

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 23-1215  
Black Hawk County No. FECR248386

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STATE OF IOWA,  
Plaintiff–Appellee,

vs.

OTIS SEAY, JR.,  
Defendant–Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR BLACK HAWK COUNTY  
THE HONORABLE MELISSA ANDERSON-SEEBER (GUILTY PLEA) &  
DAVID P. ODEKIRK (SENTENCING), JUDGE

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**BRIEF FOR APPELLEE**

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**STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

- I. Did the district court abuse its discretion in sentencing Seay to incarceration?**

## **ROUTING STATEMENT**

The State agrees this case can be decided based on existing legal principles. Appellant's Br. at 4. Transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

## **NATURE OF THE CASE**

Otis Seay, Jr. entered an *Alford* plea to failure to comply with the sex offender registry (second or subsequent offense), a class "D" felony in violation of Iowa Code sections 692A.104, 692A.105, and 692A.111. D0058, Plea Hearing Tr. at 17:1–18:4, 20:15–24:24 (04/27/2023). The court imposed a term of imprisonment not to exceed five years and a \$1,025 fine. D0061, Sentencing Hearing Tr. at 15:2–12 (07/27/2023); D0037, Order of Dispo. at 1 (07/27/2023); D0043, Nunc Pro Tunc (08/02/2023).

Seay appeals his sentence. He contends the district court abused its discretion by imposing incarceration. Appellant's Br. at 10. In his view, a suspended sentence is more appropriate. Appellant's Br. at 10–11.

The Honorable Melissa Anderson-Seeber presided over the *Alford* plea and the Honorable David P. Odekirk presided over sentencing.

## **STATEMENT OF THE FACTS**

In December 2012, Seay was convicted of three counts of sexual abuse in the third degree which required him to register with the Iowa Sex Offender Registry. D0013, Min. of Test. at 6 (11/28/2022). In February

2017, Seay registered with the registry. D0013 at 6. Less than two years later, in September 2018, he was convicted of failure to comply with the sex offender registry. D0013 at 6. The next year, he was convicted of failure to comply with the sex offender registry twice more, once in April 2019, and again in September 2020. D0013 at 6.

On April 27, 2024, Seay was again convicted of failure to comply with the sex offender registry (his fourth) following an *Alford* plea. D0013 at 6; D0058 at 24:25–25:7. In support of his plea, he agreed the court could consider the minutes of testimony. D0058 at 22:9–17. The minutes disclose that in September 2022, Seay created a Facebook profile using the name “Al Stump Jr.,” and listed his phone number and posted photos of himself. D0013 at 6. He did not, however, inform the Iowa Sex Offender Registry that he had this new Facebook profile. D0013 at 6, 8–13.

### **JURISDICTIONAL STATEMENT**

The State does not contest this Court’s jurisdiction to decide Seay’s appeal. *State v. Hightower*, 8 N.W.3d 527, 534 (Iowa 2024). Because Seay appeals his sentence that was neither mandatory nor agreed to, he has good cause to appeal and this Court has jurisdiction to decide his appeal. Appellant’s Br. at 8–10; D0058 at 13:4–14:9; D0061 at 5:15–10:14; *Hightower*, 8 N.W.3d at 534.

And although Seay filed his notice of appeal before the court entered a nunc pro tunc order amending the sentencing order, a subsequent notice of appeal was not required for Seay’s sentencing challenge to be properly before this Court because the nunc pro tunc was not a ruling on a collateral or independent issue. *State v. Formaro*, 638 N.W.2d 720, 727 (Iowa 2002); D0037; D0040, Not. of App. (08/01/2023); D0043. Rather, the nunc pro tunc made “the record show truthfully what judgment was actually rendered[.]” *State v. Jackson*, No. 17-1816, 2018 WL 6706216, at \*1 (Iowa Ct. App. Dec. 19, 2018); D0061 at 15:2–12 (noting the oral sentence pronounced imposed an indeterminate five-year term of imprisonment and \$1,025 fine); D0037 at 1 (noting the written judgment and sentence imposed an indeterminate one-year term of imprisonment and \$1,025 fine); D0043 (“[T]he Order Judgment and Sentence filed July 27, 2023 is amended to provide that the defendant is sentenced to an indeterminate term of confinement not to exceed five years. Said order is otherwise unchanged.”). So, “the nunc pro tunc order ‘amended’ the sentencing order[] from which [Seay] had already perfected an appeal.” *Jackson*, No. 17-1816, 2018 WL 6706216, at \*1; D0037; D0040; D0043.

## ARGUMENT

### I. **The district court appropriately exercised its discretion in sentencing Seay to incarceration.**

#### **Preservation of Error**

The State does not contest error preservation. *See State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010) (“[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court.”); *see also* Appellant’s Br. at 8.

#### **Standard of Review**

Iowa appellate courts review sentences imposed in criminal cases for correction of errors at law. *State v. Damme*, 944 N.W.2d 98, 103 (Iowa 2020). Sentencing decisions carry a strong presumption of validity and the defendant must overcome that presumption when challenging a court’s sentence. *State v. Cheatham*, 569 N.W.2d 820, 821 (Iowa 1997); *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). “We afford sentencing judges a significant amount of latitude because of the ‘discretionary nature of judging and the source of the respect afforded by the appellate process.’” *State v. Fetner*, 959 N.W.2d 129, 133 (Iowa 2021). Absent “an abuse of discretion or some defect in the sentencing procedure,” appellate courts will not reverse a sentence. *Damme*, 944 N.W.2d at 103 (citations omitted). “An abuse of discretion occurs when the court exercises its discretion on



grounds or for reasons that are clearly untenable or unreasonable.” *State v. Thompson*, 951 N.W.2d 1, 4 (Iowa 2020) (citations omitted).

### **Merits**

Iowa Code section 901.5 directs the sentencing court to receive and examine “all pertinent information, including the presentence investigation report and victim impact statements, if any,” before considering various sentencing options. *See also State v. Thomas*, 659 N.W.2d 217, 221 (Iowa 2003) (citations omitted). The court then determines which of these statutory options “is authorized by law for the offense,” and “which of them or which combination of them, in the discretion of the court, will provide maximum opportunity for rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others.” Iowa Code § 901.5. Courts will also consider “the nature of the offense; the attendant circumstances; and the defendant’s age, character, propensities, and chances of reform” as well as the defendant’s criminal history, employment circumstances, family circumstances, and “such other factors as are appropriate.” Iowa Code § 907.5 (outlining necessary considerations before deferring judgment or suspending sentence); *State v. Dvorsky*, 322 N.W.2d 62, 67 (Iowa 1982).

“The application of these goals and factors to an individual case, of course, will not always lead to the same sentence.” *Formaro*, 638 N.W.2d at 725. “Judicial discretion imparts the power to act within legal parameters according to the dictates of a judge’s own conscience, uncontrolled by the judgment of others.” *Id.*; *State v. Wright*, 340 N.W.2d 590, 593 (Iowa 1983) (“The right of an individual judge to balance the relevant factors in determining an appropriate sentence inheres in the discretionary standard.”).

Here, the court heard from the State as well as Seay and his counsel. D0061 at 5:15–13:11. The court also had before it the PSI. D0061 at 2:13–5:9, 14:10–18.

The State recommended an indeterminate five-year prison sentence served concurrently with his parole violation sentence and a \$1,025 fine based the PSI, Seay’s near 30-year criminal history, and his repeated failure to comply with his residential facility and sex offender registry obligations. D0061 at 5:17–9:1.

Seay’s counsel recommended the court impose, but suspend, a term of incarceration. D0061 at 9:3–19. He emphasized that Seay used his 251 days in pretrial custody to consider his circumstances and urged community supervision gave him the best chance at rehabilitation moving

forward. D0061 at 9:3–19. Seay explained that in his view, a prison sentence was too harsh because he created the Facebook profile to promote his artwork and had no intention of hurting anyone. D0061 at 11:1–13:11. He also outlined his family and personal circumstances, including his need to sell his artwork to help support his family. D0061 at 11:22–13:11.

The PSI preparer recommended incarceration. D0034, PSI at 17–18 (07/10/2023). It outlined Seay’s criminal history between 1993 and the current offense in 2023. D0034 at 4. It included his previous convictions for distributing controlled substances, domestic abuse assault, contempt for violating court orders, fifth-degree theft, interference with official acts, operating while intoxicated, harassing a public officer, public intoxication, third-degree sexual abuse, and failure to comply with the sex offender registry, as well as his earlier efforts at supervised release. D0034 at 3–6. It noted his spotty employment history and that he wanted to work towards his college degree. D0034 at 6, 7, 8. It also discussed Seay’s attitude towards parole supervision, describing him as argumentative, manipulative, disrespectful, and unwilling to comply with the Waterloo Residential Correctional Facility’s rules. D0034 at 17.

Ultimately, the court determined incarceration (over a suspended sentence) best fit Seay and his crime. D0061 at 14:3–16:8. The court

explained it “considered the factors set forth in the Iowa Code, considered the presentence investigation report and the recommendations set forth in that report” along with “the recommendations of the parties, the defendant’s allocution, . . . the nature of this offense, the defendant’s age, prior record, employment, and family circumstances.” D0061 at 14:10–18. Based on this and the available sentencing options the court concluded that incarceration “will provide for the maximum opportunity for the rehabilitation of the defendant and maximum protection of our community from further offenses by the defendant and others[.]” D0061 at 14:19–15:12; D0037 at 3; D0043.

Seay contends incarceration is too harsh. Appellant’s Br. at 10. In his view, a suspended sentence better serves the goals of rehabilitation. Appellant’s Br. at 10. But the record supports the court’s decision to incarcerate Seay and the decision is neither unreasonable nor untenable. *See Formaro*, 638 N.W.2d at 725.

The court based its decision on appropriate material, such as the PSI, counsels’ recommendations, Seay’s age, criminal history, and chances of reform, and the need to protect the community from further offenses. D0061 at 14:3–16:8; D0037 at 3; D0043; *Formaro*, 638 N.W.2d at 725; *Dvorsky*, 322 N.W.2d at 67. These factors do not warrant leniency—

particularly Seay's unsuccessful efforts towards parole and work release, and repeated sex offender registry violations. They instead suggest if Seay receives a suspended sentence, he is likely to reoffend. The district court acted within its discretion to impose incarceration and its decision is reasonable. This Court should affirm.

### **CONCLUSION**

Seay is not entitled to resentencing. This Court should affirm.

### **REQUEST FOR NONORAL SUBMISSION**

The State believes that this case can be resolved by reference to the briefs without further elaboration at oral argument. Accordingly, the State joins Seay's request for non-oral submission.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(g) and 6.903(1)(i)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **1,746** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

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