

DA 16-0702

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 147N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TYRONE EVERETT PAYNE,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC 13-428
Honorable Robert L. Deschamps, III, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Briana E. Kottke, Stack & Kottke, PLLC, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant
Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Ryan Mickelson, Deputy
County Attorney, Missoula, 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 Tyrone Everett Payne (Payne) appeals an October 20, 2016 order from the Fourth Judicial District Court, Missoula County, revoking his sentence. We affirm.

¶3 On January 6, 2014, Payne entered an "Alford" plea for Failure to Give Notice of Change of Address by a Sexual or Violent Offender. The District Court then sentenced him to the Montana State Prison for three years, with credit for 147 days served and the remainder to be suspended and unsupervised probation. On March 14, 2014, the State filed its first Petition to Revoke alleging Payne violated his terms of probation. The District Court revoked Payne's sentence and re-imposed the fully suspended three-year term to Montana State Prison with credit for 156 days served, but required supervised probation. On September 18, 2015, the State filed a second Petition to Revoke based on probation violations. The District Court once again revoked Payne's probation, imposed a three-year suspended sentence, and ordered all previous conditions re-imposed. On August 25, 2016, the State filed its third Petition to Revoke based on new probation violations which included indecent exposure, methamphetamine use, and failure to report to probation officer. On September 28, 2016, the District Court held an evidentiary hearing. The

District Court found Payne in violation of conditions #5 (failing to check in with probation officer), #9 (laws and conduct), and #10 (admission of methamphetamine use). The District Court determined the State failed to prove alleged violation under condition #13 (failure to obtain chemical dependency evaluation). On October 4, 2016, in open court, the District Court revoked Payne's sentence and sentenced him to three years in Montana State Prison with no time suspended and credited him for 364 days in custody. The District Court issued its order setting forth Payne's sentence on October 20, 2016. Payne appeals from this order.

¶4 We review a district court's decision to revoke a suspended sentence to determine whether the court's decision was supported by a preponderance of the evidence and, if it was, whether the court abused its discretion. *State v. Goff*, 2011 MT 6, ¶ 13, 359 Mont. 107, 247 P.3d 715 (citations omitted). Whether the district court violated a probationer's due process rights is a question of law for which our review is plenary. *State v. Baird*, 2006 MT 266, ¶ 15, 334 Mont. 185, 145 P.3d 995 (citation omitted).

¶5 Payne argues the evidence does not establish the probation violations found by the Court. We disagree. Review of the record shows uncontroverted evidence Payne missed a meeting with his probation officer on June 2, 2016, engaged in conduct constituting indecent exposure including sitting half-naked on a bench not wearing any pants when encountered by an officer, and admitted use of methamphetamine. We conclude the District Court's decision to revoke Payne's sentence was supported by a preponderance of the evidence and revocation was not an abuse of discretion.

¶6 Payne also asserts the District Court violated his substantive and procedural due process rights when it allowed introduction of evidence in violation of the hearsay rule and found he committed the offense of disorderly conduct. Payne raises these issues for the first time on appeal. We generally refuse to consider issues presented for the first time on appeal because 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). Nonetheless, we conclude the District Court did not violate Payne’s due process rights.

¶7 Payne argues the District Court erred when it allowed the supervising probation officer to testify regarding hearsay evidence. The Montana Rules of Evidence do not apply to a probation revocation hearing. M. R. Evid. 101(c)(3); *see also State v Gillingham*, 2008 MT 38, ¶ 26, 341 Mont. 325, 176 P.3d 1075. Therefore, the State’s witnesses could testify regarding hearsay evidence. Payne further argues allowing the supervising probation officer to testify to the beliefs and actions of out-of-court accusers over his objection violated his right to confront witnesses. Payne does not deny that he was able to confront and cross-examine adverse witnesses, rather he objects to the inability “to confront and cross-examine his accusers.” The minimum due process requirement for revocation hearings is “the right to confront and cross-examine adverse witnesses,” not accusers. *State v. Megard*, 2004 MT 67, ¶ 23, 320 Mont. 323, 87 P.3d 448, *vacated by State v. Megard*, 2006 MT 84, 332 Mont. 27, 134 P.3d 90 (holding the district court erred in amending the

judgments after a year and a half to reduce the defendant's credit for time served). The record reflects Payne was allowed to confront and cross-examine the State's witnesses.

¶8 Lastly, Payne argues the District Court improperly prosecuted him for disorderly conduct. However, the District Court's comment regarding the disorderly conduct was unnecessary to the decision. The facts relied upon by the District Court clearly supported Payne's violations of probation condition #9. Furthermore, the record reflects the District Court did not impose judgment for the offense of disorderly conduct, but rather for indecent exposure. Therefore, we conclude Payne's due process rights were not violated because the revocation hearing was fundamentally fair and met the minimum due process requirements.

¶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. 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.

¶10 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA