

252 Mont. 531, \*; 830 P.2d 1280, \*\*;  
1992 Mont. LEXIS 44, \*\*\*; 49 Mont. St. Rep. 141

LEXSEE 252 MT 531

**STATE OF MONTANA, Plaintiff and Appellant, v. HARVEY WALTER NIEMI,  
Defendant and Respondent**

**No. 91-130**

**Supreme Court of Montana**

*252 Mont. 531; 830 P.2d 1280; 1992 Mont. LEXIS 44; 49 Mont. St. Rep. 141*

**September 19, 1991, Submitted on Briefs  
February 19, 1992, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1] As Corrected.

**PRIOR HISTORY:** Appeal from the District Court of Cascade County. Eighth Judicial District. Honorable Joel G. Roth, Judge.

**DISPOSITION:** Affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** The State of Montana appealed from a judgment of the District Court of Cascade County, Eighth Judicial District (Montana), which sentenced defendant to 10 years imprisonment for attempt to commit deliberate homicide and two years imprisonment for use of a dangerous weapon, both sentences suspended except for 15 days already served. The District Court further sentenced defendant to 4000 hours of community service.

**OVERVIEW:** Defendant and his wife appeared to be happily married. Many perceived defendant to be a mild-mannered. One day, defendant waited for his wife to enter the basement. When the wife appeared, defendant stabbed her several times with a knife, wounding her in the head, chest, stomach, and hand. Following the stabbing, defendant expressed remorse. The wife recovered. At his trial defendant testified that at the time of the crime he felt out of his body. A psychiatrist testified that defendant was in a dissociative state. Defendant was found guilty and was sentenced to 10 years for the attempt and two years for the use of a dangerous weapon. The trial court suspended both sentences, stating that there was a showing that defendant's mental capacity was impaired. On appeal, the court affirmed. The court held that although the sentences could not be suspended under *Mont. Code Ann. §§ 46-18-201(5)* and *46-18-221(3)*, there was an exception under *Mont. Code Ann. § 46-18-222(2)*. The sentences could be suspended if the defendant's mental capacity, at the time of the commis-

sion of the offense, was significantly impaired, although not so impaired as to constitute a defense to the prosecution.

**OUTCOME:** The court affirmed defendant's conviction and sentence.

**CORE TERMS:** sentence, mandatory minimum, imprisonment, mental capacity, impaired, sentencing, suspended, dangerous weapon, deliberate, homicide, sentenced, stabbed, cross-appeal, community service, dissociative, exempt, basement, stabbing, judgment of conviction, sentencing provision, criminal record, state of mind, experienced, suspension, exempted, happened, deferred, remorse, suspend, duress

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Sentencing > Ranges  
Criminal Law & Procedure > Sentencing > Suspension*  
[HN1] See *Mont. Code Ann. § 46-18-201(5)*.

*Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Attempted Murder > Penalties  
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > Penalties  
Criminal Law & Procedure > Sentencing > Ranges*  
[HN2] *Mont. Code Ann. § 46-18-221(3)* provides that the mandatory minimum sentence for use of a dangerous weapon may not be deferred or suspended, except as provided in *Mont. Code Ann. § 46-18-222*.

*Criminal Law & Procedure > Sentencing > Mental Incapacity  
Criminal Law & Procedure > Sentencing > Suspension*  
[HN3] *Mont. Code Ann. § 46-18-222(2)* provides, in part, that a defendant's mandatory minimum sentence

may be suspended if the defendant's mental capacity, at the time of the commission of the offense for which he is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution.

**COUNSEL:** For Appellant: **Marc Racicot**, Attorney General; **Joseph Thaggard**, Asst. Attorney General, Helena; **Patrick L. Paul**, County Attorney; **Steven Hudspeth**, Deputy, Great Falls.

For Respondent: **Daniel Donovan**, Great Falls.

**JUDGES:** Justice Gray delivered the Opinion of the Court. Justices Trieweiler, Hunter, Weber and McDonough concur.

**OPINION BY: GRAY**

### OPINION

[\*532] [\*\*1281] The State of Montana appeals a judgment of conviction and sentencing order from the Eighth Judicial District, Cascade county, which sentenced Harvey Walter Niemi (Harvey) to ten years imprisonment for attempt (deliberate homicide) and two years imprisonment for use of a dangerous weapon, both sentences suspended except for fifteen days already served. The District Court further sentenced Harvey to 4000 hours of community service. We affirm on another ground.

We rephrase the issues presented on appeal to the following:

Did the District court err when it suspended Harvey's sentences of ten years imprisonment for attempt (deliberate homicide) and two years imprisonment for use of a dangerous [\*\*\*2] weapon under §§ 46-18-201(5) and -221(3), MCA?

Harvey and Katherine Jean Niemi (Jean) were married on June 10, 1966. Following their marriage, the couple resided in Great Falls, Montana.

Both Harvey and Jean were employed as teachers; Jean retired in 1988 and Harvey retired in 1989. Through the years, Harvey and Jean generally were viewed as a happily married couple. Many perceived Harvey to be a mild-mannered, non-violent, and kind person. Prior to January 1990, Harvey's criminal record consisted of one minor traffic violation.

On January 9, 1990, Harvey and Jean began a normal day at home. Following a noon-time meal, Harvey told Jean that he was going to a local store to purchase some remodeling supplies. However, Harvey did not leave the home. He went to the basement, changed his clothing, put on an old pair of eyeglasses and a pair of

panty hose over his head, and placed rubber gloves on his hands. He then waited for Jean to enter the basement. When Jean entered [\*\*1282] the basement to use a bathroom, Harvey stabbed her several times with a knife, wounding [\*533] her in the head, chest, stomach, and hand. Following the stabbing, Harvey expressed remorse and said [\*\*\*3] he could not understand how he could have committed such an offense. Jean recovered from the stab wounds.

On January 23, 1990, the State charged Harvey by information with one count of attempt (deliberate homicide). Harvey pled not guilty to this charge on February 14, 1990. A jury trial was held on November 13 to November 20, 1990. At the trial, Harvey testified that for years he had repressed anger concerning Jean. He further testified that at the time of the stabbing, he felt he was not in his body, but rather, was above and behind his body, watching what was happening. Dr. William Stratford, a psychiatrist, testified that at the time of the stabbing, Harvey experienced a dissociative state of mind. On November 20, 1990, the jury found Harvey guilty of the charged offense.

Prior to sentencing, Harvey moved the District Court to find that § 46-18-222, MCA, exempted him from the mandatory minimum sentencing penalties contained in § 45-5-102(2), MCA, the sentencing provision for deliberate homicide, and § 46-18-221(1), MCA, a sentencing provision for use of a dangerous weapon. Harvey argued that § 46-18-222(2) and (3), MCA, exempted him from the mandatory minimum sentences [\*\*\*4] because at the time he stabbed Jean 1) his mental capacity was significantly impaired, and 2) he was acting under unusual and substantial duress. At the sentencing hearing, Harvey abandoned his argument that he was acting under unusual and substantial duress at the time he stabbed Jean but maintained that his mental capacity was significantly impaired.

Following oral argument, the District Court found that Harvey's mental capacity at the time he stabbed Jean did not exempt him from the mandatory minimum sentences under §§ 45-5-102(2) and 46-18-221(1), MCA. The District court sentenced Harvey to ten years imprisonment for attempt (deliberate homicide) and two years imprisonment for use of a dangerous weapon, both sentences suspended except for fifteen days already served. The District Court further sentenced Harvey to 4000 hours of community service.

The State filed its notice of appeal regarding Harvey's sentence on January 15, 1991. Harvey likewise filed a notice of appeal on March 8, 1991. On June 4, 1991, the State filed a brief, which in part anticipated and discussed issues Harvey could raise in his cross-appeal. On August 6, 1991, Harvey filed a brief that resembles

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the [\*\*\*5] format of a cross-appeal. On August 13, 1991, Harvey moved this [\*534] Court to stay his appeal pending the outcome of the State's appeal under Montana Rule of Appellate Procedure 3. On September 9, 1991, this Court granted Harvey's request for a stay of his appeal.

Because Harvey's cross-appeal has been stayed by this Court, issues raised by both the State and Harvey in their respective briefs that pertain to Harvey's cross-appeal will not be discussed herein. Accordingly, we will limit our discussion to the following issue:

Did the District Court err when it suspended Harvey's sentences of ten years imprisonment for attempt (deliberate homicide) and two years imprisonment for use of a dangerous weapon under §§ 46-18-201(5) and -221(3), MCA?

The District Court at the sentencing hearing held that Harvey's mental capacity at the time he stabbed Jean did not exempt him from mandatory minimum sentencing under § 46-18-222, MCA. The District Court acknowledged, however, that it was a "close question" as to whether Harvey's mental capacity was significantly impaired at the time of the offense under § 46-18-222(2), MCA. The District Court stated:

When you look at what happened [\*\*\*6] here, the overall event that occurred it is almost incredible and it is difficult to believe that anybody in their right mind in [\*\*1283] full possession of their mental faculties would have committed this offense under these circumstances . . . . And although there has been a psychiatric explanation of what happened, this dissociative state, the jury did not accept that offered evidence in determining guilt of Mr. Niemi. Although the required proof, I think, to establish this mental capacity exception, I don't think it requires proof beyond a reasonable doubt as do the elements of the criminal offense. But, I really question whether -- there is certainly some indication, certainly some testimony here that the mental capacity of Mr. Niemi was impaired at that time when this offense occurred and maybe for a short period of time before it occurred when he was waiting. But, I find it difficult to accept that Mr. Niemi's mental capacity was so significantly impaired to justify an exception from mandatory minimum sentence.

...

This is the most unusual criminal case that I have presided over in my 14 years on the bench. It's very bizarre. Serious and yet the people that are involved [\*\*\*7] are exemplary people and it just borders on mind boggling.

[\*535] The District Court further held that incarceration in this instance would be inappropriate in light of Harvey's stellar community service record, the nature of the offense, the unlikelihood that Harvey would ever attempt to harm Jean again, Harvey's remorse, and his lack of a previous criminal record. Thereafter, the District Court, *inter alia*, sentenced Harvey to the mandatory minimum sentence of ten years imprisonment for attempt (deliberate homicide) under § 45-5-102(2), MCA, and the mandatory minimum sentence of two years imprisonment for use of a dangerous weapon under § 46-18-221(1), MCA; the court suspended both sentences except for fifteen days already served. The District Court cited *State v. Arbgast (1983)*, 202 Mont. 220, 656 P.2d 828, as authority for its ability to suspend Harvey's mandatory minimum sentences.

The State argues that *Arbgast* is not applicable to these facts. The State further argues that the District Court erred by suspending the sentences in this case under §§ 46-18-201(5) and -221(3), MCA. Section 46-18-201(5), MCA, provides [\*\*\*8] [HN1] "[e]xcept as provided in 46-18-222, the imposition or execution of the first 10 years of a sentence of imprisonment imposed under 45-5-102 may not be deferred or suspended." Section 46-18-221(3), MCA, [HN2] provides that the mandatory minimum sentence for use of a dangerous weapon "may not be deferred or suspended, except as provided in 46-18-222." The State argues that because the District Court held that § 46-18-222, MCA, did not apply, §§ 46-18-201(5) and -221(3), MCA, require the court to sentence Harvey to serve twelve years imprisonment for attempt (deliberate homicide) and use of a dangerous weapon.

We agree that *Arbgast* is not applicable here. In *Arbgast*, suspension of the defendant's sentence was not specifically limited by statute to one of the exceptions contained in § 46-18-222, MCA. Here, both statutes under which Harvey was sentenced expressly prohibit suspension of the sentence *unless* § 46-18-222, MCA, applies.

However, following a careful review of the record, we hold that the sentences at issue herein can be suspended because Harvey's mental capacity at the time of the offense was significantly impaired under § 46-18-222(2), MCA. Section 46-18-222(2), MCA,

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[\*\*9] [HN3] provides in part that a defendant's mandatory minimum sentence may be suspended if "the defendant's mental capacity, at the time of the commission of the offense for which he is to be sentenced, was significantly impaired, *although not so impaired as to constitute a defense to the prosecution.*" [Emphasis added.] Here, the jury did not find that Dr. Stratford's testimony concerning Harvey's mental state [\*536] supported a defense to the offense. However, § 46-18-222(2), MCA, still allows a court in sentencing a defendant to suspend mandatory minimum sentencing [\*1284] if it finds the defendant's mental capacity was significantly im-

paired but not so impaired as to constitute a defense. We emphasize again that the District Court stated that the issue of whether Harvey was significantly impaired was a "close question." Moreover, we are persuaded by Dr. Stratford's testimony, which details how Harvey experienced a dissociative state of mind at the time of the offense. We therefore affirm the result of the District Court's judgment of conviction and sentencing order on the ground that Harvey is exempt from mandatory minimum sentencing under [\*\*\*10] § 46-18-222(2), MCA.

Affirmed.