IN THE SUPREME COURT OF IOWA
Supreme Court No. 20–0257

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KORKI RICOH WILBOURN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MARSHALL COUNTY
THE HONORABLE JOHN J. HANEY, JUDGE
(PLEA & SENTENCING)

APPELLEE'S BRIEF

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ROUTING STATEMENT

The State recognizes that at the time Appellant Wilbourn filed his proof brief, the question of whether the newly amended Iowa Code section 814.6, (effective July 1, 2019) foreclosed his right to appeal his guilty plea when only challenging the sentence imposed, remained an issue of first impression that would have ordinarily made retention appropriate. *See* 2019 Iowa Acts ch. 140, §, 28 (codified at Iowa Code § 814.6(1)(a) (2020)); Appellant's Br. at 24. However, on May 29, 2020, the Iowa Supreme Court resolved that question in its *State v. Damme*, 944 N.W.2d 98, 103–105 (Iowa 2020) decision, where it held that good cause exists when a defendant challenges his or her sentence rather than the guilty plea. The ruling in *Damme* renders moot Wilbourn's request for retention as well as the arguments raised under section I of Wilbourn's brief. Because the case can be decided by applying existing legal principles, transfer to the Court of Appeals would be appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

In exchange for charging concessions, Korki Ricoh Wilbourn pleaded guilty to possession of methamphetamine with intent to

deliver, class B felony, in violation of Iowa Code section 124.401 (1)(b)(7) (2019); and failure to affix a drug tax stamp, a class D felony, in violation of Iowa Code sections 453B.3, 453B.1(3)(a)(1), 453B.1(1), and 453.B.12 (2019); PleaTr. p. 2, lines 2–p.3, lines 18; p. 17, lines 20–p. 19, lines 12.

In this direct appeal, Wilbourn contends the district court improperly exercised its sentencing discretion by failing to consider the provisions of Iowa Code sections 901.11(1) and 124.413(3). *See* Appellant's Br. at 83–96. He further states that there is a conflict between the district court's oral pronouncement and its written order imposing his fine for his conviction for failure to affix a drug stamp. *See* Appellant's Br. at 96–98.

The Hon. John J. Haney presided over the guilty plea and sentence.

Course of Proceedings

Korki Wilbourn was charged by trial information on September 17, 2019 with ten offenses: two counts of attempted murder, Class B felonies, in violation of Iowa Code section 707.11 (2019); possession of a controlled substance (methamphetamine) with intent to deliver (with a firearm sentencing enhancement), a Class B felony, in

violation of Iowa Code sections 124.401(1)(b)(7), 124.413, 124.401(1)(e) (2019); failure to affix a tax drug stamp, a Class D felony, in violation of Iowa Code sections 453B.1(3)(a)(1), 453B.1(1), 453B.12 (2019); going armed with intent, also a Class D felony, in violation of Iowa Code section 708.8 (2019); reckless use of a firearm, an aggravated misdemeanor, in violation of Iowa Code section 724.30(1) (2019); intimidation with a dangerous weapon, a Class C felony in violation of Iowa Code section 708.6 (2019); possession of a firearm by a felon, a Class D felony, in violation of Iowa Code section 724.26 (2019); assault causing bodily injury, a serious misdemeanor, in violation of Iowa Code sections 708(1), 708.2(2) (2019); and driving while license is revoked, a serious misdemeanor in violation of Iowa Code section 321J.1 (2019); *See* Trial Information; App.4–7.

Wilbourn pleaded guilty on November 27, 2019 to an amended charge of possession of methamphetamine with intent to deliver, without the firearm enhancement. He also pled guilty to failure to affix a drug tax stamp. *See* PleaTr. p. 2, lines 16–p. 3, lines 18; p. 11, lines 8–15; p. 17, lines 25–p. 31, lines 10. In exchange for Wilbourn's guilty pleas, the State agreed to dismiss the rest of the counts. *Id*; FECR095804 Sent. Order; App.14–18. The plea stated that the

parties would request an agreed to sentence in which Wilbourn would serve a consecutive prison sentence. The parties further agreed to the specific sentencing reductions they would be asking the district court to apply for the possession of methamphetamine with intent to deliver conviction. Pursuant to Iowa Code section 124.413(1), Wilbourn was not eligible for parole or work release for that conviction until he had served a minimum term of confinement of one–third of his maximum indeterminate sentence of 25 years. The parties requested the court, pursuant to section 910.10(2), to further reduce this mandatory minimum sentence by one–third because Wilbourn had pleaded guilty. PleaTr. p. 2, lines 16–p. 3, lines 14; p. 11, lines 8–p. 12, lines 15. The district court was not bound by the parties sentencing recommendation. PleaTr. p. 12, lines 17–p. 13, lines 2. Nevertheless, during sentencing the district court considered the joint recommendation and sentenced Wilbourn according to the terms of the plea negotiations and the joint sentencing recommendation. *See* Sent. Tr. p. 9, lines 23–25.

The State accepts the rest of Wilbourn's course of proceedings as adequate and essentially correct. *See* Appellant's Br. at 25–31; Iowa R. App. P. 6.903(3).

Facts

The State generally accepts Wilbourn's statement of facts as essentially accurate. *See* Iowa R. App. P. 6.903(3).

ARGUMENT

Jurisdiction

Wilbourn is appealing from a judgment of a conviction that was entered following his guilty plea, and after July 1, 2019. That means section 814.6 (1)(a)(3) applies, and Wilbourn must establish "good cause" for the appeal before this Court can exercise appellate jurisdiction. Because Wilbourn "challenges [his] sentence rather than the guilty plea," he has good cause to appeal and this Court has jurisdiction. *See State v. Damme*, 944 N.W.2d 98, 103–05 (Iowa 2020).

I. Wilbourn is not entitled to a new sentencing hearing because the district court did not abuse its sentencing discretion.

Preservation of Error

Generally applicable rules of error preservation do not apply. Wilbourn may challenge the procedures for imposing his sentence as defective for the first time on appeal. *See Lathrop v. State*, 781 N.W.2d 288, 292–93 (Iowa 2010); Iowa R. Crim. P. 23(5)(a).

Standard of Review

When a challenged sentence falls within statutory limits, an appellate court reviews for abuse of discretion. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996); *State v. Sandifer*, 570 N. W.2d 256, 257 (Iowa App. 1997). The court will only find an abuse of discretion where the district court acts on grounds clearly untenable or to an extent clearly unreasonable. *Thomas*, 547 N.W.2d at 225. Trial court sentencing decisions, however, carry a strong presumption of validity. *State v. Cheatheam*, 569 N.W.2d 820, 821 (Iowa 1997). The burden to overcome this presumption is "heavy, indeed." *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983).

Merits

Wilbourn claims he is "entitled to a new sentencing hearing because the record establishes the district court was not aware it had the discretion to order [his] mandatory minimum sentence reduced up to one half, pursuant to Iowa Code sections 124.413(3) and 901.11(1)." *See* Appellant's Br. at 87. He adds that a new hearing is also required because the district court improperly pronounced the mandatory minimum terms of his sentence and that though the court

corrected its articulation with a nunc pro tunc order, such order is an insufficient fix. *Id.*

Wilbourn pled guilty to possession of more than five grams of methamphetamine with intent to deliver, a class "B" felony, in violation of Iowa Code section 124.401(1)(b)(7). Violation of this chapter is punishable by a prison term not to exceed twenty–five years. *See* Iowa Code § 902.9(1)(b); Iowa Code § 124.401(b). This prison sentence is subject to a mandatory minimum term. A person sentenced for a violation of section 124.401(1)(b) "shall not be eligible for parole or work release until the person has served a minimum term of confinement of one–third of the maximum indeterminate sentence prescribed by law." *See* Iowa Code § 124.413(1) (2019). However, under Iowa Code section 901.10, the district court has discretion to waive a portion of the minimum term specified in section 124.413(1) (one–third of the maximum indeterminate sentence) for a first–time offender who pleads guilty to a methamphetamine offense under section 124.401(1)(b). In such cases, the court has discretion to reduce the mandatory minimum sentence by up to one–third. *See* Iowa Code § 901.10(2).

In sentencing Wilbourn, the district court imposed a 25–year prison sentence for his violation of Iowa Code section 124.401(1)(b) and reduced the mandatory one–third minimum by another one–third because Wilbourn had pled guilty to the offense. *See* FECR095804 Sent. Order; App.14–18. (Stating "The Defendant shall serve the mandatory minimum sentence described in Iowa Code section 123.413, reduced to the maximum extent possible described in Iowa Code section 901.10(2)). The court gave its reasons for the sentence: Wilbourn's age, prior employment circumstances, family circumstances, nature of offenses, need for community protection, the PSI recommendation, Wilbourn's substance abuse history, the plea agreement and the parties joint sentencing recommendation. *See* Sent. Tr. p. 9, lines 6–25; FECR095804 Sent. Order; App.14–18. The sentence balanced Wilbourn's need for rehabilitation with protection of the community. *See* Sent. Tr. p. 9, lines 1–5.

The rules of criminal procedure require the district court to state its reasons for a sentence. Iowa R. Crim. P. 2.23(3)(*d*). The purpose of this rule is to allow appellate review of the sentencing court's discretionary action. *See State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000). A statement may be terse and succinct and still

meet this purpose. *See State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989). The court does not need to give a detailed statement. *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa Ct. App. 1994). It need not give reasons for rejecting a sentencing option. *Thomas*, 547 N.W.2d at 225; *State v. Loyd*, 530 N.W.2d 708, 713-14 (Iowa 1995); *State v. Russian*, 441 N.W.2d 374, 375 (Iowa 1989); *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995).

Wilbourn asks for resentencing. He believes the district court "was not aware that it had discretion to order his mandatory minimum sentence reduced up to one half" because neither the parties nor the court commented on the limitation of parole eligibility contained in Iowa code sections 123.413(3) and 901.11(1). *See* Appellants Br. at 87–89. Relying on those two sections, Wilbourn argues that the district court had the discretion to reduce his mandatory minimum sentence by one–half and that its failure to exercise that discretion requires resentencing. *See* Appellant's Br. at 89; *See* §§ 901.11(1), 124.413(3).

Wilbourn's argument bears similarity to a claim made in *State v. Breeding*, No. 17–1478, 2019 WL 1940723 (Iowa Ct. App. May 21, 2019). In *Breeding*, the defendant also argued that the district court

had failed to exercise its discretion in imposing his sentence because it did not cite to Iowa Code section 124.413(3) and 901.11(1). *Breeding*, WL 1940723, at *4. Breeding argued that these two code sections allowed the district court to consider a reduction of his mandatory minimum sentence by one–half. *Id.* But the Iowa Court of Appeals rejected this argument. The Court found that even though the one–third mandatory minimum term prescribed by Iowa Code section 124.413(1) can be subject to a one–half reduction based on sections 901.11(1) and 124.413(3) determination, that general section did not control the specific section 901.10(2). The Court concluded that Iowa Code section 901.10(2) controls because it is a separate specific statute that provides a specific sentencing reduction for violations of section 124.401(1)(b) that involves amphetamine and methamphetamine and precludes even a first–time offender from receiving "any reduction of sentence" for a violation of section 124.401(1)(b)(7) "unless the defendant pleads guilty." *Id.*; *See* Iowa Code § 901.10(2). As the court noted, "[t]o the extent there is a conflict or ambiguity between specific and general statutes, the provisions of the specific statutes control." *Id.* (quoting *Seeberger v. Davenport Civil Rights Comm'n*, 923 N.W.2d 564, 571 (Iowa 2019)

(internal quotation marks and citations omitted). *Breeding* is applicable here. Iowa Code section 901.10(2) is a specific provision that targets a defendant such as Wilbourn, its provisions therefore control. As such, the district court did not need to consider section 901.11(1) and 124.413(3) as Wilbourn urges. This Court should affirm.

To the extent that Iowa Code section 901.11(1) and 124.413(3) apply, this Court should still find that the district court did not abuse its discretion because it simply sentenced Wilbourn according to the plea agreement. The district court does not abuse its sentencing discretion by giving effect to the parties' plea agreement. *See State v. Thacker*, 862 N.W.2d 402, 410 (Iowa 2015) (stating, "[W]hen a district court simply imposes a sentence agreed to by parties it does not exercise discretion in a fashion that requires a statement of the reasons on the record."). In such cases, however, the plea agreement must be contained in the record so that the reviewing Court can determine whether the district court, in fact, gave effect to the parties' agreement. *Id.* Here, the district court unequivocally considered the plea agreement which was contained in the record. *See* Sent. Tr. p. 9, lines 1–p. 11, lines 6; FECR095804 Sent. Order; App.14–18. And

though it did not solely rely on the plea agreement for its sentencing decision, it cited to it as one of the reasons; and the sentence imposed was identical to what Wilbourn had bargained. *Id.* Consequently, the district court did not need to consider or even explain why it was rejecting any sentencing reductions under Iowa Code sections 901.11(1) and 124.413(3) if it was simply affirming the plea agreement. As a result, the district court did not err in imposing the sentence to which Wilbourn agreed in his plea bargain.

Lastly, to the extent Wilbourn argues that resentencing is required because there was confusion in the district court's language regarding his reduced time, that argument lacks merit. *See* Appellant's Br. at 92. At sentencing, the parties made a joint recommendation, asking the court to sentence Wilbourn, on the violation of section 124.401(1)(b)(7), to a term not to exceed 25 years with a mandatory minimum sentence of one–third before parole eligibility. The parties further requested that the minimum term be reduced by a further one–third because Wilbourn had accepted responsibility and pled guilty. Sent. Tr. p. 4, lines 22–p. 6, lines 7. In pronouncing judgment, and granting the parties request, the district court stated:

> I will recommend the reductions in the mandatory minimums of that sentence that has been negotiated as part of the plea agreement, which is basically a two–third reduction of that mandatory minimum, I believe; one–third and one–third if I heard the parties correctly.

Sent. Tr. p. 10, lines 2–7. Here, the court may have inartfully expressed itself; but reading the statement in context, it is unambiguously clear that the court was effectuating the plea negotiations by granting a further one–third reduction of Wilbourn's mandatory minimum sentence after the statutory one–third reduction. Wilbourn's contention that the court "believed [it] was ordering half of the length of the mandatory minimum the parties recommended" has no support in the record. The court made its intent clear on the record that it was sentencing Wilbourn according to the negotiated plea agreement. *See* Sent. Tr. p. 9, lines 23–25. Moreover, the court's oral pronouncement mirrored that in the nunc pro tunc order that was later issued. *See* 1/15/2020 Order; App.21–22. Critically, the order nunc pro tunc did not change any terms of the court's oral pronouncement, it simply reaffirmed that under section 124.413(1) Wilbourn was not be legible for parole until he has served one–third of the maximum indeterminate sentence and that this mandatory minimum term would be further reduced by one–

third due to Wilbourn's plea of guilty. *Id.* The order thus conformed to the court's original intent and properly served the function of a nunc pro tunc order. *See State v. Johnson*, 744 N.W.2d 646, 648 (Iowa 2008) (stating that a nunc pro tunc order should be "limited to situations where there is an obvious error that needs correction or where it is necessary to conform the order to the court's original intent."). This Court should affirm.

II. The district court's written judgment imposing a $5,000 fine for failure to affix a drug tax stamp conflicts with the court's oral pronouncement which imposed a $750 fine.

Preservation of Error

Wilbourn next contends that there is a conflict between the district court's oral and written judgment orders regarding his obligation to pay the fine amount for his failure to affix a drug tax stamp conviction. *See* Appellant's Br. at 96–98; *see also* Sent. Tr. p. 10, lines 16–20; FECR095804 Sent. Order; App.14–18.

"Errors in sentencing … 'may be challenged on direct appeal even in the absence of an objection in the district court.'" *State v. Thacker*, 862 N.W.2d 402, 405 (Iowa 2015) (quoting *State v. Lathrop*, 781 N.W.2d 288, 292–93 (Iowa 2010)).

Standard of Review

"When a party asserts that an inconsistency exists between an oral sentence and a written judgment entry, [this Court] review[s] the matter for correction of errors at law." *State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995).

Merits

When a written judgment differs from the oral pronouncement of sentence, "the oral pronouncement … controls." *Hess*, 533 N.W.2d at 528 (citation omitted). If "the error … was not the result of judicial intention but was merely clerical in nature[,]" the district court should correct the written judgment by issuing a nunc pro tunc order. *Id.* at 529. "The purpose of a nunc pro tunc order is not to correct a mistake of litigants, judicial thinking, or a mistake at law; the function is to make the record show truthfully what judgment was actually rendered." *State v. Mason*, No. 02-0591, 2003 WL 22087414, at *2 (Iowa Ct. App. Sept. 10, 2003) (citing *Headley v. Headley*, 172 N.W.2d 104, 108 (Iowa 1969)). A nunc pro tunc order may only be used "where there is an obvious error that needs correction or where it is necessary to conform the order to the court's original intent." *State v. Johnson*, 744 N.W.2d 646, 648-49 (Iowa

2008); *see also Hess*, 533 N.W.2d at 527 ("An error is clerical in nature if it is not the product of judicial reasoning and determination.").

Wilbourn is correct that the district court entered conflicting orders by imposing a fine of $5,000 for the drug tax stamp violation charge in its written order instead of the $750 that the court orally pronounced during the sentencing hearing. *See* Appellant's Br. at 96–98; *see also* Sent. Tr. p. 10, lines 16–20; FECR095804 Sent. Order; App.14–18. During the sentencing hearing, the district court imposed a $5,000 fine for the possession of methamphetamine with intent to deliver conviction, and a $750 fine for the tax stamp violation. *See* Sent. Tr. p. 10, lines 1–20. Nevertheless, in its written order, the court imposed a fine of $5,000 for both convictions. *See* FECR095804 Sent. Order; App.14–18. A nunc pro tunc is necessary here because the written order conflicts with the oral pronouncements, and it is ostensible from the discrepancy that this was a clerical error. This Court, therefore, should order the district court to correct this error via a nunc pro tunc order.

CONCLUSION

This Court should affirm Wilbourn's sentence and order the district court to enter an order nunc pro tunc correcting the fine amount.

REQUEST FOR NONORAL SUBMISSION

This matter does not require oral argument. The State asks to be heard only if the Court grants Wilbourn's request for a hearing.

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

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Dated: August 28, 2020

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