MONTANA SUPREME COURT

Docket No. DA 24-0250

STATE OF MONTANA,

Plaintiff/Appellee,

v.

TANNER DAVID ALFORD,

Defendant/Appellant

APPELLANT'S OPENING BRIEF

On Appeal from RAVALLI COUNTY DISTRICT COURT
The Honorable HOWARD F. RECHT Presiding

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ISSUES PRESENTED FOR REVIEW

1) The mandatory minimum custodial sentencing contained in Montana's felony DUI statutes is unconstitutional because it prevents sentencing judges from exercising appropriate discretion in all felony DUI cases.

STATEMENT OF THE CASE

Defendant Tanner Alford (Tanner) was arrested for suspicion of Driving Under the Influence of Alcohol, 4th offense, on March 31, 2023. Tanner spent 4 days in jail, and then bonded out. On April 26, 2023, Tanner was arraigned, and he entered a not guilty plea. On February 28, 2024, Tanner appeared before the Ravalli County District Court and entered a change of plea. A Presentence Investigation (PSI) which recommended no in-custody time was filed with the court on April 10, 2024. And on April 17, 2024, the court sentenced Tanner to the statutory mandatory minimum sentence of 13 months with the Department of Corrections followed by 5 years with the Montana State Prison, which years were suspended on conditions. This sentence was imposed pursuant to statute, and the district court did not consider the financial impact of this sentence upon the Defendant.

STATEMENT OF THE FACTS

On March 31, 2023, Tanner Alford was arrested for suspicion of Driving Under the Influence of Alcohol, 4th offense. [Doc. 3, *Information*.] Tanner was fully cooperative with arresting officers and admitted his mistake. [Doc. 37, *Pre-Sentence Investigation*, p. 2.] At the time of his arrest, Tanner was suffering from untreated PTSD, Depression, and Anxiety. [Doc. 36, *Defendant's Sentencing Memorandum*, p. 2.] He had also been on medical leave from his job due to an on-the-job injury he suffered that rendered him temporarily unable to work. [*Id.*] Although he had years of sobriety, Tanner had lapsed that day and was self-medicating with alcohol in an attempt to help the issues he was facing. [Doc. 37, p. 2.]

Following arraignment, Tanner was placed on alcohol monitoring and pre-trial supervision. [Ravalli County Jail Diversion Program Order, 4/3/2023.] Throughout the pendency of his case for over one year, Tanner successfully maintained his sobriety and successfully complied with all conditions of his release.

Tanner also voluntarily underwent assessment and treatment following his arrest. [Doc. 36, p. 2.] He voluntarily underwent a

chemical dependency evaluation with Rachel Lund, a licensed addiction counselor in Hamilton, Montana. [*Id.*, Ex. A.] That assessment found that Tanner met the criteria for Level One care and did not recommend that inpatient treatment would be appropriate for Tanner. [*Id.*] The provider recommended that Tanner work toward his goals in the community rather than in custody or inpatient treatment. [*Id.*] Additionally, the provider noted that Tanner had followed through with all of his weekly scheduled appointments and the homework she assigned him to assist with relapse prevention skills. [*Id.*]

Tanner also voluntarily engaged in additional ongoing treatment with Kendra Tucker, a mental health therapist in Victor. [Doc. 36, Ex. B.] Ms. Tucker diagnosed Tanner with PTSD, major depressive disorder, and generalized anxiety disorder. [*Id.*] Her treatment plan does not include inpatient therapy. [*Id.*] Instead, it includes ongoing outpatient psychotherapy focused on emotional regulation, coping skills, self-confidence, communication skills, psychoeducation, and EMDR. [*Id.*]

Tanner also voluntarily began working with psychologist Dr. Wendy Flansburg and with his general care practitioner for on-going

physical and mental health concerns. [Doc. 36, Ex. C.] His general care practitioner, Dr. Johnson of the Community Physician Group, has stated that it is her medical opinion that taking Tanner out of the community treatment in which he has been successfully treating his alcoholism and mental health issues for nearly a year "would be detrimental" to his progress and "he would likely regress in his conditions." [*Id.*] She recommended that alternative sentencing be offered in order for Tanner to remain in the care of the multiple coordinated providers with whom he has been treating since his arrest. [*Id.*]

In addition to his ongoing work with the addiction counselor, mental health therapist, psychologist, and general care practitioner, Tanner began attending AA meetings multiple times each week. [Doc. 36, Ex. D.] There, he began receiving the community support that was lacking in his life prior to his arrest. [Doc. 36, p. 4.] He also was able to be that support for others, offering encouragement for others struggling with addiction and even serving in the important role as an AA sponsor for another person. [*Id.*]

During the pendency of this case, Tanner sustained a traumatic

head injury and was diagnosed with Severe Post-Concussion Syndrome. [Doc. 36, Ex. D.] The injury occurred when Tanner was the victim of a hit-and-run accident while riding his bicycle to work (to comply with his suspended driver's license) in November of 2023. [Doc. 36, Ex. C.] Since then, Tanner has suffered from headaches, fainting, dizziness, fatigue, and memory loss. [*Id.*] His physician, Dr. Johnson, has concerns that he may have developed a new Seizure Disorder as a result of this incident, and Tanner is in ongoing treatment. [*Id.*]

Tanner is the father of a 3-year-old child who depends upon Tanner's ability to earn an income for her food, clothing, shelter, and daily care. Tanner and his wife divorced due to the stress of this case; however, they continue to co-habit as a couple and work on their relationship and care for their young daughter. Tanner's wife is an immigrant from Taiwan and has no family in the United States. She is dependent upon Tanner to earn income for the family and to help raise their young daughter.

Throughout these proceedings, Tanner attempted to negotiate with the prosecution for placement into the treatment court or alternative forms of sentencing that would take into account the

recommendations of Tanner's physical and mental healthcare providers and his life circumstances. The Ravalli County Attorney's Office responded to these attempts by stating,

> "Our policy is to stick with DUIs and not back down. His personal situation just doesn't play into it on our decisions like it does on yours. We've sent single mothers with little to no help with their children to WATCh and they have gotten through it, I'm sure he will too. The only way forward at this point is trial then WATCh or just straight up WATCh."—[Doc. 36, p. 10.].

Facing such a one-size-fits-all approach to his case, Tanner entered into a Plea Agreement with the Ravalli County Attorney on January 5, 2024. Just three months later, the Montana Supreme Court issued its decision in *State v. Gibbons* which changed the law and analysis under which the Plea Agreement was accepted. At his April 17, 2024, Sentencing Hearing, Tanner requested the district court to consider his personal and financial situation, his mental and physical health, and his family status prior to imposing sentencing. The court did not consider these facts in pronouncing sentencing, and Tanner was sentenced according to the statute.

STANDARD OF REVIEW

Criminal sentences are reviewed for legality, and a claim that a

criminal sentence violates a constitutional provision is reviewed *de novo*. *State v.* Yang, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897.

SUMMARY OF ARGUMENT

Montana's Constitution provides protections for defendants against excessive bail, excessive fines, and cruel and unusual punishment. Mont. Const. art. II, § 22. The mandatory minimum custodial sentencing contained in Montana's felony DUI violates Montana's Constitution because it removes a sentencing judge's discretion to issue a sentence that does not impose an excessive fine or a cruel and unusual punishment. The mandatory sentence requirements for felony DUIs prevent sentencing judges in every single case from considering a host of important sentencing considerations, including but not limited to the following: 1) the financial impact that in-custody time will have upon defendants and their families; 2) the defendant's physical and mental well-being; and 3) the defendant's character and background history. In short, these mandatory minimum sentencing requirements impermissibly remove judicial discretion in sentencing for all felony DUI cases. The portion of Mont. Code Ann. § 61-8-1008 that requires a mandatory minimum sentence in all cases should be found to

be unconstitutional, and this case should be remanded to the district court for resentencing.

ARGUMENT

I. The mandatory minimum custodial sentencing contained in Montana's felony DUI statutes is unconstitutional because it prevents trial courts from considering proportionality factors before imposing sentence.

"Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted." Mont. Const. art. II, § 22; *State v. Tapson*, 2001 MT 292, ¶ 307 Mont. 428, 41 P.3d 305.

"When a sentencing statute containing a mandatory fine requirement prevents the trial court from considering proportionality factors before imposing a fine, the statute is facially unconstitutional." *State v. Gibbons*, 2024 MT 63, ¶ 58, 546 P.3d 686. Statutory mandatory minimum fines are facially unconstitutional because such mandates do not allow sentencing judges to consider proportionality factors, such as the nature of the financial burden and the defendant's ability to pay. *Id.* ¶ 2.

"A statutorily mandated minimum fine prevents the trial court from considering in every case constitutionally and statutorily required

factors embodied in the prohibition against excessive fines and fees of the United States Constitution, the Montana Constitution, and in Montana statutes implemented to protect against such a constitutional violation." *Id.*

"The weight of history and the reasoning of the Supreme Court demonstrate that excessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances. The central tenet of the excessive fines clause is to protect individuals against fines so oppressive as to deprive them of their livelihood." *Gibbons* ¶ 49 in footnote citing to *City of Seattle v. Long*, 198 Wn.2d 136, 493 P.3d 94, 113 (Wash. 2021).

"By their very nature, a mandatory minimum allows no discretion for the sentencing judge to impose anything but the mandatory fine. This is in direct opposition to the requirements of 46-18-231, MCA, which codifies that the proportionality analysis required by the Montana and federal constitutions must include—not only a proportionality to the offense with the Legislature has determined when establishing the penalty for an offense—a proportionality *to the offender* as well." *Gibbons* ¶ 56.

The statutory minimum in-custody provision for felony DUI convictions violates the cruel and unusual punishment prohibition contained in the Montana Constitution. The mandatory minimum in-custody statute is just as offensive to Montana's constitutional proportionality requirement as is the mandatory minimum fine statute that was found to be unconstitutional in *Gibbons*. The non-discretionary application of in-custody time for felony DUIs creates a situation in which the sentence is disproportional to the specific nature of the offense or the offender. In some cases, such as Tanner's, the minimum in-custody time is grossly disproportional to the conduct and/or to the Defendant's ability to pay the financial and human costs associated with the in-custody time.

A litigant challenging the facial constitutionality of a statute must establish that either no set of circumstances exists under which the statute would be valid, meaning that it is unconstitutional in all its applications, or the statute lacks a plainly legitimate sweep. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1187, 1190, 170 L.Ed.2d 151 (2008); *Yang*, ¶ 14; *State v, Sedler*, 2020 MT 248, ¶ 17, 401 Mont. 437, 437 P.3d 406. The

mandatory minimum in-custody time in Mont. Code Ann. § 61-8-1008 is unconstitutional in all applications because it prohibits a sentencing court from considering its proportionality to a defendant's particular DUI offense, including but not limited to the defendant's ability to pay the financial and human costs associated with the in-custody time. In every case, a sentencing judge imposing sentence under Mont. Code Ann. § 61-8-1008 cannot consider "the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment" of the fees and expenses associated with the mandatory minimum in-custody time. As such, this Court should reverse and vacate the sentence imposed in Tanner's judgment and remand for re-sentencing consistent with the Court's opinion.

II. The mandatory minimum custodial sentencing contained in Montana's felony DUI statutes eliminate judicial discretion.

This Court has held that sentencing courts are consistently given broad discretion to determine the appropriate sentence. *State v. Alden*, 282 Mont, 45, 51, 934 P.2d 210, 214 (1997). "One of the purposes of the 1973 Montana Criminal Code was to vest wide sentencing discretion in the trial judge who is familiar with the character and past record of the

defendant, and with the circumstances of the particular case." *State v. Maldonado*, 176 Mont. 322, 334, 578 P.2d 296, 303 (1978).

In *Gibbons*, this Court has found that "mandatory minimum sentencing laws eliminate judicial discretion to impose sentences below the statutory minimum." *Gibbons* ¶ 52. Just as mandatory minimum fines eliminate judicial discretion, so too do mandatory minimum in-custody sentences. Judicial discretion in sentencing is one of the primary roles of a sentencing judge, and eliminating that discretion is contrary to Montana case law and contrary to one of the original purposes of the 1973 Montana Criminal Code. The portion of Section 61-8-1008 that provides for across-the-board, mandatory minimum custodial sentencing should be found to be contrary to Montana law and public policy.

a. The mandatory minimum custodial sentencing contained in Montana's felony DUI statutes eliminate sentencing judges' discretion to consider a defendant's character and record and the unique circumstances of each case.

When imposing sentence, "the sentencing court may consider any relevant evidence relating to the nature and circumstances of the crime, the character of the defendant, the defendant's background history,

mental and physical condition, and any evidence the court considers to have probative force." *Driver v. Sentence Rev. Div. in the Sup. Ct. of Mont.*, 2010 MT 4, ¶ 17, 355 Mont. 273, 227 P.3d 512.

In all cases, Montana's minimum custodial sentencing for felony DUIs prevents judges from considering relevant evidence related to the specific case and defendant. In Tanner's case, neither his mental or physical health care providers nor his PSI report recommended in-custody time or inpatient treatment. In fact, Tanner's physician opined that time in custody or in inpatient treatment "would be detrimental" to Tanner's progress and "he would likely regress in his conditions." As written, Mont. Code Ann. § 61-8-1008 prohibited the sentencing judge from considering this evidence, eliminating his judicial discretion.

b. The mandatory minimum custodial sentencing contained in Montana's felony DUI statutes eliminate sentencing judges' discretion to consider the collateral financial costs to defendants and their families.

"The sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine and interest. In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of

the fine and interest will impose." Mont. Code Ann. § 46-18-231(3). The afore-quoted statute "is an enlightened response to the increasing punitiveness in the American approach to criminal justice, and acknowledgement that imposition of mandatory fines on impoverished defendants are unlikely to reduce future crime, and a recognition that the impact of mandatory minimum fines is disproportionate on families of poor defendants and minority communities, particularly those of color." *Gibbons*, ¶ 54.

"A sentencing court is authorized to order a fine or cost only if the offender has the ability to pay and only after the sentencing judge considers the nature of the offense, the financial resources of the offender, and the nature of the burden the fine will impose." *Gibbons*, ¶ 47.

"Moreover, the collateral consequences of imposing disproportionate fines on an offender's family, who often pay their loved one's financial obligation, ensures that the reach of the criminal justice system and its punishment extends beyond the offender. Oftentimes, the symbiotic harm from mandatory minimum fines affects the women in an offender's family—the mother, wife, or sister pays the fine for

their loved one and there is less money for food, clothing, and shelter." Gibbons, ¶ 55.

"A mandatory minimum penalty transfers sentencing discretion, like that embodied in § 46-18-231, MCA, from the judge and *requires* a particular sentence be imposed. A sentencing judge cannot consider when imposing a mandatory fine whether a defendant will be able to pay for necessities, adequately feed and take care of children and other family obligations, purchase necessary medication, maintain housing, and the like." *Gibbons*, ¶ 55.

Here, Tanner is the father of a 3-year-old child who depends upon his ability to earn an income for her food, clothing, shelter, and daily care. Tanner and his wife divorced due to the stress of this case; however, they continue to co-habit as a couple and work on their relationship and care for their young daughter. His wife is an immigrant from Taiwan and has no family in the United States. If Tanner is taken from the family, his wife will bear the financial burden of caring for their child, covering all household expenses, medical and childcare expenses, and covering the costs associated with Tanner's in-custody placement, fines, and fees. While the *Gibbons* case focused on

the financial impact of mandatory fines, the financial impact associated with mandatory in-custody time, and mandatory in-custody treatment programs such as WATCh are real and significant. These financial impacts affect Defendants such as Tanner as well as their families, such as Tanner's wife and young daughter.

In Tanner's case, neither his PSI nor any of his physical or mental health treatment providers recommended any in-custody time or inpatient treatment. Indeed, Dr. Johnson of Community Physician Group opined that in-custody time or inpatient treatment would be detrimental to Tanner's mental health and sobriety. But Mont. Code Ann. § 61-61-8-1008 does not permit the sentencing court to take those important factors into consideration.

When the prosecution was asked to consider Tanner's mental and physical health, the recommendations of his treating providers, and the fact that he was under substantial duress at the time of the offense, its response was "Our policy is to stick with DUIs and not back down. His personal situation just doesn't play into it on our decisions like it does on yours. We've sent single mothers with little to no help with their children to WATCh and they have gotten through it, I'm sure he will

too. The only way forward at this point is trial then WATCh or just straight up WATCh." While this indiscretionary approach may be favored by the prosecutor on this case, sentencing judges must not be forced to take such an approach.

The mandatory minimum sentence included in Mont. Code Ann. § 61-8-1008 prohibits a judge from considering the financial and human costs not only upon a defendant, but also upon a defendant's family. As written, the statute encourages the application of a blunt hammer applied to all cases without consideration of its effect. It ties the hands of sentencing judges, rendering them incapable of considering each unique defendant and each unique case to create a consequence that is appropriate. This is an impermissible removal of the sentencing judge's judicial discretion.

III. The mandatory minimum custodial sentencing contained in Montana's felony DUI statutes are contrary to Montana's Correctional and Sentencing Policy.

Montana's Correctional and Sentencing Policy is laid out in Mont. Code Ann. § 46-18-101. Amongst other provisions, this policy provides that the sentencing policy of the state of Montana is to "encourage and provide opportunities for the offender's self-improvement to provide

rehabilitation and reintegration of offenders back into the community." This statutory policy also provides that "sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances."

The mandatory minimum sentencing requirements of Mont. Code Ann. § 61-8-1008 are contrary to Montana's Correctional and Sentencing Policy because they do not permit a judge to provide opportunities for self-improvement. In Tanner's case, his health care provider has opined that time in custody would be detrimental to his improvement. Indeed, his physician stated that such a sentence would undo Tanner's work and progress on sobriety and mental health. Undoing a defendant's work on sobriety and mental health would almost certainly promote recidivism and endanger the public, contrary to the requirements of subsection (2)(b). The mandatory minimum sentencing requirements of section 61-8-1008 prohibit the judge from exercising judicial discretion to consider aggravating and mitigating circumstances, such as those present in Tanner's case. Montana's Correctional and Sentencing Policy provides that such discretion "must" be permitted.

The mandatory minimum imprisonment term for DUI misdemeanor offenses can be suspended or served under home arrest if "the judge finds that the imposition of the imprisonment sentence will pose a risk to the person's physical or mental well-being." Mont. Code Ann. § 61-8-1007(1)(c).

Contrasted with the judicial discretion allowed for misdemeanor DUI convictions, there is virtually no room for judicial discretion for felony DIU convictions. A sentencing judge is permitted to take an offender's physical and mental well-being into account when sentencing an offender for misdemeanor DUIs. However, even in cases such as Tanner's, when a physician opines that in-custody time would be detrimental to a defendant's sobriety as well as physical and mental well-being, the sentencing judge lacks authority to take these important facts into consideration.

The mandatory minimum sentencing provision of Mont. Code Ann. § 61-8-1008 should be found to be contrary to Montana law, and this case should be remanded for re-sentencing.

CONCLUSION

For the foregoing reasons, Appellant Tanner Alford respectfully

requests that this Court reverse and vacate the sentence imposed in Tanner's judgment and remand for a new sentencing hearing in which the District Court undertakes a proportionality and ability to pay the financial and human costs analysis.

DATED this 29th day of July, 2024.

A&M LAW
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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11 (4)(d), I certify that this Appellant's Brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points and is double-spaced. The word count calculated by Microsoft Word is 3,587, exclusive of the tables of contents and authorities and the certificates of compliance and service.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 29th day of July, 2024, a true and correct copy of the foregoing was served upon the following via email:

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I, Misty D. Gaubatz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-29-2024:

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