FILED
03/01/2022
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 20-0305

DA 20-0305

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 43N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES THOMAS MIESMER,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. BDC 13-566
Honorable Elizabeth A. Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Moses Okeyo, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Michael P. Dougherty, Assistant Attorney General, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Jennifer Quick, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: February 2, 2022

Decided: March 1, 2022

Filed:

Clerk

Justice Jim Rice 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 Charles Miesmer (Miesmer) appeals the Eighth Judicial District Court's Dispositional Judgment revoking his six-year suspended prison sentence. We affirm.

¶3 In October 2014, Miesmer pled guilty to felony sexual assault in violation of § 45-5-502(3), MCA, for sexually assaulting a 12-year-old girl. The District Court designated Miesmer a Level II sexual offender and sentenced him to 10 years at the Montana State Prison, with 6 years suspended. Miesmer was released in December 2018 to serve the suspended portion of his sentence under supervision. As a sex offender, Miesmer was subject to conditions to ensure the safety of the community. A central condition was that he "shall enter and successfully complete sexual offender treatment with a clinical provider who is a member in good standing with [The Montana Sexual Offenders Treatment Association] or its equivalent, and who is approved by the Probation and Parole Officer." Officer Adam Cole (Cole), a sex offender specialist with Probation and Parole (Probation) at the Montana Department of Corrections (DOC), supervised Miesmer.

¶4 Cole filed his first Report of Violation (ROV) about Miesmer on August 1, 2019, alleging that 1) Miesmer had been "terminated" from Chris Nordstrom's (Nordstrom) sex

offender treatment program in Missoula, and was thus in violation of the condition he participate in treatment; and 2) Child and Family Services (CFS) had conducted a welfare check at Miesmer's home and reported he had been living with a female infant for approximately two weeks, in violation of the prohibition that he not reside with any minors without prior approval by Cole and his therapist. On October 23, Cole filed a second ROV alleging Miesmer admitted to purchasing and consuming alcohol and renting pornography from an adult bookstore; both actions violated probation conditions. The third ROV, filed by Cole on November 12, alleged Miesmer "quit" Mike English's (English) treatment group in Hamilton, another violation of the condition to remain in treatment. On January 16, 2020, Cole filed a fourth ROV alleging Miesmer hid in his room for two hours and refused to open the door of his apartment when officers knocked and identified themselves.[1] The fifth and final ROV, filed by Cole on March 3, alleged Nordstrom "suspended" Miesmer from his treatment program. Miesmer was arrested for this violation, and during the arrest officers found a backpack with clothes, including underwear, that appeared to belong to a female adolescent, a prescription bottle of Viagra that was not approved by Probation as required, and a container of Vaseline. The State filed two petitions for revocation based on the ROVs.

¶5 At the revocation hearing, Cole testified that Miesmer "was struggling to follow the conditions that were laid out to him by [Probation] and the [c]ourts. He seemed to think

[1] Miesmer's conviction involved the kidnapping and sexual assault of a minor in his home.

half the rules applied," and was only partially truthful with Cole. The last ROV occurred when Miesmer was already on GPS monitoring and enhanced supervision. Cole offered his opinion as a sex offender specialist that Miesmer could not be adequately supervised in the community and recommended Miesmer complete his treatment through the Sex Offender Program (SOP) at the Montana State Prison.

¶6 Specifically, Cole testified extensively about Miesmer's difficulty remaining in treatment. Regarding the allegation that Nordstrom terminated Miesmer from his group, Cole testified that after the CFS welfare check at Miesmer's home, the case worker contacted Cole's supervisor, who summoned Miesmer to the probation office. Miesmer then admitted to the supervisor he had been in contact with the infant.[2] Probation notified Nordstrom of this contact and Nordstrom decided to terminate Miesmer from his group. Miesmer enrolled in English's group in Hamilton less than a month later and initially attended all therapy sessions, but then, according to English's report to Cole, "told the group that he was switching providers" and transferring to a provider in Missoula, Chris Quigley (Quigley). Cole called Quigley, who was unaware Miesmer was in the ROV process and had previously been terminated from treatment. Quigley declined to accept Miesmer "due to his dishonesty and not [being] forthcoming." English accepted Miesmer back into his treatment group but then, unfortunately, he passed away. Alison Janes (Janes) took over English's group. Cole testified he offered Miesmer the opportunity to change

[2] The Montana Rules of Evidence, including rules limiting hearsay testimony, do not apply to a revocation hearing. M. R. Evid. 101(c)(3).

providers at this time, but that Miesmer told him he was happy to stay with Janes. Nonetheless, two weeks later Nordstrom advised Cole by email that Miesmer had rejoined his group. Cole was unaware of Miesmer's new-found intent to change treatment groups, and he testified that Miesmer "told Nordstrom that I was -- approved the transfer, and was aware of it, which is incorrect." Consequently, Nordstrom suspended Miesmer "due to his dishonesty." Cole contacted Janes, who was then unwilling to accept Miesmer back to her group. With no secured treatment, Miesmer was in violation and was soon arrested.

¶7 Cole testified Miesmer had then asked to be treated by Charmaine Nicholson (Nicholson), a provider in Great Falls. Nicholson would require Miesmer to be under intensive supervision and to travel to Great Falls once a week, a three-hour drive each way. Cole consulted with his supervisor, who advised Probation "would not allow [Miesmer] to travel to Great Falls on a weekly basis due to concerns of his behavior and conduct since he's been out [of prison]." Probation "also ha[d] concerns that when [Miesmer] was traveling to Hamilton, which was forty-five minutes south of Missoula, he was saying it was a financial burden. Now, he wants to travel just shy of three hours to Great Falls once a week."

¶8 Miesmer's testimony disputed the allegations of having contact with an infant and the treatment violations. He explained he had met Kevin and Ericka McLeod, a homeless couple with car troubles and Ericka evidently pregnant, in a Walmart parking lot and offered to tow their trailer to a storage unit. According to Miesmer, the McLeods kept in touch with him and, after their baby was born, Kevin saw Miesmer in the Albertsons's

parking lot and asked if the family could stay at Miesmer's home. Miesmer said they could not, due to his status as a sex offender, but later offered to let them use his address to receive mail. He apparently maintained contact with them, but at the time of the hearing could no longer reach them because Kevin "[didn't] have the same phones, nothing. He just disappeared." Nonetheless, Miesmer offered a notarized note from Kevin stating Miesmer gave the McLeods permission to use his address, and Kevin had met with CFS there twice, but that Miesmer never had contact with his daughter, nor had the family ever lived with him. Miesmer admitted to allowing the family to store belongings at his residence but denied knowing Kevin intended to use his residence for CFS visits. As noted below, the District Court rejected this testimony as lacking credibility.

¶9 Regarding treatment, Miesmer confirmed he enrolled in English's group shortly after his first termination from Nordstrom's. He expressed concern about being in English's group because of the commute to Hamilton: "I wanted to attend [] therapy in Missoula to avoid the hundred-mile round trip because of the icy, snowy roads that would develop in the wintertime." Miesmer testified he contacted and made an appointment with Quigley, who showed interest in accepting him into his Missoula-based program, but that the appointment never happened because Cole "intercepted me the week before." He testified he told Cole about his plan to transfer to Quigley, and that Cole had gone to see Quigley, but that Quigley "was no longer willing to accept me into his group . . . . until I take care of the revocations." Rather than quitting English's group, as English had reported to Cole, Miesmer testified he merely told English about his appointment with Quigley and

that the transfer "was not a sealed deal." After Quigley cancelled the appointment, Miesmer rejoined English's group upon release from detention. According to Miesmer, after English passed away, Janes offered to help him switch providers.

¶10 Miesmer testified he liked therapy with Janes, "but the commute was kind of horrific, especially with the weather," so he instead sought therapy with Nordstrom in Missoula. Miesmer testified, in direct conflict to Cole, that he had informed Cole of his plan to rejoin Nordstrom's group. Nordstrom asked Miesmer to request Janes send a letter to himself and Cole giving permission to switch groups, but, according to Miesmer, this was not done. When asked, "Do you understand that you were terminated [from treatment] due to your dishonest behaviors?", Miesmer answered affirmatively. He confirmed he currently sought treatment with Nicholson and understood the conditions and costs of therapy in Great Falls. When the State asked about his altered attitude towards a long commute to therapy, Miesmer stated, "I didn't look at the whole picture, I guess . . . . I don't have a problem with it. I'm the one that put myself in the situation, so I'll be okay."

¶11 The State argued Miesmer committed a non-compliance violation of his treatment condition, and that he had demonstrated an inability to stay in compliance under community supervision: "Taking into account rehabilitation, quite frankly, this offender is not going to get into compliance until he gets the requisite sex offender treatment [in prison]. He's not taking accountability. He's not being honest, and [revocation] also takes into account the danger to the community that he poses." Alternatively, the State argued the court should revoke based on Miesmer's numerous compliance violations and Cole's

unsuccessful attempts to bring him into compliance with probation conditions. Miesmer's defense counsel argued the State had "not established a voluntary non-comp[liance violation], nor [have] they established exhaustion." He characterized Miesmer as a "client who's trying to get the right treatment, get it set up." In response, the District Court stated: "I have to tell you. I'm not seeing that . . . . when he's out and about by himself, he's exhibiting predatory behavior . . . . I am just not seeing this Defendant as a supervisable person in his current situation."

¶12 The District Court made oral findings at the hearing's conclusion:

> I have determined that the State proved the violation as alleged in the petition by the requisite standard. I am going to revoke the suspended sentence and sentence the Defendant to the Montana State Prison with no -- for six years. With zero years suspended. *No parole until SOP one and two are completed in prison . . . . I just think this is appropriate. I frankly did not find you, Mr. Miesmer, to be credible*, and I am very concerned about -- without treatment that you -- while I applaud your efforts to change your life. *I find that you're still dangerous for -- especially children and the story that you told about the Walmart parking lot is just really shocking and horrifying to me on behalf of children in the community*. [(Emphasis added.)]

¶13 On appeal, Miesmer argues the State did not prove a non-compliance violation and the District Court could not have legally revoked his sentence for the compliance violations because Cole did not exhaust the Montana Incentives and Interventions Grid for Adult Probation and Parole (MIIG). Alternatively, Miesmer argues the District Court violated his right to due process by not considering alternatives to imprisonment. We affirm based on the District Court's finding Miesmer committed a non-compliance violation. We consider Miesmer's alleged compliance violations only as they relate to the court's finding of a non-compliance violation and the court's credibility determination.

¶14 We review a district court's decision to revoke a suspended sentence to "determine whether the district court's decision was supported by a preponderance of the evidence in favor of the State, and if so, whether the court abused its discretion." *State v. Oropeza*, 2020 MT 16, ¶ 14, 398 Mont. 379, 456 P.3d 1023. "A district court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Fjelsted*, 2020 MT 278, ¶ 8, 402 Mont. 46, 475 P.3d 387. A district court's statutory interpretation is a question of law we review for correctness. *Oropeza*, ¶ 14.

¶15 Montana revised its approach to probation and parole violations in 2017 and adopted MIIG, a DOC policy guiding community supervision of offenders and standardizing response to violations. *Oropeza*, ¶ 4. The policy "effectively bifurcated probation and parole condition violations into either compliance or non-compliance violations." *Oropeza*, ¶ 6. Only five specific violations qualify as non-compliance, including "failure to enroll in or complete a required sex offender treatment program." Section 46-18-203(11)(b)(v), MCA. Any violation not categorized as a non-compliance violation is a compliance violation. Section 46-18-203(11)(b), MCA. Therefore, all the ROVs relating to Miesmer's participation in sex offender treatment are allegations of non-compliance violations, and the remaining allegations are compliance violations. When an offender commits a compliance violation, officers must consult MIIG to determine an appropriate intervention or incentive response. Section 46-18-203(8)(a), MCA. A district court cannot revoke a suspended sentence for a compliance violation unless it finds the probation officer

has exhausted the MIIG and documented those efforts, or that "the offender's conduct indicates that the offender will not be responsive to further efforts under the [MIIG]." Section 46-18-203(8)(a), (c), MCA; *City of Missoula v. Pope*, 2021 MT 4, ¶ 7, 402 Mont. 416, 478 P.3d 815. But if a district court determines that an offender has committed a non-compliance violation, the court need not consult the MIIG and may directly "revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed." Section 46-18-203(7)(a)(iii), MCA. The State must prove both compliance and non-compliance violations by a preponderance of the evidence. Section 46-18-203(6)(a), MCA.

¶16 Miesmer argues "[i]t is unclear what the [D]istrict [C]ourt found to be a violation," and that the court "revoked Miesmer's probation without entering a finding that he voluntarily committed even a single non[-]compliance violation." However, while the court's findings were admittedly bare, the context in which the oral pronouncement of revocation was made demonstrates it was premised upon violation of the sex offender treatment condition—a non-compliance violation. Immediately prior to the portion of the pronouncement quoted above, the court asked detailed questions about Miesmer's treatment participation and the availability of the SOP at the Montana State Prison. This was the court's sole focus prior to stating, "the State proved the violation as alleged in the petition," and, "[n]o parole until SOP one and two are completed in prison."

¶17 Miesmer argues the District Court could not have found he committed a non-compliance violation without finding he violated the condition *voluntarily*. He asserts

that under the 2017 reforms, the sex offender treatment non-compliance violation "now requires POs to demonstrate that the offender voluntarily failed to successfully complete treatment while in the community." He cites no authority, however, to support a "voluntary failure" requirement. Nowhere in § 46-18-203, MCA, is the court required to make a specific finding that the offender committed the violation voluntarily. A judge must only find "that the offender has violated the terms and conditions of the suspended or deferred sentence and the violation is not a compliance violation" before the court may revoke. Section 46-18-203(7)(a)(iii), MCA. It is the prosecution's responsibility, not that of the probation officer, to prove by a preponderance of the evidence "that there has been a violation of [] the terms and conditions of the suspended or deferred sentence." Section 46-18-203(6)(a)(i), MCA. Indeed, we previously held that "violations of non-financial probationary conditions need not necessarily be willful in order to justify revocation." *State v. Lee*, 2001 MT 176, ¶ 21, 306 Mont. 173, 31 P.3d 998. *See also Bearden v. Georgia*, 461 U.S. 660, 668, 103 S. Ct. 2064, 2070 n.9 (1983). No new "voluntary" language was added in the 2017 reforms.

¶18 Even if a voluntary violation was required, it would be satisfied here. Miesmer describes his inability to stay properly enrolled in treatment as the fault of others, particularly Cole, whom he accuses of "secur[ing] his rejection" from multiple treatment programs. But the record reflects it was Miesmer's own actions that largely, if not entirely, caused him to not be enrolled in a suitable program. At the least, he unwisely initiated and kept contact with a family unknown to him with a female infant, and at most, he had direct

contact with the infant. This situation was of Miesmer's own creation and resulted in his termination from Nordstrom's group. His pattern of dishonest communications with treatment providers and with Cole resulted in his termination from treatment with Nordstrom, Quigley, and Janes. He clearly failed to arrange treatment with the requisite approval of his probation officer. His explanation that Nordstrom would re-enroll him after he "took care" of his revocations is an acknowledgment of the consequences of his actions.

¶19 Cole correctly testified that he is required to file an ROV when an offender under his supervision is terminated from sex offender treatment. The MIIG outlines "Sex Offender Specific Incentives and Intervention." Regarding the condition to "[a]ttend and complete sex offender treatment," the MIIG explicitly requires Probation to file an ROV upon "[t]ermination from sex offender treatment." Montana Incentives/Intervention Grid for Adult Probation & Parole, Dep't. of Corr. Prob. & Parole Div. Operational Procedure, Procedure No. PPD 6.3 101(A), at 3 (DOC June 17, 2019). The State may file a petition for revocation based on the ROV. Section 46-18-203(1), MCA. When a non-compliance violation is proven, the court has the option to "revoke the suspension of sentence and require the offender to serve [] the sentence imposed." Section 46-18-203(7)(a)(iii), MCA. Cole fulfilled his duty to file ROVs for the times he believed Miesmer was suspended, terminated, or quit his treatment, the State validly filed its petitions, and the District Court had discretion to revoke Miesmer's sentence upon proof of one or more of the non-compliance violations by a preponderance of the evidence.

¶20 Miesmer argues he complied with his treatment condition because he enrolled in treatment multiple times and all parties agree he faithfully attended English's group. However, Miesmer's briefing obscures the reality of his treatment situation, especially at the time of his revocation hearing. His sentence was revoked following his suspension from Nordstrom's group, which was the second time he was asked to leave that group, about seven months after he was terminated the first time. The fact that he soon enrolled in English's group after his first termination does not account for everything that happened thereafter. While he states that "[he] was enrolled and actively continuing sex offender treatment in the community through another provider when his sentence was revoked," at the time of the hearing Miesmer was not in treatment—the fifth and final ROV was filed after Nordstrom suspended him for dishonesty. After Nordstrom's suspension, Janes would not take him back. Miesmer testified, and Cole confirmed, that Nicholson was willing to accept him, but he was not enrolled in her program when his sentence was revoked. Probation had already determined, due to ongoing concerns about his behavior and the long commute, that they would not give Miesmer permission to travel to Great Falls once a week. Thus, by his own admission Miesmer was not in compliance with his treatment condition at the time of the hearing, and treatment with Nicholson, prohibitively located three hours away, was the *only* remaining option for Miesmer to be treated in the community at the time of the hearing. Cole testified, "I've called around to every provider [in the Missoula area] that we've worked with recently in the past, and one new one, and nobody was willing to accept him."

¶21 Miesmer's quitting, termination, or suspension were enough individually or collectively for the District Court to revoke his sentence. Miesmer agreed he was terminated from treatment due to his own dishonest behaviors. As noted in the State's briefing, "Miesmer does not dispute he was terminated from treatment and, instead, quarrels about one of the reasons why he was first kicked out of Nordstrom's group," i.e. the allegation of contact with the McLeods' infant daughter. On this point and others, the District Court heard conflicting testimony from Cole and Miesmer, and we defer to the District Court's interpretation of the conflicting testimony. *State v. Bieber*, 2007 MT 262, ¶ 23, 339 Mont. 309, 170 P.3d 444 (citation omitted). The District Court expressed its view of Miesmer's credibility as a witness multiple times throughout the hearing, repeatedly finding him not credible. Miesmer's case is similar to our decision affirming revocation of sentence in *State v. Aune*, 2003 MT 3, 314 Mont. 1, 61 P.3d 785.

¶22 Alternatively, Miesmer argues the District Court violated his right to due process by not considering alternatives to incarceration and cites our decision in *Lee*. "The Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." *Lee*, ¶ 18 (citation omitted). *Lee* addressed a situation where the State's actions, rather than the offender's own willful conduct, prevented completion of sex offender treatment. *Lee*, ¶ 23. Miesmer argues that his failure to comply with the treatment condition was effectively due to Cole "telling providers that Miesmer was dishonest and manipulative," and therefore "secur[ing] his rejection" from treatment programs.

However, the evidence suggests otherwise—that Miesmer's own behaviors convinced providers he was dishonest and manipulative. As a probation officer, Cole is required to confer with treatment providers and to hold Miesmer accountable for properly following the process for requesting permission to change providers. Here, there was sufficient evidence for the District Court to conclude that Miesmer's inability to stay enrolled in treatment was due to his own choices, not the actions of the State.

¶23 The District Court did not make a specific finding that ongoing treatment with Nicholson was an inappropriate option, but it knew this was Miesmer's only alternative to incarceration and clearly considered it at the hearing. Both Miesmer and the State offered testimony and argument regarding Miesmer's potential for success with Nicholson. Although Nicholson was willing to accept Miesmer under what the District Court described as "[a] lot, a lot of restrictions," the court found Miesmer's assertion that he would complete treatment with Nicholson to lack credibility, stating, "I think we see his credibility differently," in response to Miesmer's counsel's argument in favor of treatment with Nicholson. The court further discussed with counsel the varying incentives and goals advanced by completing treatment in prison versus the community and noted that, in addition to the goals of punishment, rehabilitation, and cost efficiency, "there's one other goal, and that's public safety." *See State v. Price*, 2008 MT 319, ¶ 24, 346 Mont. 106, 193 P.3d 921 (distinguishing *Lee* because the defendant's concerning behavior while serving suspended sentence justified incarceration for remainder of sentence).

¶24 Miesmer's past aversion to traveling forty-five minutes to attend treatment in Hamilton in what he described as "horrific" conditions further supports the District Court's determination that weekly travel three hours each way to Great Falls, including in winter conditions, was not a realistic treatment option. The District Court had no affirmative duty to find Miesmer an appropriate treatment program in the community after finding him unsuitable for available programs. *State v. Williams*, 1999 MT 240, ¶¶ 22-23, 296 Mont. 258, 993 P.2d 1. It acted within its discretion to determine that, based on Miesmer's circumstances and behavioral history, treatment with Nicholson was not an alternative to incarceration that would adequately further the purposes of Miesmer's suspended sentence. *See Williams*, ¶ 24; *Lee*, ¶ 23; *Price*, ¶ 24.

¶25 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. The District Court's ruling to revoke Miesmer's suspended sentence was not an abuse of discretion.

¶26 Affirmed.

/S/ JIM RICE

We concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR