DA 16-0478

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 251N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHAD CHRISTOPHER HEITKEMPER,

Defendant and Appellant.

APPEAL FROM: District Court of the Twenty-Second Judicial District,
In and For the County of Carbon, Cause No. DC 13-55
Honorable Blair Jones, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Lisa S. Korchinski, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Micheal S. Wellenstein, Assistant Attorney General, Helena, Montana

Alex Nixon, Carbon County Attorney, Red Lodge, Montana

Submitted on Briefs: August 29, 2018

Decided: October 9, 2018

Filed:

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 Chad Christopher Heitkemper (Heitkemper) appeals from a Twenty-Second Judicial District Court Sentence and Judgment whereby the District Court sentenced Heitkemper to twenty years in Montana State Prison with seven years suspended. We affirm.

¶3 On November 21, 2013, the State charged Heitkemper with Sexual Assault, a felony, in violation of § 45-5-502 (1) and (3), MCA, for allegedly touching the vaginal area of a nine-year-old child without consent.

¶4 Heitkemper was released on bail and required to wear a GPS tracking device. On January 23, 2014, the District Court held a hearing on Heitkemper's motion to rescind the GPS requirement, which was denied. At the hearing, Heitkemper's attorney informed the court that Heitkemper had a heart attack while in jail. He stated his belief that Heitkemper "had a stint put in." Heitkemper interrupted his attorney and stated, "Medical stint."

¶5 On May 22, 2014, Heitkemper signed a § 46-12-211(1)(c), MCA, plea agreement[1] with the State, in which he agreed to plead guilty to sexual assault. The parties agreed to a fifteen-year commitment to the Department of Corrections (DOC), with ten years suspended.

¶6 On May 29, 2014, the District Court held a change of plea hearing and had an extensive colloquy with Heitkemper. Heitkemper stated he understood the District Court was not bound by the plea agreement, and if it imposed a greater sentence, he would not be able to withdraw his guilty plea. He acknowledged his satisfaction with the adequacy of his attorney's assistance and stated he was not under the influence of drugs or alcohol. The District Court accepted Heitkemper's guilty plea to felony sexual assault and ordered a presentence investigation report (PSI) and psychosexual evaluation for Heitkemper. The PSI recommended the court sentence Heitkemper to twenty years at the Montana State Prison, with five years suspended.

¶7 On November 25, 2014, the District Court received a pro se letter from Heitkemper asking the court to retract his guilty plea and expressing "concerns" about his attorney's representation. Heitkemper wrote,

> In this letter, and the following, I will state to the best of my ability my concerns, and questions. I have discussed these with Mr. Paskell and there has been no direct answers. . . . My first concern is of how much I can trust my own counsel. On Jan. 21, 2014 I made an appearance in order to request a bond reduction. At that time the Court was informed that my heart contained a stint! It does not. . . . Therefore I respectfully ask the Court to retract my plea of guilty to not guilty. I also respectfully ask for new counsel.

[1] The District Court is not bound to follow the parties' recommended sentence. Section 46-12-211(1)(c), MCA.

(Emphasis in original.)

¶8 The District Court administrator sent copies of Heitkemper's letter to both Heitkemper's attorney and the prosecution, and asked them to contact each other and discuss Heitkemper's requests. The administrator informed the parties that the District Court would "hear the parties' respective positions" at a status conference set for December 3, 2014.

¶9 On December 3, 2014, the District Court held Heitkemper's sentencing hearing. Before sentencing, the court gave the prosecution, Heitkemper's attorney, and Heitkemper individual opportunities to speak. No mention was made of Heitkemper's letter. In addressing the court, Heitkemper stated, "I do regret my actions"; "I'm taking responsibility"; and "I'm asking, and my attorney is also asking, for this plea," but made no mention of the concerns and requests expressed in his letter. The District Court sentenced Heitkemper to twenty years in Montana State Prison with seven years suspended following completion of Phase I and II of the sex offender treatment program.

¶10 On July 9, 2015, Heitkemper filed a pro se motion to withdraw his guilty plea, which the District Court denied. Heitkemper claimed (1) he was under the influence of marijuana when he pled, and (2) his counsel persuaded him that taking the plea deal was Heitkemper's best chance at receiving a lesser sentence. The District Court found that the record directly contradicted Heitkemper's first assertion, and that the advice from Heitkemper's attorney was well within the range of acceptable assistance. The District Court concluded that Heitkemper failed to present any evidence that his attorney provided ineffective assistance or that his plea was involuntary.

¶11 A district court has discretion over a defendant's request for new counsel. This Court reviews the district court's decision for an abuse of discretion. *State v. Cheetham*, 2016 MT 151, ¶ 13, 384 Mont. 1, 373 P.3d 45.

¶12 "Criminal defendants have a fundamental right to effective assistance of counsel." *State v. Aguado*, 2017 MT 54, ¶ 23, 387 Mont. 1, 390 P.3d 628 (citing U.S. Const. amend. VI and Mont. Const. art. II, § 24). "When a defendant alleges denial of effective assistance of counsel and requests appointment of new counsel, a district court must conduct an adequate initial inquiry [to] determine whether the allegations are seemingly substantial." *State v. Edwards*, 2011 MT 210, ¶ 29, 361 Mont. 478, 260 P.3d 396.

¶13 An inquiry is "adequate so long as the 'court considers the defendant's factual complaints together with counsel's specific explanations addressing the complaints.'" *State v. Schowengerdt*, 2015 MT 133, ¶ 17, 379 Mont. 182, 348 P.3d 664 (citing *State v. Rose*, 2009 MT 4, ¶ 96, 348 Mont. 291, 202 P.3d 749). The defendant bears the burden to present "material facts" establishing "(1) 'complete collapse of the attorney-client relationship'; (2) 'total lack of communication'; or (3) 'ineffective assistance of counsel [IAC].'" *Edwards*, ¶ 32; *Aguado*, ¶ 24 (citing *Cheetham*, ¶ 19). "Bare, unsupported assertions do not suffice." *Edwards*, ¶ 32 (citing *State v. Kaske*, 2002 MT 106, ¶ 30, 309 Mont. 445, 47 P.3d 824).

¶14 An inquiry is inadequate if the "district court fails to conduct 'even a cursory inquiry.'" *Schowengerdt*, ¶ 17 (citing *State v. Happel*, 2010 MT 200, ¶ 14, 357 Mont. 390, 240 P.3d 1016). While a district court's failure to conduct a cursory inquiry that considers the defendant's factual complaints is reversible error, "reversal is only

necessitated when the defendant's conflict with counsel [i]s sufficient to require substitution at the time the request [i]s made." *Edwards*, ¶ 30.

¶15 The District Court conducted an adequate initial inquiry. Upon receipt of Heitkemper's letter, the administrator sent copies to both Heitkemper's attorney and the prosecution. The court requested the parties contact each other and discuss Heitkemper's requests, with the opportunity to express their respective positions before the court at the status conference. While the status conference doubled as Heitkemper's sentencing hearing, the court gave each party, including the defendant, the opportunity to speak before sentencing. At no point did Heitkemper, Heitkemper's attorney, or the prosecution raise concern about effectiveness of counsel or present material facts establishing a complete breakdown of the attorney-client relationship. Heitkemper instead voiced "regret" for his actions and stated that he and his attorney were both asking for the plea, suggesting continued cooperation and communication to the District Court.

¶16 Furthermore, Heitkemper's letter contained bare unsupported assertions regarding whether his plea was voluntary. The sole material fact Heitkemper asserted, that he was under the influence of marijuana, is not supported in the record. There was a signed comprehensive written plea agreement and later a colloquy with the District Court.

¶17 The District Court did not abuse its discretion. The District Court gave all parties, including Heitkemper, the opportunity to speak openly at the sentencing hearing. Heitkemper bore the burden to present material facts supporting his claims, yet voiced

none. The District Court was well within its discretion to deny Heitkemper's pro se motion to withdraw his guilty plea.

¶18 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.

¶19 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ JIM RICE