

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0109

STATE OF IOWA,
Plaintiff-Appellee,

vs.

IRVIN JOHNSON, JR.,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE DAVID STAUDT, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Whether Iowa Code section 701.9 requires merger of aggravated eluding and possession of a controlled substance.

Authorities

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2018 Iowa Acts ch. 140 § 102

ROUTING STATEMENT

The State joins in Johnson’s recommendation for this case to be transferred to the Iowa Court of Appeals. Appellant’s Br. 8. He asks this Court to review the analysis in *State v. Rice*, 661 N.W.2d 550 (Iowa Ct. App. 2003) and *State v. Eckrich*, 670 N.W.2d 647 (Iowa Ct. App. 2003) in light of a recent statutory amendment. This case can be decided based on existing legal principles. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Following his guilty pleas, Johnson appeals. In case numbers FECR223777 and FECR219587, Johnson pleaded guilty to both aggravated eluding pursuant to section Iowa Code section 321.279(3) and possession of marijuana pursuant to Iowa Code section

124.401(5). On appeal, Johnson urges that the district court erred in not merging the crimes. The Honorable David Staudt presided.

Facts

FECR219587

On May 24, 2017, Officer Brownell of the Waterloo Police recognized a vehicle with the Iowa license plate FIA936A from a prior investigation. 6/15/2017 Mins. of Test. p.21; Conf.App. 26. During that investigation, Irving Johnson was arrested for driving while his license was barred. *Id.* Brownell knew that Johnson's license was still barred, so he pulled his vehicle alongside and used a light to verify the driver's identity. *Id.* He recognized the driver as Johnson. *Id.*

Brownell drove slowly so that he could place his vehicle behind Johnson's. *Id.* After doing so, he activated his light and siren to initiated the stop. *Id.*

Johnson's vehicle turned onto another street and began rapidly accelerating. *Id.* Johnson proceeded through intersections without stopping and reached over 55 miles per hour while in a 25 mile per hour zone. *Id.* He then pulled into a driveway, side-swiping a parked vehicle. *Id.* He fled the vehicle and jumped a wooden fence, ignoring Brownell's commands to stop. *Id.* Brownell began surveying the

scene. The vehicle Johnson had fled from smelled of fresh marijuana but no marijuana was within the vehicle. *Id.* Brownell located a bottle containing marijuana buds approximately fifteen feet away from the driver's side door. *Id.*

FECR223777

On February 16, 2018, Officer Tindall of the Waterloo Police Department was on patrol when he observed a gray Nissan SUV with license plate ZU78999 behind his squad car. 6/28/2018 Additional Mins. p.2; Conf.App. 62. He observed and recognized the driver, Irvin Johnson. *Id.* Tindall knew Johnson from prior interactions and police intelligence; Tindall was aware that Johnson's driver's license was barred. *Id.* Tindall turned his vehicle in order to position it behind Johnson's SUV. *Id.* When he initiated a traffic stop by activating his emergency lights Johnson began rapidly accelerating. *Id.* Tindall pursued. *Id.*

Eventually, Johnson reached speeds of 60 miles per hour while inside a 25 miles per hour zone. *Id.* As the SUV turned, Tindall could observe the driver "reach his hand outside the driver's window and toss a plastic baggie" into the intersection. *Id.* Tindall notified dispatch of the baggie's location. *Id.*

Johnson continued evading police and attempted to turn into an alley behind Conger Street when he lost control and crashed into a tree. *Id.* He was arrested. *Id.* Officers subsequently located a small plastic baggie containing a green leafy substance within the intersection Tindall provided to dispatch. *Id.* The substance had the odor of marijuana. *Id.* Additional testing showed the material was marijuana. 2/27/2018 Mins. of Test. p.14; Conf.App. 54.

Course of Proceedings

The State accepts Johnson's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

ARGUMENT

I. Johnson's Sentences are not Subject to Merger.

Preservation of Error and Authority to Hear Case

The State does not contest error preservation. Where merger is required, a sentence imposed for a merger-precluded offense would be illegal and void. *See* Iowa Code § 701.9 (2017); *State v. Love*, 858 N.W.2d 721, 723 (Iowa 2015); *State v. Anderson*, 556 N.W.2d 340, 344 (Iowa 1997). A challenge on this ground may be raised on appeal and generally applicable error preservation rules do not apply. *See, e.g., State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009); *Overton v. State*, 493 N.W.2d 857, 859 (Iowa 1992).

Although error preservation is not a bar, the State notes that on July 1, 2019, recently enacted legislation affecting the jurisdiction for guilty-plea appeals will become effective and may affect the ability for this Court to consider Johnson’s appeal. *See* 2019 Iowa Acts ch. 140, § 28; Iowa Code § 3.7(1) (establishing an effective date when none is listed). Specifically, the amendment to Iowa Code section 814.6 eliminates a defendant’s right to appeal from a guilty plea unless the defendant is convicted of a Class A felony or when the defendant establishes good cause. *See* 2019 Iowa Acts ch. 140, § 28. This change would generally preclude this appeal.

The State submits this amendment to section 814.6 is procedural and retrospective. Generally, “[i]f a procedural statute is amended, the rule is that the amendment applies to pending proceedings as well as those instituted after the amendment.” *See Smith v. Korf, Diehl, Clayton and Cleverly*, 302 N.W.2d 137, 138–39 (Iowa 1981) (quoting comment to Uniform Statutory Construction Act, now codified in Iowa Code section 4.5); *accord Dolezal v. Bockes*, 602 N.W.2d 348, 351–52 (Iowa 1999) (citing *Bascom v. Iowa Dist. Ct. of Cerro Gordo Cty.*, 1 N.W.2d 220, 221 (Iowa 1941)) (“In contrast to substantive legislation, procedural legislation applies to all

actions—those that have accrued or are pending and future actions.”). This amendment—under either a limiting appellate jurisdiction or authority to hear direct appeals rationale—does not deny the defendant a substantive right altogether; it merely changes the court to hear the claims in the first instance. A “jurisdiction-conferring or jurisdiction-stripping statute usually ‘takes away no substantive right but simply changes the tribunal that is to hear the case.’” *Hamdan v. Rumsfeld*, 548 U.S. 557, 577 (2006) (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Johnson may raise this illegal sentence claim before the district court pursuant to Rule 2.24(5)(a).

It is likely that the new legislation is not entirely jurisdictional. It leaves intact the ability of the court to grant discretionary review and appeals from guilty pleas to Class A felonies, where good cause is established, or where a motion in arrest of judgment was denied. *See* 2019 Iowa Acts ch. 140, §§ 28–29. Nevertheless, the Act does eliminate the authority of the court to entertain appeals from ordinary guilty pleas. *See State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1993) (describing the difference between authority and jurisdiction). And in this instance there is little reason to treat a statute which strips the authority of a court to hear a case differently

than statutes that strip the jurisdiction to hear a case. *Patchak v. Jewell*, 828 F.3d 995, 1002 (D.C. Cir. 2016), *aff'd sub nom. Patchak v. Zinke*, 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (recognizing that a change in a statute would apply when the newly enacted legislation in question removes the judiciary's authority to review a particular case or class of cases and using terms authority and jurisdiction interchangeably). Because the legislature's decision to modify section 814.6 removed the right of appeal for convictions stemming from a guilty plea, this Court should not rule on Johnson's present appeal. Again, because Johnson can present the claim at any time before the district court, no injustice will result.

In the event the Court bypasses this issue and elects to resolve Johnson's claim now, it will find that the convictions do not merge.

Standard of Review

Review of an illegal sentence for lack of merger is for correction of errors at law. *State v. West*, 924 N.W.2d 502, 504 (Iowa 2019); *State v. Daniels*, 588 N.W.2d 682, 683 (Iowa 1998).

Merits

Johnson argues that constitutional protections against double jeopardy, Iowa Code section 701.9, and Iowa Rule of Criminal

Procedure 2.6(2) prohibit separate sentences for his aggravated eluding convictions and his possession of a controlled substance convictions in FECR219587 and FECR223777; he urges the convictions must merge. Appellant’s Br. 15–23. Recognizing the issue has been previously litigated, Johnson urges this Court to revisit the analysis laid out in *State v. Eckrich*, 670 N.W.2d at 649–50 and conclude that a recent legislative amendment now requires a different result. As the State explains below, he is mistaken. It remains apparent that the legislature intended multiple sanctions for Johnson’s conduct.

Again, Johnson urges that merger should occur under the United States Constitution, Iowa Code section 701.9, and Iowa Rule of Criminal Procedure 2.6(2). Appellant’s Br. 17–19. Generally, all three merger inquiries align: “[i]f the Double Jeopardy Clause is not violated because the legislature intended double punishment, section 701.9 is not applicable and merger is not required.” *State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995) (citing *State v. Finnel*, 515 N.W.2d 41, 44 (Iowa 1994)).

Recently restated in *State v. West*, 924 N.W.2d 502, 512 (Iowa 2019), the merger analysis is ordinarily a two-step process. First, this

Court must “decide whether the crimes meet the legal elements test for lesser included offenses.” *See id.* When the legal elements test is not satisfied, merger is unnecessary. *See State v. Stewart*, 858 N.W.2d 17, 22–23 (Iowa 2015) (holding merger not required because “it is simply not legally impossible to commit the greater crime actually charged without also committing the lesser crime as charged”). If that legal elements test was satisfied—and it is legally impossible to commit the greater crime without also committing the lesser—the Court then must determine “whether the legislature intended multiple punishments for both offenses.” *See Halliburton*, 539 N.W.2d at 344; *see also West*, 924 N.W.2d at 512 (finding the *Halliburton* approach reasonable). If so, merger would still be unnecessary. *Id.*

“To apply the legal elements test for lesser included offenses, we compare the elements of the two offenses to determine whether it is possible to commit the greater offense without also committing the lesser offense.” *See id.* Here, if viewed as elements it would be impossible to commit felony eluding while violating Iowa Code section 124.401 and not also violate Iowa Code section 124.401. *See State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001) (explaining the

test reviews the legal elements and does not consider the facts of a particular case); *State v. Jeffries*, 430 N.W.2d 728, 737–39 (Iowa 1988) (the impossibility test adopted by the court eliminated “the troublesome problem posed by the manner in which we applied our previous factual test to lesser-included offenses”). With the *Blockburger* elements test satisfied, the inquiry would then turn to whether the legislature intended for multiple punishments. *West*, 924 N.W.2d at 512.

As Johnson notes, this is not the first time that this Court has been asked to review Iowa Code section 321.279’s enhancements and a question of merger. In *State v. Rice*, 661 N.W.2d 550 (Iowa Ct. App. 2003) and *State v. Eckrich*, 670 N.W.2d 647 (Iowa Ct. App. 2003), this Court rejected claims that an analogous lesser-included offense of operating while intoxicated should merge into enhanced eluding. *See Rice*, 661 N.W.2d at 551–52; *Eckrich*, 670 N.W.2d at 649–50 (citing *Rice*). In addition to finding the merger doctrine inapplicable because aggravated eluding is a sentencing enhancement and not an element the Court *also* found that the structure and penalties for the crimes evinced a legislative intent for multiple punishments. As the *Eckrich* court analyzed the question:

the punishment for eluding under section 321.279(3)(b) does not include several of the punishments for operating while intoxicated under section 321J.2(2)(a)(3), and (4) which include driver's license revocation, substance abuse evaluation and treatment, attending a drinking driver's course, and, when available and appropriate, attending a reality education substance abuse prevention program. Iowa Code section 901.5(10) also requires license revocation of any person convicted under section 124.401 where section 321J.2(2)(a)(3) does not. It does not appear the legislature set out to insulate a person from the specific sentencing mandates of section 321J.2(2)(a)(3) and section 124.401, just because that person was also "eluding" as proscribed under 321.279(3)(b). Rather it appears quite evident that each statute was designed to address a separate form of illegal conduct and the punishments designed accordingly.

Eckrich, 670 N.W.2d at 649–50.

Johnson urges that a recent statutory amendment to Iowa Code section 901.5(10) now requires merger. Appellant's Br. 21–23. Previously, an individual convicted of a violation of Iowa Code chapter 124 faced automatic revocation of their driver's license for a period of 180 days. Iowa Code § 901.5(10) (2017). In 2018, the Iowa legislature removed this automatic revocation. 2018 Iowa Acts ch. 140 § 102. Now according to Johnson, "There is no longer any penalties

applying to the possession offense that do not apply to the felony offense.” Appellant’s Br. 22. But this is not so.

Violation of section 124.401 contains sanctions that violation of 321.279 does not. Renumbered Iowa Code sections 901.5(10) and (11) (2019) continue to permit a district court to consider and—if it elects to—enter an order denying federal and state benefits to the defendant. *See* Iowa Code § 901.5(10), (11). Individuals convicted of Iowa Code section 124.401 are also subject to an additional drug abuse resistance education surcharge. Iowa Code § 911.2. They are subject to a law enforcement initiative surcharge. Iowa Code § 911.3. A panel of the Iowa Court of Appeals has specifically relied on these distinct sanctions as evidence of the legislature’s intent when rejecting a claim that possession of a controlled substance should merge into a conviction for possession of contraband in a correctional institution. *State v. Friedman*, No. 05-0967, 2006 WL 929327, at *2 (Iowa Ct. App. Apr. 12, 2006) (rejecting claim conviction under 124.401(5) should merge into conviction for violating Iowa Code sections 719.7(1)(a), (3)(c), and (4)(b)). Johnson’s sentencing orders reveal these differences. Each additional sanction as applied to his possession counts, but not his eluding convictions. FEER223777

1/4/2019 Sentencing Order p.2; FECR219587 1/4/2019 Sentencing Order p.2; App. 23–27; 32–36.

And in addition to these penalties and like Iowa Code section 321J.2, an individual convicted of section 124.401(5) is subject to subsequent-offense enhancements if they violate the statute again. Iowa Code § 124.401(5); see *Rice*, 661 N.W.2d at 552 (rejecting merger claim, “merging operating while intoxicated convictions into eluding convictions would thwart the legislative design of 321J.2 and its subparts, which detail a number of offense-specific sentencing provisions, including mandatory minimums and subsequent-offense enhancements”). This too demonstrates the legislature’s intent. It does not appear the legislature set out to insulate a person from the specific sentencing mandates of section 124.401, just because that person was also “eluding” as proscribed under 321.279(3)(b). Merging the possession conviction into the eluding conviction would necessarily frustrate the enhancement framework the legislature has created.

Finally, the statutes are directed at separate evils—possession of illegal substances and failure to comply with police directives. Each are meant to deter and protect against a distinct form of illegal

conduct, again leading to a conclusion the legislature intended multiple punishments. *See Rice*, 661 N.W.2d 551–52 (citing *State v. Cartee*, 577 N.W.2d 649, 654 (Iowa 1998) (a person is not punished twice for the same conduct where statutes “address two separate evils”)).

Just as the *Rice* and *Eckrich* courts concluded, although the *Blockburger* elements test is satisfied here, examining the structure of Iowa Code sections 124.401 and 321.279 alongside other provisions of Iowa law leads to the conclusion that the legislature did not intend these crimes to merge and instead intended separate punishments for Johnson’s separate criminal acts.

CONCLUSION

Merger is not implicated in this case because aggravated eluding is not a separate element and is instead a sentencing enhancement. Even if viewed as an element, each statute was intended to address a separate form conduct and impose cumulative punishment. This Court should affirm.

REQUEST FOR NONORAL SUBMISSION

The State joins in Johnson's request for nonoral submission.

Appellant's Br. 23.

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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)(d) and 6.903(1)(g)(1) or (2) because:

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