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James Murnion
Alexander Blewett III School of Law

State v. Zunick: Second Guessing a First Impression

James Murnion

I. INTRODUCTION

State v. Zunick[1] presented the Montana Supreme Court with a question of first impression: what constitutes a proper colloquy under Montana Code Annotated § 46–12–211(4), and when must the colloquy occur?[2] This statute governs the process of when a district court judge refuses to accept the terms of a plea agreement following the entry of a guilty plea.[3] Specifically at issue in this case is the statute's requirement that the court allow the defendant an opportunity to withdraw his guilty plea following a deviation from the agreed-upon sentence.[4]

This note first examines how a defendant could historically withdraw a plea of guilty under Montana Code Annotated § 46–16–105(2). Then, following an examination of the factual and procedural history in *Zunick*, this note analyzes how these two statutes may stand in relation to each other. However, because the Court in *Zunick* never addressed § 46–16–105(2), we are ultimately left in the dark as to the true understanding of how these two statutes are connected, if at all.

II. HISTORY

Traditionally, a district court may permit the withdrawal of a guilty plea upon a showing of good cause.[5] The Court has noted that "good cause" includes the minimal constitutional requirement that a guilty plea be made intelligently and voluntarily.[6] Montana uses the Supreme Court's voluntariness standard laid out in *Brady v. United States*:[7]

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their

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[1] *State v. Zunick*, ___ P.3d ___, 2014 WL 4432601 (Mont. 2014).
[2] *Id*. at *3.
[3] Mont. Code Ann. § 46–12–211(4) (2013).
[4] *Id.*
[5] Mont. Code Ann. § 46–16–105(2).
[6] *State v. Deserly*, 188 P.3d 1057, 1060 (Mont. 2008), *overruled on different grounds by State v. Brinson*, 210 P.3d 164 (Mont. 2009).
[7] *Brady v. United States*, 397 U.S. 742 (1970).

> nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[8]

However, involuntariness alone is not enough to satisfy the good cause requirement: "Involuntariness *and* discovery of new exculpatory evidence constitute good cause for withdrawal of a plea . . . but others may exist."[9] Section 46–16–105(2) also allows good cause if there is "a claim of innocence . . . supported by evidence of a fundamental miscarriage of justice."[10]

III. FACTUAL AND PROCEDURAL BACKGROUND

On February 14, 2012, Missoula County sheriffs found Zunick and his car in a ditch.[11] The officers observed that he was visibly intoxicated and arrested him.[12] Zunick admitted to being drunk, and back at the detention center his blood alcohol was measured at 0.202.[13] Zunick was charged with criminal endangerment and aggravated driving under the influence.[14]

On March 13, 2012, Zunick pleaded not guilty to both counts.[15] On June 19, 2012, and with advisement of counsel, Zunick made a plea agreement with the State pursuant to § 46–12–211(1)(b).[16] The State agreed to seek a sentence of six years, with three years suspended, for the criminal endangerment and one year suspended for the DUI.[17] At the change of plea hearing, the district court informed Zunick that the court was not bound by the terms of the agreement, but if the court chose not to follow the sentencing recommendations, Zunick would be afforded the chance to withdraw his plea(s) of guilty.[18]

On September 4, 2012, the district court sentenced Zunick to ten years suspended with the conditions laid out in the plea agreement.[19] The court explained its reasoning for not imposing the recommended sentence: a longer sentence with no actual incarceration better suits Zunick because he is raising a seven-year old daughter.[20] The court then asked Zunick if he had any questions about the conditions and if he agreed with the sentence.[21] Zunick stated that he understood and agreed

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[8] *Deserly*, 188 P.3d at 1060 (quoting *Brady*, 397 U.S. at 755).
[9] *Id.* (emphasis added).
[10] *Id.*
[11] *Zunick*, at *1.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Zunick* at *1.
[18] *Id.* at *3.
[19] *Id.* at *1.
[20] *Id.* at *3.
[21] *Id.* at *1.

with the sentence.[22] The court did not explicitly tell Zunick it was rejecting the plea agreement nor did the court allow him an opportunity to withdraw his plea.[23]

On March 26, 2013, Zunick violated a condition of his suspended sentence when he drove without permission from his probation officer.[24] On May 24, 2013, Zunick moved the district court to change this condition; the court denied the motion on June 18, 2013.[25] On September 17, 2013, Zunick moved to withdraw his guilty plea, alleging that the court failed to comply with § 46–12–211(4).[26] Upon rejecting a (1)(b) plea agreement, this statute requires the court to: (1) inform the parties it is rejecting the agreement; (2) advise the defendant that the court is not bound by the agreement; (3) afford the defendant the opportunity to withdraw his plea; and (4) advise the defendant that the disposition of the case may be less favorable than that contemplated in the agreement.[27] On October 28, 2013, the court denied Zunick's motion to withdraw his plea; Zunick appealed from that decision.[28]

IV. MAJORITY OPINION

In a 4–1 decision, the Court held the full advisory provisions of § 46–12–211(4) must be expressly given by the judge when the plea agreement is rejected.[29] A district court cannot, as it did in Zunick's case, give the advisory warnings in a piecemeal fashion during multiple hearings.[30] To reach this decision, the Court relied upon a principle of statutory construction contained in Montana Code Annotated § 1–2–101, which states that where a statute has several particulars, the judge should adopt a construction that gives meaning to all.[31] The statute at issue in this case reads "[i]f the court rejects a plea agreement . . . the court shall, on the record [provide the four advisories]."[32] The Court stated that the only reasonable statutory interpretation requires these advisories to be given at the time the plea agreement is actually rejected; advisories given before this time do not satisfy the statute.[33] Because the district court did not give the full advisories at the time it rejected the plea agreement, the district court's ruling was reversed.[34] Zunick's sentence was vacated and

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[22] *Id.*
[23] *Zunick* at *3.
[24] *Id.* at *4 (McGrath, J., dissenting).
[25] *Id.*
[26] *Id.*
[27] Mont. Code Ann. § 46–12–411(4).
[28] *Zunick* at *2.
[29] *Id.* at *4.
[30] *Id.* at *3.
[31] *Id.*
[32] Mont. Code Ann. § 46–12–211(4).
[33] *Zunick* at *3.
[34] *Id.* at *4.

the trial judge was instructed to conduct another sentencing hearing.[35] The court may again either accept or reject the agreement; if it rejects the agreement, it must give the full advisory and allow Zunick an opportunity to withdraw his plea.[36] If the court accepts the agreement, then it must impose the sentence in that agreement.[37]

V. MCGRATH'S DISSENT

The lone dissenter, Justice McGrath, took a more traditional view of guilty plea withdrawal. He argued Zunick not only understood the terms of his sentence, but he explicitly agreed with its terms at the sentencing hearing.[38] Additionally, Zunick did not make the necessary good cause showing required to withdraw a plea of guilty, "[h]e simply found the conditions advantageous, until he didn't."[39] McGrath essentially argued, as the district court did, that we should give precedence to substance over form regarding the sentencing hearing.[40]

VI. ANALYSIS

In *Zunick*, the Court never mentioned the necessary good cause showing under § 46–16–105(2), despite the fact both parties addressed this statute in their briefs.[41] The facts make it clear that Zunick voluntarily entered his plea of guilty under the *Brady* test, making a traditional good cause showing difficult at best.[42] Instead, the Court relied solely on § 46–12–211(4) to reach its decision.[43] The question thus becomes, how do these two statutes relate to one another?

One possibility is that a district court's failure to give the full advisories pursuant to § 46–12–211(4) constitutes good cause for the purposes of § 46–16–105(2). In fact, the Court suggested just that in *State v. Lone Elk*:[44] "fair and just reasons for withdrawal of guilty plea include an inadequate colloquy."[45] However, an improper colloquy was not the issue in *Lone Elk*; the statement that an unsatisfactory colloquy is good cause under § 46–16–105(2) was mere dicta.[46]

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[35] *Id.*
[36] *Id.*
[37] *Zunick* at *4
[38] *Id.* at *4 (McGrath, J., dissenting).
[39] *Id.*
[40] *Id.* at *2 (majority).
[41] Appellant's Opening Br., *State v. Zunick*, 2014 WL 832813 at *5 (Mont. Feb. 18, 2014) (No. DA 13-0812); Appellee's Br., *State v. Zunick*, 2014 WL 2198009 at *5 (Mont. May 14, 2014) (No. DA 13-0812).
[42] *Zunick* at *1.
[43] *Id.* at *4.
[44] *State v. Lone Elk*, 108 P.3d 500 (Mont. 2005).
[45] *Id.* at 505 (citing *United States v. Turner*, 898 F.2d 705, 713 (9th Cir. 1990)).
[46] *Id.*

The second possibility, and the more plausible one, is that the relation between the two statutes is nearly nonexistent. Justice McGrath's dissent does not mention § 46–16–105(2).[47] Yet he does argue that despite an inadequate colloquy under § 46–12–211(4), Zunick should not have been granted relief.[48] Surely if an inadequate colloquy is good cause then Justice McGrath could not make this argument. The majority also fails to address good cause, even though it would make their argument even stronger: the district court failed to provide a proper colloquy, therefore Zunick had good cause to withdraw his plea. Both the majority and the dissenting opinions strongly suggest that an inadequate colloquy pursuant to § 46–12–211(4) does not constitute good cause under § 46–16–105(2).[49] Nonetheless, because the issue was not discussed in *Zunick*, we are unfortunately left to wonder how the Court views the relationship between the two statutes.

The Court's decision also has unfortunate implications for Mr. Zunick. If the Court ruled an inadequate colloquy is good cause to withdraw a plea of guilty, then it could have granted Zunick's motion to withdraw his plea, and he would presumably go to trial. Yet because the case was ruled entirely under § 46–12–211(4), the remedy sidesteps Zunick's request to withdraw his guilty plea and essentially rewinds the trial process to the point where the error was made: the sentencing hearing.[50] Thus, even though Zunick "won" the case, the Court did not grant his motion (the denial of which being the basis of his appeal).[51] The overturned district court may now impose the original plea agreement sentence, which includes three years of incarceration.[52] If the court does impose this sentence, Zunick will not be able to withdraw his plea unless he can show good cause, which is fairly unlikely given the current analysis. To be fair, Zunick never specifically argued that an inadequate colloquy constitutes good cause under § 46–15–105(2). Perhaps if he did, the Court could have taken on the issue, and Zunick could have been granted the relief he was actually seeking.

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[47] *Zunick* at *4 (McGrath, J., dissenting).
[48] *Id.*
[49] *Id.* at **3–4 (majority).
[50] *Id.* at *4.
[51] *Id.*
[52] *Zunick* at *4.