

APPENDIX A

FILED

04/20/2021

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 20-0102

DA 20-0102

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 98N

BRIAN D. SMITH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-16-698
Honorable Leslie Halligan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Brian D. Smith, Self-represented, Deer Lodge, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Brad Fjeldheim, Assistant
Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Missoula, Montana

Submitted on Briefs: March 24, 2021

Decided: April 20, 2021

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 Brian Smith (Smith) appeals from the January 13, 2020 Order Denying Second Petition for Post-Conviction Relief issued by the Fourth Judicial District Court, Missoula County. We affirm.

¶3 On January 25, 2012, Smith pleaded guilty to felony aggravated assault. The District Court sentenced Smith to 20 years in the Montana State Prison without the possibility of parole on May 9, 2012. The court entered written judgment on May 21, 2012. On June 1, 2012, he filed a motion to withdraw his guilty plea, which the District Court denied on July 26, 2012. Smith did not file a timely appeal but filed his first habeas corpus action on April 24, 2013, challenging the District Court's jurisdiction and the validity of his change of plea proceedings. We denied this habeas action as it was without merit on June 5, 2013. *Smith v. Frink*, No. OP 13-0278, 311 P.3d 444 (Mont. June 5, 2013). On June 11, 2013, Smith filed a petition for out-of-time appeal, in which he sought to attack his conviction through appeal of the denial of his motion to withdraw his guilty plea. On July 10, 2013, we denied Smith's petition for an out-of-time appeal, determining he had not demonstrated record-based claims necessary for direct appeal and that his appeal was

“very untimely.” *State v. Smith*, No. DA 13-0399, Order (Mont. July 10, 2013). On April 4, 2016, Smith again filed a petition for habeas corpus attacking his conviction, this time asserting it to be void as he did not receive a predetermination hearing before the prosecution commenced. On April 12, 2016, we again denied Smith’s habeas petition, concluding the District Court did have subject matter jurisdiction to proceed with his prosecution and his claims were barred by principles of claim preclusion. *Smith v. Fender*, No. OP 16-0205, 384 Mont. 551, 384 P.3d 40 (Apr. 12, 2016). On August 16, 2016, Smith filed his first postconviction relief (PCR) petition, which was denied by the District Court. Smith appealed this denial. We affirmed the denial of Smith’s PCR petition as time barred and concluded he did not satisfy the newly discovered evidence requirement to overcome the statutory time bar. *Smith v. State*, No. DA 17-0146, 2018 MT 115N, 2018 Mont. LEXIS 150. On June 30, 2017, Smith filed a notice of appeal of the district court’s June 15, 2017 order denying his second motion to withdraw his guilty plea as time-barred, but his appeal was ultimately dismissed for his failure to file an opening brief. *State v. Smith*, No. DA 17-0385, Order (Mont. Feb. 14, 2018).

¶4 Smith then embarked on filing two additional writs for habeas corpus, raising challenges to his sentence and attorney abandonment, both of which we denied. *See Smith v. McTighe*, No. OP 18-0532, 393 Mont. 542 (Sept. 25, 2018); *Smith v. McTighe*, No. OP 19-0503, 397 Mont. 555, 449 P.3d 789 (Sept. 17, 2019). In our September 17, 2019 order, we also prohibited Smith from making any further direct filings with this Court without first obtaining leave to do so.

¶5 On January 13, 2020, Smith filed his second PCR petition in the District Court, which is the subject of this appeal, again raising issues of attorney abandonment. The District Court denied this petition without hearing. In his second PCR petition, Smith asserted that his failure to receive an order issued by the District Court in DC 11-161 on January 18, 2013, frustrated his ability to appeal his conviction and is evidence of his attorney's malfeasance or abandonment. The District Court concluded these arguments lacked merit. The District Court noted that Smith had until July 2012, to appeal his conviction and judgment and that failure to receive the order, which was not issued until approximately 6 months after his appeal time ran, could not have thwarted him from filing an appeal. Even had he timely received the order, it would have made no difference in his ability to file an appeal 6 months earlier. Next, Smith argued attorney ineffectiveness or malpractice when a separate attorney he consulted with, Ed Sheehy (Sheehy), post-trial advised Smith via letter of July 10, 2012, he did not have a good faith basis to appeal and would need to instead pursue postconviction relief in his criminal case. Smith asserted this purportedly bad advice caused him to lose the right to contest his conviction and/or sentence through appeal. The District Court again did not find this argument to have merit, concluding that to the extent it supported his theory of attorney abandonment, his time to assert this theory as a basis for relief had long passed as it could have been raised in his first PCR petition.

¶6 We review a district court's denial of a PCR petition to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *State v. Evert*, 2007 MT 30, ¶ 12, 336 Mont. 36, 152 P.3d 713.

¶7 From our review of the record, we do not find the District Court's findings to be clearly erroneous or its conclusions of law incorrect. The facts supporting Smith's claims asserted in his second PCR petition occurred within one year of his conviction and could have been raised in a timely PCR petition. Smith had one-year from the date his conviction became final to bring a timely PCR petition. *See* § 46-21-102(1), MCA. Smith's conviction became final in July 2012. As such, he had to bring any PCR petition in July 2013. He did not bring his first PCR petition for over four years post finality of his conviction and the PCR petition at issue here for over seven years post finality of his conviction. Further, "[t]he court shall dismiss a second or subsequent petition by a person who has filed an original petition unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or an amended original petition." Section 46-21-105(1)(b), MCA. Smith failed to raise any issue in his second PCR petition that could not have reasonably been raised in his first PCR petition, thus the District Court did not abuse its discretion by dismissing his second PCR petition without holding a hearing. The District Court and this Court have carefully considered and analyzed Smith's filings to date and we agree with the District Court that his attempt at relief through his second PCR petition is no longer time well spent by the District Court or by this Court.

¶8 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.

¶9 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

APPENDIX B

1 Leslie Halligan, District Court Judge
2 Fourth Judicial District
3 Missoula County Courthouse
4 200 West Broadway Street
5 Missoula, MT 59802-4292
6 (406) 258-4771

FILED JAN 13 2020

SHIRLEY E. FAUST, CLERK
By *Laura M. Mincell*
Deputy

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

8 BRIAN DOUGLAS SMITH,
9 Petitioner,
10 v.
11 STATE OF MONTANA,
12 Respondent.

Dept. No. 1
Cause No. DV-16-698

**ORDER DENYING SECOND
PETITION FOR POST-CONVICTION
RELIEF**

13
14 This matter comes before the Court on Petitioner Brian Douglas
15 Smith's [Second] *Verified Petition for Postconviction Relief* ("Petition"), filed
16 *pro se*. The Clerk of the District Court received the Petition on January 2,
17 2020, and it was accompanied by a Motion to Proceed without Paying Filing
18 Fee. Because the Court hereby deems the Petition to be properly filed within
19 this pre-existing cause number, there was no need for a fee. The Court
20 instructs the Clerk to file both documents in the register of actions for this
21 cause number. The Court has reviewed the Petition and finds it appropriate
22 to deny it without further consideration.
23

1 The present Petition mainly focuses on Smith's alleged failure to
2 receive an Order issued by the Court in Cause No. DC-11-161 (Smith's
3 criminal case leading to his present conviction and incarceration) on January
4 18, 2013. In that Order, the Court (Hon. Ed McLean) answered a letter from
5 Smith asking for additional pages of the transcript from the sentencing
6 hearing. The Court's answer was negative because the Court had already
7 provided him copies of the operative portions of that hearing, where the Court
8 imposed his sentence and the conditions thereon. Smith had earlier pled
9 guilty to one count of aggravated assault, as charged in the Information
10 against him. The Petition argues that Smith's failure to receive that Order
11 frustrated his ability to appeal his conviction and is evidence of his attorney's
12 malfeasance or negligence that also frustrated his ability to appeal his
13 conviction. Both of these arguments lack merit.
14

15
16 Smith had until approximately July 21, 2012 to appeal his conviction
17 and judgment. The Order that he complains of not receiving was not issued
18 until January 18, 2013, approximately six months after that deadline.
19 Because the deadline had long passed, his timely receipt of that Order would
20 have made no difference in his ability to appeal. Thus, even had his attorney
21 provided the Order to him, he still would not have been able to appeal then.
22 Smith has not demonstrated how his timely receipt of that Order would have
23


1 made a difference in his various and hypothetical legal actions following his
2 conviction.

3 Further, the final piece of evidence on which he relies is a letter to him
4 dated July 12, 2012 in which the Office of the State Public Defender explains
5 his lack of appellate options. To the extent that this may support his theory
6 of "attorney abandonment," his time to assert this theory as a basis of relief
7 has long passed. Smith gives the Court no reason to conclude that he did
8 not receive the letter at the time or that he only learned of it later. Thus, he
9 could have raised this issue in his [First] Verified Petition for Post-Conviction
10 Relief filed under this cause number. Pursuant to Mont. Code Ann. § 46-21-
11 105(1)(b), the Court is therefore compelled to dismiss the present Petition.
12

13 The Court has already carefully considered and thoughtfully analyzed
14 the merits of Smith's 2017 Motion to Withdraw Guilty Plea in DC-11-161 and
15 his [First] Verified Petition for Post-Conviction Relief filed under this cause
16 number in August 2016. Smith took the Court's denials of those requests to
17 the Montana Supreme Court and did not prevail. The record in these cases
18 evidences other attempts for relief through the federal court system, all which
19 failed addition to these defeats. Smith's latest attempt for relief through his
20 Petition is no longer time well spent by either him or the Court. The Court
21 has carefully considered all that Smith has had to say on the subject of his
22
23

1 treatment under the law, including his new theories, and still finds that he is
2 not entitled to the relief that he is seeking here. Thus, the Court denies the
3 Petition.

4 DATED this 13th day of January, 2020.

5
6 
7 Leslie Halligan
8 District Court Judge
9
10

11 cc: Brian D. Smith, *pro se*, AO# 3009410, Conley Lake Rd, Deer Lodge, MT 59722
12 Missoula County Attorney's Office
13
14
15
16
17
18
19
20
21
22
23

ORIGINAL

FILED

09/25/2018

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 18-0532

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 18-0532

FILED

BRIAN D. SMITH,

SEP 25 2018

Petitioner,

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

v.

ORDER

PAT McTIGHE, Warden,

Respondent.

Representing himself, Brian D. Smith has filed a petition for a writ of habeas corpus, arguing that his sentence is “facially invalid and illegal,” because it is based on “false information” and lacks specific reasons for a parole restriction.

In 2012, Smith pleaded guilty to felony aggravated assault in exchange for the prosecution’s agreement to dismiss a charge of felony assault with a weapon. On May 9, 2012, the Missoula County District Court sentenced Smith to Montana State Prison for a twenty-year term with no eligibility for parole. Smith filed a motion to withdraw his plea, which the District Court denied on July 25, 2012. Smith did not seek a timely appeal with this Court, and we later denied his petition for an out-of-time appeal in July 2013. *State v. Smith*, No. DA 13-0399, Order (Mont. Jul. 10, 2013).

In 2016, Smith sought postconviction relief in the District Court by filing a petition. The court in its denial noted the petition’s untimeliness yet addressed the merits. Smith appealed the court’s decision, and this Court affirmed in an unpublished opinion. *Smith v. State*, No. DA 17-0146, 2018 MT 115N, ___ Mont. ___, 416 P.3d 1054 (table).

Smith raises several issues in his petition. He asserts that the reasons for his parole eligibility restriction are not valid in light of § 46-18-202(2), MCA. He maintains that his sentence violates this statutory section language in that “the judgment must contain a statement of the reasons for the restriction.” Section 46-18-202(2), MCA (emphasis added

to the original language). Smith contends that the written reasons for the court's judgment are not specific, do not contain factual evidence, and conflict with § 46-18-223(3), MCA.

Smith also asserts that the procedural bar and res judicata do not apply to this petition. He argues several tangential issues about what the presentence investigation report (PSI) contained, what the presiding Judge stated at sentencing, and that Smith was willing to go to trial on the second charge, which was not encouraged by his counsel. Citing to Montana case law, Smith argues materially false information is the basis of his sentence, which therefore results in an illegal sentence. See *Bauer v. State*, 1999 MT 185, ¶ 20, 295 Mont. 306, 983 P.2d 955 ("a defendant is protected from a sentence predicated on misinformation about that defendant's criminal history."). Smith requests this Court vacate and remand for resentencing pursuant to *Lott v. State*, 2006 MT 279, 334 Mont. 270, 150 P.3d 337.

Smith does not have a facially invalid and illegal sentence. While Smith correctly refers to Montana's statutes, and his written judgment, he is mistaken that the court's reasons are inadequate. The court included two reasons for the sentence when it imposed the parole ineligibility restriction:

1. The sentence takes into account the violent nature of the crime and the injuries to the victim and her family.
2. It is too great of a risk to release the Defendant into the community.

First, the court's reasons do not conflict with § 46-18-223(3), MCA, because that statute does not apply to Smith's sentencing. Section 46-18-223, MCA, deals with a hearing on an application to exceptions for mandatory minimum sentences. Second, Montana's statutes do not require factual findings or any more specificity. Section 46-18-202(2), MCA, requires a sentencing judge to include the reasons for the parole restriction in writing.

The District Court was within its authority and gave written reasons for the sentence imposed. We have held that § 46-18-202(2), MCA, authorizes a sentencing court to impose parole eligibility restrictions when imposing a prison term that exceeds one year. *State v. Kirkbride*, 2008 MT 178, ¶¶ 16-21, 343 Mont. 409, 185 P.3d 340. We have further held

that sentencing courts are afforded broad discretion in sentencing and have "upheld restrictions based at least in part upon the heinous nature of the crime." *State v. Christianson*, 1999 MT 156, ¶¶ 31, 37, 295 Mont. 100, 983 P.2d 909 referring to *State v. Heit*, 242 Mont. 488, 791 P.2d 1379 (1990).

During the sentencing hearing, the District Court stated, as put forth in Smith's copy of the attached transcript:

And, as [the victim's] sister pointed out, you didn't have just one victim. You shattered the whole family – mother, sister, as well as [the victim].

You didn't just hurt her. You tried to kill her, and in the process, you cut her throat, tore an ear off of her head, and then, gave her a couple different skull fractures, along with several lacerations, that required surgery, and much surgical stitches to put her head back together.

Tr. at 35. The District Court detailed the severity of Smith's crime during this hearing and complied with the statutory language by including sufficient reasons for the parole restriction in the written judgment.

Smith is incorrect in his assertion that the procedural bar and res judicata, also known as claim preclusion, do not apply here. The cases to which he cites for support of his issues were all direct appeals, not petitions, such as his writ. In *Lott*, there was a change in Montana's law after Lott's sentence, which directly affected Petitioner Lott and his double jeopardy claims. *Lott*, ¶¶ 20-23. We do not have that situation here, and we have previously explained such to Smith in prior proceedings.¹ Smith is precluded from raising these issues related to his underlying proceeding, the PSI, and sentencing in a petition for a writ of habeas corpus. His supporting documents reference an intention to file an appeal,

¹ See *Smith v. Frink*, No. OP 13-0278, Order denying his petition for habeas corpus relief challenging the court's jurisdiction and presiding judge (Mont. Jun. 5, 2013); *State v. Smith*, No. DA 13-0399, Order denying his petition for an out-of-time appeal because it was untimely and any ineffectiveness of assistance of counsel claims should have been raised in a petition for postconviction relief (Mont. Jul. 10, 2013); and *Smith v. Fender*, No. OP 16-0205, Order denying petition for a writ of habeas corpus because the District Court had subject matter jurisdiction and his claims were barred by principles of claim preclusion (Mont. Apr. 12, 2016).

Exhibit "F"

1 The Honorable Leslie Halligan
DISTRICT COURT JUDGE
2 Dept. No. 1
Fourth Judicial District
3 Missoula County Courthouse
Missoula, Montana 59802

COPY

6 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

7 BRIAN DOUGLAS SMITH, * Dept. No. 1
8 Petitioner, * Cause No. DV-16-698

9 -VS-

* ORDER

10 STATE OF MONTANA, *
11 Respondent. *

12 * * * * *

13 On motion of the State of Montana and good cause appearing,
14

15 IT IS HEREBY ORDERED

16 1. Defense counsel, the attorney who represented Petitioner in the
17 proceedings resulting in his criminal conviction and who is now
18 charged by Petitioner with ineffective assistance as counsel, is
19 hereby ordered to respond by affidavit or other sworn testimony to
20 the charges of ineffective assistance of counsel respecting
21 representation.
22

23 2. Defense counsel shall be immune from proceedings before the
Montana Commission on Practice and from civil or other actions of

1 any kind for alleged malpractice in so responding to the allegations
2 of Petitioner insofar as said response related to the allegations in the
3 petition.
4

5
6 DATED this _____ day of September, 2016.
7

8
9 DISTRICT COURT JUDGE

10 cc: Suzy Boylan, County Attorney's Office
11 Missoula OPD
12
13
14
15
16
17
18
19
20
21
22
23

1 Ed McLean, District Judge
2 Department No. 1
3 Fourth Judicial District
4 Missoula County Courthouse
5 Missoula, Montana 59802
6 Telephone: (406) 258-4771

FILED JUL 26 2012

SHIRLEY E. FAUST, CLERK
By Cassidy Deputy

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

8 STATE OF MONTANA,) DEPT. 1
9 Plaintiff,) CAUSE NO. DC-11-161
10 -vs-) OPINION AND ORDER
11 BRIAN DOUGLAS SMITH,)
12 Defendant.)

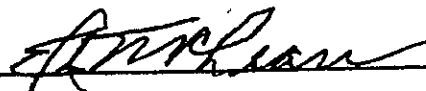
13
14 Pending before the Court, is Defendant's Motion to Withdraw a Plea of
15 Guilty Under Mont. Code. Ann. § 46-16-105 based on the allegation that his
16 public defender mislead him by promising him he would be able to cross-
17 exam the witnesses at his sentencing hearing to challenge untrue testimony,
18 and had he known he would not be allowed to cross-exam the witnesses, he
19 would never have agreed to plead guilty.

20
21 Defendant has failed to cite to or provide any evidence to support that
22 any of the witness impact statements made at the sentencing hearing were
23 untruthful, and such untruths had a significant impact on the mandatory
24 sentence he received of 20 years without the possibility of parole. Had the
25
26

1 Defendant wanted to challenge the truthfulness of the testimony of the
2 witnesses against him, he should have proceeded to trial. Instead, Defendant
3 clearly acknowledged at both the change of plea hearing and the sentencing
4 hearing that no promises were made to entice him to change his plea to guilty
5 and that he was satisfied with the services of his attorney.
6

7 IT IS HEREBY ORDERED that Defendant's Motion to Withdraw a Plea
8 of Guilty Under Mont. Code Ann. § 46-16-105 is DENIED.

9 SO ORDERED and DATED this 25th day of July, 2012.

10
11 
12 _____
13 ED McLEAN, District Judge

14 cc: Brian Douglas Smith
15 Susan Boylan, Esq.
16 Katie Green, Esq.
17
18
19
20
21
22
23
24
25
26

**Additional material
from this filing is
available in the
Clerk's Office.**