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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 18-0387

DA 18-0387

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 40N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ANTHONY LEE EVANS,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 00-097B
Honorable Robert B. Allison, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Gregory Hood, Assistant Appellate Defender, Helena, Montana

For Appellee:

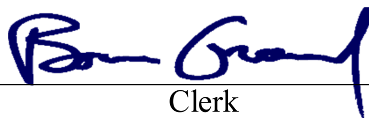
Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Travis R. Ahner, Flathead County Attorney, John Donovan, Deputy County Attorney, Kalispell, Montana

Submitted on Briefs: December 18, 2019

Decided: February 18, 2020

Filed:



Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, 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 Following reports of probation violation and a petition to revoke, the Eleventh Judicial District Court, Flathead County, revoked the suspended sentence for Anthony Lee Evans on April 19, 2018, and sentenced him to twenty-four years in the Montana State Prison (MSP). Evans appeals. We affirm the revocation and remand to the District Court for an amended judgment committing Evans to the Department of Corrections (DOC).

¶3 In 2001, Evans pleaded guilty to felony sexual assault and felony attempted sexual intercourse without consent. Evans, thirteen years old at the time of the offenses, assaulted a nine-year-old girl after threatening her with a weapon and tying her to a tree. On July 26, 2001, the District Court committed Evans, then sixteen, to the DOC for two concurrent forty-year terms with twenty-four years suspended. The court awarded Evans credit for 743 days served in the Flathead County Detention Center and imposed numerous probationary terms and conditions.

¶4 Evans was released from MSP on July 10, 2015, to begin serving his probationary term. He signed his conditions of probation on that day. They included:

> 5. The Defendant shall maintain employment or a program approved by the BOPP or his Probation/Parole Officer. He must obtain permission from his Probation/Parole Officer prior to any change of employment. He will inform his employer of his status on probation or parole.
>
> . . .
>
> 9. The Defendant's person, residence, or vehicle may be searched at any time by lawful authorities when a probation and parole officer or Intensive Supervision Officer has reasonable grounds to believe the search will disclose evidence of a violation of probation or parole or Intensive Supervision.
>
> . . .
>
> 13. The Defendant shall at all times be cooperative and truthful in all his communications and dealings with his Probation/Parole Officer.
>
> . . .
>
> 20. The Defendant will enter in and successfully complete an MSOTA certified outpatient sexual offender program, and follow all rules and recommendations made by said program. The Defendant will be responsible for costs of such program.
>
> . . .
>
> 29. The Defendant shall not access Internet services without prior permission from his supervising officer and sex offender therapist.

¶5 Within a month of his release, Evans had an intervention hearing, pursuant to § 46-23-1015, MCA, after two probation and parole officers determined that Evans was not complying with his probationary terms and conditions. Evans had not entered outpatient sexual offender treatment; he had missed counseling sessions at Gallatin Mental Health; and he was not living in an approved residence. As a result of the intervention, the officers directed Evans to enroll in a sexual offender program, follow through with his

appointments, and locate housing. The officers placed him on Intensive Supervision Probation (ISP), from which Evans was discharged in February 2016. After several months of living in motels, living in a tent, and being homeless, Evans secured housing with the assistance of his probation and parole officer and the Human Resource Development Council (HRDC).

¶6 In July 2016, two probation and parole officers paid Evans a home visit to his studio apartment in Bozeman. Evans and his girlfriend were home. The officers noticed several shopping bags, some with recently purchased DVDs and fishing tackle. They also noted a microwave and a small, dormitory-sized refrigerator. Evans's probation and parole officer, Officer Daly, questioned Evans about these purchases based upon his knowledge from five months of supervising Evans. Evans stated that he was still employed at Montana Ale Works. Officer Daly knew that Evans was lying because Officer Daly had spoken with the Montana Ale Works manager, who stated that Evans had been fired and he had no intention of hiring him again. Officer Daly also had spoken with another of Evans's prior employers at a painting service and knew that Evans had been untruthful about that employment as well.

¶7 Based on Evans's response to his questions, Officer Daly proceeded to search the apartment. This search yielded two cans of beer in the refrigerator, a folding pocket knife with "thumb assist," and a smartphone. Officer Daly examined Evans's phone to review the history of his internet searches.

¶8 Officer Daly filed a Report of Violation on August 1, 2016, listing multiple violations of various conditions. The State filed a Petition to Revoke, and the District Court

issued a bench warrant for Evans's arrest. Evans posted bond and received notice of hearing on the petition for September 29, 2016. Evans did not appear for the hearing.

¶9 Over a year later, following Evans's return to Montana after absconding to Utah, Evans appeared with counsel at an initial revocation hearing in the District Court. Evans denied the alleged violations of his probationary conditions. At the conclusion of a hearing in March 2018, the court denied Evans's motion to strike based on illegal searches of Evans's residence and his cellular phone. Evans's counsel filed a Second Motion to Strike Alleged Violations on April 4, 2018.

¶10 On April 19, 2018, Evans appeared with counsel, and the court acknowledged receipt of Evans's second motion to strike, denying it on the record. Evans admitted to eight violations of conditions of the suspended sentence, while reserving his right to appeal the denial of his motions. The District Court revoked his suspended sentence and imposed a twenty-four-year sentence to MSP to run concurrently with his federal sentence from Utah.

¶11 This Court reviews a district court's revocation of a suspended sentence for an abuse of discretion. *State v. Graves*, 2015 MT 262, ¶ 12, 381 Mont. 37, 355 P.3d 769. A district court may revoke a suspended sentence if it determines that the probationer's conduct on liberty is not what the probationer agreed to at sentencing. *Graves*, ¶ 12. "However, the State must prove by a preponderance of the evidence that the probationer has violated the terms or conditions of the suspended sentence." *State v. Therriault*, 2000 MT 286, ¶ 25, 302 Mont. 189, 14 P.3d 444 (citation omitted). *See also* § 46-18-203(6)(i), MCA. We review the court's interpretation and application of the law

for correctness. *Therriault*, ¶ 24. We review the legality of a sentence to determine whether it is within statutory parameters. *State v. Tracy*, 2005 MT 128, ¶ 12, 327 Mont. 220, 113 P.3d 297 (superseded by statute, § 46-18-203(9), MCA (2003)); *Graves*, ¶ 29.

¶12 Evans argues that the search of his residence lacked reasonable cause because the items in plain view did not indicate imminent criminal activity and are reasonable purchases. Evans acknowledges that a probation officer may conduct a home visit "to determine whether the individual is abiding by the conditions of his or her probation[.]" *State v. Moody*, 2006 MT 305, ¶ 16, 334 Mont. 517, 148 P.3d 662. He points out, however, that reasonable cause is required to search a probationer's residence. *State v. Beaudry*, 282 Mont. 225, 228, 937 P.2d 459, 460-61 (1997). Evans contends that what Officer Daly saw in plain view did not establish a factual foundation to support reasonable belief of violations. Evans states that a dormitory-sized refrigerator and a microwave are necessary items, and the other purchases Officer Daly observed were minor.

¶13 The State responds that, because the District Court had authority to revoke Evans's suspended sentence based on admitted violations independent of the search, this Court need not address Evans's arguments. *State v. Cook*, 2012 MT 34, ¶ 23, 364 Mont. 161, 272 P.3d 50. Evans admitted violating condition number 20. The State points out that during the suppression hearing, Evans's defense counsel acknowledged: "So certainly Mr. Daly was probably [] well within his right to revoke him for not making his sex offender treatment payments . . . ." It contends that a single probationary violation of a suspended

sentence is sufficient to support a court's revocation of that suspended sentence. *Cook*, ¶ 23.

¶14 We find the State's arguments persuasive. Attached to Officer Daly's Report of Violation was a copy of an e-mail from Evans's counselor for his sexual offender program. The e-mail stated that, although Evans had attended his required classes for the past year, he had never made a payment and owed $1,400. Officer Daly had contacted Evans's counselor by telephone on the day he went to visit Evans at his studio apartment. Before Officer Daly reached Evans's apartment, the officer knew that Evans was not in compliance with condition number 20, that is, entering, completing and paying for the costs of an outpatient sexual offender program. The home visit reinforced Officer Daly's concerns about Evans's spending habits and untruthfulness regarding his employment, indicating additional violations of condition numbers 5 and 13.

¶15 The District Court did not abuse its discretion when it revoked Evans's suspended sentence. *Graves*, ¶ 12. Recognizing that Evans was incarcerated at a young age and may not have developed life skills in prison, the court noted that he was offered guidance and provided opportunities to comply with probationary conditions upon his release. Officer Daly testified at the suppression hearing about the effort and time various probation and parole officers and HRDC spent to help Evans succeed after his custodial discharge. The court received evidence that, irrespective of what the search uncovered, Evans had violated at least one of his probationary conditions and that Evans's conduct on liberty was not what Evans agreed to at his 2001 sentencing or upon his 2015 release. *Graves*, ¶ 12; *Therriault*, ¶ 25. "A single violation of the conditions of a suspended sentence is sufficient

to support a district court's revocation of that sentence." *State v. Gillingham*, 2008 MT 38, ¶ 28, 341 Mont. 325, 176 P.3d 1075 (citing *State v. Rudolph*, 2005 MT 41, ¶ 13, 326 Mont. 132, 107 P.3d 496). *See also Cook*, ¶ 23. Evans was not in compliance after a year from his release because he had not paid, as he agreed to do, for his sex offender program costs. Evans was not truthful with Officer Daly about his employment. These violations are dispositive. We do not reach Evans's claims about the alleged unlawful searches.

¶16 Finally, the State agrees with Evans that the District Court's sentence upon revocation to MSP imposes "an additional, more burdensome, condition . . ." than does a DOC commitment. *Tracy*, ¶ 20. Section 46-18-203(7)(c), MCA (1997), the statute in effect at the time of Evans's offenses, provides that: "If the court finds that the defendant has violated the terms and conditions of the suspended . . . sentence, the court may[] revoke the suspension of sentence and require the defendant to serve either the sentence imposed or any lesser sentence[.]" The District Court incorrectly applied the law governing sentencing upon revocation and imposed a more burdensome sentence upon Evans in 2018. *Therriault*, ¶ 24; *Graves*, ¶¶ 29-30; *Tracy*, ¶ 20.[1]

¶17 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. We affirm the revocation of Evans's suspended sentence,

[1] Evans retains the option of seeking sentence review. Section 46-18-903(1), MCA.

vacate the sentence to MSP, and remand with instructions to the District Court to amend the 2018 sentencing judgment to reflect a DOC commitment.

/S/ BETH BAKER

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JIM RICE
/S/ INGRID GUSTAFSON