

DA 07-0358

IN THE SUPREME COURT OF THE STATE OF MONTANA

2008 MT 134N

ROBERT AYRES DaSILVA, Jr.,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. CVD 07-252
Honorable Kenneth R. Neill, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Robert Ayres DaSilva, Jr., Pro Se; Deer Lodge, Montana

For Appellee:

Hon. Mike McGrath, Attorney General; Mark W. Mattioli, Assistant
Attorney General, Helena, Montana

Brant Light, Cascade County Attorney; Joel Thompson, Deputy County
Attorney, Great Falls, Montana

Submitted on Briefs: March 19, 2008

Decided: April 22, 2008

Filed:

Clerk

Justice Brian Morris delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(d)(v), Montana Supreme Court 1996 Internal Operating Rules, as amended in 2003, the following memorandum decision shall not be cited as precedent. It shall be filed as a public document with the Clerk of the Supreme Court and its case title, Supreme Court cause number and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Appellant Robert Ayres DaSilva, Jr., (DaSilva) appeals the District Court's order denying his petition for postconviction relief. We affirm.

¶3 The State originally charged DaSilva with felony failure of sex offender to give notice of address change and felony criminal possession of dangerous drugs, along with several misdemeanor offenses. DaSilva entered into a binding plea agreement in which he agreed to plead guilty to felony possession of dangerous drugs and to two misdemeanor charges. The State, in turn, agreed to recommend a four-year commitment to the Department of Corrections (DOC) "with all but time served suspended." The State further agreed that its recommended sentences for the misdemeanors would be served concurrently. The District Court accepted DaSilva's plea of guilty and sentenced DaSilva, as contemplated by the agreement, to a four-year DOC commitment with all time suspended except for the 348 days that DaSilva had served up to that point. DaSilva did not appeal.

¶4 The District Court revoked DaSilva's suspended sentence, including the DOC commitment, in February 2006, based on DaSilva's violation of conditions of his probation pertaining to employment, reporting, laws and conduct, and illegal drug use. The District

Court revoked the suspended portion of its earlier sentence and also gave DaSilva credit for 40 days of time served. DaSilva did not appeal his revocation.

¶5 DaSilva filed a petition for postconviction relief in February 2007 in which he alleged that his original sentence violated the plea agreement and that “the suspended and probationary sentences imposed simultaneously constituted double jeopardy.” The District Court denied DaSilva’s petition on the grounds that his claims were time barred, procedurally barred, and lacked merit. DaSilva appeals.

¶6 DaSilva bases most of his appeal on the alleged double jeopardy violation. DaSilva further contends that the District Court’s original sentence did not conform with the terms of the plea agreement. The State takes issue with both of DaSilva’s claims on appeal.

¶7 We review a district court’s denial of a petition for postconviction relief to determine whether the court’s findings of fact are clearly erroneous and whether its conclusions of law are correct. *State v. Morgan*, 2003 MT 193, ¶ 7, 316 Mont. 509, ¶ 7, 74 P.3d 1047, ¶ 7. We have determined to decide this case pursuant to Section I, Paragraph 3(d), of our 1996 Internal Operating Rules, as amended in 2003, that provide for memorandum opinions. It is manifest on the face of the briefs and record before us that settled Montana law controls the outcome and that the district court correctly interpreted the law.

¶8 Affirmed.

/S/ BRIAN MORRIS

We Concur:

/S/ PATRICIA COTTER
/S/ JOHN WARNER
/S/ JIM RICE
/S/ W. WILLIAM LEAPHART