



Montana Legislative Services Division
Legal Services Office

Memorandum

To: Law and Justice Interim Committee
From: Julianne Burkhardt
Date: August 28, 2013
Re: Overview of Criminal Justice Process Following Conviction

I. Introduction

The primary ways for a person to be convicted of a felony are a guilty plea or a verdict of guilty following a trial. Guilty pleas are addressed in §46-16-105, MCA. The conduct of a criminal jury trial is addressed in §46-16-401, *et seq.* Following conviction, offenders proceed to the sentencing phase.

II. Sentencing

The sentence and judgment phase of a criminal case is addressed in Title 46, chapter 18, MCA. The correctional and sentencing policy of the state of Montana is found in §46-18-101:

46-18-101. Correctional and sentencing policy. (1) It is the purpose of this section to establish the correctional and sentencing policy of the state of Montana. Laws for the punishment of crime are drawn to implement the policy established by this section.

(2) The correctional and sentencing policy of the state of Montana is to:

(a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;

(b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;

(c) provide restitution, reparation, and restoration to the victim of the offense; and

(d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

(3) To achieve the policy outlined in subsection (2), the state of Montana adopts the following principles:

(a) Sentencing and punishment must be certain, timely, consistent, and understandable.

(b) Sentences should be commensurate with the punishment imposed on other persons committing the same offenses.

(c) Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.

(d) Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances.

(e) Sentencing practices must include punishing violent and serious repeat felony offenders with incarceration.

(f) Sentencing practices must provide alternatives to imprisonment for the punishment of those nonviolent felony offenders who do not have serious criminal records.

(g) Sentencing and correctional practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions.

(h) Sentencing practices must emphasize restitution to the victim by the offender. A sentence must require an offender who is financially able to do so to pay restitution, costs as provided in 46-18-232, costs of assigned counsel, as provided in 46-8-113, and, if the offender is a sex offender, costs of any chemical treatment.

(i) Sentencing practices should promote and support practices, policies, and programs that focus on restorative justice principles.

Following conviction of a felony, the district court orders a presentence investigation. *See* §46-18-111, MCA. The presentence investigation report contains the following information:

46-18-112. Content of presentence investigation report. (1) Whenever an investigation is required, the probation officer shall promptly inquire into and report upon:

(a) the defendant's characteristics, circumstances, needs, and potentialities;

(b) the defendant's criminal record and social history;

(c) the circumstances of the offense;

(d) the time of the defendant's detention for the offenses charged;

(e) the harm caused, as a result of the offense, to the victim, the victim's immediate family, and the community; and

(f) the victim's pecuniary loss, if any. The officer shall make a reasonable effort to confer with the victim to ascertain whether the victim has sustained a pecuniary loss. If the victim is not available or declines to confer, the officer shall record that information in the report.

(2) All local and state mental and correctional institutions, courts, and law enforcement agencies shall furnish, upon request of the officer preparing a presentence investigation, the defendant's criminal record and other relevant information.

(3) The court may, in its discretion, require that the presentence investigation report include a physical and mental examination of the defendant.

(4) Upon sentencing, the court shall forward to the sheriff all information contained in the presentence investigation report concerning the physical and

mental health of the defendant, and the information must be delivered with the defendant as required in 46-19-101.

As described in §46-18-112, MCA, once a person is convicted, the Montana Rules of Evidence and other statutes which limit the information, testimony, and evidence a jury is allowed to consider, no longer apply. For example, the criminal history of the accused is generally not a part of the criminal trial. However, once a person is convicted the Montana Rules of Evidence, which typically keep that information away from the jury, no longer apply and a defendant's criminal history often has a large impact on the sentence ordered by the district court. Additionally, even if the offender does not have a criminal history, information regarding the offender's social history or reputation in the community can be considered at sentencing.

III. Postsentencing Options

A. Appeal -- An appeal may be filed by a defendant within 60 days of the date of the sentence and judgment. The scope of the appeal is governed by §46-20-104, MCA:

46-20-104. Scope of appeal by defendant. (1) An appeal may be taken by the defendant only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant.

(2) Upon appeal from a judgment, the court may review the verdict or decision and any alleged error objected to which involves the merits or necessarily affects the judgment. Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-701(2).

A defendant may also obtain a stay of execution of a sentence while the appeal is pending. For example, a defendant who is sentenced to a term of incarceration in the Montana State Prison may request bail pending appeal and if bail is granted the sentence of imprisonment must be stayed. *See* §46-20-204, MCA.

B. Application to Sentence Review Division -- Another option available to offenders following conviction is an application to the sentence review division of the Montana supreme court. The sentence review division is composed of three district court judges appointed by the chief justice of the Montana supreme court. *See* §46-18-901, MCA. The sentence review division considers the appropriateness of the sentence and may review all documents connected with the conviction and sentence. The sentence review division has broad powers to decrease or increase a sentence. *See* §46-18-904, MCA. An offender may file an application with the sentence review division if sentenced to a term of 1 year or more in the state prison or to the custody of the department of corrections. *See* §46-18-903, MCA. The decision of the sentence review division is final. Thus, there is no direct right of appeal from a decision of the sentence review division. *See* §46-18-905, MCA.

C. Petition for Postconviction Relief -- Another avenue for potential relief for a defendant who has no adequate remedy of appeal is provided in §46-21-101, MCA:

(1) A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was imposed in violation of the constitution or the laws of this state or the constitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy may petition the court that imposed the sentence to vacate, set aside, or correct the sentence or revocation order.

A petition for postconviction relief may be filed within 1 year from the date when the conviction becomes final. In general terms, a conviction is final for purposes of postconviction relief when the defendant's appeal rights have expired. If exculpatory evidence is discovered at any time during the sentence the defendant has one year from the date the conviction becomes final or the date the defendant knew or should have known of the new evidence to file a petition for postconviction relief. *See* §46-21-102, MCA. A common claim seen in petitions for postconviction relief is a claim of ineffective assistance of counsel. Finally both the petitioner and the prosecution have a right of appeal to the Montana supreme court. The notice of appeal must be filed within 60 days of entry of an order on the petition for postconviction relief. *See* 46-21-203, MCA.

D. Application for Writ of Habeas Corpus -- A defendant may file a petition for a writ of habeas corpus at any time following exhaustion of appeal rights.

46-22-101. Applicability of writ of habeas corpus. (1) Except as provided in subsection (2), every person imprisoned or otherwise restrained of liberty within this state may prosecute a writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint.

(2) The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal. The relief under this chapter is not available to attack the legality of an order revoking a suspended or deferred sentence.

The focus of the writ of habeas corpus is whether the person is being imprisoned illegally. However, a person may not be released unless the person's substantial rights are affected. *See* §46-22-102, MCA.

IV. Conclusion -- Following sentencing felony offenders who are sentenced to incarceration have several avenues to contest their conviction and incarceration. These opportunities include: 1) direct appeal, 2) application to the sentence review division, 3) petition for postconviction relief, and 4) a petition for a writ of habeas corpus.