

 ORIGINAL

FILED

03/07/2023

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 23-0116

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 23-0116

FILED

MAR 07 2023

Bowen Greenwood
Clerk of Supreme Court
State of Montana

WAYNE ANTHONY AVILES,

Petitioner,

v.

ORDER

CAPTAIN JASON KOWALSKI,

Respondent.

Self-represented Petitioner Wayne Anthony Aviles has filed a Petition for Writ of Habeas Corpus, requesting full exoneration and expungement of charges from his record, his immediate release from prison, and a large amount of restitution. Aviles alleges illegal incarceration due to his "illegal sentence" because it is a five-year, unsuspended term to the Department of Corrections (DOC). Aviles contends that his sentence violates his right to be free from double jeopardy. He also lists at least fifteen claims, such as conflict of interest, ineffective assistance of counsel, and violations of other constitutional rights. Aviles includes 192 pages of attachments. He is currently placed at the Missoula Assessment Sanction Center (MASC).

On October 10, 2017, the Tenth Judicial District Court, Fergus County, sentenced Aviles for felony sexual intercourse without consent to the DOC for an unsuspended ten-year term. The District Court later amended the sentence on the State's motion, holding a hearing on January 4, 2018, and imposing a ten-year DOC term with five years suspended. Aviles did not appeal.

In open court on May 24, 2022, the District Court revoked Aviles's suspended sentence because of violations. The court imposed a five-year, unsuspended term and awarded credit for time served as well as street time. Aviles did not appeal his sentence upon revocation.

Upon review, Aviles's five-year unsuspended sentence is lawful and valid because it is a sentence upon revocation. Pursuant to § 46-18-203(7)(a)(iii), MCA, a sentencing court may revoke the suspension of the sentence and impose any term that is not longer than the original sentence. Upon revocation, Aviles received a five-year sentence, which is not longer than his original ten-year sentence with five years suspended. Section 46-18-203(7)(a)(iii), MCA. Aviles's sentence does not violate the right to be free from double jeopardy. This Court has stated that "revocation of a suspended sentence based upon violations of probationary conditions and reinstatement of the [] sentence does not violate a person's constitutional rights against double jeopardy[.]" *State v. Dewitt*, 2006 MT 302, ¶ 10, 334 Mont. 474, 149 P.3d 549.

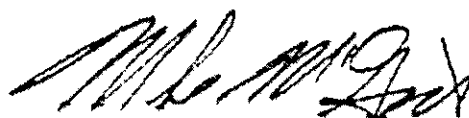
Aviles's other claims cannot be addressed through the remedy of habeas corpus. Section 46-22-101(1), MCA. His litany of claims would be more appropriately raised in direct appeal, and at this point, he is time-barred to challenge his conviction and sentence through an appeal. Section 46-22-101(2), MCA.

Aviles retains the remedy of filing a petition for postconviction relief with the District Court. He may raise the claims concerning his counsel's representation through such a petition. See §§ 46-21-101 through 46-21-105, MCA. Under Montana law, Aviles is procedurally barred to challenge his sentence upon revocation through the remedy of habeas corpus. Section 46-22-101(2), MCA. Aviles is not entitled to his requests of exoneration, dismissal of charges, release, or restitution. Therefore,

IT IS ORDERED that Aviles's Petition for Writ of Habeas Corpus is DENIED and DISMISSED.

The Clerk of the Supreme Court is directed to provide a copy of this Order to: Captain Kowalski, counsel of record, and Wayne Anthony Aviles personally.

DATED this 7th day of March, 2023.



Chief Justice

Joe Jacobson

April Hasty

Det. M. L. H.

Jim Rice
Justices

ORIGINAL

FILED

03/24/2023

In The Supreme Court of The State of Montana

Bowen Greenwood
Clerk of the Supreme Court
STATE OF MONTANA

Case Number: OP 23-0116

Wayne Anthony Aviles,
Petitioner,

Supreme Court No. OP 23-0116

V.

Captain Jason Kowalski,
Respondent.

Petition For Reversal, 3 Contempts of Court
(Perjury, Willful Neglect, Abuse of Process or
Proceedings), Court Serving An Inaccurate and
Illegal Document, and No Double Jeopardy
Test Performed.

Comes now, above named petitioner, in regard to the denial and dismissal received on March 10, 2023. Aviles petitions for the above named motion. Aviles requests a reversal of the order to deny and dismiss his habeas corpus petition.

The Montana Supreme Court is committing perjury by stating "Aviles alleges illegal incarceration due to his 'illegal sentence' because it is a 5-year, unsuspended term to the Department of Corrections (DOC). Aviles contends that his sentence violates his right to be free from double jeopardy." It is perjury because what Aviles stated was that he is illegally and unlawfully incarcerated due to multiple sentences for the same crime as indicated in the memorandum, 4 separate sentences to be exact. This constitutes 3 double jeopardy's, not just one. And the court mentions nothing of the fact that Aviles also received a sentence for 10 years Montana State Prison (MSP) in the oral judgment. By law the oral judgment takes importance and trumps the written judgment. It takes precedence. Yet this isn't the only issue.

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State of Montana

The court also violates their own rules by not supplying a Certificate of Service with papers presented for filing, under rule 10,(4). Also the 4 justice signatures and the chief justice signature are not legible and have no printed name by any of the signatures with titles. This proves as an inaccurate and illegal document that could have been forged by anyone due to not knowing who those signatures belong to. It's not verifiable. Aviles requests a proper legal document with printed names and titles by signatures as well as an attached Certificate of Service

The Montana Supreme Court also alleges that his other claims can't be addressed through the remedy of habeas corpus. According to the book "The Habeas Corpus Manual" by Raymond E. Lumsden, in chapter 5, Ineffective assistance of counsel "constitutes the largest segment of claims raised in all state habeas corpus and post-conviction petitions." This is why the United States Supreme Court uses the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Also see Ex parte Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980).

Other issues are as stated Newly Discovered Evidence which in every state will require a new trial. Aviles claims actual innocence which is a substantive claim as stated in Herrera v. Collins, 506 U.S. 390 (1993). Also in Ex parte Tuley, 109 S.W.3d 388 (Tex. Crim. App. 2002), which expanded that court's actual innocence jurisprudence as set out in Ex parte Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996). Also see Ex parte Harmon, 116 S.W.3d 778 (Tex. Crim. App. 2002). New evidence is also in Montana Code under MCA, § 46-21-102(2).

For Brady violations like Aviles mentions, see *Ex parte Calderon*, 399 S.W.3d 64 (Tex. Crim. App. 2010), see also *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006), and see *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012).

This shows that it's definitely usable for post-conviction relief via habeas corpus petition.

Next, the court did not perform the double jeopardy test per the Blockburger test which is the standard. *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed 306, 52 S.Ct. 180 (1932) defines double jeopardy in the U.S. Supreme Courts decision. See also *Lewis v. U.S.*, 523 U.S. 155 (1998).

When applying the Blockburger test, one must apply the test twice, one for each offense. (i.e. - 4 sentences require 4 tests).

If any offense contains the same elements that are exactly the same as the other offense, then double jeopardy exists. For example, if your first offense has 3 elements to the offense, and they are the same as the elements in your second offense, then double jeopardy applies. (From "The Habeas Corpus Manual", ch. 10, page 94).

If the court chooses not to perform the Blockburger test, then Aviles requests for that to be put on record. That is acting as if the law doesn't exist, and again it is perjury. The court is not above the law and has to follow the rules like everyone else. It is the obligation of the court to do so. Even if Aviles were to let drop the revocation part (for an example), that still leaves 3 other sentences and 2 double jeopardy's. Those are not procedurally barred. So the Blockburger test needs to be applied, one for each of the 3 sentences.

This law coupled with the United States Constitution under Preamble, Art. I, Section 10, "No state shall... pass any Bill of... Law impairing the obligation of contracts,".

What this means is that the Montana Supreme Court can't contradict its obligations as set forth under MCA, § 28-1-203, previously mentioned. But the fact is that the Montana Supreme Court doesn't follow some of the rules it sets out due to the Montana Constitution, Art. VII, Section 2 (3) "rules governing appellate procedure... for all other courts." This would explain why Aviles did not receive a Certificate of Service. This means that the law technically doesn't apply to the Montana Supreme Court and as such is a contradiction to the other laws set forth as mentioned and is in fact a "law impairing the obligation of contracts" as per U.S. Constitution, Art. I, Section 10. This is a blatant violation and affects everyone under the case load of Montana Supreme Court.

This is willful neglect under MCA, § 3-1-501, (1), (c) and abuse of the process or proceedings (d), which is a contempt of court. This is also a clear violation of due process rights under 14th amendment. For all the justices of the Montana Supreme Court to violate those laws is a very egregious act and all perpetrators must be held accountable. So Aviles requests all violators to be held in contempt until the law is rectified to account for all courts in the state of Montana which is to include the Montana Supreme Court.

This is important because the Montana Supreme Court has the obligation to uphold the laws it creates.

If they choose not to follow their own rules, that shows a corruption of justice. The habeas corpus is a form of relief to right a wrong done to someone in the form of post-conviction relief.

Dated: March 15, 2023.

Cou'd to: State of Montana, Attorney General
Clk of Court

Wayne Aviles

Wayne Aviles, Pro Se

Certificate of Service

I, the undersigned here, certify that on this 15th day of March, 2023, I served a true and correct copy of the following:

"Petition for Reversal of Verdict of Court (Perjury, willful neglect, abuse of process or proceedings), Court Services in a court and other document, Notable Injury, and performed" upon:

State of Montana

Clerk of Court

146 E. 2nd Avenue

Butte, MT 59701

P.O. Box 202402

215 N. Sanders St.

Helena, MT 59601-2401

Butte, MT 59601

I am submitting this to a designated person within the court system, and I am certifying that the copy of the document is true and correct as the same appears on file.

Respectfully,

Wayne A. Aviles, pro se

Missoula County Detention Center

2340 Mission Rd.

Missoula, MT 59808-1830

FILED

04/11/2023

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 23-0116

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 23-0116

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APR 11 2023

Bowen Greenwood
Clerk of the Supreme Court
State of Montana

WAYNE ANTHONY AVILES,

Petitioner,

v.

ORDER

CAPTAIN JASON KOWALSKI,

Respondent.

On March 7, 2023, this Court denied and dismissed self-represented Petitioner Wayne Anthony Aviles's Petition for Writ of Habeas Corpus because he was barred to challenge his 2022 sentence upon revocation, under Montana law. Section 46-22-101(2), MCA. On March 10, 2023, Aviles filed a fifteen-page Memorandum in support of his Writ. Since then, Aviles has filed a "Petition for Reversal, 3 Contempts of Court (Perjury, Willful Neglect, Abuse of Process or Proceedings), Court Serving an Inaccurate and Illegal Document, and No Double Jeopardy Test Performed." He states: "Aviles requests reversal of the order to deny and dismiss his habeas corpus petition." We deem his recent filing a petition for rehearing, pursuant to M. R. App. P. 20(1).

M. R. App. P. 20(1) provides criteria for rehearing. This Court "will consider a petition for rehearing presented only upon . . . [t]hat it overlooked some fact material to the decision[,] . . . or [t]hat its decision conflicts with a statute or controlling decision not addressed by the supreme court." M. R. App. P. 20(1)(a)(i) and (iii). "Absent clearly demonstrated exceptional circumstances, the supreme court will not grant petitions for rehearing of its orders disposing of motions or petitions for extraordinary writs." M. R. App. P. 20(1)(d).

Aviles's Memorandum is not proper. Because this Court received his Memorandum after we issued the Order, we will not consider Aviles's Memorandum. Moreover, Aviles

cannot demonstrate that his Memorandum is appropriate under M. R. App. P. 14(5). This Court declines to address the claims presented in the Memorandum.

Turning to his Petition for Rehearing, Aviles's claims are mistaken. We explained that his 2022 sentence upon revocation does not subject him to double jeopardy. Under Montana law, the scope of habeas corpus is very narrow—a demonstration of illegal restraint or incarceration. Section 46-22-101(1), MCA. We reiterate:

Upon review, Aviles's five-year unsuspended sentence is lawful and valid because it is a sentence upon revocation. Pursuant to § 46-18-203(7)(a)(iii), MCA, a sentencing court may revoke the suspension of the sentence and impose any term that is not longer than the original sentence. Here, Aviles received a five-year sentence, which is not any longer than his original ten-year sentence with five years suspended. Section 46-18-203(7)(a)(iii), MCA. His sentence does not violate the right to be free from double jeopardy. This Court has stated that “revocation of a suspended sentence based upon violations of probationary conditions and reinstatement of the [] sentence does not violate a person's constitutional rights against double jeopardy[.]” *State v. Dewitt*, 2006 MT 302, ¶ 10, 334 Mont. 474, 149 P.3d 549.

Turning to Aviles's other claims, these claims cannot be addressed through the remedy of habeas corpus. Section 46-22-101(1), MCA. His litany of claims would be more appropriately raised in direct appeal, and at this point, he is time-barred to challenge his conviction and sentence through an appeal. Section 46-22-101(2), MCA.

Aviles retains the remedy of filing a petition for postconviction relief with the District Court. He may raise the claims concerning his counsel's representation through such a petition. See §§ 46-21-101 through 46-21-105, MCA. Under Montana law, Aviles is procedurally barred to challenge his sentence upon revocation through the remedy of habeas corpus. Section 46-22-101(2), MCA. Aviles is not entitled to his requests of exoneration, dismissal of charges, release, or restitution.

Aviles v. Kowalski, No. OP 23-0116, Order, at 2 (Mar. 7, 2023). We conclude that Aviles provides no basis or criteria to warrant a rehearing. Accordingly,

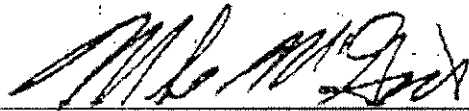
IT IS ORDERED that Aviles's “Petition for Reversal, 3 Contempts of Court (Perjury, Willful Neglect, Abuse of Process or Proceedings), Court Serving an Inaccurate

and Illegal Document, and No Double Jeopardy Test Performed[.]” deemed a Petition for Rehearing, is DENIED and DISMISSED.

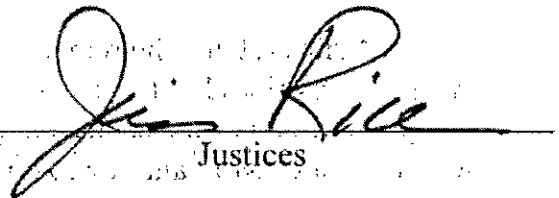
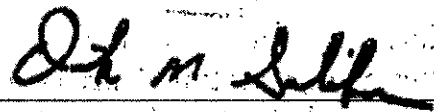
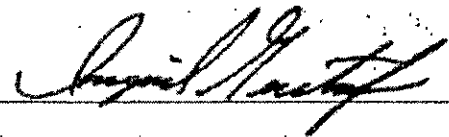
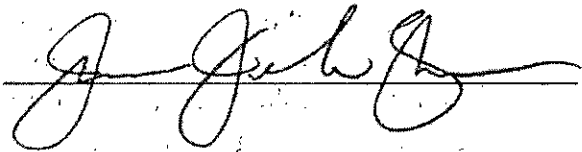
IT IS FURTHER ORDERED that Aviles’s Memorandum is DENIED, as moot.

The Clerk of the Supreme Court is directed to provide a copy of this Order to counsel of record and Wayne Anthony Aviles personally.

DATED this 11th day of April, 2023.



Chief Justice



Justices

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