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Children, Families, Health, and Human Services Interim Committee

63rd Montana Legislature

TO: Children, Families, Health, and Human Services Interim Committee Members

FROM: Alexis Sandru, Staff Attorney

DATE: November 5, 2013

RE: Section 46-14-312(2), MCA -- Legislative History (Agenda Item 3.b)

At its September meeting, the CFHHS Interim Committee requested background information regarding subsection (2) of 46-14-312, MCA, which provides sentencing procedures for defendants who are found guilty of a crime but who, because they were suffering from a mental disease or defect or developmental disability when the crime was committed, were unable to appreciate the criminality of their conduct or conform their conduct to the law. The following summary describes the legislative history for 46-14-312(2), MCA, as well as related case law. For reference, 46-14-312 currently provides:

> **46-14-312. Sentence to be imposed.** (1) If the court finds that the defendant at the time of the commission of the offense of which the defendant was convicted did not suffer from a mental disease or defect as described in 46-14-311, the court shall sentence the defendant as provided in Title 46, chapter 18.
>
> (2) If the court finds that the defendant at the time of the commission of the offense suffered from a mental disease or defect or developmental disability as described in 46-14-311, any mandatory minimum sentence prescribed by law for the offense need not apply. The court shall sentence the defendant to be committed to the custody of the director of the department of public health and human services to be placed, after consideration of the recommendations of the professionals providing treatment to the defendant and recommendations of the professionals who have evaluated the defendant, in an appropriate correctional facility, mental health facility, as defined in 53-21-102, residential facility, as defined in 53-20-102, or developmental disabilities facility, as defined in 53-20-202, for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The director may, after considering the recommendations of the professionals providing treatment to the defendant and recommendations of the professionals who have evaluated the defendant, subsequently transfer the defendant to another

correctional, mental health, residential, or developmental disabilities facility that will better serve the defendant's custody, care, and treatment needs. The authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.

(3) Either the director or a defendant whose sentence has been imposed under subsection (2) may petition the sentencing court for review of the sentence if the professional person certifies that:

(a) the defendant no longer suffers from a mental disease or defect;

(b) the defendant's mental disease or defect no longer renders the defendant unable to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law;

(c) the defendant suffers from a mental disease or defect or developmental disability but is not a danger to the defendant or others; or

(d) the defendant suffers from a mental disease or defect that makes the defendant a danger to the defendant or others, but:

(i) there is no treatment available for the mental disease or defect;

(ii) the defendant refuses to cooperate with treatment; or

(iii) the defendant will no longer benefit from active inpatient treatment for the mental disease or defect.

(4) The sentencing court may make any order not inconsistent with its original sentencing authority, except that the length of confinement or supervision must be equal to that of the original sentence. The professional person shall review the defendant's status each year.

1. Legislative History

Section 46-14-312, MCA, was enacted in 1979 as part of HB 877. Prior to 1979, a defendant could raise insanity as an affirmative defense, meaning that a defendant could avoid responsibility for a crime by proving that it was more likely than not that the defendant at the time the crime was committed was suffering from a mental disease or defect that made the defendant unable to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law.[1] HB 877 abolished insanity as an affirmative defense and provided alternative procedures for when to consider a defendant's mental state in a criminal proceeding:

(1) before trial to determine whether the defendant was fit to proceed (i.e., able to understand the proceedings against the defendant or assist in the defense);

(2) during trial to determine whether the defendant possessed the requisite state of mind (i.e., whether the defendant acted purposely or knowingly); and

(3) at sentencing to determine whether, at the time of the offense, the defendant was able

[1] Section 95-503, RCM (1947).

to appreciate the criminality of the act or conform the defendant's conduct to the law.[2]

In effect, 46-14-312, MCA, moved consideration of whether, because of a mental disease or defect, a defendant was able to appreciate the criminality of the defendant's conduct or conform the defendant's conduct to the law from the jury during trial to the court during the sentencing phase. This section was not originally included in HB 877 but was part of a separate bill, SB 495, and was later amended into HB 877 after SB 495 was tabled in committee. Testimony regarding HB 877 focused primarily on the abolishment of the insanity defense and not on the sentencing component. Senator Towe, the sponsor of SB 495, advocated that mental illness or defect should affect a defendant's sentence; a defendant suffering from a mental disease or defect "should not be treated the same way".[3] Subsection (2) of 46-14-312, MCA, as originally enacted provided:

> (2) If the court finds that the defendant at the time of the commission of the offense suffered from a mental disease or defect as described in [section 9][4], any mandatory minimum sentence prescribed by law for the offense need not apply and the court shall sentence him to be committed to the custody of the director of the department of institutions[5] to be placed in an appropriate institution for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The authority of the court with regard to sentencing is the same as authorized under Title 46, chapter 18, provided the treatment of the individual and the protection of the public are provided for.

In 1995, HB 84 amended 46-14-312(2), MCA, adding the requirement that the director consider the recommendations of the professionals treating a defendant when placing the defendant in a facility; replacing the term "institution" with the term "correctional or mental health facility"; and granting the director authority to subsequently transfer a defendant to another facility.[6]

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[2] St. v. Korell, 213 Mont. 316, 690 P.2d 992 (1984).

[3] See pg. 6, Minutes of Senate Judiciary Committee, February 19, 1979.

[4] The reference to section 9 was incorrect. Section 10, Ch. 713, L. 1979, provided: "Whenever a defendant is convicted on a verdict or a plea of guilty and he claims that at the time of the commission of the offense of which he was convicted he was suffering from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the sentencing court shall consider any relevant evidence as it considers necessary for the determination of the issue [. . .] ."

[5] Section 46-14-312(2) was amended in 1991 and 1995 to change the reference to the department of institutions to the department of corrections and human services and, later, to the department of public health and human services and to include stylistic changes. See Ch. 262, L. 1991; Ch. 800, L. 1991; and Ch. 546, L. 1995.

[6] Ch. 256, L. 1995.

Proponents testified that HB 84 clarified that the director could make a decision, without having to go to court and based on the information available from correctional and mental health professionals, on the initial placement of a defendant and could later transfer the defendant to another institution as the defendant's needs changed.[7]

Written testimony in favor of HB 84 submitted by the then medical director of Montana State Hospital (MSH) described three groups of individuals who were sentenced to MSH but who might require transfers: (1) individuals who were misdiagnosed with mental illness or who recovered quickly; (2) individuals who are mentally ill but refuse to cooperate with treatment; or (3) individuals who do not respond to any treatment. The medical director cited issues related to keeping these individuals at MSH:

> [One] individual comes to mind who was sentenced under this act who soon after admission showed no signs of mental illness. Not only did symptoms of any mental illness disappear, but the patient interfered with the treatment of other patients by suggesting they not participate in therapy, not take medication, or not cooperate with the treatment program. Such individuals also tend to intimidate, exploit, and victimize seriously mentally ill patients with whom they are placed. For example, one individual with no visible means of support constantly has money. Our only explanation is that he is exploiting other patients by outwitting them. Such activities by these individuals interfere with the treatment of the seriously mentally ill, and in those cases where it recreates victimization can actually make the patient worse. One such individual had secured a $10,000 loan from a patient until staff learned of the act and prohibited completion of the illicit financial arrangement.[8]

The medical director further stated that the above groups could be more appropriately served in the prison:

> [Such] individuals, when ready for discharge from the hospital, are not accepted by the mental health centers because they have no identifiable mental illness. The mental health center correctly asks what they can do for them as there is nothing to treat. It often is more helpful to the individual, and serves the interest of society better, if that person can be transferred to the prison and released from the prison through appropriate programs of supervision and accountability.
>
> It is counter-productive to keep someone who is guilty but mentally ill in [MSH] when such individual then refuses treatment which might help him in not reoffending. Some such individuals would be more appropriately transferred to the prison. I might add that this is also less expensive for the state.

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[7] Pg. 2, Minutes of House Judiciary Committee, January 11, 1995.

[8] Exhibit 1, Minutes of House Judiciary Committee, January 11, 1995.

> There are a small number of mental conditions for which there is no treatment to date, or which are resistant to known treatment. Perhaps the best example of this would be some personality disorders where the individual has firmly entrenched personality traits of manipulation, lying, exploitation, and a total insensitivity to the needs and welfare of others. In some situations such calloused individuals would be more appropriate for a prison setting.[9]

The sole opponent to HB 84 expressed concern about "the grant of unfettered discretion to the department to transfer inmates between correctional facilities and mental health facilities". The opponent proposed that the statute should not allow the department to initially place a defendant in a correctional facility but should require that all defendants be initially placed in a mental health facility and should require that any subsequent transfer to a correctional facility involve the courts.[10]

Section 46-14-312(2), MCA, was last amended in 2003 to include defendants suffering from a developmental disability; to require that the director also consider the recommendations of the professionals evaluating a defendant when placing the defendant; and to add a residential facility, which by definition is the Montana Developmental Center (MDC), and a developmental disabilities facility as potential placement facilities.[11] The 2003 amendments were the result of issues involving a criminal commitment to MDC and were part of a clean-up bill that came out of the CFHHS Interim Committee that sought to clarify the mechanism for criminal commitments to MDC.[12] An informational witness expressed concern about giving placement discretion to DPHHS rather than the courts.[13]

2. Case Law

The Montana Supreme Court has defined the applicability of 46-14-312, MCA, concluding that the alternative sentencing provisions of 46-14-312(2), MCA, do not apply to defendants who were not mentally ill at the time of the commission of the crime or who were mentally ill at the time of the commission of the crime but were still able to appreciate the criminality of their acts or conform their conduct to the law.[14]

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[9] Exhibit 1, Minutes of House Judiciary Committee, January 11, 1995.

[10] Exhibit 2, Minutes of House Judiciary Committee, January 11, 1995.

[11] Ch. 452, L. 2003.

[12] Pg. 22, Minutes of Senate Judiciary Committee, January 10, 2003; pg. 3, Minutes of House Judiciary Committee, March 7, 2003; pg. 6, Minutes of House Appropriations Committee, March 31, 2003.

[13] Pg. 3, Minutes of House Judiciary Committee, March 7, 2003.

[14] See St. v. Mercer, 191 Mont. 418, 625 P.2d 44 (1981); St. v. Watson, 211 Mont. 401, 686 P.2d 879 (1984).

The Court has not faced challenges specific to the director's transfer authority provided for in subsection (2) of 46-14-312, MCA. However, the Court has addressed challenges that the alternative sentencing procedures provided in the statute violate the constitutional prohibition on cruel and unusual punishment and has concluded that "[these] requirements place a heavy burden on the courts and the [department]. They serve to prevent imposition of cruel and unusual punishment upon the insane."[15]

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[15] Korell, 213 Mont. at 333, 690 P.2d at 1001.