

DA 18-0206

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 29N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ALAN FRANK COMBS,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC-04-244(c)
Honorable Heidi J. Ulbricht, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Alan Frank Combs, Self-represented, Deer Lodge, Montana

For Appellee:

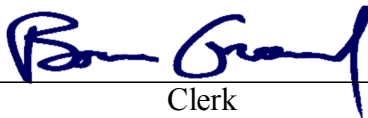
Timothy C. Fox, Montana Attorney General, Jonathan Krauss, Assistant
Attorney General, Helena, Montana

Travis R. Ahner, Flathead County Attorney, Andrew Clegg, Deputy County
Attorney, Kalispell, Montana

Submitted on Briefs: January 8, 2020

Decided: February 4, 2020

Filed:


Clerk

Justice Ingrid Gustafson 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 Alan Frank Combs (Combs) appeals from the Order Amending Sentence issued February 21, 2018, by the Eleventh Judicial District Court, Flathead County, the District Court's February 21, 2018 Order on Motion to Withdraw Plea, and this Court's April 23, 2018 order granting the Appellate Defender Division's motion to withdraw as counsel. We affirm.

¶3 Combs pled no contest to aggravated burglary and assault with a weapon and was sentenced in 2005. Since being sentenced, Combs has filed a direct appeal, for postconviction relief, and habeas proceedings. *See State v. Combs*, No. 05-720, 2007 MT 6N, 2007 Mont. LEXIS 4 (affirming judgment and rejecting Combs's motion to withdraw pleas and other issues); *State v. Combs*, No. DA 07-0405, 2008 MT 163N, 2008 Mont. LEXIS 232 (affirming denial of motions to withdraw pleas and dismiss judge); *Combs v. Castle*, No. OP 09-0250, 2009 Mont. LEXIS 829, Order (June 23, 2009) (denying petition for a writ of habeas corpus, in which Combs claimed ineffective assistance of counsel, coerced waiver of speedy trial, judicial misconduct, and witness tampering by his wife); *Combs v. State*, No. DA 10-0455, Order (Mont. Apr. 5, 2011) (dismissing Combs's appeal

from denial of habeas corpus relief); *Combs v. State*, No. DA 12-0392, 2013 MT 142N, 2013 Mont. LEXIS 173 (affirming denial of petition for postconviction relief as untimely); and *Combs v. Kirkegard*, No. OP 13-0653, 2013 Mont. LEXIS 517, Order (Oct. 30, 2013) (denying habeas relief based on claims of double jeopardy, rejecting the claim that Combs was entitled to withdraw his pleas, and precluding further consideration of whether Combs's pleas may be withdrawn).

¶4 In February 2017, Combs filed another petition for writ of habeas corpus in the Powell County District Court, alleging his Flathead County sentence was facially invalid because it imposed parole conditions when the court did not have statutory authority to do so. The State conceded and the Powell County District Court granted the writ and remanded the matter to the district court in Flathead County for resentencing. Upon remand, Combs, through counsel, filed a motion to withdraw plea and the District Court set an evidentiary and sentencing hearing. The State filed a response asserting the court was limited on remand to correct the illegal imposition of mandatory parole conditions, defense counsel was conditionally appointed for resentencing due to invalid parole conditions—not to reopen Combs's prior pleas, and claims to withdraw Combs's pleas were barred by this Court's multiple prior orders in postconviction and habeas proceedings. On February 21, 2018, the District Court concluded Combs was not entitled to seek withdrawal of his pleas as an amended judgment clarifying that the parole conditions contained in the original judgment were merely recommendations did not amount to a

judicial disposition giving rise to a new postconviction petition filing period. On that same day, the District Court also issued its Order Amending Sentence. Combs appealed.

¶5 After filing his appeal but before filing his initial appeal brief, Combs filed another habeas petition with this Court asserting many of the same challenges and authority he asserts in this appeal—the District Court lacked statutory authority to impose parole conditions; because the District Court did not resentence him in open court, the court’s amended sentencing order does not correct his invalid sentence in violation of §§ 46-18-102(1), 46-18-115, and 46-18-116(1), MCA. In this appeal, Combs further argues that prior to appropriate resentencing in open court he had the right to move for withdrawal of his pleas pursuant to § 46-16-105(2), MCA. In 2018, this Court considered these arguments and denied Combs’s Petition for Writ of Habeas Corpus, stating, in pertinent part:

The only relief to which Combs is entitled is to have a copy of the Flathead County District Court’s Order Amending Sentence sent to MSP Records Department. This relief does not include another complete sentencing hearing under Montana’s statutes. Although the Powell County District Court used the word, “resentencing,” it effectively returned the matter to correct any language concerning parole conditions. [*State v.*] *Heafner*, [2010 MT 87,] ¶ 10[, 356 Mont. 128, 231 P.3d 1087]. The Flathead County District Court has since corrected the illegal provision. *Heafner*, ¶ 11. In *Heafner*, this Court determined that “[t]he sentencing document should therefore accurately reflect the sentence and any applicable conditions.” *Heafner*, ¶ 11. Combs was convicted in 2005, and his 2005 prison sentence was and remains valid. The sentencing court, upon return of the writ, merely corrected its language to reflect a recommendation, rather than an order, for parole conditions. Combs is not entitled to an opportunity to appear in open court for resentencing because the recommended conditions are not new or more

punitive than before. *State v. Therriault*, 2000 MT 286, ¶¶ 43-46, 302 Mont. 198, 14 P.3d 444.

Combs v. Michael, No. OP 18-0654, 394 Mont. 389, 432 P.3d 703 (table) (Nov. 27, 2018).

¶6 After the Notice of Appeal was filed this Court granted the Appellate Defender Division’s motion to withdraw as appellate counsel. Combs asserts our granting of appellate counsel’s motion to withdraw was also error.

¶7 The State asserts “the law of the case and res judicata preclude consideration of Combs’ appeal raising the same challenges to the amended sentence which this Court has already finally decided.” With the exception of permitting appellate counsel to withdraw, we agree. The doctrine of res judicata prevents a party from relitigating a matter that the party has already had an opportunity to litigate. *Olympic Coast Inv., Inc. v. Wright*, 2005 MT 4, ¶ 26, 325 Mont. 307, 105 P.3d 743. Under the law of the case doctrine, a prior decision from this Court resolving an issue between the same parties is binding and may not be relitigated. *State v Wagner*, 2013 MT 47, ¶ 18, 369 Mont. 139, 296 P.3d 1142. Like res judicata, the law of the case doctrine is based on policies of judicial economy and finality of judgment. *Wagner*, ¶ 18. This Court has already decided the primary issues Combs raised on appeal—challenge to the denial of his motion to withdraw his pleas and challenge to the District Court’s resentencing procedure and Order Amending Sentence. As such, Combs is precluded from relitigating these issues.

¶8 We turn then to Combs’s assertion this Court erred in granting appellate counsel’s motion to withdraw. Upon remand to the Flathead County District Court, Combs was

appointed counsel for the limited matter of Combs's resentencing to correct the invalid parole restriction language contained in his judgment. Following the District Court's denial of Combs's motion to withdraw his pleas and its issuance of the Order Amending Sentence, Combs's counsel filed a Notice of Appeal and then a motion to withdraw as appellate counsel. Appellate counsel interpreted Combs's appeal from the order denying his motion to withdraw pleas as outside the scope of the conditional appointment.

¶9 Generally, this Court grants appellate counsel requests to withdraw after following the procedures set forth in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967) and § 46-8-103(2), MCA. Withdrawal of counsel regarding the withdrawal of plea issue appears to be correct because the issue exceeded the scope of counsel's remand appointment. However, regarding sentencing and the Order Amending Sentence, counsel did not file, and this Court did not require, an *Anders* brief or memorandum prior to granting counsel's motion to withdraw. Despite this, it is apparent from the record existing at the time appellate counsel moved for withdrawal that Combs had no nonfrivolous, meritorious appeal issues regarding his motion to withdraw his pleas or the District Court's resentencing procedure and Order Amending Sentence. We have now fully reviewed the record and find no nonfrivolous appeal issues. Thus, any error in prematurely granting appellate counsel's motion to withdraw was harmless.

¶10 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.

¶11 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH

/S/ LAURIE McKINNON

/S/ JAMES JEREMIAH SHEA

/S/ JIM RICE