

DA 20-0064

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 125N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RONALD ALAN HUMMEL,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 19-121(B)
Honorable Robert B. Allison, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Deborah S. Smith, Helena, Assistant
Appellate Defender, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Bree Gee, Assistant Attorney
General, Helena, Montana

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

Submitted on Briefs: May 18, 2022

Decided: June 28, 2022

Filed:


Clerk

Justice Ingrid Gustafson 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 Ronald Alan Hummel appeals from his conviction for driving under the influence (DUI) in violation of § 61-8-401(1), MCA (2017), in the Eleventh Judicial District Court, Flathead County. Hummel argues the State violated his right to confront witnesses against him when it allowed a witness to appear by two-way videoconference; the District Court abused its discretion in denying his request to call the prosecutor as an impeachment witness; and the District Court illegally imposed conditions of parole in the written judgment. We affirm Hummel's conviction for DUI and reverse and remand for the District Court to conform the written judgment to its oral pronouncement of sentence by clarifying the parole conditions are recommendations and to strike Condition 15.

¶3 On April 7, 2019, law enforcement responded to the Dairy Queen parking lot in Columbia Falls after Robert Smith called law enforcement to report a potential drunk driver. When Officer Tyler English arrived at the scene, he found Hummel near his motorcycle with his pants unzipped and not all the way pulled up. Hummel was struggling to button and zip them. English noticed Hummel smelled of alcohol, his speech was slurred, and his movements were slow. Hummel had urinated on his pants. Hummel declined to perform field sobriety tests and English placed him under arrest. English

removed the keys from the ignition of the motorcycle and took Hummel into the police station. After Hummel declined to provide breath or blood samples at the station, English received a telephonic search warrant for a blood draw. Kenneth Lard performed the blood draw. State Crime Lab analysis of the sample showed a blood alcohol content (BAC) of 0.14 percent at the time of the draw. Hummel was charged with DUI in violation of § 61-8-401(1), MCA (2017), or in the alternative, operating a motor vehicle with alcohol concentration of 0.08 percent or more (DUI per se) in violation of § 61-8-406(1), MCA (2017).

¶4 Before trial, the State moved for “telephonic testimony” from Lard, who was working out-of-state. The motion noted Hummel objected to the motion. The District Court ordered that Lard “may testify remotely provided that it is by Vision Net or Real Presence or some other medium that allows the witness to be viewed during his testimony by counsel, parties, and the jury.” Hummel raised no objections to the order at any time before or during trial. Lard testified remotely over video at trial.

¶5 At trial, Smith testified he saw Hummel pull into the Dairy Queen parking lot on his motorcycle as Smith waited in the drive-through for his food. Smith testified Hummel’s motorcycle fell over on Hummel’s leg as he tried to step off it. Smith and his wife went over to lift the motorcycle off Hummel and help him up. Smith testified he could smell alcohol on Hummel. After returning to his truck, Smith saw Hummel urinating on a fence and decided to call law enforcement. Smith left the parking lot after getting his food. He saw a patrolman arriving as he pulled out of the Dairy Queen parking lot.

¶6 Hummel testified in his own defense. He admitted he drank three-quarters of a beer before arriving at Dairy Queen. He explained he stopped at Dairy Queen to use the restroom but urinated on himself when he arrived due to a prostate issue. He then went to the Town Pump across the street to pick up Lysol to clean up his pants and his bike seat and also purchased some high alcohol content “tall boys,” which he then drank. He testified his bike fell on him when he bumped into the bike after cleaning the seat, which is when Smith pulled into the parking lot driving a truck.

¶7 The jury found Hummel guilty of DUI and acquitted him of DUI per se. At sentencing, the District Court imposed a 25-year sentence to the Montana State Prison to run consecutively to a sentence Hummel was serving on parole at the time he committed this offense. At the sentencing hearing, the District Court waived certain financial obligations and recommended other conditions contained in the presentence investigation report as conditions of parole. The written judgment stated the conditions were imposed, not recommended, and included Condition 15 which purports to require Hummel to prepay supervisory fees for his parole while he remains incarcerated. Hummel appeals.

¶8 Hummel first argues the District Court violated his right to confront witnesses under the Sixth Amendment to the United States Constitution and Article II, Section 24, of the Montana Constitution by allowing Lard to testify by videoconference. A party must timely object to errors affecting constitutional rights or the party waives the claim. *State v. Hamilton*, 2018 MT 253, ¶ 17, 393 Mont. 102, 428 P.3d 849. This Court will not review waived claims on appeal with limited exceptions. *Hamilton*, ¶ 17. “[O]bjections must be made as soon as the grounds for them become apparent.” *Hamilton*, ¶ 31. We decline to

consider Hummel's confrontation claim as Hummel failed to object to Lard's testimony by videoconference before the District Court. While the record shows Hummel objected to the State's motion for "telephonic testimony," the District Court did not grant the State's motion for telephonic testimony. Rather, the court allowed Lard to testify remotely only by a "medium that allows the witness to be viewed during his testimony." At no point did Hummel object to Lard's testimony by videoconference.

¶9 Hummel next argues the District Court abused its discretion by denying his request to call the prosecutor as a witness to impeach Smith's credibility with a prior inconsistent statement. The prosecutor interviewed Smith before trial. In an e-mail to Hummel's defense counsel outlining what Smith told him, the prosecutor wrote Smith stated he had consumed alcohol the day of the incident. Defense counsel did not interview Smith before trial. Shortly before the jury was brought in for opening statements, the prosecutor informed defense counsel he had spoken to Smith again after selecting the jury and Smith now stated he had not consumed alcohol the day of the incident and the prosecutor must have misheard him. During cross-examination, Smith denied he consumed alcohol that day. Defense counsel then sought to impeach Smith with his prior inconsistent statement to the prosecutor. Smith adamantly denied he drank alcohol that day and maintained he does not drink alcohol. The prosecutor objected when defense counsel asked, "So if [the prosecutor] had told me he told me he was drinking, would that be dishonest of him?" After a sidebar discussion, the District Court ruled defense counsel could not impugn the prosecutor's credibility and struck that question from the record. Back in front of the jury, defense counsel moved onto another line of questioning. On the morning of the second

day of trial, defense counsel raised the issue of calling the prosecutor as an impeachment witness to testify about Smith's prior inconsistent statement. He argued his cross-examination of Smith on this issue was shut down. The District Court stated it was not shutting down further questioning about Smith's drinking but was shutting down questioning about the prosecutor's honesty. Defense counsel sought to call the prosecutor as a witness, or a stipulation Smith made an inconsistent statement, or to enter the e-mail from the prosecutor into evidence for the jury to see. The District Court denied the motion. The District Court reasoned defense counsel was able to cross-examine Smith about his alcohol consumption under oath. The defense recalled Smith to the stand and again questioned him whether he had been drinking the day of the incident. Smith again adamantly denied he had consumed alcohol and maintained he does not drink alcohol. He stated he did not recall telling the prosecutor before trial he had consumed alcohol that day and the prosecutor must have been mistaken.

¶10 We review a district court's ruling on a motion seeking the testimony of the prosecutor trying the case for a clear and prejudicial abuse of discretion. *See State v. Mont. Eighteenth Judicial Dist. Court*, No. OP 20-0587, 403 Mont. 548, 483 P.3d 475 (Mar. 9, 2021). The district court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 27, 303 Mont. 274, 16 P.3d 1002. A party seeking the testimony of a prosecutor trying the case "must demonstrate that the evidence is vital to his case, and that his inability to present the same or similar facts from

another source creates a compelling need for the testimony.” *See United States v. Watson*, 952 F.2d 982, 986 (8th Cir. 1991).

¶11 The District Court did not commit a clear and prejudicial abuse of discretion under the facts of this case. Hummel was allowed to cross-examine Smith and to recall him for further questioning about his alcohol consumption. Hummel questioned Smith about whether he had ever been intoxicated, whether he drank alcohol the day of the incident, and why his statement to the prosecutor about his alcohol consumption before trial was inconsistent with his trial testimony. The District Court did not abuse its discretion in denying Hummel’s motion to call the prosecutor as an impeachment witness on these facts.

¶12 Finally, Hummel argues the written judgment does not conform with the pronounced oral sentence because it imposes, rather than recommends, parole conditions and Condition 15 lacks statutory authority and must be stricken. The State concedes the judgment should be remanded to amend the language of the written judgment to reflect that the conditions are recommendations of the court. The State also concedes the last sentence of Condition 15 should be stricken to avoid confusion because supervision fees are not charged when an offender is incarcerated.

¶13 Condition 15 states:

The Probation & Parole Officer shall determine the amount of supervision fees (§ 46-23-1031, MCA) to be paid each month in the form of money order or cashier’s check to the Department of Corrections Collection Unit, P.O. Box 201350, Helena, MT 59620 (\$50 per month if the Defendant is sentenced under § 45-9-202, MCA, dangerous drug felony offense and placed on ISP). The DOC shall take a portion of the Defendant’s inmate account if the Defendant is incarcerated.

¶14 As noted in Condition 15, § 46-23-1031, MCA, governs the imposition of supervisory fees for parolees. This provision includes a requirement for a parolee to pay a supervisory fee while under supervision of the Department of Corrections and allows the District Court, the Board of Pardons and Parole, or the Department of Correction to reduce or suspend the fee if it would cause significant financial hardship. *See* § 46-23-1031(1)(c), MCA; *State v. Waters*, 1999 MT 229, ¶ 33, 296 Mont. 101, 987 P.2d 1142. If Hummel is paroled this provision will apply to Hummel whether the District Court recommends Condition 15 or not. As such, we reverse and remand for the District Court to conform the written judgment to the oral pronouncement of sentence by clarifying the conditions are recommendations of the court and to strike Condition 15.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶16 Hummel's conviction is affirmed. The case is reversed and remanded to conform the written judgment to the oral pronouncement of sentence by clarifying the conditions are recommendations of the court and to strike Condition 15.

/S/ INGRID GUSTAFSON

We concur:

/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ JIM RICE