DA 21-0309

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 130N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GRALEN EUGENE HOBBLE, JR.,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DDC 20-031(b)
Honorable Elizabeth A. Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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

For Appellee:

Austin Knudsen, Montana Attorney General, Bjorn Boyer, Assistant Attorney General, Helena, Montana

Joshua Racki, Cascade County Attorney, Jennifer Quick, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: June 14, 2023

Decided: July 5, 2023

Filed:

Clerk

Chief Justice Mike McGrath 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 Gralen Eugene Hobble, Jr. (Hobble) appeals the Disposition Judgment issued by the Eighth Judicial District Court, Cascade County, on May 3, 2021. Hobble alleges the court erred in two ways. First, he claims the court abused its discretion by revoking his sentence without adequately considering alternatives to incarceration. Second, he claims the court incorrectly denied him credit for elapsed time. Hobble also contends that he received ineffective assistance of counsel. We affirm.

¶3 On June 30, 2020, the District Court sentenced Hobble to a four-year commitment to the Department of Corrections (DOC), with all four years suspended for the offense of felony partner or family member assault (PFMA). The court imposed several conditions on Hobble as part of his suspended sentence, including "obey[ing] all laws," and completion of a batterer's intervention course based on the Duluth Model and chemical dependency treatment. The court carefully instructed Hobble that only one counselor in the area offered the specific intervention course.

¶4 Hobble received instructions to report to the DOC's Adult Probation and Parole Bureau (P&P) after the sentencing hearing. He did not report. Hobble later claimed that he did in fact report but did not make contact with anyone at the P&P office.

¶5 On July 7, 2020, Hobble finally did report to the P&P office. Thereafter, P&P officer Tomeka Williams instructed Hobble to sign up for Medicaid to secure financial coverage for his court-ordered programming. Williams noted that Hobble told her he was living in Ulm. She informed him of his obligation to register with Cascade County; Hobble confirmed he understood that requirement. Williams later reported that Hobble never provided her with a valid residential address.

¶6 On September 15, 2020, the Great Falls Police Department cited Hobble for disorderly conduct. The contacting officer noted that Hobble could hardly speak due to intoxication. Hobble then failed to appear on that citation; a city contempt warrant was issued in response.

¶7 On December 2, 2020, the District Court filed a Notice of Violation upon receipt of a noncompliance report filed by a representative of Gateway Recovery Center (GRC), where Hobble intended to obtain a chemical dependency evaluation. The noncompliance report indicated that Hobble had missed two scheduled appointments and that he had pledged to "bring money in and doesn't." Hobble had previously made similar offers of money to no effect. The State infers from these facts that Hobble did not sign up for Medicaid, as instructed.

¶8 On January 12, 2021, Hobble was arrested by the Great Falls Police Department on the city contempt warrant. The arresting officer noted that Hobble was highly intoxicated

and refused to submit to a breath test. Hobble later provided the Great Falls Police Department with an address outside of Ulm—thereby suggesting that he had failed to comply with his obligation to update his address.

¶9 On January 14, 2021, the State placed Hobble under a probation hold because he failed to appear at an initial appearance on the citation he received in September 2020. On January 15, 2021, Hobble was found guilty of disorderly conduct and sentenced by a municipal court to three days in jail. Hobble remained in custody until his revocation hearing on May 3, 2021.

¶10 On February 1, 2021, Williams filed a Petition for Revocation of Suspended Sentence (Petition). The Petition alleged five violations: Count I—that Hobble committed the offense of disorderly conduct by urinating in a public parking lot while intoxicated; Count II—that Hobble failed to provide Williams with his address, failed to provide an updated telephone number, and failed to report as instructed on November 5, 2020; Count III—that Hobble consumed alcohol and was intoxicated when law enforcement made contact with him on September 15, 2020, and January 12, 2021; Count IV—that Hobble failed to engage in or complete the assigned batterer's intervention program and chemical dependency treatment; and Count V—that Hobble failed to update his address in the violent offender registry. The Petition also contained William's assertion that further interventions pursuant to the Montana Incentive and Interventions Grid were not possible because Hobble had failed to report and subsequently absconded. Williams also detailed that Hobble has "continued to drink alcohol, has continued to violate laws and get new charges, has been uncooperative and hostile to law enforcement . . . , has avoided

treatments, has refused to acknowledge or accept accountability for his violent crime, and was actively avoiding [P&P]."

¶11 On May 3, 2021, the District Court held a hearing on the Petition via Zoom. Hobble appeared in custody and was represented by counsel, Michael Kuntz (Kuntz). Williams intended to testify at the hearing but was unable to attend due to a family matter. The prosecutor accordingly moved to continue the hearing. Kuntz told the court that he did not object to the continuation because he intended to have Williams lay the foundation for the introduction of certain documents. Hobble, informed by Kuntz that the court could only consider those if he agreed to the continuance, objected to the continuance. Hobble explained that he had "already been in here for almost four months." The prosecutor agreed to proceed with the State's case by asking the court to take judicial notice of the January 2021 disorderly conduct conviction. Kuntz agreed to proceed with the defense by having Hobble testify to lay the foundation for the aforementioned documents.

¶12 With the parties in agreement, the District Court opted to proceed with the hearing. The State argued in support of the Petition. The court took judicial notice of the disorderly convict conviction. The State refrained from introducing any further evidence and instead opted to cross-examine Hobble on the rest of the alleged violations. While testifying, Hobble did not challenge the disorderly conduct conviction. He introduced text messages between himself and Williams. The first message occurred on July 2, 2020, and showed that Hobble sent Williams a residential address. This text occurred five days prior to Hobble informing Williams that he was living in Ulm. The second message occurred on August 10, 2020, and showed that Hobble informed Williams of his intent to make a

payment to P&P. The third message occurred on September 18, 2020, and showed that Hobble disclosed his disorderly conduct citation to Williams. The fourth message occurred on December 11, 2020, and showed that Hobble told Williams that he would be working in Glasgow and Havre that week.

¶13 Hobble introduced a violent offender registry form dated December 1, 2020, in which he listed a residential address in Great Falls. He admitted that he had moved into the apartment in November 2020, but asserted that he mistakenly put the wrong apartment number on the form. Hobble also testified that he never lived in Ulm but instead stayed with a friend there on a periodic basis. He suggested that William's uncertainty about his residential address was a miscommunication. Hobble did not testify to having informed Williams about his new address.

¶14 Hobble claimed that he tried to receive a chemical dependency evaluation at GRC but failed due to it requiring payment in full. Hobble's testimony suggested that he did not know what services GRC provided, which prompted the District Court to reiterate the explicit instructions it had previously delivered—that a specific provider (not GRC) provided the mandated batterer's intervention course. The prosecutor then asked if Hobble understood the court's initial order—to complete both the batterer's intervention course and chemical dependency treatment. Hobble signaled he had understood and offered that he tried to start "the process[.]"

¶15 The District Court determined that a factual basis existed to revoke Hobble's sentence given that the State had met its burden of proof on Counts I, III, and IV. The court proceeded to disposition. Kuntz argued three points: first, that the court should again

suspend the term and regard the time Hobble spent in jail since January 2021 as a sanction; second, that Hobble had not been afforded enough time to complete the ordered programs and should not be penalized for his inability to pay for those services; and third, that Hobble deserved another chance. The court sentenced Hobble to a four-year commitment with DOC, with two years suspended. The court explained that it had provided Hobble with "crystal clear" instructions regarding the batterer's course and specified that P&P would have paid the initial fees for that course. Generally, the court felt that Hobble was not "paying attention or . . . taking [its] order seriously." In light of Hobble's actions while on probation, the court indicated its desire to prevent Hobble from "spiraling." Hobble received 248 days credit for time served and no credit for elapsed time.

¶16 Hobble claims the court abused its discretion by revoking his sentence without adequately considering alternatives to incarceration. Sections 46-18-203(7) and 203(8), MCA, pertain to violations of suspended or deferred sentences. Subsection (7) applies in the context of violations that are not considered compliance violations. Section 46-18-203(7), MCA. These behaviors involve serious violations of supervision including 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. *See State v. Tippets,* 2022 MT 81, ¶ 13 n.3, 408 Mont. 249, 509 P.3d 1 (defining compliance violations under § 46-18-203(11)(b)(i)-(v), MCA). Upon a finding of a non-compliance violation with respect to a suspended sentence, the sentencing judge may:

> (i) continue the suspended sentence . . . without a change in conditions;
> (ii) continue the suspended sentence with modified or additional terms and conditions . . . ;
> (iii) revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence . . . .

Section 46-18-203(7)(a)(i)-(iii), MCA.

¶17 This Court applies an abuse of discretion standard when reviewing a district court's decision to revoke a suspended sentence. *State v. Jardee*, 2020 MT 81, ¶ 5, 399 Mont. 459, 461 P.3d 108.

¶18 Hobble argues that the District Court erred by not considering alternatives to revocation and notes that the court had the authority to impose a "solution short of incarceration." Hobble maintains that he was employed, made a down payment to receive the ordered chemical dependency treatment, and that GRC was denying him treatment until he paid in full. He claims that because financial obligations were the obstacle to obtaining rehabilitation, the court was required to consider alternatives to incarceration.

¶19 Hobble mischaracterizes the basis of the court's decision by suggesting that it punished him for lacking financial resources. This Court has previously explained that a single violation of the conditions of a suspended sentence is sufficient to support a district court's revocation of that sentence. *State v. Sebastian*, 2013 MT 347, ¶ 16, 372 Mont. 522, 313 P.3d 198 (citing § 46-18-203, MCA). It is uncontested that Hobble testified to heavy inebriation and public urination that led to a disorderly conduct conviction in clear violation of the conditions of his suspended sentence. Furthermore, to the extent Hobble lacked the financial resources required to complete the chemical dependency treatment at GRC, such

financial hurdles do not explain why he had not taken any courses related to the mandated batterer's program—for which the court noted P&P would have paid the initial amount. In other words, Hobble mistakenly attempts to analogize his case to *Bearden v. Georgia*, 461 U.S. 660, 673, 103 S. Ct. 2064, 2074 (1983), and its prohibition on revocation of an indigent defendant's probation for failure to pay restitution unless the sentencing court finds that the indigent defendant did not make sufficient bona fide efforts to pay the restitution; the basis for the court's revocation of Hobble's sentence did not turn on his financial status.

¶20 Though the District Court may have had the authority to pursue alternative "solutions," the statutory framework does not instruct the court to select the one preferred by the defendant. Here, the court conducted a hearing that included oral argument on the Petition, which detailed several non-compliance violations, including, but not limited to, Hobble's failure to receive treatment. Prior to fashioning its judgment, the court evaluated that Petition, the strength of the State's evidence, and related arguments, and the court heard testimony from Hobble in which he provided details about his disorderly conduct offense. The court's revocation of Hobble's suspended sentence was not done arbitrarily, without employment of conscientious judgement; nor did it exceed the bounds of reason resulting in a substantial injustice.

¶21 Second, Hobble claims the court incorrectly denied him credit for elapsed time. A sentencing judge must consider credit for elapsed time when setting a revocation sentence. Section 46-18-203(7)(b), MCA; *see Jardee*, ¶ 10 (concluding that the 2017 version of the statute eliminated the discretion of district court judges when deciding whether to grant or

deny credit for street time). After such consideration, the judge "shall . . . allow all of the elapsed time served without any record or recollection of violations as credit against the sentence." Section 46-18-203(7)(b), MCA. A district court cannot deny credit for elapsed time "unless specific violations during the times in question are demonstrated." *State v. Gudmundsen*, 2022 MT 178, ¶ 14, 410 Mont. 67, 517 P.3d 146.

¶22 In *Jardee*, this Court affirmed the district court's decision to deny credit for elapsed time in light of Jardee admitting that he failed to report his correct address to P&P. *Jardee,* ¶ 12. We acknowledged that additional reasoning by the district court would have been helpful for the purpose of establishing whether and when Jardee violated the terms of his suspended sentence. *Jardee,* ¶ 12. Despite that limited analysis by the district court, this Court determined that it was not an error to deny credit for elapsed time due to evidence in the record that Jardee was violating the terms of the suspended sentence. *Jardee,* ¶ 12.

¶23 In *State v. Johnson*, 2022 MT 216, 410 Mont. 391, 519 P.3d 804, Johnson contended that the district court erred in denying credit for elapsed time by failing to show evidence of him continually violating the conditions of his suspended sentence during the period in question. *Johnson,* ¶ 25. Yet, Johnson acknowledged that they had failed to comply with a condition prior to the period, and this Court concluded that Johnson made no demonstrated effort to do so during the period. *Johnson,* ¶¶ 25, 29. Johnson also failed to take proactive steps to comply with other conditions during the period. *Johnson,* ¶¶ 25, 29. Consequently, we held that the court did not err by denying credit for elapsed time. *Johnson,* ¶ 30.

¶24 A review of Hobble's actions in and around the period for which he seeks credit for elapsed time—July 7, 2020, to September 15, 2020—demonstrates that he persistently violated the conditions of his sentence and, therefore, is not entitled to any credit for the requested period. Despite acknowledging at numerous times that he understood the court's explicit instructions related to the batterer's intervention program, Hobble did not make a meaningful effort to participate in that program. Likewise, despite receiving instructions from P&P on ways to limit the financial burdens imposed by the chemical dependency program, the record contains no evidence of Hobble attempting to follow those instructions.

¶25 Here, as in *Jardee*, additional analysis by the District Court would have been helpful in evaluating Hobble's compliance with the terms of the suspended sentence. The court's findings and observations during the Petition hearing nevertheless establish that—as in *Johnson*—Hobble persistently failed to comply with his conditions for the period in question. The court did not err by denying Hobble's request for elapsed time credit.

¶26 Finally, Hobble alleges he received ineffective assistance of counsel because his attorney cooperated with the prosecutor to produce the evidence to the DOC that resulted in his sentence. Hobble argues that Kuntz, upon learning that the State had no witness and had to rely on judicial notice of a disorderly conduct conviction, should have moved to dismiss the remaining allegations; instead, Kuntz called Hobble as a witness—providing the State with the evidence required to prove its case through cross-examination.

¶27 In assessing ineffective assistance of counsel claims, Montana courts apply the United States Supreme Court's two-prong test as articulated in *Strickland v. Washington*,

466 U.S. 668, 104 S. Ct. 2052 (1984). *See State v. Colburn*, 2018 MT 141, ¶ 21, 391 Mont. 449, 419 P.3d 1196. Under the first prong of the *Strickland* test, the defendant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Golie v. State*, 2017 MT 191, ¶ 7, 388 Mont. 252, 399 P.3d 892 (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). Under the second prong of *Strickland*, the defendant must show that counsel's performance prejudiced the defense. *Whitlow v. State,* 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861 (internal citation omitted). Because a defendant must prove both prongs, an insufficient showing under one prong eliminates the need to address the other. *Whitlow*, ¶ 11 (internal citations omitted).

¶28 This Court presumes effective assistance of counsel. *State v. Daniels*, 2003 MT 247, ¶ 21, 317 Mont. 331, 77 P.3d 224 (internal citation omitted). When scrutinizing whether counsel was deficient, this Court does not analyze the conduct with hindsight; instead, we "presume that counsel's conduct falls within a range of acceptable professional assistance, and a defendant must overcome that presumption." *State v. Schowengerdt,* 2018 MT 7, ¶ 31, 390 Mont. 123, 490 P.3d 38 (internal citation omitted).

¶29 In *Oliphant v. State*, 2023 MT 43, 411 Mont. 250, 525 P.3d 1214*,* this Court reiterated that in order to overcome that presumption a client must do more than indicate feasible alternatives. *Oliphant*, ¶ 41 (internal citations omitted). We rejected the claim in that case, in part, because the allegedly deficient behavior could be "explained by manifold, acceptable rationales." *Oliphant*, ¶ 41.

¶30 Kuntz's performance was not deficient. To hold otherwise would contradict this Court's recognition that trial "counsel is allowed wide latitude in deciding what tactics [he] should, and should not, employ in defending [his] client." *State v. Kougl,* 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095 (internal citation omitted). Kuntz evaluated several factors in making his strategic decision to have Hobble testify: his client's desire to resolve the case without a continuance; the strength of the State's case with or without a key witness; and the chance to have Hobble explain information already before the court via the Petition in a light more favorable to the defense. It is not for this Court to second guess Kuntz's evaluation of those factors. *See State v. Dethman,* 2010 MT 268, ¶ 19, 358 Mont. 384, 245 P.3d 30. Hobble's ineffective assistance of counsel claim fails to satisfy the first prong of *Strickland*.

¶31 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.

¶32 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE