

46-18-502. Sentencing of persistent felony offender. (1) Except as provided in 46-18-219 and subsection (2) of this section, a persistent felony offender shall be imprisoned in the state prison for a term of not less than 5 years or more than 100 years or shall be fined an amount not to exceed \$50,000, or both, if the offender was 21 years of age or older at the time of the commission of the present offense.

(2) Except as provided in 46-18-219, an offender shall be imprisoned in a state prison for a term of not less than 10 years or more than 100 years or shall be fined an amount not to exceed \$50,000, or both, if:

(a) the offender was a persistent felony offender, as defined in 46-18-501, at the time of the offender's previous felony conviction;

(b) less than 5 years have elapsed between the commission of the present offense and:

(i) the previous felony conviction; or

(ii) the offender's release on parole, from prison, or from other commitment imposed as a result of the previous felony conviction; and

(c) the offender was 21 years of age or older at the time of the commission of the present offense.

(3) Except as provided in 46-18-222, the imposition or execution of the first 5 years of a sentence imposed under subsection (1) of this section or the first 10 years of a sentence imposed under subsection (2) of this section may not be deferred or suspended.

(4) Any sentence imposed under subsection (2) must run consecutively to any other sentence imposed.

History: En. 95-1507 by Sec. 5, Ch. 513, L. 1973; amd. Sec. 21, Ch. 184, L. 1977; amd. Sec. 11, Ch. 584, L. 1977; R.C.M. 1947, 95-1507(2), (3); amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 327, L. 1981; amd. Sec. 16, Ch. 482, L. 1995; amd. Sec. 12, Ch. 52, L. 1999.

Compiler's Comments:

1999 Amendment: Chapter 52 at beginning of (2) inserted exception clause; in (2)(b)(ii) after "parole" deleted "or otherwise"; in (2)(c) at end deleted "the offender shall, except as provided in 46-18-219, be imprisoned in the state prison for a term of not less than 10 years or more than 100 years or shall be fined an amount not to exceed \$50,000, or both"; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 52, L. 1999, provided: "WHEREAS, the Correctional Standards and Oversight Committee was authorized by the Fifty-Fifth Legislature to conduct a study of correctional standards and to act as a correctional oversight committee; and

WHEREAS, the Committee contracted for a review of Title 46, chapter 18, MCA, sentencing statutes; and

WHEREAS, the Committee found that the statutes providing for sentencing and judgment regarding criminal procedures are confusing and rife with cross-references, internal references, and inconsistent terminology that make the statutes difficult to read and understand; and

WHEREAS, the Committee recommended that a bill be drafted to amend Title 46, chapter 18, MCA, to make nonsubstantive changes to clarify and streamline the statutes to eliminate contradictions, confusion, inconsistent terminology, and excessive internal references.

THEREFORE, the Legislature of the State of Montana finds it appropriate to so amend certain sentencing-related statutes."

1995 Amendment: Chapter 482 in version effective July 1, 1997, in (1), near beginning, and in (2), near end, inserted reference to exception in 46-18-219; and made minor changes in style.

Coordination Instruction -- Effective Dates: Section 21, Ch. 482, L. 1995, provided: "(1) If House Bill No. 357 and [this act] [Senate Bill No. 66] are both passed and approved:

(a) [sections 1 through 18] of [this act] are effective July 1, 1997; and

(b) the sentencing commission shall include recommendations for implementing the public policy contained in [sections 1 through 18] of [this act].

(2) [Sections 19, 20, and this section] [enacted as codification and coordination instructions] are effective July 1, 1995.

(3) If House Bill No. 357 is not passed and approved, then this section is void." House Bill No. 357 was approved March 31, 1995, as Ch. 306, L. 1995. Therefore, the amendments to 46-18-502, enacted as sec. 16 of Senate Bill No. 66, are effective July 1, 1997.

1981 Amendments: Chapter 198, L. 1981, inserted language allowing the court to fine the offender a

maximum of \$50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Chapter 327 inserted "Except as provided in subsection (2)" at the beginning of (1); inserted (2) relating to an offender who was a persistent felony offender at the time of his previous felony conviction, except the language relating to the \$50,000 fine, which was added pursuant to Ch. 198 (see above); inserted "or the first 10 years of a sentence imposed under subsection (2)" in (3); and inserted (4) requiring that a sentence under subsection (2) runs consecutive to any other sentence.

Cross References:

Prohibition on deferral of imposition of sentence, 46-18-201.

Additional sentence for offenses committed with dangerous weapon, 46-18-221.

Case Notes:

Felony DUI -- Designation as Persistent Felony Offender Valid: The defendant was convicted in May 2009 of felony DUI and was charged with another felony DUI in August 2011. Prosecutors subsequently sought a persistent felony offender designation for the defendant, which was imposed by the District Court and upheld by the Supreme Court. According to the Supreme Court, the defendant was lawfully sentenced to 10 years in prison with no time suspended as a persistent felony offender. *St. v. Kime*, 2013 MT 14, 368 Mont. 261, 295 P.3d 580, distinguishing *St. v. Damon*, 2005 MT 218, 328 Mont. 276, 119 P.3d 1194.

Sentencing -- District Court Departure From Persistent Felony Offender Statute -- Sentence to Department of Corrections Instead of State Prison Considered Proper Departure: The defendant was convicted of felony partner or family member assault, designated as a persistent felony offender (PFO), and committed to the Department of Corrections (DOC) for the statutory minimum period of 5 years under 46-18-502. On appeal, the defendant argued that the District Court misinterpreted 46-18-222, which allows the court to forego restrictions when there is "no serious bodily injury" to the victim. The Supreme Court affirmed the sentence and determined that regardless of whether the prosecution proved "serious bodily injury", the District Court correctly departed from the PFO statute by sentencing the defendant to the DOC rather than the state prison. Moreover, the District Court based its sentence on the defendant's likelihood of reoffending and the court's desire to rehabilitate him. *St. v. Thompson*, 2012 MT 208, 366 Mont. 260, 286 P.3d 581.

Sentence Under Persistent Felony Offender Statute Replaces Underlying Felony Sentence: It was within the District Court's discretion to sentence the defendant to 40 years at the Montana State Prison for violation of 45-6-204 because he was designated and sentenced as a persistent felony offender and his sentence replaced the penalty for the underlying felony. *Sartain v. St.*, 2012 MT 164, 365 Mont. 483, 285 P.3d 407.

Imposition of Two Separate Sentences Illegal -- Gunderson Opinion Followed: The District Court imposed two separate sentences on Johnson, one for the underlying felony and another sentence because Johnson was a persistent felony offender (PFO). Citing *St. v. Gunderson*, 2010 MT 166, 357 Mont. 142, 237 P.3d 74, the Supreme Court reiterated that there should be only one sentence under the PFO statute and that the PFO sentence actually replaces the other sentence for the underlying felony. Because there were two sentences from the District Court, the sentences were illegal. *St. v. Johnson*, 2010 MT 288, 359 Mont. 15, 245 P.3d 1113.

Sentencing Defendant as Persistent Felony Offender -- No Double Jeopardy: Sentence enhancements based on recidivism, and not based on the same prior conviction, do not violate double jeopardy. *St. v. Brooks*, 2010 MT 226, 358 Mont. 51, 243 P.3d 405.

Plea Agreement Contained No Sentencing Recommendation Promises -- No Breach of Contractual Obligation: A sentencing court may consider relevant evidence pertaining to the defendant's character and history and to incidents making up the defendant's background. *St. v. Manywhitehorses*, 2010 MT 225, 358 Mont. 46, 243 P.3d 412.

District Court Upheld in Sentencing Defendant to Life Imprisonment for Attempted Rape and to 100 Years for Burglary Under Persistent Felony Offender Statute: The Supreme Court held that a proper interpretation of sentencing statutes allowed a District Court to mix and match a persistent felony offender sentence with another felony conviction occurring in the same proceeding and exceed the 100-year limit for imprisonment. *State v. Gunderson*, 2010 MT 166, 357 Mont. 142, 237 P.3d 74, overruling *State v. Gaither*, 2009 MT 391, 353 Mont. 344, 220 P.3d 640, that held that a persistent felony offender could not

be sentenced to a term of imprisonment greater than 100 years.

100-Year Sentence for Persistent Felony Offender Replaces Sentence for the Underlying Felony:

The Supreme Court overruled its previous decisions that the 100-year sentence for a persistent felony offender could be added to the sentence for the underlying felony and held that the 100-year sentence replaced the underlying sentence and that a District Court could sentence an offender to the maximum sentence on each charge. *State v. Gunderson*, 2010 MT 166, 357 Mont. 142, 237 P.3d 74, overruling *State v. Gunderson*, 282 Mont. 183, 936 P.2d 804 (1997), *State v. Robinson*, 2008 MT 34, 341 Mont. 300, 177 P.3d 488, and *State v. Gaither*, 2009 MT 391, 353 Mont. 344, 220 P.3d 640.

Persistent Felony Offender Sentence Limited to 100 Years: Gaither received an 85-year sentence for felony attempted sexual abuse of children, 10 years for felony criminal endangerment, and an additional 50 years with 10 years suspended as a persistent felony offender, for a total of 135 years in prison. Gaither appealed the sentence on grounds that the maximum sentence that could be imposed as a persistent felony offender is 100 years. The state contended that the sentence available under 46-18-502 could be applied to specific crimes in order to augment the overall sentence available for a defendant being sentenced for more than one felony. The Supreme Court interpreted 46-18-502 as mandatory, so that once a District Court decides to sentence an offender as a persistent felony offender, the sentence must be from 10 to not more than 100 years. The statute does not give a District Court authority to mix and match a persistent felony offender sentence with another felony conviction occurring in the same proceeding and exceed the 100-year limit on imprisonment. Because Gaither's sentence exceeded the 100-year limitation, it was illegal, so the case was remanded for resentencing, and if the state sought to sentence Gaither as a persistent felony offender, the prison sentence could not exceed 100 years. *St. v. Gaither*, 2009 MT 391, 353 M 344, 220 P3d 640 (2009).

Alternative Sentence for Drug Offense Not Precluded by Persistent Felony Offender Statutes, but Incarceration Not Error: Brendal pleaded guilty to fraudulently obtaining dangerous drugs and was sentenced to 25 years in prison with 15 years suspended. Based on prior convictions for the same offense, the sentencing court designated Brendal as a persistent felony offender and imposed a mandatory 10-year prison sentence. Brendal appealed the sentence on grounds that the sentencing court should have considered a sentence to a drug treatment program pursuant to the alternative sentencing authority in 45-9-202. However, the Supreme Court affirmed. The persistent felony offender statutes do not preclude a District Court from providing an alternative sentence under 45-9-202 for a person convicted of a drug-related offense, as long as the required criteria for imposing an alternative sentence are satisfied. Therefore, although the District Court could have provided an alternative sentence, it was not error to sentence Brendal to incarceration. *St. v. Brendal*, 2009 MT 236, 351 M 395, 213 P3d 448 (2009).

Consideration of Sentencing Factors in Sentencing Persistent Felony Offender Not Violative of Right to Trial by Jury: Following conviction for an eighth DUI, Vaughn was sentenced as a persistent felony offender to a 50-year term in the state prison. Relying on the proposition in *Blakely v. Wash.*, 542 US 296 (2004), that factual findings that serve to enhance a sentence beyond the statutory maximum must be determined by a jury beyond a reasonable doubt, Vaughn appealed the felony sentence, asserting that the 50-year sentence imposed under this section served to enhance the sentence beyond the maximum 13-month commitment to the Department of Corrections followed by a suspended sentence of up to 5 years authorized for felony DUI in 61-8-731 and that therefore the persistent felony offender sentence should have been determined by a jury on the facts. The Supreme Court first noted that the Blakely proposition applies to a fact other than the fact of a prior conviction and that it is the fact of a defendant's prior felony conviction that authorizes an enhanced sentence under 46-18-501 and this section. Here, Vaughn's enhanced felony DUI sentence was based on the sentencing court's finding that Vaughn had a prior felony DUI conviction. That factual determination may properly be made by the sentencing court rather than by a jury. The prior DUI was a sentencing factor that was an aggravating or mitigating circumstance supporting the imposition of a sentence within the range authorized for a persistent felony offender. Thus, Vaughn's right to a trial by jury was not violated by the sentencing court's findings of fact in support of a sentence as a persistent felony offender. The sentence was affirmed. *St. v. Vaughn*, 2007 MT 164, 338 M 97, 164 P3d 873 (2007). See also *Apprendi v. N.J.*, 530 US 466 (2000).

Suspension of Sentence Following Probation Violation Not Violative of Double Jeopardy -- Credit for Time Served Properly Allowed: DeWitt was convicted of two counts of aggravated burglary, found to be

a persistent felony offender, and sentenced to three consecutive 10-year sentences. DeWitt appealed, and the Supreme Court remanded with instructions to dismiss one count. While awaiting resentencing, DeWitt was incarcerated for 1,275 days. The District Court then resentenced DeWitt to one 10-year sentence for aggravated burglary and a consecutive 10-year sentence as a persistent felony offender, suspended all but 1,275 days of the 20-year sentence, and gave DeWitt credit for 1,275 days served. Without prison time to serve, DeWitt was immediately released on probation. DeWitt subsequently violated probation, the suspended sentence was revoked, and DeWitt was sentenced to 10 years with 5 years suspended, with credit for 160 days served while awaiting revocation proceedings. DeWitt appealed on grounds that the sentencing court failed to allow credit for the 1,275 days served when the suspended sentence was revoked and the new 10-year sentence was imposed and asserted that his double jeopardy rights were violated by reinstatement of the original sentence. The Supreme Court disagreed with both arguments. When the sentencing court sentenced DeWitt following the probation violation, the court had a 16.5-year suspended sentence to work with, which was more than sufficient to account for the 10-year sentence with 5 years suspended that was imposed. Although a sentencing court must give credit for time served, revocation of a suspended sentence based on a probation violation and reinstatement of the original sentence does not constitute double jeopardy as long as the sentence is within the parameters of the sentence imposed in the initial suspended sentence and credit is allowed for time served. Further, a persistent felony offender designation is not a separate crime carrying a separate sentence, but rather is a statutorily required sentence enhancement that is part of the initial sentence, so the sentencing court could not have "dropped" the persistent felony offender count and sentenced DeWitt only under the aggravated burglary count, thereby limiting the available time on resentencing to 6.5 years. The sentence was not violative of double jeopardy, was within statutory parameters, and was affirmed. *St. v. DeWitt*, 2006 MT 302, 334 M 474, 149 P3d 549 (2006).

Constitutionality of Persistent Felony Offender Statutes: Shults contended that the persistent felony offender (PFO) statutes were unconstitutional on their face in violation of double jeopardy, equal protection, and cruel and unusual punishment or as they applied to Shults's case. The Supreme Court disagreed. First, the PFO statutes do not constitute double jeopardy because a sentence as a habitual criminal is not viewed as a new jeopardy (see *Gryger v. Burke*, 334 US 728 (1948)). Second, Shults was not able to show that the PFO statutes classify two or more similarly situated groups in an unequal manner and thus failed to meet the first threshold of a meritorious equal protection claim. Last, a sentence that is within maximum statutory guidelines and that is not so disproportionate as to shock the conscience or outrage the moral sense of the community is not considered cruel and unusual punishment. Shults's sentence was within statutory parameters, and in light of Shults's 18-year criminal history and repeated failure to conform his behavior to societal norms despite having numerous opportunities to do so, the sentence could not be seen as so disproportionate as to shock the conscience or outrage the moral sense of the community and thus was not considered cruel and unusual punishment. *St. v. Shults*, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Failure to Raise Legality of Sentence on Direct Appeal -- Postconviction Consideration Barred: Osborne was convicted of a fourth DUI in 1999, and when charged with felony DUI in 2003, the state sought to have Osborne declared a persistent felony offender. The District Court obliged, and Osborne was declared a persistent felony offender and sentenced to 10 years in prison with 5 years suspended. Osborne did not appeal the sentence directly, but filed a petition for postconviction relief, asserting that the sentence was not legal. The petition was denied, and Osborne appealed. The state argued that the Supreme Court was procedurally barred under 46-21-105 from considering the petition because the legal challenge to the sentence could have been raised on direct appeal. Osborne asserted that because the state did not raise the procedural bar issue in District Court, that argument was waived. Although the Supreme Court as a rule does not consider issues raised for the first time on appeal, this general rule does not preclude consideration of jurisdictional questions raised for the first time on appeal. The procedural bar is jurisdictional, so the court considered the state's argument, concluding that lack of subject matter jurisdiction may not be waived and that 46-21-105 represents a jurisdictional limit on courts' ability to entertain and decide petitions for postconviction relief and effectively prohibits courts from exercising jurisdiction over grounds for relief that could have been raised on direct appeal. Thus, Osborne's failure to challenge the legality of the sentence on direct appeal precluded consideration in a postconviction petition. *St. v. Osborne*, 2005 MT 264, 329 M 95, 124 P3d 1085 (2005).

District Court Jurisdiction to Apply Persistent Felony Offender Designation to Felony DUI: Yorek pleaded guilty to and was sentenced on a felony DUI charge. The District Court determined that it had jurisdiction and imposed a persistent felony offender designation. Yorek sought postconviction relief on grounds that the District Court lacked subject matter jurisdiction to impose a persistent felony offender designation for felony DUI. The District Court denied the petition for postconviction relief, concluding that sentencing for felony DUI is not solely governed by 61-8-731 and 61-8-734, that nothing in the persistent felony offender statute excludes felony DUI offenders from its application, and that Yorek waived any jurisdiction claim by pleading guilty. The Supreme Court affirmed. Nothing in this section distinguishes between or among the types of felonies to which it applies, or excludes DUI offenders. Rather, if the underlying charge meets the definition of a felony and if the state has provided proper notice of its intent to seek persistent felony offender status under 46-13-108, a District Court has the statutory authority to designate and sentence an offender as a persistent felony offender. Yorek's crime met the definition of a felony, and Yorek fell squarely within the persistent felony offender statute. The state met the notice provisions, and the District Court possessed subject matter jurisdiction to designate Yorek as a persistent felony offender. Because the jurisdiction question was dispositive, the Supreme Court did not reach the question of whether Yorek's guilty plea was a procedural bar against bringing the claim. *St. v. Yorek*, 2002 MT 74, 309 M 238, 45 P3d 872 (2002), followed in *St. v. Pettijohn*, 2002 MT 75, 309 M 244, 45 P3d 870 (2002), and *St. v. Damon*, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005).

Failure to Adequately Inform Defendant of Maximum Possible Penalty -- Reversible Error in Failing to Allow Withdrawal of Guilty Plea: After offering an Alford plea but prior to a change of plea hearing, Melone signed an acknowledgment of waiver of rights, stating that he understood the maximum possible penalty for felony assault and that his sentence could be enhanced for using a deadly weapon and because of his prior criminal record. At the change of plea hearing, the court informed Melone that the weapon enhancement penalty would not apply and that the maximum penalty for felony assault was "ten years in the Montana State Prison or a \$50,000 fine". The court then allowed Melone to withdraw his guilty plea and enter the Alford plea. The court later sentenced Melone to 10 years in prison, plus 10 years to be served consecutively as a persistent offender. Melone moved for a hearing on the persistent offender enhancement and requested that he be allowed to withdraw his plea. The court rejected the motion to withdraw the plea, but vacated the sentence and granted a new sentencing hearing to allow Melone to present evidence regarding applicability of the persistent offender enhancement. Following the hearing, the court affirmed its original sentence. Melone appealed, contending that he was never informed that he could receive up to 100 years because of his potential status as a persistent offender and that, as a consequence, his plea was not knowing and voluntary. The Supreme Court agreed. Under 46-12-210 and 46-16-105, a defendant must be informed of the maximum penalty, including the effect of any penalty enhancement provision. The fact that the *prosecutor* informed Melone of a possible persistent offender penalty immediately prior to questioning did not satisfy the statutory requirement that the *court* inform the defendant of the maximum penalty. Melone's statements in the written acknowledgment were insufficient to satisfy the doubts of the Supreme Court that Melone was aware that his sentence could be enhanced by up to 100 years as a result of his plea. Rather, it appeared that Melone was under the mistaken belief that he risked sentence enhancement only if he proceeded to trial. Resolving their doubt that the plea was voluntary in favor of Melone, the Supreme Court reversed and remanded the case to District Court to allow Melone to withdraw the plea. *St. v. Melone*, 2000 MT 118, 299 M 442, 2 P3d 233, 57 St. Rep. 493 (2000).

Sentence of 100 Years Without Parole for Sexual Intercourse Without Consent Committed Upon Person of Same Gender Not Excessive -- Persistent Felony Offender: Ford contended that his sentence of 100 years without parole eligibility for sexual intercourse without consent committed upon a person of the same gender was excessively harsh and disproportionate to the gravity of the crime. The Supreme Court found that the sentence was within legal parameters provided by statute and affirmed the sentence, noting that Ford: (1) was a persistent felony offender; (2) had a prior criminal history of sexually preying on young boys; (3) had undergone previous attempts by professional therapists and state officials to treat his problems but was apparently unwilling to accept the provided treatment; and (4) had a predatory nature. *St. v. Ford*, 278 M 353, 926 P2d 245, 53 St. Rep. 947 (1996).

Notice of Intent to Seek Increased Punishment Not Filed With Court Until After Trial -- No Error in Persistent Felony Offender Designation: The state timely served defense counsel with notice of its intent

to seek increased punishment for McQuiston as a persistent felony offender but did not file the notice with the court until after trial was concluded, 5 months before sentencing. McQuiston contended that timely filing of the notice was a jurisdictional prerequisite and that failure to so do constituted reversible error. However, the state's notice to defense counsel 5 months before trial and to the court 5 months before sentencing did not prejudice McQuiston, and the persistent felony offender designation was not made in error. *St. v. McQuiston*, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Persistent Felony Offender Statute Determinative of Sentence Rather Than Statute Governing Underlying Offense: On March 13, 1995, the District Court sentenced McQuiston in open court to 15 years in the state prison, with 5 years suspended, for sexual intercourse without consent and 15 years in the state prison, with 5 years suspended, for incest. On March 14, the court entered written judgment sentencing McQuiston to two consecutive terms of 30 years in the state prison, with the last 5 years suspended, for each offense and further designated McQuiston a persistent felony offender and a dangerous offender. On March 31, the court, after review of the transcript of the sentencing hearing, amended the sentence to 22 1/2 years in prison, with 5 years suspended, for each offense and ordered the sentences to be served consecutively for a total of 45 years in prison, with 10 years suspended. McQuiston alleged error in sentencing, arguing that the sentence constituted an ex post facto violation because it was based on the incest penalty in effect at the time of sentencing rather than the penalty in effect at the time that the offense occurred. However, when a defendant has been designated a persistent felony offender, it is this section that determines the maximum sentence, not the statute governing the underlying offense. The 22 1/2-year sentence was well within the maximum allowed under this section, was not applied ex post facto, and was thus affirmed. *St. v. McQuiston*, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Maximum Statutory Sentence for Persistent Felony Offender -- Not Additional Sentence: After finding Fitzpatrick to be a persistent felony offender, the District Court sentenced him to 10 years for escape and 5 years for burglary, plus an additional 100 years on each count as a persistent felony offender. The sentence imposed by this section is a maximum sentence, replacing the maximum sentence for the offense, and is not a sentence in addition to the sentence for the offense. Therefore, the Supreme Court vacated the sentences as being in excess of statutory maximums and remanded for resentencing consistent with this section. The sentences may not exceed 100 years on each count and must run consecutively. *St. v. Fitzpatrick*, 247 M 206, 805 P2d 584, 48 St. Rep. 164 (1991), replacing a prior opinion at 48 St. Rep. 5 (1991), followed in *St. v. DeSalvo*, 273 M 343, 903 P2d 202, 52 St. Rep. 1019 (1995), and distinguished in *St. v. Gunderson*, 282 M 183, 936 P2d 804, 54 St. Rep. 283 (1997), and *St. v. Robinson*, 2008 MT 34, 341 M 300, 177 P3d 488 (2008), in which persistent felony offender sentences imposed in addition to sentences for the original offenses were not considered illegal because the total sentences imposed were below the maximum provided for by subsection (2) of this section and were thus within statutory parameters. *State v. Gunderson*, 282 Mont. 183, 936 P.2d 804, (1997), and *State v. Robinson*, 2008 MT 34, 341 Mont. 300, 177 P.3d 488, were overruled by *State v. Gunderson*, 2010 MT 166, 357 Mont. 142, 237 P.3d 74.

Second Felony Arising as Result of First Felony -- Persistent Offender Designation Proper -- Crimes Sufficiently Disparate: Defendant was arrested on a felony drug charge and later assaulted an officer while attempting to escape. Defendant asserted that the District Court erred in designating him a persistent felony offender because both underlying convictions arose from a single transaction. However, the fact that both crimes arose out of the same transaction does not in itself bar application of the persistent felony offender designation. In general, when different crimes, even though unrelated in nature, are committed at the same place, on the same victim or group of victims, and at the same time or as part of a continuous series of criminal acts, they should be considered as having been committed on the same occasion for sentence enhancement purposes. In this case, the crimes were sufficiently disparate in time, place, and victim that they could not be said to have occurred on the same occasion, so sentence enhancement was appropriate. *St. v. Hawkins*, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989).

Defendant Not Designated Persistent Felony Offender in Previous Conviction -- Discretion of Judge Within Statutory Limits: Defendant argued that because he was not designated a persistent felony offender in his previous conviction, he should have received only 5 years under 46-18-502(1) rather than 50 years with 40 years suspended under 46-18-502(2). However, the sentence was within the range authorized by this section, and the judge did not abuse his discretion in imposing the sentence when the

defendant could have been designated a persistent felony offender at the time of his previous conviction, based on his record at that time. *St. v. Tracy*, 233 M 529, 761 P2d 398, 45 St. Rep. 1705 (1988).

Rules of Evidence Inapplicable to Sentencing: Defendant contended that the court erred in adding 10 years to his sentence for being a persistent felony offender because the court relied on evidence improperly before it. The Supreme Court affirmed the sentence because the rules of evidence do not apply to sentencing and because the evidence was competent. *St. v. Smith*, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988).

Three Hundred-Year Prison Sentence of Mentally Ill Defendant Upheld: Sentencing defendant, who was found mentally ill but criminally culpable, to the Montana State Prison for a term of 300 years without the possibility of parole or furlough was not cruel and unusual punishment. The District Court had stated, among other things, that defendant was very dangerous and there was no treatment program that would alter his behavior. *St. v. Watson*, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984).

Defendant Under Duty to Contest Presentence Report in Lower Court: After conviction of theft and robbery, defendant was designated as a persistent felony offender and his sentence was enhanced. Defendant contended that there was no evidence that he was the same person whose prior record was introduced at the sentencing hearing. The Supreme Court, relying on *St. v. Radi*, 185 M 38, 604 P2d 318 (1979), held that the defendant has an affirmative duty to contest matters contained in a presentence report. He chose not to and is precluded from doing so on appeal. *St. v. Madera*, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983), distinguished in *St. v. Maier*, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999).

Finding of No Mitigating Factors Supported in Record -- Alcohol and Sexual Problems: Where the trial court considered defendant's drinking and sexual problems but concluded that those conditions did not excuse defendant from accountability for his acts, and the evidence presented at the hearing and in the presentence investigation report supported the trial court's conclusion, there was no abuse of discretion in sentencing defendant as a persistent felony offender. *St. v. Metz*, 184 M 533, 604 P2d 102 (1979).

Sentence Under Persistent Offender Statute Not Cruel and Unusual -- Fairness Questions for Sentence Review Board: A sentence of 100 years is within the maximum allowable by the persistent felony offender statute, and as such does not violate the eighth amendment to the United States Constitution. Challenges to the equitability of a sentence as opposed to its legality are properly directed to the Sentence Review Division. *St. v. Metz*, 184 M 533, 604 P2d 102 (1979).

Specific Objection to Evidence Required in Persistent Felony Offender Hearing: By failing to make a specific objection, the defendant waived his right to assert that the State's certificate of prior conviction was not competent evidence without proof that he was the person named in the certificate. The defendant was informed well in advance of the time he entered his guilty plea that he would be tried as a persistent felony offender. At the hearing to determine whether the defendant was a persistent felony offender, he had an opportunity to object to the State's lack of identification but failed to do so. *St. v. Metz*, 184 M 533, 604 P2d 102 (1979). See also *St. v. Brown*, 228 M 209, 741 P2d 428, 44 St. Rep. 1462 (1987).

Presumption of Constitutionality: Following a conviction for attempted deliberate homicide, the defendant was sentenced as a persistent felony offender to 30 years in prison without parole. While the defendant claims the sentence to be unconstitutional, it was held in *St. v. Karathanos*, 158 M 461, 493 P2d 326 (1972), that a sentence within statutory limits is presumed to be constitutional. The defendant has the burden of overcoming the presumption and has not done so. *St. v. Kirkland*, 184 M 229, 602 P2d 586 (1979).

Persistent Felony Offender Versus Law-Abiding Citizen: Article II, sec. 28, Mont. Const., grants an offender who has served his sentence a fair opportunity to enjoy the rights that law-abiding citizens enjoy. It does not grant him immunity from being treated as a persistent felony offender. *St. v. Radi*, 176 M 451, 578 P2d 1169 (1978). See *St. v. Gafford*, 172 M 380, 563 P2d 1129 (1977).

Presentence Investigation: Although the State proved the defendant's status as a persistent felony offender by means of a prior felony conviction pending appeal, the need for a presentence investigation report was not thereby eliminated. *St. v. Radi*, 176 M 451, 578 P2d 1169 (1978).

Statutes Construed Together: The Supreme Court saw no problem in construing 46-18-502 and 46-18-503 (renumbered 46-13-108) together to provide both the procedural requirements and substantive basis for implementing persistent felony offender sanctions since that is precisely what the Legislature

intended. *St. v. Radi*, 176 M 451, 578 P2d 1169 (1978).

Misuse of Plea Bargaining Process and Habitual Criminal Statute: Without declaring the plea bargaining process constitutionally infirm or the habitual criminal statute unconstitutional on its face, the Supreme Court held that the defendant was denied due process under federal and state provisions when he realistically was sentenced to 10 years for attempted burglary and 40 years for refusing to plead guilty and insisting upon a jury trial. *St. v. Sather*, 172 M 428, 564 P2d 1306 (1977).

Sentence for Prior Conviction: A judgment under former law that the defendant "be imprisoned in the state prison for the term of ten years, five years upon the conviction for assault in the second degree, and five years for the prior conviction of a felony as by the statute made and provided" was not void as to the 5 years for the former conviction. *St. v. Connors*, 27 M 227, 70 P 715 (1902).