DA 16-0614

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 226N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

THOMAS EMIL SLIWINSKI,

Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause Nos. BDC 2003-14 and BDC 2003-133
Honorable DeeAnn Cooney, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Colin M. Stephens, Smith and Stephens, P.C., Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Jonathan M. Krauss, Assistant Attorney General, Helena, Montana

Leo J. Gallagher, Lewis and Clark County Attorney, Helena, Montana

Submitted on Briefs: August 1, 2018

Decided: September 11, 2018

Filed:

Justice James Jeremiah Shea 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, 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 Thomas Emil Sliwinski appeals the Order of the First Judicial District Court, Lewis and Clark County, revoking Sliwinski's previously-suspended sentence and entering an amended judgment based on its finding that he failed to adhere to sentencing conditions. We affirm.

¶3 On January 21, 2003, the State charged Sliwinski with sexual intercourse without consent, in violation of § 45-5-503, MCA, for engaging in sexual activity with his then-fourteen-year-old step-daughter. On March 10, 2003, Sliwinski pled guilty to criminal endangerment, in violation of § 45-5-207, MCA. On October 28, 2003, the District Court imposed a ten-year suspended sentence for the charge of criminal endangerment. On May 7, 2004, following a bench trial, Sliwinski was convicted of tampering with or fabricating evidence, in violation of § 45-7-207(1)(a), MCA. On May 27, 2004, the District Court imposed a five-year suspended sentence for the offense of tampering with or fabricating evidence to run consecutively to the ten-year sentence. As part of the conditions of his sentences, Sliwinski was to register as a sex offender, attend sex-offender treatment with a Montana Sex Offender Treatment Association (MSOTA) provider, and comply with all treatment recommendations. Sliwinski then began treatment with MSOTA provider Kevin Wyse.

¶4 Around June 14, 2004, Wyse terminated Sliwinski's treatment. Wyse informed Sliwinski's probation officer, Cathy Murphy, that Sliwinski was a very manipulative offender and was not complying with treatment. Wyse observed that Sliwinski lacked motivation to change, manipulated the therapeutic process to avoid incarceration, and refused to stop living with his victim and minor children. Sliwinski alleged it was not dangerous for him to live in the home with his victim or other minor children, and that he was actively seeking treatment under the direction of another therapist.[1]

¶5 The State moved to revoke Sliwinski's suspended sentences. Leading up to the revocation hearing, there was no evidence Sliwinski was engaging in sex-offender treatment or was in compliance with his probation conditions. Sliwinski was still living with his victim and family members, including underage children. Sliwinski failed to appear at the revocation hearing and the District Court issued an arrest warrant. Sliwinski absconded to Mexico with his victim and minor children, where he lived as a fugitive for over ten years.[2] Ultimately, Sliwinski was apprehended by Mexican authorities and brought back to Montana.

¶6 On February 4, 2016, the District Court set a hearing for the revocation proceedings. Sliwinski moved for a continuance, the State did not object, and the District Court ordered

[1] Based on the correspondence between Wyse and Murphy, Murphy had not discussed, let alone approved, Sliwinski's transfer to another therapist. Additionally, the treatment provider Sliwinski sought out made a referral to the Department of Family Services because Sliwinski, a sex offender, was "living with all those underage kids." Sliwinski also sought treatment from another provider in Great Falls, but she too would not accept Sliwinski into treatment because he refused to stop living with his victim and minor children.

[2] Sliwinski appealed his convictions directly to this Court. However, this Court dismissed the direct appeal with prejudice after Sliwinski absconded.

the hearing continued for thirty-five days. On March 10, 2016, when Sliwinski next appeared, he asked for an additional continuance. The District Court denied Sliwinski's request, concluding:

> It seems like a fairly clear-cut discussion . . . if there is either evidence that [Sliwinski] was in sex offender treatment or was not. . . .
>
> . . .
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> The issue seems really clear to me that there was an allegation that [Sliwinski] was in violation of the terms of the probation. He didn't show up to actually dispute that. He left.

At the hearing, probation officer Annette Carter testified about the presentence investigation she and Murphy prepared and about Sliwinski's history of participation and compliance with sex offender treatment with Wyse. Sliwinski did not object to Carter's testimony. The District Court determined "that Mr. Sliwinski did, in fact, violate the conditions of the suspended sentence." The District Court stated that the record, including the testimony of Carter and the letter from Wyse, "make[s] it clear that [Sliwinski] did not complete . . . [or] comply with the condition that he attend sex offender treatment, and he was not around for the next [twelve] years to . . . either refute that or to . . . show that he did so." With the consent of the State, the District Court allowed a second continuance of one week for defense counsel to consult with Sliwinski to determine whether he wanted to testify and provide "an explanation as to what happened or [offer] some further insight."

¶7 On March 17, 2016, the District Court reconvened the proceeding. Sliwinski lodged an after-the-fact objection regarding Carter's "double or triple hearsay" testimony, argued he had not been given access to Wyse's records, and argued he should be given time to hire

another expert to testify regarding whether Sliwinski should have been terminated from sex offender treatment. Sliwinski's counsel indicated that Sliwinski wanted to testify, but did not because defense counsel was not "adequately prepared to question [Sliwinski]." The District Court revoked the previously-imposed suspended sentences.

¶8 On July 27, 2016, the District Court held a sentencing hearing and sentenced Sliwinski in open court. On August 22, 2016, the District Court entered amended judgments and commitments ordering Sliwinski be sentenced to Montana State Prison for ten years on the charge of criminal endangerment and five years suspended on the charge of tampering with or fabricating physical evidence, to run consecutively. Sliwinski appeals.

¶9 This Court reviews a district court's revocation of probation for an abuse of discretion. *State v. Graves*, 2015 MT 262, ¶ 12, 381 Mont. 37, 355 P.3d 769 (citing *State v. Lundquist*, 251 Mont. 329, 331, 825 P.2d 204, 205 (1992)); *State v. Lange*, 237 Mont. 486, 490–91, 775 P.2d 213, 216 (1989) ("[a] judge [or her successor] . . . who has suspended the execution of a sentence under . . . § 46-18-201, MCA . . . is authorized in [her] discretion to revoke the suspension or impose sentence and order the person committed. . . ."); § 46-18-203(1), MCA. This Court reviews a district court's ruling on a motion to continue for an abuse of discretion. *State v. Sebastian*, 2013 MT 347, ¶ 14, 372 Mont. 522, 313 P.3d 198; *State v. Clifford*, 2005 MT 219, ¶ 25, 328 Mont. 300, 121 P.3d 489. A claim of ineffective assistance of counsel involves a mixed question of law and fact which this Court reviews de novo. *State v. Rovin*, 2009 MT 16, ¶ 24, 349 Mont. 57, 201 P.3d 780.

¶10 "The standard for revocation of probation is whether the trial judge is reasonably satisfied that the conduct of the probationer has not been what he agreed it would be if he were given liberty." *Graves*, ¶ 12. At a revocation hearing, the State shall prove, "by a preponderance of the evidence, that there has been a violation of: the terms and conditions of the suspended or deferred sentence . . . ." Section 46-18-203(6)(a), MCA[3]; *Sebastian*, ¶ 14; *see also State v. Robinson*, 190 Mont. 145, 149, 619 P.2d 813, 815 (1980) ("[a] revocation proceeding is not a criminal adjudication and does not require proof of a new criminal offense to justify revocation since it merely cancels a prior act of grace. . . ."). If a district court finds the offender "has violated the terms and conditions of the suspended or deferred sentence and the violation is not a compliance violation" the district court may "revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed. . . ." Section 46-18-203(7), MCA; *see also* § 46-18-203(11)(b), MCA (defining "compliance violation" as "a violation of the conditions of supervision that is not . . . (iv) absconding; or (v) failure to enroll in or complete a required sex offender treatment program or a treatment program designed to treat violent offenders. . . .").

¶11 Although the United States and Montana Constitutions protect individuals from state action that would deprive them of life, liberty, or property without due process of law, U.S. Const. Amend. XIV, § 1; Mont. Const. art. II, § 17; *Sebastian*, ¶ 17, a probationer's

[3] On appeal, Sliwinski concedes that the current MCA version applies in this case and that the District Court is allowed to retroactively revoke the five-year consecutive suspended sentence that Sliwinski had not yet begun to serve at the time of his revocation. *See Graves*, ¶ 14.

right to due process in a revocation proceeding is different from the right to due process in a criminal proceeding, *Sebastian*, ¶ 19. A probationer is entitled to notice of alleged violations leading to the petition to revoke, disclosure of evidence against the probationer, the opportunity to be heard in person and to present evidence, the right to cross-examine adverse witnesses, a neutral arbiter, and a written statement of the evidence relied upon by the arbiter with the reason for the probation revocation. *Graves*, ¶ 21; *see also Sebastian*, ¶ 18. The Montana Rules of Evidence do not apply to probation revocation hearings. *Sebastian*, ¶ 19.

¶12 A district court must consider a motion for continuance "in light of the diligence shown by the moving party" and both parties' right to, and interest in, a speedy trial. *State v. Holm*, 2013 MT 58, ¶ 28, 369 Mont. 227, 304 P.3d 365 (citing § 46-13-202(3), MCA).

¶13 In assessing claims of ineffective assistance of counsel, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861; *State v. Colburn*, 2018 MT 141, ¶ 21, 391 Mont. 449, 419 P.3d 1196. The first prong of the *Strickland* test requires the defendant to show that his counsel's performance was deficient. *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064. To demonstrate that counsel's performance was deficient, the defendant must prove that counsel's performance fell below an objective standard of reasonableness. *Whitlow*, ¶ 14; *Bishop v. State*, 254 Mont. 100, 103, 835 P.2d 732, 734 (1992). The second prong of the *Strickland* test requires the defendant to prove that his counsel's deficient performance prejudiced the defense. *Whitlow*, ¶ 10; *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064. To show prejudice, the defendant alleging

ineffective assistance of counsel must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Stock v. State*, 2014 MT 46, ¶ 24, 374 Mont. 80, 318 P.3d 1053 (internal citations omitted). Decisions regarding the timing and number of objections "generally lie within counsel's tactical discretion . . . ." *State v. St. Germain*, 2007 MT 28, ¶ 42, 336 Mont. 17, 153 P.3d 591.

¶14 On appeal, Sliwinski argues (1) the District Court erred when it denied Sliwinski's counsel's Motion for Continuance of the revocation hearing because counsel was not prepared to proceed, and (2) that his counsel was ineffective for failing to be prepared for the revocation proceedings. We disagree.

¶15 Sliwinski clearly failed to comply with required conditions of his probation, namely his sex offender treatment and his MSOTA provider recommendations. He does not dispute this non-compliance. Before he absconded from supervision, Sliwinski was not reporting for any sex offender treatment. As the District Court correctly noted, the issue of Sliwinski's violation of the sex-offender-treatment condition was "fairly clear-cut" depending only on whether there was "evidence that [Sliwinski] was in sex offender treatment or was not." Sliwinski was granted a thirty-five day continuance and an additional week continuance following the State's presentation of the evidence. Even without the additional continuance, Sliwinski had the opportunity to offer evidence that he was participating and in compliance with sex offender treatment. *See Graves*, ¶ 21; *Sebastian*, ¶ 18. He did not.[4] Sliwinski's discontinuance of sex offender treatment—and

[4] Sliwinski's argument that he was diligent and should have been afforded additional time is further belied by the record leading up to the initial revocation hearing. *See Holm*, ¶ 28. In advance of

probation violation—was established by a preponderance of the evidence at the revocation hearing by Wyse's Treatment Termination Letter and Carter's testimony. *See Sebastian*, ¶ 14; § 46-18-203(6)(a), MCA. The District Court did not abuse its discretion when it denied Sliwinski's Motion for Continuance and revoked his previously-suspended sentence. *See Graves*, ¶ 12; *Sebastian*, ¶ 14; § 46-18-203(7), MCA.

¶16 Sliwinski's claim of ineffective assistance of counsel is similarly unpersuasive. Sliwinski argues that his counsel was ineffective by failing to be more prepared, failing to secure witnesses who could have offered direct testimony potentially rebutting Carter's "recited hearsay," and failing to object to Carter's testimony on hearsay or due process grounds. Sliwinski's counsel told the District Court he reviewed the entire record. Further, counsel did request additional time to prepare Sliwinski to testify and to secure additional witnesses. However, the District Court, in its discretion, denied those requests. The Montana Rules of Evidence do not apply to probation revocation hearings, *Sebastian*, ¶ 19, and though counsel did make after-the-fact hearsay objections to Carter's testimony, he was under no obligation to provide additional safeguards above and beyond what was reasonably expected for the circumstances. Moreover, such tactical decisions about which objections to make clearly lie within Sliwinski's counsel's reasoned discretion. *See St. Germain*, ¶ 42. Sliwinski also had notice of his alleged violations, saw the evidence against him, cross-examined adverse witnesses, and was provided with an oral and written

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the 2003 revocation hearing, and prior to Sliwinski absconding to Mexico, Sliwinski sought, and was provided with, a continuance and record discovery. Sliwinski also interviewed Murphy and Wyse for several hours in the presence of his stand-by counsel and the County Attorney.

statement justifying the District Court's decision to revoke. *See Graves*, ¶ 21; *Sebastian*, ¶ 18. This is all that is required under the statute and due process to revoke a previously-suspended sentence. *See Graves*, ¶ 21; § 46-18-203, MCA.

¶17 We are satisfied Sliwinski was afforded sufficient due process and that his counsel effectively assisted him throughout the proceedings. Sliwinski did not "overcome the presumption that his counsel acted in a reasonable, professional manner." *See Sellner v. State*, 2004 MT 205, ¶ 48, 322 Mont. 310, 95 P.3d 708. None of Sliwinski's claims against counsel satisfy the first prong of *Strickland*. *See Whitlow*, ¶¶ 10, 14.

¶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. We affirm.

/S/ JAMES JEREMIAH SHEA

We concur:

/S/ JIM RICE
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ INGRID GUSTAFSON