

DA 18-0410

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 16

---

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ADRIAN DAVID OROPEZA,

Defendant and Appellant.

---

APPEAL FROM: District Court of the Nineteenth Judicial District,  
In and For the County of Lincoln, Cause No. DC-16-128  
Honorable Matthew J. Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, James Reavis, Assistant Appellate  
Defender, Helena, Montana

For Appellee:

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

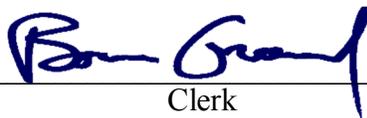
Marcia J. Boris, Lincoln County Attorney, Jeffrey Zwang, Deputy County  
Attorney, Libby, Montana

---

Submitted on Briefs: December 18, 2019

Decided: January 28, 2020

Filed:

  
Clerk

---

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Adrian David Oropeza appeals a Nineteenth Judicial District Court order revoking Oropeza’s deferred sentence for criminal possession of illicit drugs. We affirm.

¶2 We address the following issue on appeal:

*Whether the District Court abused its discretion when it revoked Oropeza’s deferred sentence after he failed to report to his probation officer for three months.*

## FACTUAL AND PROCEDURAL BACKGROUND

### Montana Criminal Justice Reform

¶3 In 2015, the State of Montana was suffering from prison overcrowding, high recidivism of first-time criminal offenders, and a growing impact of substance abuse on people in the state’s criminal justice system. Since 2008, state spending on corrections had increased by 16 percent, causing annual spending of approximately \$180 million. Governor’s Office, *Governor Bullock Signs Bills to Reform Montana’s Criminal Justice System*, State of Montana Newsroom (July 19, 2017), <https://perma.cc/KS7J-YGKR> [hereinafter *Criminal Justice Reform Bills*]. Further, the state’s prison population was projected to increase 13 percent by 2023, requiring additional spending of tens of millions of dollars for prison contract beds and hundreds of millions to construct and operate new prison facilities. Council of State Gov’t, *Justice Reinvestment in Montana: Report to the Montana Commission on Sentencing* 1-2 (2017), <https://perma.cc/Y7X3-EHP6> [hereinafter *Report to the Montana Commission on Sentencing*]. Among the primary causes of prison overcrowding included probation and

parole revocations. *Report to the Montana Commission on Sentencing*, at 3.<sup>1</sup> In June 2015, to address these problems, Montana’s Governor, the Chief Justice of the Montana Supreme Court, the Attorney General, members of the House of Representatives and Senate, and the Director of the Department of Corrections (“DOC”) requested intensive technical assistance from Montana’s Council of State Governments Justice Center to use a justice reinvestment approach in the state. *Report to the Montana Commission on Sentencing*, at 1. In addition, in April 2015, the Montana Legislature enacted S.B. 224 to establish a bipartisan, interbranch Commission on Sentencing (“Commission”) to study the state’s criminal justice system, review its findings, and discuss policy options. 2015 Mont. Laws ch. 343.

¶4 In 2017, based on the Commission’s findings, the Montana Legislature passed sweeping criminal justice reform legislation aimed at utilizing data driven decisions and evidence-based practices to reduce incarceration, statewide pressure on detention facilities, and the accompanying burden on taxpayers.<sup>2</sup> *Criminal Justice Reform Bills*. Included among these reforms, S.B. 59 required the DOC to adopt, maintain, and implement a policy known as the Montana Incentives and Interventions Grid for Adult Probation & Parole (“MIIG”) to guide community supervision of offenders. 2017 Mont. Laws ch. 390, § 5. In addition, S.B. 63 modified the process of revoking a probationer or defendant’s deferred or suspended sentence for violations of probation conditions.

---

<sup>1</sup> In 2015, 74 percent of prison admissions stemmed from revocations of supervision.

<sup>2</sup> Under these new policies, it is projected Montana will avoid spending \$69 million over the six years following implementation. *Report to the Montana Commission on Sentencing*, at 1.

2017 Mont. Laws ch. 391, § 1. In May 2017, Governor Bullock approved these reforms, codifying S.B. 59 as § 46-23-1028, MCA, and S.B. 63 as § 46-18-203(7) through (12), MCA. Probation and parole reforms are retroactively applied to all suspended and deferred sentences, regardless of the original conviction date. Section 46-18-203(12), MCA.

#### Montana Incentives and Intervention Grid for Adult Probation & Parole

¶5 The MIIG grid “provides a consistent approach for Probation & Parole Officers to provide interventions to offenders for compliance and non-compliance violations with the goal of promoting accountability and long-term behavioral change.” Montana Incentives/Intervention Grid for Adult Probation & Parole, Dep’t. of Corr. Prob. & Parole Div. Operational Procedure, Procedure No. PPD 6.3 101(A), at 2 (DOC May 29, 2018), <https://perma.cc/LM3R-2YLT> [hereinafter PPD 6.3 101(A)]. Officers consult MIIG to select either an incentive or intervention response based on the offender’s behavior, progress, targeted behavior, motivation to change, risk category, and case plan, considering any aggravating and mitigating circumstances. PPD 6.3 101(A), at 2. To encourage and reinforce an offender’s current desired behavior, officers select incentive responses that, in most cases, are temporary. PPD 6.3 101(A), at 3. Incentives are to be individualized, graduated, meaningful to the offender, and appropriate for the behavior being reinforced. PPD 6.3 101(A), at 2. However, when an offender has violated the conditions of his or her community supervision or rules of the probation or parole department facility, officers can use an intervention response, including verbal

reprimand, a case management response, an intervention hearing, conditional release or on-site hearing, short jail time, or report of violation. PPD 6.3 101(A), at 4.

¶6 Along with providing a host of case-specific incentive and intervention responses, the implementation of MIIG effectively bifurcated probation and parole condition violations into either compliance or non-compliance violations. Section 46-18-203(7) through (12), MCA. A compliance violation is any violation of a condition of supervision, save for five exceptions constituting non-compliance violations: a new criminal offense, possession of a firearm, harassing a victim or someone close to the victim, absconding, and failure to complete sex offender treatment. Section 46-18-203(11)(b)(i)-(v), MCA. Compliance violations no longer result in automatic revocation of a deferred or suspended sentence; instead, the offender is subject to the appropriate intervention or incentive response. Section 46-18-203(8)(a), MCA. However, an offender's probation or parole can be revoked for a compliance violation if three criteria have been met: (1) MIIG procedures have been exhausted, (2) violations have been documented, and (3) a probationer's conduct suggests he or she will be unresponsive to further MIIG efforts. Section 46-18-203(8)(c), MCA.

¶7 Conversely, non-compliance violations are not subject to MIIG procedures and revocation proceedings may occur directly. Section 46-18-203(7)(a)(iii), MCA. "Absconding" constitutes a non-compliance violation and is defined as "when an offender deliberately makes the offender's whereabouts unknown to a probation and parole officer or fails to report for the purposes of avoiding supervision, and reasonable efforts by the probation and parole officer to locate the offender have been unsuccessful."

Section 46-18-203(11)(a), MCA. If a judge determines that an offender has violated the terms and conditions of his or her suspended or deferred sentence and the violation is a non-compliance violation, the judge may: continue the suspended or deferred sentence without a change in the conditions; continue the suspended sentence with modified or additional conditions; revoke the suspended sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed if it is not a longer imprisonment or commitment than the original sentence; or impose any sentence that might have been originally imposed if the sentence was deferred. Section 46-18-203(7)(a)(i)-(iv), MCA.

Factual and Procedural History: Oropeza

¶8 On March 13, 2017, Oropeza pleaded guilty to Criminal Possession of Dangerous Drugs, a felony, pursuant to a plea agreement. In May 2017, the District Court accepted the plea agreement and sentenced Oropeza to a two-year deferred imposition of sentence, subject to twenty-four conditions of supervision. These conditions included requiring Oropeza to submit written monthly reports to his probation officer, mandating that Oropeza personally contact his probation officer at the officer's direction (condition five), and ordering Oropeza to abstain from using or possessing alcohol and illegal drugs and submit to testing for drugs or alcohol on a random or routine basis (condition ten).

¶9 On October 11, 2017, Darrell Vanderhoef, Oropeza's probation officer,<sup>3</sup> met with Oropeza at his home after learning he had visited the hospital because of an explosion. On the same day, Vanderhoef obtained a urine sample from Oropeza that tested positive for methamphetamine, marijuana, and opiates.<sup>4</sup> The sample was later confirmed by testing in a crime lab. Vanderhoef told Oropeza to report to him the next day. Oropeza did not report. On November 30, 2017, after still having had no contact with Oropeza, Vanderhoef attempted to contact Oropeza at his residence, but he was not home. Vanderhoef did not leave a note. On December 2, 2017, Vanderhoef again attempted unsuccessfully to contact Oropeza at home, but still did not leave a note. On December 5, 2017, Oropeza's former probation officer encountered Oropeza in the grocery store and told him to contact Vanderhoef. Oropeza did not. On January 16, 2018, Vanderhoef called Oropeza's employer twice, but did not receive an answer. Vanderhoef then called Oropeza's girlfriend, who said he had just driven her to work and that she would contact him immediately and tell him to contact Vanderhoef. Oropeza again never contacted Vanderhoef. On January 25, 2018, having not had any contact with Oropeza since October 11, 2017, Vanderhoef submitted a Report of Violation to the District Court, alleging that Oropeza violated condition five of his probation conditions, failure to report, a non-compliance violation, and condition ten, prohibiting drug use, a compliance

---

<sup>3</sup> From May 2017, until September 22, 2017, Oropeza was supposed to report to probation officer Steve Watson. From September 22, 2017, onward, Oropeza was required to report to Vanderhoef.

<sup>4</sup> It was confirmed at the April 23, 2018 adjudication hearing that the opiate in Oropeza's urine test was a result of a prescription provided to him by his doctor.

violation. On January 29, 2018, the State filed a Petition to Revoke Probation and an arrest warrant was issued. Oropeza was arrested on February 9, 2018.

¶10 On April 23, 2018, the District Court held an adjudication hearing regarding the Report of Violation. Vanderhoef testified that the terms of Oropeza's probation required him to report monthly, and despite repeated efforts to contact Oropeza, he failed to report to his probation officer. Vanderhoef also provided the court with the results of Oropeza's positive urine sample for illicit drugs. Vanderhoef further testified that when a person is enrolled in probation, the officer reviews the conditions of the probation with the offender, and that based on this procedure, Oropeza should have been aware that he needed to report on a monthly basis.

¶11 Oropeza argued that his sentence could not be revoked for his failure to report as his absence did not qualify as absconding and the State did not demonstrate he committed another non-compliance violation.<sup>5</sup> It was uncontested that Vanderhoef did not apply MIIG, which must be applied before an offender's probation can be revoked for a compliance violation. The State argued that Oropeza's failure to report for three months constituted absconding, a non-compliance violation, which did not require the application of MIIG prior to initiating revocation proceedings.

¶12 At the adjudication hearing, the court explained to Oropeza that "it is not anybody's job to chase you around and to look for you. That's just not what it is. It is your responsibility." The court concluded that the preponderance of evidence indicated

---

<sup>5</sup> Although Oropeza violated condition ten of his probation for use of illicit drugs, Vanderhoef alleged, and the State does not contest, that this violation constituted only a compliance violation pursuant to § 46-18-203(11)(b), MCA.

that Oropeza violated condition five, requiring he report to his probation officer, because “the undisputed evidence shows that over a period of months, having had that home visit, and having had that test, you then stopped reporting, regardless of where you went or where you were doing that.” Additionally, the court determined that Oropeza violated condition ten, prohibiting use of illicit drugs. The court stated that both violations were “material” violations of Oropeza’s deferred sentence.

¶13 On April 30, 2018, the District Court held a dispositional hearing. The court reiterated its conclusion from the adjudication hearing that a preponderance of the evidence indicated that Oropeza violated condition five of his probation, requiring him to maintain contact with his probation officer. In reaching its conclusion, the court clarified,

Now with that, you [Oropeza] failed to report. You had obligations, you were told to do that, you knew that was your obligation and you didn’t do it. It is not Officer Vanderhoef’s job to come find you. It is not Officer Watson’s job to come find you. It is not their job to come do it. You failed to report. That qualifies as a non-compliance absconding that falls right within the definition.

The District Court revoked Oropeza’s deferred imposition of sentence and sentenced him to a five-year commitment to the DOC with two years suspended. Oropeza appeals.

### **STANDARDS OF REVIEW**

¶14 A trial court’s statutory interpretation is a question of law this Court reviews for correctness. *State v. Duong*, 2015 MT 70, ¶ 11, 378 Mont. 345, 343 P.3d 1218. When the issue presented is whether the district court had authority to take a specific action, the question is one of law and subject to de novo review. *State v. Graves*, 2015 MT 262, ¶ 12, 381 Mont. 37, 355 P.3d 769. However, we review a district court’s decision to

revoke a suspended or deferred sentence to determine whether the district court's decision was supported by a preponderance of the evidence in favor of the State, and if so, whether the court abused its discretion. *State v. Goff*, 2011 MT 6, ¶ 13, 359 Mont. 107, 247 P.3d 715.

## DISCUSSION

¶15 *Whether the District Court abused its discretion when it revoked Oropeza's deferred sentence after he failed to report to his probation officer for three months.*

¶16 Oropeza argues that pursuant to the 2017 Criminal Justice reform standards, his three-month absence constituted only a "failure to report," a compliance violation, rather than "absconding," a non-compliance violation, because: (1) the State did not establish that his failure to report was made for the purpose of avoiding supervision, and (2) his probation officer did not make reasonable efforts to locate him. Consequently, Oropeza argues that because the probation officer did not exhaust MIIG prior to the revocation of his deferred sentence, the District Court's order and judgment must be reversed.

¶17 Following the 2017 amendments of § 46-18-203, MCA, a court may not revoke a suspended or deferred sentence for violations of a parole or probation condition unless the violation qualifies as a non-compliance violation or the probation officer has exhausted all responses in MIIG. Section 46-18-203(7)-(8), MCA. "Absconding" constitutes a non-compliance violation that permits a court to revoke a sentence without exhausting these incentives and interventions. Section 46-18-203(7)(a)(iii), (11)(b)(iv), MCA. Again, "absconding" is defined as "when an offender deliberately makes the offender's whereabouts unknown to a probation and parole officer or fails to report for

the purposes of avoiding supervision, and *reasonable* efforts by the probation and parole officer to locate the offender have been unsuccessful.” Section 46-18-203(11)(a), MCA (emphasis added). If a court finds by a preponderance of the evidence that an offender has committed a non-compliance violation, it may revoke a suspended or deferred sentence and impose any sentence that may have been originally imposed. Section 46-18-203(6)(a), (7)(a)(iii), MCA.

¶18 The District Court did not abuse its discretion in holding that Oropeza absconded. First, the District Court correctly determined that Oropeza knew his obligation requiring he report to his probation officer monthly and, based on the evidence presented at the adjudication hearing, he made no effort to report to Vanderhoef for three months for the purpose of avoiding supervision. The evidence on which the District Court relied is beyond adequate to make such a finding. Oropeza last had contact with Vanderhoef on October 11, 2017. Although Vanderhoef was Oropeza’s most recent probation officer, Oropeza knew that he was supposed to report every month and had been generally complying with this requirement from May through September 2017. Additionally, on October 11, 2017, Vanderhoef informed Oropeza directly that he needed to contact him the following day. Then, on December 5, 2017, Oropeza was told by his former probation officer at the grocery store that he needed to contact Vanderhoef. Despite Oropeza’s understanding that he was obligated to report monthly to his probation officer and Vanderhoef’s repeated efforts to initiate contact with him, Oropeza did not report to Vanderhoef for over three months prior to the State’s filing of the Petition to Revoke.

The District Court correctly concluded that Oropeza's failure to report fell directly within the statutory definition of "absconding," pursuant to § 46-18-203(11)(a), MCA.

¶19 Additionally, the District Court correctly concluded that the probation office made "reasonable efforts" to contact Oropeza. Again, on October 11, 2017, Vanderhoef explicitly told Oropeza that he needed to contact him the following day. Vanderhoef visited Oropeza's residence at least twice<sup>6</sup> and made multiple calls to his place of employment. A probation officer also personally advised Oropeza at the grocery store to contact Vanderhoef. Vanderhoef even contacted Oropeza's girlfriend by phone, telling her he needed to speak to him. Over a period of months between October 11, 2017, and his arrest on February 9, 2018, Oropeza did not contact or even attempt to contact Vanderhoef.

¶20 Collectively, Vanderhoef's recurrent efforts to reach Oropeza and Oropeza's prolonged failure to initiate or even attempt to initiate contact with Vanderhoef constitutes sufficient evidence for the District Court to determine that Oropeza absconded within the definition of § 46-18-203(11)(a), MCA. The District Court did not abuse its discretion in revoking Oropeza's deferred sentence.

### **CONCLUSION**

¶21 The District Court did not abuse its discretion in determining Oropeza absconded, a non-compliance violation of his probation conditions, such that Vanderhoef was not required to exhaust MIIG procedures prior to initiating revocation proceedings against

---

<sup>6</sup> While it may have been a better practice for Oropeza's probation officer to also leave a note each time he visited Oropeza's residence advising his failure to report would be considered absconding, the overall efforts made by the probation office to contact Oropeza were reasonable.

Oropeza. The District Court's conclusion is supported by substantial evidence that Oropeza failed to report for the purpose of avoiding supervision and that the probation office made reasonable efforts to contact Oropeza.

¶22 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON

/S/ BETH BAKER

/S/ JAMES JEREMIAH SHEA

/S/ INGRID GUSTAFSON