

DA 16-0305

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 127N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHRISTOPHER MICHAEL EMTER,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 07-1066
Honorable Michael G. Moses, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy A. Hinderman,
Assistant Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Ingrid Rosenquist, Deputy
County Attorney, Billings, Montana

Submitted on Briefs: April 11, 2018

Decided: May 22, 2018

Filed:



Clerk

Justice Laurie McKinnon 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 Christopher Michael Emter appeals from an order of the Thirteenth Judicial District Court, Yellowstone County, revoking and imposing a previously-suspended sentence. We remand for the District Court to strike its requirement that Emter's previously-suspended sentence run consecutive to an unrelated federal sentence and otherwise affirm.

¶3 In 2008, Emter pleaded guilty to felony criminal endangerment pursuant to a plea agreement with the State. Emter and the State jointly recommended the District Court dismiss two other charges and sentence him to eleven years commitment with six years suspended. The District Court accepted the recommendation and sentenced Emter accordingly. Emter did not appeal his conviction or petition for postconviction relief. After serving the unsuspended portion of his sentence, the Department of Corrections released Emter to serve the suspended portion on probation. One of Emter's probation conditions required him to obey all city, county, state, and federal laws or face revocation of his suspended sentence.

¶4 In 2013, the State petitioned to revoke Emter's suspended sentence based on numerous alleged probation violations and new, pending federal charges. A jury in the United States District Court for the District of Montana convicted Emter of possessing a

firearm as a felon and sentenced him to forty-eight months commitment to the Bureau of Prisons followed by three years of supervised release. Based on his federal conviction, the District Court revoked Emter's suspended sentence and imposed the six years that were previously suspended. The District Court stated, "the Defendant is sentenced . . . to the Department of Corrections for SIX (6) YEARS, to run CONSECUTIVELY to the FORTY-EIGHT (48) MONTHS incarceration in the United States Bureau of Prisons, but CONCURRENTLY to the THREE (3) YEARS Supervised Release following incarceration." Emter appeals.

¶5 First, Emter argues the District Court erred in ordering his previously-suspended sentence run consecutive to his federal incarceration. The State concedes this argument. A district court may revoke a suspended sentence "and require the offender to serve either the sentence imposed or any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence." Section 46-18-203(7)(a)(iii), MCA. Emter's 2013 federal sentence did not exist in 2008; therefore, under § 46-18-203(7)(a)(iii), MCA, the District Court could not have ordered his 2008 commitment to run consecutive to any portion of his 2013 commitment. Accordingly, we remand for the District Court to strike the following language from its order revoking Emter's suspended sentence: "to run CONSECUTIVELY to the FORTY-EIGHT (48) MONTHS incarceration in the United States Bureau of Prisons, but CONCURRENTLY to the THREE (3) YEARS Supervised Release following incarceration." *See State v. Youpee*, 2018 MT 102, ¶ 6, 391 Mont. 246, ___ P.3d ___.

¶6 Second, Emter argues that the District Court’s original sentence for his felony criminal endangerment conviction was illegal because it was for one year longer than statutorily authorized. We disagree and note that Emter and the State jointly recommended the District Court sentence him to eleven-years commitment based on his crime and his designation as a persistent felony offender (PFO). He now argues the District Court erred by imposing the sentence he recommended because its judgment did not specify that it was sentencing Emter as a PFO.

¶7 “[A] sentence is not illegal if it falls within statutory parameters.” *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892. Under § 45-5-207(2), MCA (2007), the maximum penalty for criminal endangerment was ten years imprisonment. However, under § 46-18-502(1), MCA (2007), the maximum penalty for criminal endangerment committed by a PFO was 100 years imprisonment. The State filed a notice of its intent to designate Emter as a PFO under § 46-13-108, MCA (2007). That statute required a district court to hold a hearing if the defendant objected to being designated a PFO. Section 46-13-108(3), MCA (2007). Emter did not object to his designation. By failing to object to the State’s PFO designation request, Emter accepted the designation. Further, in his plea agreement, Emter acknowledged, “I have been designated a **Persistent Felony Offender**, which is a sentence enhancement.” Emter’s sentence of eleven years commitment for felony criminal endangerment committed by a PFO fell within the statutory parameters of § 46-18-502(1), MCA (2007), because it was less than 100 years imprisonment.

¶8 A district court's failure to abide by a statutory requirement may rise to an objectionable sentence, though not necessarily an illegal one. *Kotwicki*, ¶ 13. "We generally refuse to review on appeal an issue to which the party failed to object at the trial court." *Kotwicki*, ¶ 8. Section 46-18-115(6), MCA (2007), required the District Court to specifically state all reasons for the sentence, including any enhancements. The District Court's judgment did not state that it was sentencing Emter based on his designation as a PFO. The District Court's failure to specify Emter's status as a PFO in its order was objectionable; however, Emter did not object at sentencing. If he had, the District Court could have corrected its judgment and specified that it was sentencing Emter pursuant to the State's notice and Emter's acknowledgment that he was a PFO. Emter did not appeal his original sentence nor did he petition for postconviction relief. The District Court's original sentence for his felony criminal endangerment conviction was objectionable, not illegal, and we affirm the District Court's judgment.

¶9 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.

¶10 We remand this case for the District Court to modify Emter's sentence as explained above but otherwise affirm the District Court's judgment.

/S/ LAURIE McKINNON

We concur:

/S/ JAMES JEREMIAH SHEA

/S/ INGRID GUSTAFSON

/S/ DIRK M. SANDEFUR

/S/ JIM RICE