

DA 17-0153

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 256N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CODY WAYNE JOHNSTON,

Defendant and Appellant.

APPEAL FROM: District Court of the Seventh Judicial District,
In and For the County of Richland, Cause No. DC 15-92
Honorable Elizabeth A. Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Koan Mercer, Assistant Appellate
Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Mardell Ployhar, Assistant
Attorney General, Helena, Montana

Mike Weber, Richland County Attorney, Sidney, Montana

Submitted on Briefs: September 19, 2018

Decided: October 16, 2018

Filed:



Clerk

Justice Jim Rice 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 Appellant Cody Wayne Johnston (Johnston) appeals the sentence imposed by the Seventh Judicial District Court, Richland County, for his convictions after jury trial of deliberate homicide and tampering with physical evidence. We affirm.

¶3 Johnston was sentenced to life plus 10 years in Montana State Prison for his crimes relating to the disappearance of Nicole Waller (Waller). Waller disappeared on February 14, 2013, after she and Johnston ended their romantic relationship. Her body was never found. At the sentencing hearing, the State maintained that "[S]omewhere out there rests the body of Nicole. The defendant knows exactly where she is, but he refuses to tell us." When imposing the sentence of life plus 10 years, the District Court stated, "This sentence that I intend to impose considers the severe and substantial impact the defendant's choices had on everyone, including Nicole Waller and her entire family. And the fact that he has chosen not to disclose where she is, even to this day, has done nothing to mitigate and actually has aggravated the pain and suffering for the family and the community." The written sentence similarly stated that the court considered "the severe and substantial impact of the Defendant's choice to commit homicide and subsequently hide the evidence

of the crimes, deny responsibility, and refuse to tell the family where the body of their loved one, Nicole Waller, can be found.”

¶4 Although Johnston maintained his innocence at sentencing, he does not challenge his conviction on appeal, and instead argues the District Court improperly relied on information related to his claim of innocence when imposing the sentence—that he failed to disclose the location of the victim’s body, and failed to show remorse for his actions. Additionally, Johnston challenges the court’s imposition of conditions of a suspended sentence when no portion of his sentence was suspended.

¶5 “This Court reviews a sentence for legality only.” *State v. Rennaker*, 2007 MT 10, ¶ 41, 335 Mont. 274, 150 P.3d 960 (citations omitted).

Consideration of silence and remorse in sentencing

¶6 Johnston argues the District Court imposed a longer sentence due to his failure to disclose the location of Waller’s body and his failure to show remorse. Before we turn to the issue of whether the court improperly based its sentence on these factors, we must determine three preliminary matters related to an appeal of this nature. *Rennaker*, ¶ 47. First, we must determine whether Johnston invoked his right to remain silent or maintained his innocence. *Rennaker*, ¶ 47. Here, Johnston did not expressly invoke his right to remain silent, but he maintained his innocence throughout the proceeding, testifying at his trial and sentencing hearing. During sentencing, he stated, “I pray for Nicole’s family. I pray that they find some peace. I pray every day that Nicole is found and brought home to her family. While saying that, I respectfully affirm my innocence and look forward to my

appeal of freedom.” See *Rennaker*, ¶ 47 (defendant testified at trial and sentencing hearing); *State v. Cesnik*, 2005 MT 257, ¶ 21, 329 Mont. 63, 122 P.3d 456 (defendant testified at trial and maintained his innocence).

¶7 “Secondly, if there is a conflict between the oral pronouncement of sentence and the subsequent written sentence, the oral pronouncement of sentence controls.” *Rennaker*, ¶ 48 (citations omitted). Here, the court’s oral pronouncement of the sentence and the later written judgement are similar in that they both mentioned Johnston’s failure to disclose the location of Waller’s body and his lack of remorse. Thus, because there is no conflict or omission between the two, no resolution is required.

¶8 Thirdly, we consider the evidence the District Court used to determine the sentence. *Rennaker*, ¶ 49. “[A] sentencing court can consider any evidence relevant to a defendant’s sentence, including evidence relating to the crime, the defendant’s character, background history, mental and physical condition, and any other evidence the court considers to have probative force.” *Rennaker*, ¶ 49 (internal quotations and citations omitted). Although “a court cannot sentence a defendant or augment a sentence based on a defendant’s refusal to confess to a crime,” it “can sentence a defendant based on lack of remorse.” *Rennaker*, ¶ 49 (citations omitted).

¶9 Here, the court received testimony from Johnston’s probation officer, Waller’s sister, and Johnston. It received and reviewed a statement from Waller’s daughter, letters from Waller’s parents, and the pre-sentence investigation report. The court orally stated that, in making its sentencing determination, it considered “the recommendations of the

state and the defendant and the recommendations of adult probation and parole,” Johnston’s “complex scheme to hide [Waller],” his “intent and criminal thinking,” the “severe and substantial impact the defendant’s choices had on everyone,” his “mild neurocognitive disorder caused by a traumatic brain injury,” his lack of criminal record, his education, and his consistent employment record. In addition to these considerations, the District Court mentioned Johnston’s statements to investigators in which he “deliberately deceived and misled them and the family . . . and continues to do so,” “the fact that he has chosen not to disclose where [Waller] is,” that Johnston had showed “no remorse whatsoever,” and “the position and input of the victims.” Thus, although the court mentioned Johnston’s lack of remorse and failure to disclose Waller’s body’s location, it did not give undue weight to either, and such considerations were among many factors and evidence on which the court based its sentence.

¶10 The District Court’s determination is distinguishable from *Rennaker*, ¶ 50, in which this Court reversed because the District Court stated that Rennaker’s lack of remorse and failure to acknowledge his conduct was “reason enough to send him to prison.” It is likewise distinguishable from *State v. Shreves*, 2002 MT 333, ¶¶ 11-12, 313 Mont. 252, 60 P.3d 991, in which we found the District Court’s imposition of a 100-year sentence and parole restriction was based on Shreves’ lack of remorse and refusal to admit to the crime, where Shreves had invoked his right to remain silent at the sentencing hearing. *See Shreves*, ¶ 13 (“[T]his decision is not based on the evidence presented to the District Court, but rather on the District Court’s decision to base its sentence in large part specifically on

Shreves' refusal to admit to the crime.”). As in *Rennaker* and *Shreves*, this Court reversed in *Cesnik*, where, after the defendant told his probation officer that his charges “should be dropped,” *Cesnik*, ¶ 24, the District Court was “dismayed” by Cesnik’s comment and “spent the remainder of the hearing commenting on the need to impose a sentence that would instill acceptance of responsibility in Cesnik.” *Cesnik*, ¶ 20. In contrast to these cases, the District Court here noted, among many other mentioned considerations, that Johnston showed no remorse and would not disclose the location of the body. The court did not dwell on these factors, or otherwise indicate its sentence was meant to impose a sense of responsibility or remorse in Johnston, or convince him to disclose the location of Waller’s body. Instead, the court considered them as a part of a “much larger assessment” of Johnston’s character. *See State v. Otto*, 2017 MT 212, ¶ 12, 388 Mont. 391, 401 P.3d 193. We conclude the District Court did not improperly consider Johnston’s refusal to disclose the location of the body or to admit guilt when imposing his sentence.

Conditions of suspended sentence

¶11 Next, Johnston argues the District Court erred by imposing conditions because his sentence did not allow for any suspended or deferred time. In its oral pronouncement, the court stated that “any deferred or suspended portions of [Johnston’s] sentence . . . are conditioned on the conditions of release shown on pages 14 through 16 of the presentence investigation report.” However, no part of Johnston’s life plus ten-year sentence was suspended or deferred, which the District Court acknowledged, stating that neither deferred or suspended portions “exist in this case.” We conclude the conditions imposed are simply

extraneous and harmless, because Johnston will never serve a probationary period. As such, further action to remove the conditions is unnecessary.

¶12 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.

¶13 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON