

DA 16-0353

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 241N

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JUAN ANASTASIO RODRIGUEZ,

Defendant and Appellant.

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APPEAL FROM: District Court of the Eighth Judicial District,  
In and For the County of Cascade, Cause No. CDC-09-420  
Honorable John A. Kutzman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad M. Wright, Appellate Defender, Eileen A. Larkin, Assistant  
Appellate Defender, Helena, Montana

For Appellee:

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

Joshua A. Racki, Cascade County Attorney, Great Falls, Montana

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Submitted on Briefs: August 8, 2018

Decided: September 25, 2018

Filed:



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Clerk

Chief Justice Mike McGrath 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¶2 Juan Anastasio Rodriguez appeals from a May 28, 2015 Eighth Judicial District Court order in which his sentence was revoked for violating the conditions of his deferred sentencing agreement. The issue Mr. Rodriguez raises on appeal is whether the District Court erred in not crediting elapsed street time towards Mr. Rodriguez's sentence. We affirm.

¶3 In August 2010, the State of Montana charged Mr. Rodriguez with Burglary, a felony, in violation of § 45-6-204, MCA (2009), Criminal Mischief, a misdemeanor, in violation of § 45-6-101 (2009), MCA, Tampering with Witnesses and Informants, a felony, in violation of § 45-7-206, MCA (2009), and Accountability (Tampering with or Fabricating Physical Evidence), a felony, in violation of §§ 45-2-302 and 45-7-207, MCA (2009). The parties entered into a plea agreement and Rodriguez pleaded guilty to felony burglary and felony tampering with a witness. On October 29, 2010, the District Court ordered Rodriguez's sentences to be deferred for a concurrent period of six years.

¶4 Between 2011 and 2014, numerous petitions were filed to revoke Rodriguez's deferred sentence based on reports of alleged violations of the sentencing conditions.

The violations included solicitation, aggravated promotion of prostitution, and sexual intercourse without consent—among others. Revocation proceedings were stayed until incoming charges against Rodriguez could be resolved.

¶5 In January 2015, an additional petition was filed to revoke Rodriguez’s deferred sentence. At the revocation hearing held on April 23, 2015, the District Court concluded that Rodriguez had violated the terms of his probation and the court subsequently revoked Rodriguez’s deferred sentences. Rodriguez was committed to the Department of Corrections for two ten-year sentences with five years suspended, to run concurrently. The District Court credited 125 days toward Rodriguez’s sentence for time served but did not credit Rodriguez any time spent on probation, or “street time.”

¶6 A criminal sentence is reviewed de novo for legality and compliance with statutory mandates. *State v. Youpee*, 2018 MT 102, ¶ 4, 391 Mont. 246, 416 P.3d 1050; *State v. Seals*, 2007 MT 71, ¶ 7, 336 Mont. 416, 156 P.3d 15.

¶7 Generally, we will not consider an issue raised for the first time on appeal. *State v. Lenihan*, 184 Mont. 338, 341, 602 P.2d 997, 999 (1979). However, if the sentence imposed is illegal or exceeds statutory mandates it is a non-waivable defect that this Court will take under appellate review. *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000.

¶8 The State asserts that Rodriguez waived the right to challenge the District Court’s failure to credit his street time, and failure to articulate its reasoning for doing so, because he did not object. We agree.

¶9 First, the District Court’s sentence, ten years with five suspended for each count, was within the Court’s statutory authority. Pursuant to § 46-18-203(7)(a)(iv), MCA

(2015), the District Court has the discretion to “impose any sentence that might have been originally imposed.” Rodriguez was subject to up to twenty years for the burglary conviction and ten years for the tampering with a witness conviction. *See* §§ 45-6-204(3); 45-7-206(2), MCA (2009), respectively. Accordingly, the District Court’s sentence was not illegal.

¶10 Rodriguez argues that the District Court erred when it failed to articulate its reasoning for the denial of street time credit within the order. Section 46-18-203(7)(b), MCA (2009),<sup>1</sup> provides:

If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time and either expressly allow all or part of the time as credit against the sentence or reject all or part of the time as credit. *The judge shall state the reasons for the judge’s determination in the order.*

(Emphasis added.) We agree with Rodriguez that the District Court had a statutory obligation to include its rationale behind the denial within the order. However, a district court’s failure to state the reason for the discretionary decision to grant or deny credit for street time is a waivable statutory defect. *Youpee*, ¶ 11. Rodriguez waived this right when he failed to object to the sentence at the May 19, 2015 hearing.

¶11 Finally, § 46-18-203(7)(b), MCA (2009), requires the District Court to credit “time served in a detention center or home arrest time already served.” The District Court complied with this directive and credited Rodriguez the 125 days he had spent incarcerated.

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<sup>1</sup> The initial sentence was imposed in 2010. We therefore apply the 2009 version of the statute.

¶12 The District Court imposed a legal sentence within statutory parameters and Rodriguez failed to contemporaneously object. Therefore, this issue is not subject to appellate review.

¶13 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.

¶14 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON  
/S/ JAMES JEREMIAH SHEA  
/S/ DIRK M. SANDEFUR  
/S/ INGRID GUSTAFSON