FILED
10/26/2021
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

DA 20-0251

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 275

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSHUA PAUL CORRIHER,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC-18-222(B)
Honorable Robert B. Allison, Presiding Judge

District Court of the Nineteenth Judicial District,
In and For the County of Lincoln, Cause No. DC-19-77
Honorable Matthew J. Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Moses Okeyo, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Tammy K Plubell, Appellate Services Bureau Chief, Jonathan M. Krauss, Assistant Attorney General, Helena, Montana

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

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

Submitted on Briefs: September 22, 2021

Decided: October 26, 2021

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Joshua Corriher appeals an Eleventh Judicial District Court sentencing order requiring him to pay $3,025 in restitution for his extradition from Georgia and to surrender his medical marijuana card. Corriher contends that:

> (1) The District Court could not order him to pay restitution when his only income consisted of Army disability benefits; and
>
> (2) The District Court wrongly required him to surrender his medical marijuana card pursuant to § 46-18-202(1)(f), MCA.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In November 2017, Corriher was cited for Driving Under the Influence (DUI) in violation of § 61-8-406(1)(a), MCA, resulting from a single-vehicle accident in Flathead County. He pleaded guilty to one count of criminal endangerment in May 2019. The following month, Corriher was cited for two misdemeanors and felony DUI in violation of § 61-8-406(1)(a), MCA, in Lincoln County, following another single-vehicle accident. After being charged with the DUI, Corriher left the state for Georgia, resulting in his extradition. Corriher entered a plea agreement with the State and pleaded guilty to one count of felony DUI in Lincoln County in March 2020.[1]

[1] Corriher also appeals a separate Nineteenth Judicial District Court judgment from Lincoln County imposing a $5,000 fine and requiring him to surrender his medical marijuana card under § 46-18-202(1)(f), MCA. These two cases were consolidated for appeal, but Corriher does not present any facts, argument, or legal analysis related to the Lincoln County sentence. This Court is not responsible for "conduct[ing] legal research on behalf of a party" or "develop[ing] legal analysis that might support a party's position." *State v. Cybulski*, 2009 MT 70, ¶ 13, 349 Mont. 429, 204 P.3d 7 (citation omitted). We conclude that Corriher has waived any challenge to the Lincoln County judgment.

¶3 Following Corriher's return to Montana, the Eleventh Judicial District Court sentenced him for criminal endangerment, committing Corriher to the Department of Corrections for ten years, with five suspended. The court ordered that Corriher pay the cost of extradition (Condition 30) and surrender his medical marijuana card (Condition 19). Corriher's only income at the time of sentencing was $3,000 in United States Army (Army) disability benefits he received as a result of his Post Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI). These diagnoses led to his discharge from the Army after seven years of service.

¶4 At the sentencing hearing, Corriher, through counsel, objected to Condition 19, arguing that it lacked the required nexus to his crime and thus was unconstitutional. The District Court rejected Corriher's argument:

> COURT: I'm not going to strike [Condition] 19. I -- and I do feel that there's a nexus between any kind of substance abuse, whether it's legal or illegal drugs, and this offense because this offense arose out of alcohol consumption -- excessive alcohol consumption. Alcohol is a drug, and it's just different sides of the same coin, it just happens to be legal, but it has the same awful effects. I think that your drinking and driving chronically, repeatedly, persistently both before and since your traumatic brain injury indicates an addiction to alcohol, and that use [of] other mood-altering substances like marijuana is contraindicated, and therefore I'm -- I do find that there is a nexus between the use of alcohol and the use of marijuana that renders the Medical Marijuana Act inapplicable in your case.

STANDARDS OF REVIEW

¶5 This Court reviews sentencing conditions first for legality, then for abuse of discretion as to the reasonableness of the condition under the facts of the case. *State v. Ingram*, 2020 MT 327, ¶ 8, 402 Mont. 374, 478 P.3d 799 (citation omitted). "A condition is illegal when there exists no statutory authority to impose it, where the

condition exceeds the limits of the relevant sentencing statute, or where the court fails to adhere to the affirmative mandates of the applicable sentencing statutes." *State v. Hotchkiss*, 2020 MT 269, ¶ 11, 402 Mont. 1, 474 P.3d 1273 (quoting *City of Billings v. Barth*, 2017 MT 56, ¶ 8, 387 Mont. 32, 390 P.3d 951) (internal quotations omitted). The Court exercises plenary review of constitutional issues. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131 (*MCIA II*). A statute is presumed constitutional unless it conflicts with the Constitution beyond a reasonable doubt. *MCIA II*, ¶ 12.

DISCUSSION

¶6 *1. Whether the District Court erred in ordering Corriher to pay restitution when his only income consisted of Army disability benefits.*

¶7 Corriher first argues that the District Court's imposition of Condition 30 is illegal under 42 U.S.C. § 407(a) and *State v. Eaton*, 2004 MT 283, 323 Mont. 287, 99 P.3d 661, because the court considered his monthly $3,000 in Army disability benefits—his sole source of income—in calculating the restitution amount. As he correctly asserts, these benefits cannot be "levied, garnished, or subject to court order" under law. Corriher contends that because he cannot pay the restitution from his benefits, and because the District Court "has no mechanism to compel Corriher to pay," Condition 30 "is illegal and an abuse of discretion."

¶8 The statute Corriher cites to support his argument, 42 U.S.C. § 407(a), pertains only to social security benefits. Veterans' Benefits, which include Corriher's $3,000 in Army disability benefits, are protected by 38 U.S.C. § 5301(a). Under federal law, military

disability benefits likewise are "exempt from the claim of creditors" and are not subject to "attachment, levy, or seizure by or under any legal or equitable process." 38 U.S.C. § 5301(a). The statute does not, however, prohibit the imposition of new debts or fines. *See Ingram*, ¶ 11.

¶9 Corriher likens his situation to the defendant's in *State v. Eaton*, but *Eaton* is distinguishable. Ordering Eaton to pay restitution as part of his sentence, the District Court specified that the restitution must be paid from the defendant's "net income, including income from his social security benefits." *Eaton*, ¶¶ 23-24. On appeal, Eaton argued that the order "improperly burden[ed] his Social Security benefits" in violation of § 407(a). *Eaton*, ¶¶ 23-24. Concluding that "the judgment's inclusion of Eaton's social security income" conflicted with § 407(a), we remanded the restitution order to the district court for the "offending condition" to be "eliminate[d]." *Eaton*, ¶¶ 26-28.

¶10 Here, the District Court ordered Corriher to pay restitution without referencing his Army disability benefits. Imposing restitution on a defendant whose only income is a protected benefit is not illegal if the court's order does not "reference[ ]" a specific "source [of] income or assets, and [if it does] not attempt to capture, directly or indirectly," the defendant's benefits. *Ingram*, ¶ 11. Corriher could not be ordered to pay the restitution from his Army disability benefits. Nor could the court later revoke the suspended portion of Corriher's sentence for defaulting on his restitution payments if the default is not attributable to his lack of good faith effort to obtain the necessary funds. Sections 46-18-247(2) and -203(6)(b), MCA; *see also State v. Welling*, 2002 MT 308, ¶¶ 15-16, 313 Mont. 67, 59 P.3d 1146 (revocation of an offender's deferred or suspended

sentence cannot be based on the offender's failure to make restitution payments if failure to pay is not due to the offender's lack of good faith effort). But the fact that his only income derives from protected benefits does not render the restitution order illegal, nor does it prohibit the District Court from imposing restitution on Corriher. *See Ingram*, ¶ 11.

¶11 The District Court, as a matter of law, was required to impose restitution on Corriher under §§ 46-18-201(5) and -241, MCA. The State, under § 46-18-243(2)(a), MCA, was entitled to restitution for the "costs or losses" incurred "as a result of extraditing an offender from an out-of-state jurisdiction to Montana[.]" As we explained in *Ingram*, the "receipt of [protected benefits] does not immunize [the defendant] from a mandatory fine. Rather, it merely prohibits the capture of those benefits to satisfy the fine." *Ingram*, ¶ 11. The same holds true for the mandatory imposition of restitution. An offender is not prohibited from spending his benefits as he sees fit. *See Nelson v. Heiss*, 271 F.3d 891, 896 (9th Cir. 2001) (holding that § 5301(a) does not preclude an inmate receiving veterans' benefits from directing that payments be deducted from the protected funds). Corriher's only source of income being a protected benefit did not absolve the District Court of its statutory duty to impose restitution. Corriher may petition the District Court, under § 46-18-246, MCA, to "adjust or waive restitution" as unjust, based upon his financial circumstances, if he is unable to pay the restitution with other, unprotected income. *State v. Lodahl*, 2021 MT 156, ¶¶ 24-25, 404 Mont. 362, 491 P.3d 661 (internal citation and quotation omitted). The District Court's imposition of $3,025 in restitution is not an illegal condition, and Corriher has not established that the District Court abused its discretion when it imposed the condition.

¶12 Corriher objected at sentencing to several financial conditions, including restitution, based on his inability to pay. He makes no such argument on appeal, however, which he limits to the legality of the restitution condition. As the Court discussed in *Lodahl*, the effect of § 46-18-246, MCA, is "to move the burden to the defendant to raise and prove that requiring full payment of the restitution award would be unjust under the circumstances." *Lodahl*, ¶ 23 n.1. Aside from whether there was a qualified "victim," the focus of Lodahl's appeal was the propriety of the district court's determination of her ability to pay restitution. *Lodahl*, ¶¶ 2, 7-8, 21-23. Corriher has not developed or substantiated such a claim here. Corriher retains the right to petition the District Court for waiver or modification of restitution and to demonstrate that his financial circumstances make the payment of restitution unjust. The District Court imposed a lawful sentence, and we will not reverse it by making our own factual findings without any supporting analysis from the Appellant. *See State v. Ferguson*, 2005 MT 343, ¶ 38, 330 Mont. 103, 126 P.3d 463 (citations omitted); *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 20, 373 Mont. 1, 313 P.3d 839 (citations omitted).

¶13 *2. Whether the District Court erred in ordering Corriher to surrender his medical marijuana card pursuant to § 46-18-202(1)(f), MCA.*

¶14 Next, Corriher argues Condition 19 is unconstitutional because it deprives him of his rights to "seek health" and to privacy under Section II, Article 3, and Section II, Article 10, of the Montana Constitution and because it is unrelated to him or to his crime. The State responds that Condition 19 does not violate Corriher's rights and that there is a

sufficient nexus between Corriher, his crime, and Condition 19, given the record of the proceeding and this Court's precedent.

¶15 The District Court imposed Condition 19 under § 46-18-202(1)(f), MCA, which allows the court, under the Medical Marijuana Act, to restrict Corriher's ability to seek and obtain a medical marijuana card while "in the custody of or under the supervision of the department of corrections . . . ." Section 50-46-307(4), MCA.[2] Corriher fails to show how § 50-46-307(4), MCA, violates his rights under Article II, Section 3, and Article II, Section 10, of the Montana Constitution. This Court has held that neither of these rights creates an affirmative right to access medical marijuana. *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶¶ 24, 32, 366 Mont. 224, 286 P.3d 1161 (internal quotations and citations omitted) ("[A]n individual does not have a fundamental affirmative right of access to a particular drug. . . . [A patient's choices regarding medication] and regulation of that medication does not implicate a fundamental constitutional right.") ("[T]he right to privacy does not encompass the affirmative right of access to medical marijuana."). Corriher also argues that Condition 19 is illegal as applied to him because the District Court failed to establish the required nexus between the offense and the condition per *MCIA II*, ¶ 73.

¶16 We explained the nexus required for sentencing conditions in *State v. Ashby*, 2008 MT 83, ¶ 15, 342 Mont. 187, 179 P.3d 1164: "In imposing conditions of sentence, a sentencing judge may impose a particular condition of probation so long as the condition

[2] The Medical Marijuana Act was repealed during the 2021 Legislative session by House Bill 701. H.B. 701 transferred authority over medical marijuana from the Department of Health and Human Services to the Department of Revenue. Under H.B. 701, the Legislature recodified § 50-46-307(4), MCA, to § 16-12-508(5), MCA, which provides for the same limitation.

has a nexus to either the offense for which the offender is being sentenced, or to the offender himself or herself." A sentencing court may consider a defendant's "history or pattern of drug abuse" to determine a nexus between a drug- or alcohol-related condition and the defendant, even if the drug or alcohol abuse is "unrelated" to the offense, if "the court in its discretion determines [the condition] will assist in this particular defendant's alcohol or drug rehabilitation." *Ashby*, ¶ 15. Corriher asserts, without explanation, "[t]here was no nexus between the prohibition in this case and the offender nor [sic] the offense."

¶17 Instead of demonstrating how the condition is unrelated either to him or to his crime, Corriher makes sweeping policy arguments about the benefits of marijuana in treating his PTSD and TBI. We do not quarrel with the proposition that medical marijuana may treat PTSD and TBI; that alone, though, is insufficient to show the District Court failed to find the requisite nexus. The District Court, after hearing Corriher's objections to Condition 19, articulated its reasoning that Condition 19 had a nexus to Corriher and his crime. Corriher was sentenced for an alcohol-related crime—criminal endangerment. He had a history of alcohol-related offenses, both before and after his military service. The District Court, based on witness testimony, the record, and Corriher's Pre-Sentencing Investigation, concluded that Corriher's behavior "indicate[d] an addiction to alcohol." Although Corriher's addiction was to alcohol, not to marijuana, this alone does not render marijuana use unrelated to Corriher or his crime. The District Court determined that his marijuana use was "contraindicated" for his alcohol addiction, concluding "there is a nexus between the use of alcohol and use of marijuana . . . ." There is substantial evidence in the record

establishing a nexus between Condition 19, Corriher, and his crime, and the District Court did not abuse its discretion by imposing the condition.

CONCLUSION

¶18 Corriher has failed to show that the District Court's sentence is illegal or that it abused its discretion. The District Court's March 10, 2020 sentencing order is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE

Justice Ingrid Gustafson, concurring in part and dissenting in part.

¶19 The majority upholds the District Court's imposition of $3,025 in extradition costs as "restitution." Corriher asserts imposition of the extradition cost is contrary to our holding in *Eaton*. The majority attempts to distinguish Corriher's situation from *Eaton* as the District Court here did not specify that the payment must be made from Corriher's Army disability benefits. Citing *Ingram*, the majority concludes, "[i]mposing restitution on a defendant whose only income is a protected benefit is not illegal if the court's order does not 'reference[]' a specific 'source [of] income or assets, and [if it does] not attempt to capture, directly or indirectly,' the defendant's benefits." Opinion, ¶ 10 (quoting

Ingram, ¶ 11). The majority then fails to connect the dots.[1] When a defendant has no assets, is disabled, and his only source of income is a protected benefit, an order requiring payment from the defendant must be interpreted, at a minimum, as an *indirect* attempt to capture the defendant's protected benefits. While it may be accurate that an order imposing restitution in some cases may not constitute "an attempt to capture, directly or indirectly, the defendant's protected benefits," such is not the case here given Corriher's circumstance of having no assets and his only income consisting of his protected disability benefits. Accordingly, I would reverse the District Court's imposition of the extradition cost.

¶20 Next, I turn to the Opinion's notation that Corriher may petition the District Court, under § 46-18-246, MCA, to adjust or waive the restitution as unjust if he is unable to pay it with other, unprotected income. Opinion, ¶ 11. I agree that, pursuant to § 46-18-246, MCA, Corriher may at any time petition for adjustment or waiver of the imposed restitution expenses as unjust under his circumstances, which by its nature will require the District Court to consider whether he has the financial ability to pay the ordered expenses. The issue remains, though, as to whether Corriher effectively made such a request at the time of sentencing. While Corriher did not file a formal petition citing § 46-18-246, MCA, seeking waiver or adjustment of restitution as otherwise unjust under his financial

[1] In *Ingram*, the Court made the same statement, but then failed to meaningfully analyze under the particular facts of the case how the order was not an attempt to indirectly capture the defendant's protected benefit, blanketly concluding if a court does not mention where the source of payment must come from, implicating this standard is met without further analysis. Ingram, too, was a disabled individual with no assets. His only source of income was from SSDI. Given Ingram's circumstances, any order requiring payment of a fine, etc., implicitly provided the payment to come from his protected benefit whether stated explicitly or not—Ingram had no other source of income from which to pay.

circumstances, he objected to being required to pay restitution as his disability benefits were not considered income and, even if they were, he did not have sufficient income to pay the restitution. The parties and the District Court clearly understood Corriher was raising an inability to pay issue. Again, "[w]hile it may have been preferable for [Corriher] to file a formal petition pursuant to § 46-18-246, MCA, seeking waiver or adjustment of restitution as otherwise unjust under the circumstances, on the record before us—the evidentiary presentation substantiating that the parties and court fully understood the challenge and that the hearing and opportunity of the victim to be heard requirements of § 46-18-246, MCA, were fully met—requiring such unnecessarily elevates form over substance." *Lodahl*, ¶ 26. Regardless, as I would conclude the District Court's order constituted an attempt to unlawfully capture Corriher's protected benefits, it is not necessary to determine this issue.

¶21 Given the record before us, I concur with the majority as to Condition 19. Corriher did not present any evidence that use of marijuana had no nexus to use of other addictive substances including alcohol. The prevailing belief has been that if a person has demonstrated a tendency to misuse one addictive substance, s/he will invariably be prone to use and misuse other addictive substances and any such use will inevitably spiral out of control. This was obviously the mindset of the District Court in imposing Condition 19. Corriher did nothing to educate the court as to any studies indicating more nuanced understanding of diagnosis and treatment of substance use disorders and the incidence of cross-addition and failed to provide the court with medical evidence that use of medical marijuana was not related to his alcohol use disorder and was not contraindicated by it.

/S/ INGRID GUSTAFSON

Justice Dirk Sandefur joins in the concurring and dissenting Opinion of Justice Gustafson.

/S/ DIRK M. SANDEFUR

Justice Laurie McKinnon, concurring and dissenting.

¶22 I concur with the Court's decision on Issue 2. Regarding Issue 1, I incorporate my dissent in *Ingram* wherein I concluded that the trial court's imposition of a $5,000 fine, when Ingram's only source of income was a protected veteran's benefit, constituted an improper attempt to attach that benefit in violation of § 42 U.S.C. 407(a). *See Ingram*, ¶¶ 22-32 (McKinnon, J., dissenting). My reasoning and analysis in *Ingram* applies equally to Corriher's circumstances. Therefore, I would supplement the dissent of Justice Gustafson with my analysis from *Ingram*.

¶23 Since *Ingram*, *Lodahl* has also been decided. While Corriher's argument on appeal is that the judgment constituted an improper attachment of his protected benefits, had the Court conducted an ability to pay analysis when Corriher objected at sentencing to several financial conditions, it would be apparent that Corriher's *only* income was his protected veteran's benefit. Thus, the lower court's judgment imposing a financial obligation necessarily meant Corriher's protected veteran's benefits would have to be used to pay his debt to avoid violating the terms of his sentence. We held in *Lodahl* that when a defendant objects to financial conditions of his sentence based on an inability to pay, the Court must

determine whether it is unjust to impose the condition, regardless of whether a formal petition under § 46-18-246, MCA, has been filed. *See Lodahl*, ¶ 26.

¶24 The requirement that a defendant's ability to pay be considered before imposing financial obligations as a condition of sentence is not inconsistent with the requirement that "full restitution" be imposed. Section 46-18-241, MCA. Section 46-18-244 (2), MCA, provides that the court must determine the amount of restitution in a proceeding where the "offender may *assert any defense* that the offender could raise in a civil action for the loss for which the victim seeks compensation." (Emphasis added.) Here, Corriher is asserting a defense that his protected veteran's benefits cannot be used to satisfy a restitution debt. Corriher is correct, given 42 U.S.C. § 407(a), and because he has no other income but his veteran's benefits to satisfy restitution.

¶25 Our law and precedent establish that once the court determines the amount of restitution, it must then impose the "full restitution." *See Lodahl*, ¶ 23 (citations omitted). The requirement to impose "full restitution" is not inconsistent with the requirement that a court consider an offender's ability to pay. This is because a victim still may avail themselves of civil remedies to enforce a judgment. According to § 46-18-249(1), MCA:

> [T]he total amount that a court orders to be paid to a victim may be treated as a civil judgment against the offender and may be collected by the victim at any time, including after supervision of the offender ends, using any method allowed by law, including execution upon a judgment, for the collection of a civil judgment.

While § 46-18-249, MCA, ensures that the victim retains the right to collect "full restitution," it does not provide, through the mechanism of a criminal proceeding, additional methods of collection when the offender cannot pay because he or she is poor.

Imposing a restitution obligation as a condition of a criminal sentence, when the offender has no ability to pay, is unjust.

¶26 Here, Corriher objected during his sentencing to several financial conditions based on his inability to pay. Corriher's argument on appeal that his income could not be used to pay restitution is the same as an inability to pay argument: Corriher's veteran benefits could not be attached by a civil judgment and he has no other income to pay the debts imposed by his sentence. The Court plays semantics when it says that Corriher only raises the attachment issue on appeal and that he does not appeal based on his inability to pay. Corriher objects on appeal because his *only* income available to pay his restitution obligation is an asset which is not *legally* available to satisfy his debt. We would not be "revers[ing the District Court] by making our own factual findings without any supporting analysis from the Appellant . . . ." Opinion, ¶ 11. What more must be in the record, than an offender's only income being a veteran's benefit, for the Court to apply the simple rules of a statutory scheme to achieve fairness? In my opinion, the Court's position is untenable; essentially, while we recognize an offender's protected benefits cannot be attached to satisfy a restitution debt, we nonetheless affirm the imposition of that debt knowing there are no other assets for Corriher to use to comply with the terms of his criminal sentence.

¶27 I think it is time that courts, including this Court, open their eyes to the realities of indigency, the ineffectiveness of imposing financial conditions—such as fines and prosecution costs of the State—to advance rehabilitation, and the inequities of conditioning freedom from incarceration and judicial supervision on those who are able to pay versus those who are poor.

¶28 I dissent on Issue 1.

/S/ LAURIE McKINNON