

No. DA 06-0148

IN THE SUPREME COURT OF THE STATE OF MONTANA

2007 MT 77

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STATE OF MONTANA,

Plaintiff and Respondent,

v.

ANTHONY DEAN IAFORNARO,

Defendant and Appellant.

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APPEAL FROM: District Court of the Eighteenth Judicial District,  
In and for the County of Gallatin, Cause No. DC 03-191,  
The Honorable Holly Brown, Presiding Judge.

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Montana Appellate Defender Office, Helena, Montana

For Respondent:

Hon. Mike McGrath, Attorney General; Carol E. Schmidt, Assistant  
Attorney General, Helena, Montana

Marty Lambert, Gallatin County Attorney, Bozeman, Montana

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Submitted on Briefs: January 24, 2007

Decided: March 20, 2007

Filed:

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Clerk

Justice Brian Morris delivered the Opinion of the Court.

¶1 Anthony Dean Iaforaro (Iaforaro) appeals from the District Court’s denial of his motion to withdraw his plea of nolo contendere. We affirm.

¶2 We review whether the District Court correctly denied Iaforaro’s motion to withdraw his plea of nolo contendere?

### **FACTUAL AND PROCEDURAL HISTORY**

¶3 The State charged Iaforaro on July 9, 2003, with felony attempted sexual assault for accosting a 15-year-old girl while she was cleaning his motel room. Iaforaro entered a plea of not guilty to the charge and requested that the court order a mental examination to determine his fitness to proceed to trial. The court ordered the mental examination and continued Iaforaro’s trial date.

¶4 The court determined at a hearing on December 23, 2003, that Iaforaro lacked fitness to stand trial. The court committed Iaforaro to the Department of Health and Human Services for as “long as the unfitness endures.” The court held another hearing on March 11, 2004, where all parties agreed that Iaforaro was fit to proceed to trial on the felony attempted sexual assault charge.

¶5 Iaforaro entered into a plea agreement with the State on July 28, 2004. The State agreed to drop Iaforaro’s felony attempted sexual assault charge in exchange for Iaforaro’s plea of nolo contendere to a charge of felony attempted kidnapping. The agreement specified that the State would proceed to trial on the original felony charge of attempted sexual assault if the court declined to accept Iaforaro’s plea of nolo contendere to felony attempted kidnapping. The court accepted Iaforaro’s plea and

sentenced Iaforaro on February 8, 2005, to Montana State Prison for ten years with no time suspended.

¶6 Iaforaro filed a motion to withdraw his guilty plea on November 2, 2005. Iaforaro argued that the court had failed to inform him of the “lesser included offense of unlawful restraint” when the court accepted his plea of nolo contendere to his charge of felony attempted kidnapping. He contended that his plea was involuntary in light of the court’s omission and his “documented history of serious mental illness.” The State responded that the lesser included offense of unlawful restraint was irrelevant to Iaforaro’s decision in light of the fact that he had no possibility of going to trial on the felony attempted kidnapping charge. The State pointed out that Iaforaro’s plea agreement stipulated that the State would proceed to trial on the charge of felony attempted sexual assault if the court did not accept his plea of nolo contendere to felony attempted kidnapping. The court determined that Iaforaro had failed to establish good cause to withdraw his plea. This appeal followed.

### **STANDARD OF REVIEW**

¶7 We review Iaforaro’s motion to withdraw his plea of nolo contendere to determine whether his plea was voluntary. *State v. Muhammad*, 2005 MT 234, ¶ 12, 328 Mont. 397, ¶ 12, 121 P.3d 521, ¶ 12. Our determination of whether Iaforaro’s plea was voluntary presents a mixed question of law and fact that we review *de novo*. *Muhammad*, ¶ 12.

## DISCUSSION

¶8 *Did the District Court correctly deny Iaforaro’s motion to withdraw his plea of nolo contendere?*

¶9 Section 46-16-105(2), MCA, authorizes a district court to permit a defendant to withdraw his plea of nolo contendere upon a showing of “good cause.” *Muhammad*, ¶ 14. Iaforaro argues that the District Court’s failure to inform him that unlawful restraint is a lesser included offense of felony attempted kidnapping constitutes “good cause.” He suggests that the court’s omission prevented him from entering a “knowing, intelligent and voluntary” plea.

¶10 Iaforaro cites *State v. Sanders*, 1999 MT 136, 294 Mont. 539, 982 P.2d 1015, and *State v. Rave*, 2005 MT 78, 326 Mont. 398, 109 P.3d 753, for the proposition that a district court’s failure to inform a defendant of an “applicable lesser included offense[]” establishes “good cause.” The defendants in *Sanders* and *Rave* both waived their right to submit an applicable lesser included offense instruction to a jury when they entered guilty pleas pursuant to their respective plea agreements with the State. *Sanders*, ¶¶ 4-5; *Rave*, ¶¶ 16-17. The courts had not informed the defendants, however, as to what lesser included charges that they would be waiving. *Sanders*, ¶¶ 20-21; *Rave*, ¶¶ 17-18. The Court determined that these defendants could not have knowingly and intelligently waived their right to convince a jury that they were guilty of a lesser included offense when the defendants had not been informed of what those lesser included offenses might have been. *Sanders*, ¶¶ 22-23; *Rave*, ¶ 19. The Court held that these defendants had established “good cause” to withdraw their pleas. *Sanders*, ¶¶ 23, 32; *Rave*, ¶ 19.

¶11 Iaforaro argues that he also waived his right to submit a lesser included offense instruction to a jury without first being informed of what those lesser included offenses might have been. Iaforaro's plea agreement stipulated, however, that the State would proceed to trial on the felony attempted sexual assault charge if the court did not accept his plea of nolo contendere to the felony attempted kidnapping charge. Only those lesser included offenses applicable to his charge of felony attempted sexual assault would have been relevant to Iaforaro's decision. Iaforaro does not allege that the court failed to inform him as to any of the lesser included charges applicable to felony attempted sexual assault.

¶12 We cannot fault the court or the State for failing to inform Iaforaro of any lesser included offense not relevant to his decision to enter a plea of nolo contendere. Iaforaro had no right to be informed of the possibility of submitting a lesser included offense instruction to the jury when no such possibility existed. *State v. Thee*, 2001 MT 294, ¶ 24, 307 Mont. 450, ¶ 24, 37 P.3d 741, ¶ 24.

¶13 Iaforaro also argues that his "mental illness and confusion rendered his plea unknowing, unintelligent, and involuntary." The court took care to ensure, however, that Iaforaro's mental illness did not interfere with the voluntariness of his plea agreement. The court ordered Iaforaro to be placed in the care of the Department of Health and Human Services on December 23, 2003, until he was deemed fit to proceed. Iaforaro, his doctors, his counsel, and the court later agreed at a hearing on March 11, 2004, that Iaforaro was fit to proceed.

¶14 The record indicates that no omission, misinformation, or mental incapacity hindered Iaforaro's ability to enter knowingly and intelligently into his plea agreement. The District Court correctly decided that Iaforaro had failed to establish good cause for withdrawing his plea of nolo contendere.

¶15 Affirmed.

/S/ BRIAN MORRIS

We Concur:

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