spaced Times New Roman typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my Microsoft Word software and excluding tables and certificates is 2,944.

Respectfully submitted this 19th day of August, 2025.



Britt Cotter
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CERTIFICATE OF SERVICE

I, Britt Cotter, hereby certify that I have served true and accurate copies of the foregoing Appellant's Opening Brief to the following on August 19, 2025:

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