DA 18-0565

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 277N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES JESSE JOHNSON,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 07-458(b)
Honorable Robert B. Allison, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

William F. Hooks, Law Office of William F. Hooks, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Anna Saverud, Assistant Attorney General, Helena, Montana

Travis R. Ahner, Flathead County Attorney, John Donovan, Deputy County Attorney, Kalispell, Montana

Submitted on Briefs: October 23, 2019

Decided: November 26, 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 In 2008, James Jesse Johnson (Johnson) pled guilty to Sexual Assault, a felony, and was sentenced to the Montana State Prison for a period of twenty years with twelve years suspended, subject to conditions. On September 25, 2015, Johnson was released from the Montana State Prison, and he was discharged to the suspended portion of his sentence, subject to the imposed conditions of supervision. Condition #23 provided that, "The Defendant must continue with an approved sexual offender counseling (aftercare or otherwise) for the entirety of the supervision period, at his own cost, *if deemed necessary by his supervising officer and sex offender therapist.*" (Emphasis added.)

¶3 According to the Report of Violation prepared by Johnson's probation and parole officer and filed with the court, on March 14, 2016, Johnson was terminated from his sexual offender treatment by his counselor because the counselor believed Johnson "has no insight or remorse for his actions, cannot recognize the impact of his behavior on others and could not take his group's feedback without defensiveness." The Report stated that Michael Price, Johnson's probation officer at the time of the 2016 termination from treatment, gave Johnson the opportunity to find another treatment program "in lieu of a revocation."

Johnson was then accepted into a second sexual offender treatment program, which he attended until he was terminated in February 2018. On March 2, 2018, the State filed a petition for revocation of Johnson's suspended sentence, alleging Johnson violated the conditions of his suspended sentence by failing to continue with sexual offender treatment.

¶4 At the revocation hearing, the State's only witness was Johnson's second parole and probation officer, Sarah Reil, who testified to the violations set forth in the Report of Violation that she prepared. With regard to Condition #23, Reil provided the following testimony under questioning by the county attorney:

> Q. And as part of Mr. Johnson's suspended sentence was he required to be enrolled in sex offender treatment?
>
> A. Yes.
>
> Q. And at the time of this report was Mr. Johnson in compliance with that condition of his probation?
>
> A. No, he was not.
>
> . . .
>
> Q. And then in—in February of 2018 what happened regarding Defendant's sex offender treatment at South Central Treatment Associates?
>
> A. He was terminated February 15th of 2018.
>
> . . .
>
> Q. And at that time did Mr. Johnson seem to be having trouble with the sex offender treatment and in his participation?
>
> A. Yes.
>
> Q. And what were those troubles?

> A. Well, for some of it he—and I'm going to—can I refer to the Termination Report I have from South Central.
>
> Q. Yes, its attached to the Report of Violation.
>
> A. . . . .[T]o clarify, he was on a zero—kind of a zero tolerance policy with South Central because he had been terminated from sex offender with Lisa Hjelmstad as well, so he was on a zero tolerance contract with them, but he had started kind of—in the report here it says making decisions and not asking permission.
>
> You know, he was noncompliant in group on a couple of occasions, and then, you know, he had actually—and its quoted here, but in his departing from his therapist he said "I'm tired of your shit" followed by "I'll go back to prison." So I think at that point they had reached the conclusion to terminate him from treatment.

¶5 At the hearing, Johnson argued the requirement for sexual offender treatment in Condition #23 was contingent on both the "supervising officer and sex offender therapist" deeming it necessary, and that the State had not presented evidence that this requirement had been triggered by Johnson's supervising officer and therapist prior to the alleged violation. The District Court rejected the argument and revoked Johnson's suspended sentence, from which Johnson appeals.

¶1 "The standard for revocation of a suspended or deferred sentence is whether the trial judge is reasonably satisfied that the conduct of the probationer has not been what the probationer agreed it would be if the probationer were given liberty. We review a district court's decision to revoke a deferred or suspended sentence to determine whether the court's decision was supported by a preponderance of the evidence in favor of the State and, if it was, whether the court abused its discretion." *State v. Goff*, 2011 MT 6, ¶ 13, 359 Mont. 107, 247 P.3d 715 (citation omitted). "A preponderance of the evidence is 'such

evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.'" *State v. Sebastian*, 2013 MT 347, ¶ 16, 372 Mont. 522, 313 P.3d 198. "A district court abuses its discretion when it 'acts arbitrarily without conscientious judgment or exceeds the bounds of reason.'" *State v. Richardson*, 2000 MT 72, ¶ 24, 299 Mont. 102, 997 P.2d 786. ". . . [P]lenary review is applied to whether a court violated a probationer's constitutional right of due process." *State v. Triplett*, 2008 MT 360, ¶ 13, 346 Mont. 383, 195 P.3d 819.

¶2 On appeal, Johnson argues the State failed to prove that Condition #23 had been triggered, and that Johnson's termination from therapy could not violate a condition that was not yet triggered. Specifically, Johnson argues the testimony presented by Reil does not prove whether Johnson's previous parole officer had deemed his sexual offender treatment necessary.

¶3 "The revocation hearing is not subject to the Montana Rules of Evidence. Mont. R. Evid. 101(c)(3). However, a probation revocation hearing must be fundamentally fair." *State v. Pedersen*, 2003 MT 315, ¶ 20, 318 Mont. 262, 80 P.3d 79; *see also State v. Macker*, 2014 MT 3, ¶ 15, 373 Mont. 199, 317 P.3d 150 ("The Rules of Evidence, including the hearsay rules, do not apply in revocation hearings. . . ."). Through the testimony of Reil, the State presented evidence that: upon Johnson's termination from his first treatment program, his provider deemed continued treatment necessary because of his lack of progress; Johnson's first parole officer allowed Johnson to continue sexual offender treatment "in lieu of revocation"; Johnson's second sexual offender treatment provider

deemed continued treatment necessary because of his risk of violating probation conditions; Johnson was terminated from treatment for noncompliance; and Johnson told his therapist "I'll just go back to prison" when he left treatment for the last time. Implicit within this evidence was that Johnson was under a continuing requirement to be in treatment—indeed, that's why he was enrolled in treatment in the first place—and no evidence was introduced that this requirement had ever been deemed unnecessary.

¶4 The District Court concluded that the evidence taken together showed that Johnson was not in treatment "of his own volition, I think he was required to do so by his probation officer," which was not beyond reason, given the evidence. We conclude the District Court's determination that Condition #23 had been violated was supported by a preponderance of the evidence, including the reports to which reference is permissible in a revocation proceeding, and that its determination to revoke the sentence was not an abuse of discretion.

¶5 Given the limited evidence on which his revocation was based, Johnson argues his substantive state and federal due process rights were violated. "A revocation hearing is not a criminal trial, but rather a hearing to establish whether or not a probation violation has occurred." *Pedersen*, ¶ 20. "In deference to State Court systems, the U.S. Supreme Court recognized and sought to 'preserve the flexible, informal nature of the revocation hearing, which does not require the full panoply of procedural safeguards associated with a criminal trial.'" *State v. Baird*, 2006 MT 266, ¶ 28, 334 Mont. 185, 145 P.3d 995; citing *Black v. Romano*, 471 U.S. 606, 613, 105 S. Ct. 2254, 2258 (1985); see also *Morrissey v. Brewer*,

408 U.S. 471, 480, 92 S. Ct. 2593, 2600 (1972). As discussed above, the District Court's finding that Condition #23 had been triggered was sufficiently supported by evidence. The record supports that there was a greater probability than not that Johnson's parole officer *and* sexual offender therapist deemed his treatment necessary. We conclude no constitutional violation occurred.

¶6 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. 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.

¶7 Affirmed.

/S/ JIM RICE

We concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON