

DA 15-0753

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 149N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL CORDELL COX,

Defendant and Appellant.

APPEAL FROM: District Court of the Seventeenth Judicial District,
In and For the County of Blaine, Cause No. DC 14-27
Honorable John C. McKeon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Paul D. Sullivan, Measure, Sampsel, Sullivan & O'Brien, P.C., Kalispell,
Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant
Attorney General, Helena, Montana

Kelsie Harwood, Blaine County Attorney, Chinook, Montana

Submitted on Briefs: May 23, 2018

Decided: June 12, 2018

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 Michael Cox (Cox) appeals from the October 13, 2015 order of the Seventeenth Judicial District Court, Blaine County, revoking his suspended sentence. We affirm.

¶3 In November 2014, Cox was sentenced to the Department of Corrections (DOC) for five years with all but 88 days suspended. About a year later, the State filed a petition to revoke his suspended sentence. He was appointed counsel who appeared at both the initial and revocation hearings. Cox admitted some of the alleged violations at the initial revocation appearance and the State established other violations at the subsequent evidentiary hearing. Following the evidentiary hearing, the District Court revoked Cox's suspended sentence and sentenced him to the DOC for five years with credit for 113 days already served.

¶4 Cox asserts the District Court denied his Sixth Amendment right to counsel by proceeding with the initial hearing when the detention center had failed to provide Cox access to counsel. At the initial hearing, Cox's counsel advised the District Court she had not yet had an opportunity to review the petition with Cox. She made attempts to call Cox

at the detention facility, but he was not put on the phone and she did not receive a call back. Counsel did not request a continuance or even a short break to confer with Cox.

¶5 The State counters that a revocation proceeding is a civil action such that Cox's right to counsel is grounded in his Fourteenth Amendment right to due process rather than in the Sixth Amendment. The State also asserts Cox's constitutional and/or statutory right to counsel was not infringed as counsel was appointed nearly immediately and appeared with Cox at the initial and evidentiary hearings.

¶6 Our review of constitutional issues is plenary. *State v. White*, 2014 MT 335, ¶ 12, 377 Mont. 332, 339 P.3d 1243.

¶7 We conclude Cox was not denied either a constitutional or a statutory right to counsel. Cox was appointed counsel within six days of receiving the petition. Counsel appeared and represented Cox at all revocation-related proceedings. Cox now raises, for the first time on appeal, he was denied counsel as he did not confer with counsel prior to the initial hearing. It is "fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. Whalen*, 2013 MT 26, ¶ 37, 368 Mont. 354, 295 P.3d 1055 (citation omitted). Additionally, we generally refuse to review issues which were not objected to at the lower court level. *State v. Kotwicki*, 2007 MT 17, ¶ 8, 335 Mont. 344, 151 P.3d 892. As Cox raises this issue for the first time on appeal and he failed to object to proceeding and did not seek continuance or even a short break to confer with counsel, we conclude Cox has waived this argument for appeal.

¶8 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.

¶9 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ JIM RICE