DA 17-0167

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 161N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TRACEY JADE JOHNSTON,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 16-209(A)
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Moses Okeyo, Assistant Appellate Defender, Helena, Montana

For Appellee:

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

Edward J. Corrigan, Flathead County Attorney, Stacy Boman, Deputy County Attorney, Kalispell, Montana

Submitted on Briefs: June 13, 2018

Decided: July 3, 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 non-citable cases published in the Pacific Reporter and Montana Reports.

¶2 Tracey Jade Johnston appeals the sentence he received following his conviction of felony possession of dangerous drugs. He argues the sentence was illegally premised upon a vacated conviction and that, alternatively, he received ineffective assistance of counsel (IAC). He also challenges the imposition of partial costs of the jury trial.

¶3 Outlined in his Presentence Investigation Report (PSI), Johnston has an extensive criminal history, with over forty misdemeanors and several felony convictions. In 2001, Johnston was arrested in the Seattle-Tacoma airport on outstanding warrants. Inebriated, he threatened to bomb the airport and provided details about how he would carry out the attack. A Washington jury convicted him of making bomb threats, a felony. The Washington Supreme Court remanded the case for a new trial due to inadequacies in the jury instructions. *State v. Johnston*, 127 P.3d 707, 713 (Wash. 2006). By then, Johnston had already competed his sentence, so he accepted an offer from the prosecution to plead guilty to a misdemeanor, and served no additional prison time. The PSI in the subject proceeding did not indicate that the original felony charge had been vacated, although Johnston so informed the District Court during sentencing:

The Court: What was your first felony conviction?

Johnston: Threats to bomb property.

The Court: And when was that?

Johnston: I wanna say it was 1998. It was overturned in appellate court by Washington State appellate court and court of appeals.

The Court: All right. Well, your criminal history shows a conviction for 2001.

Johnston: I don't know why it's still on my record like that. It should have been nixed from the record but it was over-turned by Washington State appellate court if somebody looks into it.

The Court: Okay.

¶4 In 2002, Johnston, again inebriated, threatened to kill patrons and bomb a casino in Washington. He pled guilty to a felony under Washington's bomb threat statute. In 2007, Johnston was convicted in Hill County, Montana, for felony driving under the influence (DUI). In 2015, Johnston committed the felony drug offense at issue here. In 2016, Johnston was charged with felony assault with a weapon, but the charge was later dismissed.

¶5 At sentencing, the District Court designated Johnston a persistent felony offender (PFO) due to his Hill County DUI conviction. Because Johnston's crime was non-violent, the District Court considered statutory alternatives to imprisonment, but declined to utilize them, reasoning:

> Turning to the 46-18-225 sentencing of nonviolent felony offenders, the Court does agree that . . . the Court can divert from the somewhat mandatory persistent felony offender sentencing in appropriate circumstances. But *based on this Defendant's criminal record, this is not an appropriate*

> *circumstance*. First, that the Defendant has not demonstrated he can remain law abiding in the community. That there is no evidence that his interests are better served somewhere else. The Defendant has had multiple opportunities for treatment which have not proven long-standing for the Defendant. There was no substantial ground tending to excuse or justify the offense of criminal possession of dangerous drugs. He did not act under strong provocation. Subsection E regarding restitution is immaterial. And that the offender has no prior history of conviction for a criminal act or if so has led a law abiding life for substantial period of time before the commission of the present crime. *I would note the Defendant has 42 prior misdemeanor . . . convictions. This is the Defendant's fourth felony offense. He has seven pending misdemeanors and one pending felony in front of this Court set to go to trial in February.* That the character and attitude of the offender indicate that he's . . . likely to commit another crime, I don't know about that. Mr. Johnston, you seem respectful to the Court but based on your criminal history I couldn't predict otherwise for the future. And I cannot say that your criminal conduct was the result of circumstances that are unlikely to reoccur. That you've not been found to respond quickly to correctional or rehabilitative treatment. And, obviously, imprisonment will create an excessive hardship on you and your family as would any other commitment.

(Emphasis added.) In its written sentence, the District Court made reference to this being Johnston's fifth felony. The District Court sentenced Johnston to five years in prison with no time suspended.

¶6 We review whether a constitutional right was violated at sentencing *de novo*. *State v. Simmons*, 2011 MT 264, ¶ 9, 362 Mont. 306, 264 P.3d 706 (citations omitted). We review a fine imposed in a sentence for legality, to determine whether it falls within the statutory parameter. *State v. Reynolds*, 2017 MT 317, ¶ 15, 390 Mont. 58, 408 P.3d 503.

¶7 The parties acknowledge the District Court was within its statutory authority, pursuant to § 46-18-501, MCA (2015),[1] to designate Johnston a PFO, given his Hill County

[1] The Legislature has since amended the PFO statutes.

felony DUI conviction. However, Johnston argues that his PFO sentence was predicated on materially false information, namely, the 2001 Washington felony bomb threat conviction that was overturned and pled down to a misdemeanor, thus violating his due process rights. Johnston notes that the District Court referenced "four" and "five" felonies in imposing sentence, when he has only three standing felony convictions. In light of Johnston's concession of the validity of his Hill County felony conviction, which makes his designation as a PFO mandatory, §§ 46-18-501 and -502, MCA, we understand Johnston's contention to be that the District Court's decision not to grant relief under § 46-18-225, providing alternatives for non-violent offenses, was predicated on materially false information.

¶8 Section 46-18-225, MCA, includes factors that guide a district court's consideration of sentencing alternatives, including whether:

> (f) the offender has no prior history of conviction for a criminal act or, if the offender has a prior history of conviction for a criminal act, the offender has led a law-abiding life for a substantial period of time before the commission of the present crime;

The sentencing court may also consider "any relevant evidence relating to the defendant's character, history and mental condition, and any evidence the court deems has 'probative force.'" *Simmons*, ¶ 11 (citations omitted). Due process guards against "a sentence predicated on misinformation" and requires that the defendant have an opportunity to "explain, argue and rebut any information which may" impact sentencing. *Simmons*, ¶ 11 (citations omitted). "Since due process does not guard against 'insignificant or non-prejudicial' misinformation introduced at sentencing, a defendant is under an

'affirmative duty' to show that the alleged misinformation is materially inaccurate or prejudicial before a sentence will be overturned by this Court." *Bauer v. State*, 1999 MT 185, ¶ 22, 295 Mont. 306, 983 P.2d 955 (citations omitted). Johnston argues the District Court improperly imposed sentence in reliance upon material misinformation, and he asks for a new sentencing.

¶9 Based on a review of the record, we conclude that Johnston's due process rights were not violated here by the District Court's consideration of two dismissed felony offenses and reference to "four" and "five" felonies. The District Court was permitted to consider the underlying factual allegations of the two dismissed felonies in imposing a sentence, and Johnston was given an opportunity to "explain, argue and rebut" that conduct. *See Simmons*, ¶ 11. The District Court provided a lengthy explanation of the reasons for not providing relief from the PFO sentence, only part of which was Johnston's significant criminal history. The exact number of felonies was not a material consideration, in light of his three standing felony convictions. The salient point was that Johnston's criminal history did not support an alternative sentence to prison, as Johnston had not "led a law-abiding life for a substantial period of time before the commission of the present crime[.]" Section 46-18-225(f), MCA. Also weighing against Johnston's due process claim is that his Hill County felony DUI required the District Court to sentence him as a PFO, §§ 46-18-501 and -502, MCA, which provided a sentencing range of five to one hundred years, § 46-18-502(1), MCA, with at least five years unsuspended, § 46-18-502(3), MCA. The District Court sentenced Johnston to the minimum of five years. Thus, his

sentence was not enhanced by the disputed information, and the District Court's reference to "four" and "five" felonies was not material or prejudicial.

¶10 Alternatively, Johnston argues his counsel rendered IAC by failing to provide the citation to the Washington Supreme Court decision overturning his conviction. To prevail on an IAC claim, the defendant must (1) demonstrate deficient performance by counsel and (2) establish prejudice such that there is a reasonable probability that, but for the deficiency, the results of the proceeding would have been different. *State v. Zink*, 2014 MT 48, ¶ 18, 374 Mont. 102, 319 P.3d 596 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Johnston has not established the result of his sentencing would have been different, given that he notified the District Court of the reversal, and given his substantial, undisputed criminal history. *See Zink*, ¶ 22. We conclude the IAC claim is without merit.

¶11 Finally, Johnston argues that the District Court erred when it imposed partial jury trial costs of $930.06 with his sentence, because he lacked the ability to pay. The District Court found Johnston "is unemployed with no assets and unknown child support debt," and thus waived fifty percent of the jury costs. At the sentencing hearing, Johnston testified that he has been unemployed for several years, has no income, no assets, and has an unknown amount of debt, including back child support.

¶12 A district court may require a convicted defendant to pay "costs of jury service" as a part of the defendant's sentence. Section 46-18-232(1), MCA. However, the court may not sentence a defendant to pay costs unless the defendant "is or will be able to pay them," taking into account the "financial resources of the defendant, the future ability of the

defendant to pay costs, and the nature of the burden that payment of costs will impose." Section 46-18-232(2), MCA. "It is clear that a sentencing court must question and determine the defendant's ability to pay fines, fees, surcharges, and costs prior to their imposition." *Reynolds*, ¶ 22.

¶13 The State argues "the record does not contain an adequate inquiry into or determination of Johnston's ability to pay the $930.06 jury trial costs imposed, as required by statute," and asks for a remand for an appropriate inquiry. We conclude the record sufficiently demonstrates Johnston's inability to pay, and we strike the condition requiring Johnston to pay $930.06 in jury trial costs from his sentence. The reminder of Johnston's sentence is affirmed.

¶14 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.

¶15 Affirmed in part and reversed in part.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR