DA 18-0255

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 159N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JUSTIN CHARLES HERNANDEZ,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 16-444D
Honorable Dan Wilson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Lane K. Bennett, Attorney at Law, Kalispell, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Roy Brown, Assistant Attorney General, Helena, Montana

Travis R. Ahner, Flathead County Attorney, Kalispell, Montana

Submitted on Briefs: May 29, 2019

Decided: July 9, 2019

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 Justin Charles Hernandez appeals the sentence imposed by the Eleventh Judicial District Court, Flathead County, for his conviction, upon guilty plea, of the crime of sexual assault, in violation of § 45-5-502, MCA. Hernandez was originally charged in October 2016 with sexual intercourse without consent for allegedly engaging in sexual intercourse with his niece between January 1, 2014, and August 16, 2016, when she was about seven to eight years old. Pursuant to a plea agreement, Hernandez' charge was reduced to sexual assault, to which he pled guilty.

¶3 At Hernandez' sentencing hearing, and in accordance with the plea agreement, the State recommended that Hernandez be sentenced to a 40-year commitment in the Montana State Prison, with 20 years suspended and a 15-year parole restriction. In support of its recommendation, the State cited the nature of the offense, Hernandez' classification as a sexual addict, the effect of his crime on the victim's family, the wishes of the families regarding sentencing, and the burdens on the prison system. Hernandez recommended that his entire sentence be suspended and that he be placed on probation, describing the State's recommendation as "way too harsh" and based upon "parental hysteria[.]" The District

Court did not adopt the recommendations of either party, but, rather, sentenced Hernandez to a 40-year term in the Montana State Prison, with no time suspended and a 15-year restriction on parole eligibility. Hernandez appeals, arguing his sentence is illegal because it was based on retribution and constituted cruel and unusual punishment under the Montana and U.S. Constitutions, and, further, he was entitled to an exception to the mandatory minimum sentencing restriction under § 46-18-222(6), MCA.

¶4 As an initial matter, Hernandez did not make any objections to his sentence during the sentencing hearing, and does not argue entitlement to review of his sentence pursuant to *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). Indeed, it would appear that some of Hernandez' arguments are not reviewable under *Lenihan*, for they go to a sentence that is objectionable, not facially invalid. *See State v. Whalen*, 2013 MT 26, ¶¶ 19-22, 368 Mont. 354, 295 P.3d 1055. Consequently, we consider Hernandez' arguments to be a request to exercise plain error review of his sentence. *See State v. Coleman*, 2018 MT 290, ¶ 12, 393 Mont. 375, 431 P.3d 26 ("We may choose to review a claim under the common law plain error doctrine when a criminal defendant's fundamental rights are invoked and where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.")

¶5 This Court's appellate review of sentences beyond one year of incarceration is for legality, which "is limited to determining whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by

the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes. Whether a sentence is legal is a question of law, which we review de novo for correctness. A sentence is legal if it falls within statutory parameters and is constitutional." *State v. Martin*, 2019 MT 44, ¶ 12, 394 Mont. 351, 435 P.3d 73 (internal quotations and citations omitted).

Legality of Hernandez' sentence

¶6 Hernandez argues his sentence was illegal because it was "based solely on the perceived need of the paternal side of the victim's family for retribution," including a parole restriction not recommended by the pre-sentence investigation report. As Hernandez acknowledges, we have previously held that retribution is permissible as a sentencing factor. *State v. Kirkbride*, 2008 MT 178, ¶¶ 11-13, 343 Mont. 409, 185 P.3d 340 ("[t]he Court has repeatedly said retribution is a component of punishment"); *State v. Rickman*, 2008 MT 142, ¶¶ 24-27, 343 Mont. 120, 183 P.3d 49 (affirming a sentence based on statements by the victim's family, the pre-sentence investigation, the possibility for rehabilitation, the safety of the public, and retribution). However, the District Court, in light of the victim's family's strong advocacy, went to extra lengths to explain that Hernandez' sentence was not premised upon retribution, stating it was "not the job of a judge under our system of laws, bound by constitution, to impose a sentence that is driven by or based primarily upon a desire for vengeance[;]" rather, the "job of a judge is to do justice." The court provided its sentencing rationale, explaining it had considered the arguments, evidence, statements by the victim, the victim's family, and Hernandez, the

plea agreement, the impact on the victim, the need for "just punishment . . . commensurate with the seriousness of the offense," and the goal of Hernandez' self-improvement, restitution, rehabilitation, and reintegration back into the community. With regard to the parole restriction, the court stated that

> [Hernandez] will not be eligible for parole until he has served 15 years of that sentence for these reasons: The Defendant is a sexual addict who committed a crime that violated the humanity of a family member who trusted him, and although he is considered amenable to treatment his selection of such a young victim, when his sexual preferences indicate he should be attracted to adult women, demonstrate that he poses a risk to further victimize young girls, and the protection of society requires such a parole restriction.

¶7 The record reflects that the court's sentence was premised upon the facts of the case and upon Montana sentencing policies and procedures. Moreover, sentencing courts are not bound to follow the sentencing recommendations made by the State, and are afforded "broad discretion to consider various factors and holistically fashion sentences, including parole restrictions." *State v. Bull*, 2017 MT 247, ¶ 16, 389 Mont. 56, 403 P.3d 670; *see also State v. Garrymore*, 2006 MT 245, ¶ 27, 334 Mont. 1, 145 P.3d 946 (noting the "broad grant of discretionary authority" given to sentencing judges under § 46-18-202(2), MCA, "to impose parole eligibility restrictions on the enormous class of sentences which exceed a one-year term of imprisonment[.]").

Cruel and unusual punishment

¶8 Article II, Section 22 of the Montana Constitution and the Eighth and Fourteenth Amendments to the United States Constitution prohibit cruel and unusual punishment,

State v. Johnson, 2002 MT 251, ¶ 14, 312 Mont. 164, 58 P.3d 172 (*overruled in part by State v. Herman*, 2008 MT 187, ¶ 12, 343 Mont. 494, 188 P.3d 978), which includes sentences that are disproportionate to the crime committed. *State v. Wardell*, 2005 MT 252, ¶ 13, 329 Mont. 9, 122 P.3d 443. A sentence that falls within the statutory guidelines generally does not violate the constitutional prohibitions against cruel and unusual punishment. *Wardell*, ¶¶ 13, 28. However, where "a sentence is so disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice, it constitutes cruel and unusual punishment." *Wardell*, ¶ 28 (internal quotations and citation omitted).

¶9 Hernandez pled guilty to sexual assault of a minor, a crime which is punishable "by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years, unless the judge makes a written finding that there is good cause to impose a term of less than 4 years and imposes a term of less than 4 years, or more than 100 years and may be fined not more than $50,000." Section 45-5-502(3), MCA. The District Court sentenced Hernandez to 40 years in the Montana State Prison, none suspended, without the possibility of parole for 15 years. This sentence was well within statutory parameters. Further, the District Court noted the Defendant's sexual addiction, and found that the protection of society, particularly the risk he posed to young girls, required imposition of a parole restriction.

Mandatory minimum sentencing exception under § 46-18-222(6), MCA

¶10 Hernandez argues that he was entitled to an exception to the mandatory minimum pursuant to § 46-18-222, MCA, because the merits of his case "support local community treatment, rather than a prison treatment setting." Mandatory minimums for sentences of certain crimes, including sexual assault, are codified in § 46-18-222, MCA, which further provides, for purposes of the charge at issue here, that "restrictions on parole eligibility . . . do not apply if . . . the offense was committed under [§] 45-5-502(3)[,] [MCA] . . . and the *judge determines*, based on the findings contained in a psychosexual evaluation report . . . that treatment of the offender while incarcerated, while in a residential treatment facility, or while in a local community affords a better opportunity for rehabilitation of the offender and for the ultimate protection of the victim and society, in which case the judge shall include in its judgment a statement of the reasons for its determination." Section 46-18-222(6), MCA (emphasis added). The statute clearly places application of the exception to a mandatory minimum sentence in the District Court's discretion. Moreover, to apply the exception recommended by Hernandez, the court would have had to find that one of the alternatives listed in § 46-18-222(6), MCA, afforded a "better opportunity for rehabilitation" while also protecting the victim and society. To the contrary, the District Court found Hernandez posed a future danger to children because Hernandez was a sexual addict who, though amenable to treatment, acted to select "such a young victim" when his sexual preferences, based on Hernandez' sexual offender evaluation, indicated that "he should be attracted to adult women[.]"

¶11 None of the above arguments raised by Hernandez demonstrate his fundamental rights were implicated such that failure to review the claimed errors may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. Further, in *Whalen* ¶ 21, we held we would not review a cruel and unusual punishment claim raised for the first time on appeal where the defendant "did not contend a statute was facially unconstitutional." Hernandez' arguments include no such facial challenge to the sentencing statute. Based on consideration of the record, we conclude that the District Court did not commit plain error requiring review.

¶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/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA