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9 **IN THE JUSTICE COURT OF THE STATE OF MONTANA IN**
10 **AND FOR THE COUNTY OF GALLATIN**

11 STATE OF MONTANA,

12 CAUSE NO. TK-2017-2025

13 Plaintiff,

14 vs.

15 GREG GIANFORTE,

16 ANSWER BRIEF RE: MOTION OBJECTING
17 TO DEFENDANT'S FINGERPRINTING AND
18 PHOTOGRAPHING

19 Defendant.

20 COMES NOW County Attorney Marty Lambert who files the following answer brief
21 regarding Defendant's motion objecting to Defendant's fingerprinting and photographing.

- 22 1. Pursuant to §44-5-202(3), MCA, Defendant must obey this Court's order or condition that
23 he be fingerprinted and photographed.

24 Defendant's Brief asserts that this Court lacks authority to order that he be fingerprinted
25 and photographed. Specifically, Defendant argues that the following statute does not support this
Court's order:

A criminal justice agency described in subsection (1)(a) shall photograph and
fingerprint a person who has been arrested or noticed or summoned to appear to
answer an information or indictment if:

- (a) The charge is the commission of a felony;
- (b) The identification of an accused is in issue; or
- (c) It is required to do so by court order.

1 §44-5-202(3), MCA. Insofar as Defendant's motion is based on an interpretation of this statute
2 Defendant's motion lacks merit and should be denied.

3
4 **a. The statute provides this Court the authority to order the sheriff to take**
5 **Defendant's fingerprints and photograph.**

6 In deciding the meaning of a statute a court should, if possible, determine the Legislature's
7 intention. §1-2-102, MCA. If statutory language is clear and unambiguous, no further
8 interpretation is needed. *MM&I, LLC v. Gallatin County Commissioners*, 2010 MT 274, ¶21, 358
9 Mont. 420, 246 P.3d 1029; *Merlin Myers Trust v. Yellowstone County*, 2002 MT 201, ¶19, 311
10 Mont. 194, 53 P.3d 1268.

11
12 In a case where the Montana Supreme Court interpreted statutes within the Montana
13 Human Rights Act, the Court held that

14
15 [w]e interpret statutes consistently with the Legislature's intent as crystallized in
16 the statute's plain language. (citation omitted) Specifically, in interpreting a
17 statute, we are "simply to ascertain and declare what is in the terms or substance
18 contained therein, not to insert what has been omitted or to omit what has been
19 inserted." Section 1-2-101, MCA. It is not our prerogative to read into a statute
20 what is not there. (citation omitted)

21 *Bates v. Neva*, 2014 MT 336, ¶13, 377 Mont. 350, 339 P.3d 1265.

22 Subsection (3)(c) of §44-5-202, MCA, provides that a criminal justice agency shall
23 photograph and fingerprint a person served with a notice to appear if required to do so by court
24 order. Defendant was served a notice to appear, and this Court has ordered that Defendant be
25 fingerprinted and photographed. Defendant should be made to obey this Court's lawful order.

1 **b. Defendant, in effect, argues that this Court should omit subsection (3)(a) of the**
2 **statute.**

3 Defendant argues that the phrase “to answer an information or indictment”, as set forth in
4 subsection (3), precludes this Court’s order for fingerprinting or photographing a defendant
5 charged with any misdemeanor offense who has not been arrested. Def.Brf., pgs. 4-5. Defendant
6 claims that, as he was not charged by indictment or information in this case, §44-5-202, MCA,
7 does not apply. Def.Brf., pgs. 3-4.

8 In making this argument Defendant chooses to ignore subsection (3)(a) of the statute:
9

10 A criminal justice agency described in subsection (1)(a) shall photograph and
11 fingerprint a person who has been arrested or noticed or summoned to appear to
12 answer an information or indictment if:

13 (a) The charge is the commission of a felony;

14
15 §44-5-202(3)(a), MCA (emphasis added). Subsection (3)(a) specifically provides that a criminal
16 justice agency shall photograph and fingerprint persons charged with felony crimes.

17 According to the erroneous interpretation of the statute offered in Defendant’s brief, only
18 persons charged with felony crimes, or arrested for misdemeanor crimes, may be fingerprinted
19 and photographed. Put differently, according to Defendant, every person charged by indictment
20 or information (a person charged with a felony), who was arrested, noticed, or summoned would
21 be subject to fingerprinting and photographing.
22

23 Based on Defendant’s interpretation there is no need for the Legislature to have enacted
24 subsection (3)(a) of the statute. Defendant’s argument therefore reduces subsection (3)(a) of the
25 statute to a tautology. In effect, Defendant asks this Court to omit what has been inserted in the
statute, contrary to the Supreme Court’s holding in *Bates, supra*, and §1-2-101, MCA.

1 **c. Defendant argues, in effect, that this Court should insert the qualifier “district”**
2 **before the word “court” in subsection (3)(c) of the statute.**

3 Defendant’s brief contains the following assertion:

4 Thus, the choice of the Legislature to include “by indictment or information”
5 cannot be ignored. By inserting those words, the Legislature intentionally limited
6 district courts’ authority to order a criminal justice agency to take photographs and
7 fingerprints of those defendants charged by indictment or information.
8 Additionally, the Legislature provided justice courts’ [sic] with no authority to
9 order fingerprinting or photographing of a defendant, as prosecutions in justice
10 courts are never commenced by information or indictment.

11 Def.Brff., pg. 4. By making this argument, Defendant seeks curtailment of this court’s authority
12 under subsection 3(c) of the statute. That subsection provides:

13 A criminal justice agency described in subsection (1)(a) shall photograph and
14 fingerprint a person who has been arrested or noticed or summoned to appear to
15 answer an information or indictment if:

16 ...

17 (c) It is required to do so by court order.

18 §44-5-202(3)(c), MCA (emphasis added).

19 Defendant’s arguments once again transgress §1-2-101, MCA, and *Bates, supra*, by
20 arguing for insertion of a word that the Legislature omitted. Defendant argues that “district” should
21 be inserted before the word court in §44-5-202(3)(c), MCA. The Legislature chose to employ only
22 the word “court” in enacting subsection (3)(c) of the statute. The Legislature did not define “court”
23 in Title 44 of the MCA, but the word is defined in Title 46 of the Code as “a place where justice
24 is judicially administered and includes the judge of the court”. §46-1-202(8), MCA.
25

1 Justice Court is a place where justice is judicially administered. Thus, when §44-5-
2 202(3)(c), MCA, provides that a “court” has authority to order a defendant who was noticed to
3 appear for a crime to be fingerprinted and photographed, that authority includes the Gallatin
4 County Justice Court and the Justice of the Peace. Contrary to Defendant’s erroneous argument,
5 the statute’s authority is not limited to only district court judges.
6

7 **d. Defendant’s interpretation ignores the statute’s conjunction “if”.**

8 The Montana Supreme Court has held that, when interpreting a statute “as a whole”, a
9 court must, if possible, “give effect to all” of the statute’s provisions. *MC, Inc., v. Cascade City-*
10 *County Bd. Of Health*, 2015 MT 52, ¶17, 378 Mont. 267, 343 P.3d 1208; §1-2-101, MCA. In this
11 case, Defendant argues for an interpretation ignoring subsections (3)(a), (3)(b), and (3)(c) of the
12 statute and therefore failing to give effect to the entirety of the statute.
13

14 The first part of the statute is meaningless unless the conditions set forth in one of the
15 subsections following “if” is satisfied. Thus, under §44-5-202(3), MCA, for any person charged
16 with either a misdemeanor or felony to be fingerprinted or photographed, the person must 1) be
17 charged with a felony (subsection (3)(a)); or 2) be situated so that the person’s identity is an issue
18 in the prosecution (subsection (3)(b)); or 3) be subject to a court order (subsection (3)(c)).

19 To give effect to all the statute’s provisions Defendant must recognize this Court’s
20 authority, as set forth in subsection (3)(c), to order that Defendant be fingerprinted and
21 photographed.
22

23
24 2. The sentencing provisions applicable to deferred impositions of sentence support this
25 Court’s order.

This Court has the following authority for imposing conditions or restrictions as part of a
deferred term:

1 When deferring imposition of sentence . . . the sentencing judge may
2 impose upon the offender any reasonable restrictions or conditions . . .
3 Reasonable restrictions or conditions imposed under subsection (1)(a) or
4 (2) may include but are not limited to:

5 . . .

6 (q) any other reasonable restrictions or conditions considered
7 necessary for rehabilitation or for the protection of the victim or
8 society.

9 §46-18-201(4)(q), MCA.

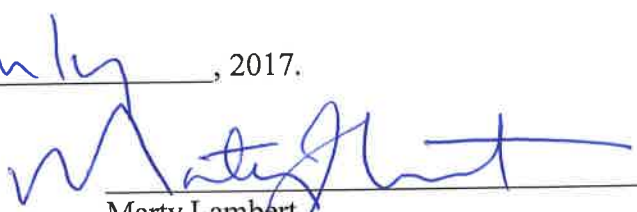
10 Provided that a nexus exists between the offender and the underlying offense, this Court's
11 condition imposed as part of a deferred term is lawful and will be upheld unless the condition is
12 "overly broad or unduly punitive" or the required nexus is "absent or exceedingly tenuous". *State*
13 *v. Melton*, 2012 MT 84, ¶18, 364 Mont. 482, 276 P.3d 900 (internal quotations omitted). *Accord*,
14 *City of Billings v. Barth*, 2017 MT 56, ¶¶8-10, 387 Mont. 32, 390 P.3d 951.

15 Defendant pled guilty to assault. In imposing conditions of Defendant's deferred term, this
16 Court apparently found that fingerprinting and photographing Defendant was a reasonable
17 condition needed for rehabilitation or for the protection of the victim or society. If so, Defendant
18 should obey this Court's order.

19
20
21 3. Conclusion.

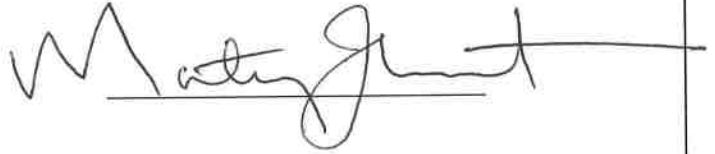
22 The legal arguments offered in support of Defendant's motion lack merit and the motion
23 should be denied.

24 DATED the 20 day of July, 2017.

25

Marty Lambert
County Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon counsel of record by scanned e-mail attachment sent to todd@whipplelawoffices.com; and wwmerc@hollandhart.com this 20 day of July, 2017.

A handwritten signature in black ink, appearing to read "Matthew J. Hunt", is written over a horizontal line. The signature is cursive and extends to the right of the line.

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