

Sentence Review Division
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SENTENCE REVIEW DIVISION OF THE SUPREME COURT OF MONTANA

STATE OF MONTANA,)	Cause No. DC-03-056
)	
Plaintiff,)	Gallatin County District Court
)	
-vs-)	Montana Eighteenth Judicial District
)	
ERNEST F. NESS,)	DECISION
)	
Defendant.)	

On September 12, 2022, the Court found the Defendant in violation of terms and conditions imposed on March 1, 2019, revoked the suspended sentence, and sentenced the Defendant sentenced to a commitment to the Department of Corrections for a term of five (5) years, for the offense of Count I: Sexual Assault, a Felony, in violation of §45-5-502, MCA.

The Court ordered the Defendant register as a Sexual Offender and designated him as a Level I Sex Offender. The Defendant was ordered to enter a Sex Offender Treatment Program affiliated with or having similar standards to the MSOTA and comply with all treatment conditions. The Defendant was given 107 days of credit for time served while on probation. The Court further ordered the Defendant receive credit for 908 days of incarceration.

On February 3, 2023, the Defendant's Application for review of that sentence came on for hearing by Zoom videoconference before the Sentence Review Division of the Montana Supreme Court (hereafter “the Division”). The Defendant appeared from the START Facility and was represented by Tyler Duggar, Defense Counsel. The State was not represented.

Before hearing the Application, the Defendant was advised that the Division has the authority not only to reduce the sentence or affirm it, but also increase it. The Defendant was further advised that there is no appeal from a decision of the Division. The Defendant acknowledged that he understood this and stated that he wished to proceed. The Defendant did not provide a statement.

Rule 12, Rules of the Sentence Review Division of the Supreme Court of Montana, provides that, "The sentence imposed by the District Court is presumed correct. The sentence shall not be reduced or increased unless it is clearly inadequate or clearly excessive." (Section 46-18-904(3), MCA).

The Division finds that the sentence imposed by the District Court is clearly excessive in that in Attachment "A" the provision or condition for probation or community supervision would unduly restrict the Defendant's access for lawful activities to the Internet or electronic devices which have Internet.

Therefore, it is the unanimous decision of the Division to render the condition in Attachment "A", so as to avoid its excessively punitive nature, that the sentence shall be **MODIFIED** as follows:

The Defendant shall not use or possess pornography, erotica, x-rated videos, adult books or magazines, including but not limited to Playboy or Penthouse, frequent adult bookstores, topless bars, massage parlors, use the services of prostitutes or have access to such materials.

The sentence, terms and remaining conditions imposed in the Judgment of September 12, 2022 are not clearly excessive and are affirmed.

DATED this 13 day of February, 2023.

SENTENCE REVIEW DIVISION



Hon. Dan Wilson, Chairperson



Hon. Luke Berger, Member



Hon. Jessica Fehr, Member

Copies mailed or emailed this 14th day of February, 2023, to:

Clerk of District Court – *via email*

Ernest F. Ness #2048306, Defendant (2)

Hon. Rienne H. McElyea – *via email*

Tyler Duggar, Defense Counsel – *via email*

Gallatin Co. Attorney's Office – *via email*

Board of Pardons and Parole – *via email*

MSP - Records Dept. – *via email*



Shelly Smith, Office Administrator
Sentence Review Division