FILED
August 10 2010
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 10-0296

RANDY LEE PLUMLEY,

Petitioner,

v.

MIKE MAHONEY,

Respondent.

ORDER

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STATE OF MONTANA

Randy Lee Plumley (Plumley) filed a petition for a writ of habeas corpus and moved for leave to proceed without paying the filing fee. Plumley alleges that the Fourth Judicial District Court abused its discretion in sentencing him for parole violations, that he is illegally sentenced, and that based upon improper sentencing, his prison term expired on June 19, 2009. As a result, he contends that the District Court lacks any jurisdiction over him and that he is illegally incarcerated.

We ordered the Attorney General to file a response which has been filed. The Attorney General states that Plumley was convicted upon a guilty plea of Aggravated Kidnapping in 1994 for which he was sentenced to prison for 20 years with 10 years suspended. In October 2005—while Plumley was on supervision—the State moved to revoke Plumley's suspended sentence. Plumley admitted that he used marijuana and methamphetamine, participated in an altercation in a bar, and violated the no-alcohol condition of his suspended sentence. He was also convicted of Criminal Mischief in a jury trial in September 2005. The District Court revoked his sentence and committed him to the Department of Corrections (DOC) for 10 years, with seven years suspended.

Plumley was released and another petition to revoke was filed in June 2007 in which it was alleged that Plumley violated conditions of his suspended sentence by using alcohol and failing to remain law-abiding. The District Court again revoked Plumley's

sentence and committed him to the DOC for seven years, all suspended. The State filed another petition to revoke in December 2008 for which Plumley was committed to the DOC for seven years with two years suspended.

The Attorney General argues that Plumley complains that the revocation court must state its reasons for denying credit for street time, and that it failed to do so in the 2005 and 2009 dispositional orders. Because this issue could have been raised in the trial court or on direct appeal, the claim is procedurally barred and time-barred.

With respect to Plumley's claim that the District Court improperly revoked and re-imposed the original sentence, citing *State v. Morrison*, 2008 MT 16, ¶¶ 16-17, 341 Mont. 147, 176 P.3d 1027, the Attorney General maintains that as long as the term does not exceed the suspended portion of the sentence originally imposed, there is no violation. The Attorney General argues that the claim is also procedurally barred and time barred.

The Attorney General also asserts that Plumley's claim the he discharged his sentence in June 2009 is premised upon law that has been superseded by statute. *Morrison*, ¶ 17. Further, the claims are also time-barred, procedurally barred, untimely and lacking in merit.

We agree with the Attorney General that these claims could have been properly addressed on appeal or in a timely petition for postconviction relief. However, Plumley is now time-barred and procedurally barred from raising them now. Habeas corpus is not available to attack the legality of an order revoking a suspended or deferred sentence. Section 46-22-101(2), MCA. Therefore, Plumley is not illegally incarcerated and has no remedy under habeas corpus. Therefore,

IT IS ORDERED that the request for leave to proceed without paying the filing fee is GRANTED.

IT IS FURTHER ORDERED that the petition for a writ of habeas corpus is DENIED.

The Clerk is directed to provide a copy of this Order to counsel of record and to Plumley.

DATED this 10th day of August, 2010.

Patricia Cotter

Jim Rice

Brian Maassen

Michael E. Wheeler

Justices