IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-1062
Cerro Gordo County FECR030451

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID DANIEL GORDON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
THE HONORABLE JAMES M. DREW, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Defendant David Daniel Gordon asks for retention. But this case can be decided by applying the holding of *State v. Giunta*, No. 15-1867, 2016 WL 2743454, at *2 (Iowa Ct. App. May 11, 2016), and the plain language of Iowa Code sections 902.4 and 901.5(6), so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

Nature of the Case

Defendant appeals his sentence following a guilty plea to one count of Theft in the First Degree, in violation of Iowa Code sections 714.1(1) and 714.2(1), a class C felony, and one count of Willful Injury, in violation of Iowa Code section 708.4(2), a class D felony. On appeal, Defendant argues the district court abused its discretion when it sentenced him and further asserts a district court should have authority to enter a deferred judgment for the first time when it reconsiders a sentence under section 902.4.

Course of Proceedings

The State accepts Defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3). But the State notes that in his course of proceedings, Defendant claims that,

during the reconsideration hearing, he "argued for a deferred judgment. The State did not resist this option[.]" App. Br. at 7. This is wrong. At the hearing, the prosecutor argued that the State, "strongly resists any – strongly, strongly resists any reconsideration whatsoever. We ask that the sentence continue as imposed, mostly because of the egregious nature of the crime itself, but also for all of the other reasons the Court noted when it imposed the prison sentence." 09-27-2022 Reconsideration Hearing at 7:19–8:20.

Facts

On March 29, 2022, Defendant filed a written guilty plea wherein he pleaded guilty to one charge of theft in the first degree and one count of willful injury. Written Guilty Plea, Dkt. No. 51; App. 28–31. In it, Defendant admitted that he "cut [a victim] with a knife to assault him…and I also intended and knew that being cut by a blade could result in serious injury[.]" *Id.* at 3; App. 30. Defendant also admitted that he took a victim's "cellular phone out of his pocket . . . [and] threw the phone into a ditch to ensure that [the victim] would be without his phone permanently." *Id.*; App. 30.

At the sentencing hearing, the State argued Defendant should be sentenced to prison, with consecutive terms, because "this was a

nasty deal. [Defendant] stabbed [the victim] multiple times; several times in the stomach area, once towards his head. He hit an artery. [The victim's] had operations as a result of this. [Defendant's] lucky he didn't kill him. I mean, this was just a terrible deal." 05-23-2022 Sent. Tr. at 5:20–7:3. Defendant requested a deferred judgment based on his good behavior since the incident and compliance with the court's orders. *Id.* at 7:8–19:22.

The district court denied Defendant's request for a deferred judgment and sentenced him to prison on both convictions, with the sentences to run concurrently. *Id.* at 23:23–25:15, *see also* Order of Disposition, Dkt. No. 77; App. 32–35. The district court gave a lengthy statement as to its reasons for the sentence:

> All right. Well, [Defendant], as [trial counsel] has indicated, sentencing decisions are really about three things. He maybe only mentioned two of them. But it's about your rehabilitation. It's also about protecting the community and also about deterring other people from committing similar acts.
>
> There's statutory factors that judges take into account, and I have done that. I've taken into account your age, and I recognize the fact that you were a juvenile when this crime was committed, but at the same time, you were on your way to your 18th birthday when the crime was committed. I've taken into account your lack of a prior record, your employment

circumstances, your family circumstances. All of those matters definitely weigh in your favor. But I've also taken into account the nature of the offense, which involves serious violence and the use of a weapon. That weighs strongly in favor of the State's position.

Your attitude. And, you know, that's a tricky one for the Court. You've been doing all the right things and you've said all the right things, and I wish I had a crystal ball to know whether defendants were sincere, because on the one hand, well, I definitely want to believe that you're sincere, but on the other hand, I can't be surprised when somebody who's facing the possibility of prison suddenly goes on their best behavior to make a good impression in the courtroom. And, again, nobody knows what's going on between your ears except you, and so, you know, I recognize your attitude as you sit here today is good, but I think a bit of healthy skepticism on the Court's part is appropriate.

And I've also taken into account the Presentence Investigation Report. The Department of Correctional Services, the personnel there are experts on these types of matters, and their recommendations are entitled to serious consideration, and I have – I have done that.

First of all, I want to state – and I think [the prosecutor] will nod his head and agree – [trial counsel] you've spoken very well on your client's behalf, and I appreciate your skills because you obviously know what you're doing and I'm impressed. And come on up here and practice anytime you want to. I appreciate your efforts.

[Trial counsel] used the word "stupid" a number of times during his argument, and I want to tell you, I've been doing this for going on 24 years, and there are days where, frankly, I just don't get a lot of joy out of my job because of people making decisions that affect their lives forever. Young people, older people, it doesn't matter. And I take no joy from having to preside over a case like this.

I – despite the fact that you were a juvenile when this was committed, this – your actions strike me as – I guess bizarre is the word that I want to use to describe them. Almost inexplicable. And, frankly, that causes me to wonder whether you're dangerous. You might not be, but your actions on this occasion indicate that you have serious deficiencies regarding impulse control. Granted, you're a young man. That can be related to that. But this was really quite shocking what you did. When you involve a weapon and you intend to cause serious injury to another human being, that sends a signal that you very well might be a dangerous person, and we need to find that out. And I hope you're not. I hope you're who you claim to be today. That's my sincere hope. But I'm not, at this point in time, ready to make that conclusion.

I readily admit that this is not an easy sentencing decision and – mostly because of your age and also because of the excellent arguments that [trial counsel] has made on your behalf. But I'm not convinced in my mind that you understand just how serious this is. We've got a weapon. We've got the use of that weapon against another individual with the intent to cause serious injury. And I don't know. I may put less emphasis on this than

> other judges, but the deterrence factor is worthy of at least some consideration, and I think that the community deserves to know that when an offense like this is committed, there are serious consequences that are going to follow. So I am not going to grant you a deferred judgment, and [Defendant], you are going to go to prison today.
>
> And before I get to the formalities of making that announcement, I want to challenge you a little bit, because if you are who you claim to be today, you'll do this, you'll make the best of it, and you'll come out and you'll say, "I told you so," and make the best of your life.
>
> I run the drug court here in Cerro Gordo County, okay? And there's a reason I'm bringing this up. Drugs – I'm not talking about your case, but I've gotten to know a lot of people who have felonies on their records, and a lot of them have become good, productive citizens with good jobs. It does not mean you cannot get employed. I've seen it with my own two eyes every week, so don't take that as a guarantee that you're never going to be able to get a job again. It's just not true. Again, I see it all too often in my drug court with those folks, so you can do it too.

Id. at 20:6–23:22.

On June 28, 2022, Defendant filed a motion to reconsider his sentence, and a hearing was held on September 27, 2022. Motion for Reconsideration of Sentence, Dkt. No. 86; App. 38–42. At the hearing, the district court expressed its desire to reconsider

Defendant's sentence and to impose a deferred judgment instead. 09-27-2022 Reconsideration Hearing at 17:7–25:2. But the district court found it was without authority to do so based on the holding of *State v. Giunta*, No. 15-1867, 2016 WL 2743454, at *2 (Iowa Ct. App. May 11, 2016). *Id.* The district court then imposed a prison sentence, suspended it, and placed Defendant on probation. *Id.* at 19:3–20:2, Order of Reconsideration, Dkt. No. 111; App. 43–44.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion When It Sentenced Defendant.

Preservation of Error

Defendant is incorrect that "[e]rror was preserved in this case when Defense Counsel advocated for a lesser sentence and subsequent filing of a Motion to Reconsider." App. Br. at 11. But Defendant's claim is preserved because errors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court. *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

Where a challenged sentence falls within the statutory parameters, this Court "presume[s] it is valid and only overturn[s] for an abuse of discretion or reliance on inappropriate factors." *State v.*

Hopkins, 860 N.W.2d 550, 554 (Iowa 2015) (citing *State v. Washington*, 832 N.W.2d 650, 660 (Iowa 2013)). Abuse of discretion is found only when the grounds for the district court's decision are clearly untenable or unreasonable. *State v. Kirby*, 622 N.W.2d 506, 511 (Iowa 2001) (quoting *State v. Thomas,* 547 N.W.2d 223, 225 (Iowa 1996)); *see also State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002) ("[O]ur task on appeal is not to second guess the decision made by the district court, but to determine if it was unreasonable or based on untenable grounds."). There is a strong presumption in favor of the district court's sentencing decision. *Formaro*, 638 N.W.2d at 724.

Merits

Defendant's first claim on appeal is that in the original sentencing hearing held on May 23, 2022, the district court abused its discretion by sentencing Defendant to a term of incarceration. Iowa Code section 901.5 provides that, "[a]fter receiving and examining all pertinent information," the district court shall consider among a number of sentencing options, including a term of confinement or a suspended sentence or probation. Iowa Code § 901.5; *see also State v. Thomas*, 659 N.W.2d 217, 221 (Iowa 2003) (internal citation omitted) ("Following a plea or verdict of guilty, a court may, subject to

exceptions, defer judgment, defer sentence, or suspend sentence."). The sentencing court determines which of the 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.

In addition to considering "the societal goal of sentencing criminal offenders," the court must also consider "the nature of the offense, the attending circumstances, the age, character and propensity of the offender, and the chances of reform." *Formaro*, 638 N.W.2d at 724–25 (internal citations omitted). The district court must apply these sentencing factors "appropriately...." *State v. Jones*, No. 02-0959, 2003 WL 122368, at *1 (Iowa Ct. App. Jan. 15, 2003). "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. "Yet, this does not mean the choice of one particular sentencing option over another constitutes error." *Id.*; *see also 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").

Defendant recognizes that it is not the court's "task on appeal [] to second-guess the sentencing court's decision," but that is precisely what he asks this Court to do. App. Br. at 11. Defendant's brief glosses over the district court's thorough and thoughtful reasons for the sentence it imposed—in which it noted and applied the relevant statutory factors, including factors specific to Defendant and his circumstances.

Defendant's arguments in his brief are the same arguments he made to the district court at the time of sentencing, and the record shows the district court considered and weighed those arguments when it sentenced him. 05-23-2022 Sent. Tr. at 20:6–23:22. Our appellate courts are unable to re-weigh these same considerations on appeal and enter a new sentence for Defendant. And as there is no indication the district court failed to consider relevant factors or that it relied on improper factors, Defendant has failed to show any abuse of discretion. *State v. Damme*, 944 N.W.2d 98, 106–07 (Iowa 2020); *see also Hopkins*, 860 N.W.2d at 554–56.

Defendant also faults the district court for not considering "any of the *Lyle* factors," while simultaneously recognizing the district court was not required to do so. App. Br. at 17–18. The district court acknowledged Defendant's young age—the reason it declined to impose consecutive sentences—and it stated it also considered Defendant's "lack of a prior record, [his] employment circumstances, [his] family circumstances." 05-23-2022 Sent. Tr. at 20:12–22, 24:6–14. But it also considered the extremely violent nature of the offense; Defendant stabbed the victim more than once, leaving him in critical condition. *Id.* at 6:8–15. Here, the district court weighed the pertinent factors and determined a prison sentence was appropriate. While Defendant may not like this decision, that does not make it an abuse of discretion.

II. Section 902.4 Does Not Give the Reconsidering Court Authority to Grant a Deferred Judgment.

Preservation of Error

Generally applicable rules of error preservation are inapposite. If the reconsidering court was mistaken in its belief that it did not have discretion to grant a deferred judgment, then "the court's failure to exercise its discretion [would be] a defective sentencing procedure to which our error preservation rules do not apply." *See State v.*

Ayers, 590 N.W.2d 25, 27 (Iowa 1999) (citing *State v. Wilson*, 294 N.W.2d 824, 825 (Iowa 1980)).

Standard of Review

"Matters of statutory interpretation and application are reviewed for errors at law." *State v. Deng Kon Tong*, 805 N.W.2d 599, 601 (Iowa 2011) (citing *State v. Stephenson*, 608 N.W.2d 778, 784 (Iowa 2000)).

Merits

Iowa Code section 901.5 states that "[a]t the time fixed by the court for pronouncement of judgment and sentence, . . . the court may defer judgment and sentence for an indefinite period." *See* Iowa Code § 901.5(1). Under Iowa law, a deferred judgment is "a sentencing option whereby both the adjudication of guilt and the imposition of a sentence are deferred by the court and . . . [t]he court retains the power to pronounce judgment and impose sentence subject to the defendant's compliance with conditions set by the court as a requirement of the deferred judgment." *See* Iowa Code § 907.1.

But section 902.4 only authorizes reconsideration of sentencing decisions—*not* reconsideration of a decision to pronounce judgment. On reconsideration of Defendant's sentence, the court could only

"reaffirm it or substitute for it any sentence permitted by law." *See* Iowa Code § 902.4.

This distinction is clear in section 901.5(6), which states: "The court may pronounce judgment and sentence the defendant to confinement and then reconsider *the sentence* as provided by section 902.4 or 903.2." *See* Iowa Code § 901.5(6) (emphasis added). Note that, like section 902.4, this does not contemplate authority to reconsider the judgment itself; that omission prevents a reconsidering court from granting a deferred judgment in place of a judgment of conviction entered previously.

If the legislature had intended to permit a reconsidering court to vacate its previously entered judgment and substitute a deferred judgment, it would have said so.[1] *See Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002)) (discussing principle known as *expressio unius est exlusio alterius*—"legislative intent is expressed by omission as well as by inclusion, and the express

[1] By way of comparison, consider Iowa Code section 901.5A, which provides that a defendant "may have the *judgment and sentence* . . . reopened for resentencing" under certain circumstances. *See* Iowa Code § 901.5A(1) (emphasis added).

mention of one thing implies the exclusion of others not so mentioned"). Because sections 901.5(6) and 902.4 grant authority to reconsider the defendant's *sentence* but not the underlying *judgment*, the reconsidering court was correct to conclude that it did not have the authority to grant a deferred judgment upon reconsideration. The Iowa Court of Appeals agrees. *See State v. Giunta*, No. 15-1867, 2016 WL 2743454, at *2 (Iowa Ct. App. May 11, 2016).

Entry of judgment of conviction is generally final and immediately appealable. Final judgment of conviction grants a defendant a right of appeal under section 814.6(1)(a), and "an appeal divests the district court of jurisdiction." *See State v. Jose*, 636 N.W.2d 38, 46 (Iowa 2001) (citing *Shedlock v. Iowa Dist. Ct.*, 534 N.W.2d 656, 658 (Iowa 1995)). And the sole provision of section 902.4 that expressly mentions judgment states that "for the purposes of appeal, a judgment of conviction of a felony is a final judgment when pronounced." *See* Iowa Code § 902.4. This means that similarly situated defendants sentenced to "shock probation" still need to file a notice of appeal within 30 days after the judgment of conviction—which means that those defendants filing for reconsideration of their sentences under section 902.4 will frequently do so after filing their

notice of appeal, and after the district court has already been divested of jurisdiction over the case. *See* Iowa R. App. P. 6.101(1)(b).

Section 902.4 gives the reconsidering court limited jurisdiction to reconsider the sentence during the pendency of an appeal from the judgment of conviction. *See* Iowa Code § 902.4 ("The district court retains jurisdiction for the limited purposes of conducting such review and entering an appropriate order notwithstanding the timely filing of a notice of appeal."). But this provision cannot extend so far as to give a reconsidering court the authority to grant a deferred judgment, which would moot all litigation over the validity of the underlying judgment on appeal. *Cf. State v. Mallett*, 677 N.W.2d 775, 777 (Iowa 2004) (noting that appeal generally strips the district court of all jurisdiction, with the exception of "jurisdiction over disputes . . . that are merely collateral to the issues on appeal").

This provision indicates that the Iowa legislature generally intended that any district court entertaining a motion to reconsider sentence should have only limited jurisdiction—which, to be limited, cannot include the authority to vacate the final judgment of conviction because doing so would divest the appellate court of its jurisdiction over the pending appeal. *See* Iowa Code § 902.4. When a

court enters a deferred judgment, it "retains the power to pronounce judgment and impose sentence subject to the defendant's compliance with conditions set by the court as a requirement of the deferred judgment." *See* Iowa Code § 907.1. As such, "a person who received a deferred judgment . . . has no right of direct appeal because there is no final judgment in the district court." *See Daughenbaugh v. State*, 805 N.W.2d 591, 598 (Iowa 2011) (citing *State v. Stessman*, 460 N.W.2d 461, 462 (Iowa 1990) and Iowa Code § 814.6(1)(a)). If a reconsidering court were to grant deferred judgment, it would retroactively divest appellate courts of jurisdiction—which would undermine the legislature's intent to provide the reconsidering court with "jurisdiction for the limited purposes" of reconsidering its sentencing decision without giving it unlimited jurisdiction over the entirety of the case while the appeal is already pending.

Defendant cites to *State v. Broten*, 295 N.W.2d 453 (Iowa 1980), but it is inapposite, because "[t]here, the district court suspended a sentence on a forcible felony, in violation of the statutory provision precluding suspension for this type of crime." *Giunta*, 2016 WL 2743454, at *2. *Broten* dealt only with what kind of sentence could be imposed; there was no consideration of deferred judgments.

See 295 N.W.2d at 454–55. Defendant also asks this Court to answer whether a "court, on reconsideration, [can] order a deferred sentence as a legal sentencing option[?]" App. Br. at 38. This answer to this is simple: yes. Because a suspended sentence is a *sentence*, not a *judgment*.

All in all, Defendant's argument is foreclosed by the holding of *Giunta*, the plain language of section 902.4, undermined by the Iowa legislature's intent to limit the reconsidering court's jurisdiction during pending appeals, and unsupported by Iowa precedent. It should be rejected.

CONCLUSION

For all the reasons stated above, the State respectfully requests that this Court affirm Defendant's conviction and sentence and deny all claims on the merits.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

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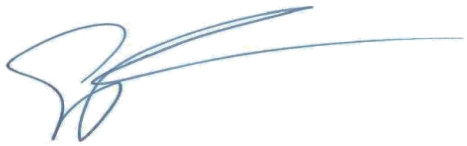
Attorney General of Iowa



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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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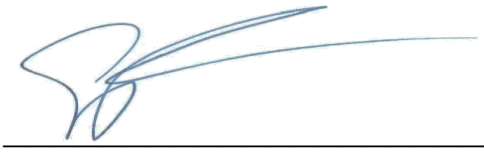
Dated: July 18, 2023



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