

DA 17-0636

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 196N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KEVIN LEE ZIMMERMAN,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 13-0676
Honorable Russell C. Fagg, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Michael Marchesini, Assistant
Appellate Defender, Helena, Montana

For Appellee:

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

Scott Twito, Yellowstone County Attorney, Victoria Callender, Deputy
County Attorney, Billings, Montana

Submitted on Briefs: July 10, 2019

Decided: August 14, 2019

Filed:


Clerk

Chief Justice 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 Kevin Lee Zimmerman appeals his designation and sentence as a Persistent Felony Offender (PFO) by the Thirteenth Judicial District Court, Yellowstone County. We affirm in part and reverse in part.

¶3 On August 15, 2013, a Billings law enforcement officer encountered Zimmerman asleep in his running vehicle in the parking lot of a bar. When the officer attempted to wake Zimmerman, he noticed a baggie with white residue on the passenger's seat, a methamphetamine pipe on Zimmerman's lap, and an odor of alcohol. A preliminary breath test indicated that Zimmerman's blood alcohol concentration was 0.11, and the baggie field-tested positive for methamphetamine.¹ The State charged Zimmerman with DUI, a felony, or, in the alternative, operation of a motor vehicle by a person with an alcohol concentration of 0.08 or more (DUI per se), a felony. At the time he was charged, Zimmerman had nine previous DUI convictions. Zimmerman was also charged with criminal possession of dangerous drugs, a felony, and criminal possession of drug paraphernalia, a misdemeanor.

¹ A blood test later indicated that Zimmerman's blood alcohol concentration was 0.097.

¶4 The State filed a notice of its intent to have Zimmerman designated a PFO considering he had been released from custody on a prior felony DUI less than five years before, in conformity with the statutory definition of PFO. Zimmerman filed a motion to strike the PFO designation, which the District Court eventually denied. Following several continuances, Zimmerman's trial was scheduled for July 20, 2015. Zimmerman failed to appear for the trial and was charged with felony bail-jumping under a separate cause number. The State filed a notice of its intent to have Zimmerman designated a subsequent PFO² in the bail-jumping case if he was convicted in the initial DUI/drug possession case because he would then have committed a second felony within the five-year period delineated in the PFO statute. Alternatively, the State sought a subsequent PFO designation in the DUI/drug possession case if his conviction for bail-jumping came first.

¶5 On January 11, 2017, Zimmerman pleaded guilty to DUI per se and nolo contendere to criminal possession of dangerous drugs. At the same hearing, he pleaded guilty to bail-jumping. At an August 1, 2017 sentencing hearing, the District Court designated Zimmerman as a PFO and sentenced him to ten years in prison with five years suspended on the DUI per se and drug possession counts and ten years in prison with no time suspended for the bail-jumping count, to run consecutive with the other sentences. Zimmerman now appeals.

² An offender is a subsequent PFO if he or she commits a felony as a PFO and less than five years have elapsed between the present offense and the previous felony conviction or the offender's release from incarceration. Section 46-18-502(2), MCA. Section 46-18-502(2), MCA, mandates that a subsequent PFO be sentenced to the state prison for not less than ten years or more than one hundred years.

¶6 This Court reviews a criminal sentence imposing over one year of incarceration for legality. *State v. Moore*, 2012 MT 95, ¶ 10, 365 Mont. 13, 277 P.3d 1212. The District Court’s designation of Zimmerman as a PFO is a question of law that we review for correctness. *State v. Thomas*, 2019 MT 155, ¶ 5, 396 Mont. 284, ___ P.3d ___.

¶7 On appeal, Zimmerman challenges the District Court’s application of the 2015 PFO statute and asserts that he should have instead been sentenced pursuant to the 2017 PFO statute, which includes an ameliorative amendment to the PFO definition. Zimmerman was sentenced under § 46-18-501, MCA (2015), which defined a PFO as an offender that had one prior felony conviction within five years of the commission of the present offense or had been released from a commitment imposed for the prior felony conviction within the last five years. *Thomas*, ¶ 3. Between the time of Zimmerman’s offense and his sentencing, the 2017 Montana Legislature passed HB 133, which altered the definition of PFO. *Thomas*, ¶ 3. The new definition requires two predicate felony convictions before the State may seek a PFO designation. Further, one of the three felonies must be a sexual or violent offense. *Thomas*, ¶ 3; § 46-1-202(18), MCA (2017). Zimmerman does not fall within the reformed definition of PFO because none of his prior felonies were sexual or violent in nature. Accordingly, Zimmerman contends that he is entitled to a sentence under the ameliorative amendment because the 2017 change went into effect before he was sentenced.

¶8 This exact issue was recently addressed in *Thomas*. In that case, this Court upheld a PFO sentence under the 2015 statute even though the sentencing took place after the enactment of the 2017 amendment, based on the maxim that “prior law remains effective

for prior offenses.” *Thomas*, ¶ 10. *Thomas* clarified that the plain language of HB 133 “unquestionably provide[s] that the revisions enacted by the Act [do] not apply to offenses committed prior to July 1, 2017.” *Thomas*, ¶ 9; 2017 Mont. Laws ch. 321, §§ 43-44. Zimmerman’s offenses occurred in 2013 and 2015, well before July 1, 2017. Therefore, Zimmerman was properly sentenced under § 46-18-501, MCA (2015), and the ameliorative 2017 amendment does not apply.

¶9 The State concedes both of Zimmerman’s remaining issues on appeal. First, the State agrees with Zimmerman that the District Court erred when it ordered him to pay \$800 for the cost of assigned counsel and \$100 for other costs without first inquiring into his ability to pay. The court was statutorily required to conduct an inquiry into Zimmerman’s financial resources before ordering payment, which it failed to do. Section 46-8-113(3), (4) MCA; *Moore*, ¶ 11. Accordingly, the case is remanded with instructions to strike the costs in conditions 13(f) and (i) from the judgments in DC 13-0676 and DC 15-0705.

¶10 Additionally, the State assents that sentencing condition thirty-two was improperly imposed in both cases. In each judgment, condition thirty-two provides that Zimmerman is responsible for the minimum \$5,000 statutorily mandated DUI fine found in § 61-8-731, MCA (2013). In truth, § 61-8-731(1)(c), MCA (2013), provided for a minimum \$1,000 fine in a felony DUI case. At sentencing, Zimmerman opposed condition thirty-two on the basis that § 61-8-731, MCA (2013), no longer applied because his sentence was imposed under the PFO statute. The District Court orally imposed concurrent \$1,000 fines and crossed out condition thirty-two in the presentence

investigation report (PSI) with an “X.” However, in its written judgment in the two cases, condition thirty-two remained as it was written in the PSI. Zimmerman is correct that the court no longer had authority to impose a fine under § 61-8-731, MCA (2013), following his designation as a PFO. *State v. Johnson*, 2010 MT 288, ¶ 16, 359 Mont. 15, 245 P.3d 1113 (holding sentences imposed based on an offender’s status as a PFO replace the sentence for the underlying felony). Further, condition thirty-two in the bail-jumping judgment cites the DUI statute for authority as well. Yet, § 61-8-731, MCA (2013), provides no authority for imposition of a fine in a bail-jumping case. For these reasons, we reverse in part and remand to the District Court with instructions to strike condition thirty-two from both judgments.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues, of first impression, and does not establish new precedent or modify existing precedent.

¶12 Affirmed in part, reversed in part and remanded with further instructions.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ DIRK M. SANDEFUR

/S/ BETH BAKER

/S/ JIM RICE

Justice Beth Baker, concurring.

¶13 I dissented in *Thomas* and continue to believe that the 2017 PFO statute should apply to offenders sentenced after its effective date. Because *Thomas* is now the controlling law, however, I am bound by it and join the Court's Opinion today.

/S/ BETH BAKER