DA 19-0322

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 34N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KOLE AARON TOLLIVER,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADC 15-307
Honorable Gregory G. Pinski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Katy Stack, Stack & Kottke, PLLC, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Benjamin Eckstein, Assistant Attorney General, Agency Legal Services Bureau, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Great Falls, Montana

Submitted on Briefs: August 5, 2020

Decided: February 9, 2021

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, we decide this case by memorandum opinion. It shall not be cited and does not serve as precedent. The case title, cause number, and disposition shall be included in our quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Kole Tolliver appeals the April 8, 2019 judgment of the Montana Eighth Judicial District Court, Cascade County, resentencing him, upon revocation of deferred sentences on two counts of felony criminal possession of dangerous drugs (CPDD), to serve two concurrent three-year terms of commitment to the Montana Department of Corrections (DOC), with recommendation for specified placement, and credit for 179 days of time-served. We affirm in part and remand in part.

¶3 In March 2016, upon a jury verdict of conviction on two counts of CPDD, respectively based on possession of methamphetamine and LSD, the District Court sentenced Tolliver to two concurrent three-year deferred impositions of sentence, subject to various conditions of deferral including, *inter alia*, that he remain drug and alcohol free and be subject to random drug testing.[1]

¶4 In September 2016, the State petitioned for revocation of Tolliver's deferred sentences based on allegations of methamphetamine and alcohol use. In November 2016, after Tolliver answered "true" to the allegations, the District Court revoked his original

[1] Tolliver appealed his original 2016 sentence, but later moved to dismiss unopposed, stipulating to remand with instructions that the District Court amend a specified condition of the judgment. This Court dismissed the appeal in accordance with the parties' stipulation.

deferred impositions of sentence and reimposed two concurrent three-year deferred impositions of sentence subject to all originally-imposed conditions of deferral, with the additional condition that he submit to, abide by, and successfully complete all requirements of the Cascade County Drug Treatment Court program.[2]

¶5 In January 2019, based on alleged non-compliance with various Treatment Court program requirements related to his ongoing drug use, the State petitioned the District Court to terminate Tolliver from the Treatment Court program, and to revoke his deferred impositions of sentence. Following an evidentiary hearing, the District Court found that Tolliver failed to comply with Treatment Court program requirements as alleged, thus manifesting his need for a higher level of supervision and treatment. The court therefore revoked his deferred impositions of sentence and gave him the choice of two options on resentencing. The first included concurrent three-year commitments to DOC, with no time suspended, and recommendation for placement in the DOC Connections Corrections program followed by aftercare in a community prelease program. The second was reimposition of concurrent three-year deferred impositions of sentence, subject to the conditions that he successfully complete the Connections Corrections program and then successfully complete the Treatment Court program, *inter alia*. The Court explained the first option as follows:

> Mr. Tolliver I am going to give you a choice . . . I will either, A, commit you to the Department of Corrections for three years. I will give you credit for 179 days time-served, and recommend you be placed at Connections

[2] On December 15, 2016, the District Court entered an amended judgment, *nunc pro tunc*, clarifying that the reimposed three-year deferred impositions of sentence would run concurrently.

> followed by aftercare at a prerelease. And then that's your sentence; okay? Once you discharge that sentence, you're done. You're not on probation. And that's that; okay?

Tolliver unequivocally chose the first option and the District Court resentenced him to two concurrent three-year terms of commitment to DOC, with no time suspended, and recommendation for placement in the Connections Corrections program, followed by aftercare in a community prelease program. The court granted him 179 days of credit for time previously served, but denied his request for an additional 357 days of credit for street time. The court subsequently issued a formal written judgment to that effect. Tolliver timely appealed.

¶6 On direct appeal, we generally review criminal sentences de novo only for legality, *i.e.*, compliance with applicable statutory parameters and requirements. *State v. Day*, 2018 MT 51, ¶ 6, 390 Mont. 388, 414 P.3d 267; *State v. Montoya*, 1999 MT 180, ¶¶ 12 and 15, 295 Mont. 288, 983 P.2d 937. Tolliver first asserts here that the District Court erroneously entered a written judgment of sentence that conflicted with its oral pronouncement of sentence. He asserts that, contrary to its oral pronouncement of a straight DOC commitment without probation, the court issued a subsequent written judgment that erroneously failed to "contain a provision suspending any probationary term," thereby:

> increas[ing] [his] sentence and [] loss of liberty because he is now subject to a term of probation until October 5, 2021, rather than having his sentence discharged when he completed prerelease in February 2020.

¶7 As a threshold matter, the oral pronouncement of sentence is "the legally effective sentence," and thus controls over any inconsistency in the subsequent written judgment.

State v. Lane, 1998 MT 76, ¶¶ 40 and 48, 288 Mont. 286, 957 P.2d 9. Within the maximum penalty imposed by the statute defining a felony offense, district courts generally have discretion to commit a defendant to the custody and control of DOC, "with a recommendation for placement in an appropriate correctional facility or program." Section 46-18-201(3)(a)(iv)(A), MCA.[3] In contrast, "probation" is a function of a deferred or suspended sentence during which a defendant is subject to DOC supervision under court-imposed conditions of the deferral or suspension. *See* §§ 46-18-201(1)-(2), (3)(a)(iv)(A), (vii), (4), (8), 46-23-1001(7), -1004, and -1011, MCA. Under a straight DOC commitment (*i.e.*, a DOC commitment with no time deferred or suspended), a defendant's failure to comply with DOC-imposed conditions of placement or conditional release generally does not subject him or her to revocation of sentence by the sentencing court, but rather, to internal administrative sanction or disposition by DOC under its administrative rules. *See* § 46-18-201(3)(a)(iv)(A), MCA.[4] *Compare* §§ 46-18-201(8), -203, 46-23-1004, and -1011, MCA.

[3] However, DOC commitments may exceed 5 years only if all but the first 5 years are suspended. Section 46-18-201(3)(a)(iv)(A), MCA. Moreover, on a DOC commitment under § 46-18-201(3)(a)(iv)(A), MCA, the placement recommendations of the sentencing court are not binding on DOC. *VanSkyock v. Mont. Twentieth Jud. Dist. Ct.*, 2017 MT 99, ¶ 12, 387 Mont. 307, 393 P.3d 1068 (citing *State v. Bekemans*, 2013 MT 11, ¶ 49, 368 Mont. 235, 293 P.3d 843).

[4] *See also* Admin. R. M. 20.1.101(2)(b) (2015) (in re DOC Adult Community Corrections Division); 20.7.601(2) (2011) (defining DOC "conditional release" as "the placement by [DOC] of an offender into the community under . . . [DOC] jurisdiction and subject to . . . [DOC] rules"); Admin. R. M. 20.7.1102 (2008) (distinguishing between "probation, parole, or other [DOC] community supervision").

¶8 Against that statutory backdrop, here, the District Court's oral pronouncement of sentence and subsequent written judgment consistently reflect and provide that, pursuant to § 46-18-201(3)(a)(iv)(A), MCA, it resentenced Tolliver to two concurrent three-year DOC commitments, with no time deferred or suspended, and recommendation that DOC place him in the Connections Corrections program, followed by aftercare placement in a community prerelease program. As matters of fact and law, the oral pronouncement of sentence and subsequent written judgment were not materially inconsistent and included no probationary term or component. We hold that, on revocation and resentencing in 2019, the District Court did not erroneously issue a subsequent written judgment in conflict with its underlying oral pronouncement of sentence.[5]

¶9 Tolliver next asserts that the District Court erroneously denied his request for 357 days of credit for street time while on probation in this case prior to revocation. On resentencing upon revocation of a deferred or suspended sentence, the court must grant the defendant "credit against the sentence" for "any elapsed time" served under the deferred or suspended sentence "without any record or recollection of violations," unless the court "determines that elapsed time should not be credited" and then "state[s] the reasons for the determination in the [sentencing] order." Section 46-18-203(7)(b), MCA. Sentencing courts accordingly have no discretion to deny street time credit absent a record-based

[5] To the extent that Tolliver further asserts that the District Court's written judgment of sentence erroneously altered his DOC discharge date, the question of whether his DOC-calculated discharge date is correct is a subsequent administrative matter not reviewable on direct appeal of the validity of the underlying sentence. Moreover, beyond cursory assertion, Tolliver has not demonstrated DOC has erroneously calculated his discharge date in any event.

finding that the defendant violated a condition of probation during the pertinent time. *State v. Jardee*, 2020 MT 81, ¶ 13, 399 Mont. 459, 461 P.3d 108. Here, the State did not object to Tolliver's request for 357 days of street time credit. The State further concedes on appeal that he was entitled to the requested street time based on the unrebutted testimony of his supervising probation officer that he completed 51 "perfect weeks" of probation without violation. We hold that the District Court erroneously denied Tolliver's request for 357 days of credit for street time, and thus remand for entry of an amended judgment granting him such credit.

¶10 We decide this case by memorandum opinion pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules on the ground that it presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. Affirmed in part and remanded in part.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON