

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. 23-0434
)
 JASON MICHAEL PIRIE,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR GREENE COUNTY
HONORABLE JOSEPH MCCARVILLE

APPELLANT’S FINAL REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 23rd day of March, 2024, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jason Pirie, No. 6221921, Fort Dodge Correctional Facility, 1550 L Street, Fort Dodge, IA 50501.

The foregoing instrument was served upon the Attorney General's Office via EDMS.

/s/ Leah Patton _____
Leah Patton

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ARGUMENT

I. THE APPELLANT HAS PRESERVED ERROR ON HIS CLAIM THAT THE TRIAL COURT ERRED IN CONDUCTING SENTENCING REMOTELY AND THE APPELLANT DID NOT CONSENT TO A REMOTE SENTENCING HEARING.

The Appellee argues that Jason has not preserved error on his claim that the trial court erred in conducting the sentencing hearing remotely. (Appellee’s Final Brief pp. 21-22). Jason disagrees and argues that error need not be preserved. Further, the Appellee argues that Jason consented to proceeding with remote sentencing because he consented with proceeding with the probation revocation. (Appellee’s Final Brief p. 23). Jason disagrees and argues that the record shows that he neither expressly nor impliedly consented to proceeding with remote sentencing.

The Attorney General’s position is inconsistent with prior cases involving this exact issue where it has conceded error was preserved concerning whether proper protocols were followed in proceeding with a remote sentencing. In *State v. Emmanuel*, 967 N.W.2d 63 (Iowa Ct. App. 2021), the State in its final brief acknowledged that “[t]he normal rules of error preservation do not apply to a direct appeal of a sentence.” (Appellee’s Final Brief p. 23) (citing *State v. Cooley*, 587 N.W.2d 2d 752, 754 (Iowa 1998)). Further, in *State v. Roe*, 2022 WL 2824732 (Iowa Ct. App. July 20,

2022), the State in its final brief conceded that ““errors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court.”” (Appellee’s Final Brief p. 23) (quoting *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010)). Because the State conceded error was preserved, the Iowa Court of Appeals in the *Emmanuel* and *Roe* cases specifically did not address error preservation, believing that error had been preserved. *See Roe*, 2022 WL 2824732, at *5; *Emmanuel*, 967 N.W.2d at 68-69.

In this case, the State has switched course and now argues that error preservation is required concerning the manner in which the sentencing hearing was held. It argues that the exception to error preservation concerning sentencing applies to the sentencing decision itself, “not to procedural errors in how the court convenes and conducts the sentencing hearing,” citing *State v. Gordon*, 921 N.W.2d 19, 22-24 (Iowa 2018), in support. (Appellee’s Final Brief p. 21).

In the *Gordon* case, the Iowa Supreme Court acknowledged a long-standing rule that “a defendant need not first challenge a district court’s abuse of discretion at the time of sentencing to have the matter directly reviewed on appeal.” *Gordon*, 921 N.W.2d at 22. The Court believed it would be “exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question the court’s exercise of discretion or forever waive

the right to assign the error on appeal.” *Id.* at 22-23 (quoting *Cooley*, 587 N.W.2d at 754). In that situation, “it would be ‘incongruous’ to apply ordinary preservation-of-error principles. . . .” *Id.* (quoting *Cooley*, 587 N.W.2d at 754). In addition, the Court also acknowledged that “a defendant need not challenge the illegality of a sentence in the district court at the time of sentencing because a defendant can raise a claim of an illegal sentence at any time.” *Id.* at 23.

On the other hand, the Court in *Gordon* held that these error preservation rules did not apply under the unique facts of the case, where the error claimed is more complex and the defendant argued that the use of risk assessment tools in the Presentence Investigation Report (“PSI”) violated his due process rights. *Id.* Both the defendant and his attorney had access to the PSI before sentencing and did not object at sentencing to the use of the risk assessment tools contained in the PSI. *Id.* The defendant did not claim his sentence was intrinsically unconstitutional. *Id.* Therefore, the Court found that the normal error preservation rules applied. *Id.* A proper objection and a record on the issue was necessary to preserve error on appeal:

How are we to determine the due process implications on the district court’s use of risk assessment tools, when we do not know anything about the tools and [the defendant] failed to object to their use? If, as [the defendant] argues, we need further evidence to determine whether the court violated his due process rights by

using this risk assessment tools, the defendant must bring that matter to the court's attention at the time of sentencing. It is unfair to the State for us to reverse the district court's sentence for allegedly considering an improper factor when the court needed more information to determine if the factor it considered was improper and the defendant failed to bring that issue to the attention of the court at the time of sentencing.

Id. at 24-25. Moreover, the sentencing court has the right to rely on information contained in a PSI when the defendant does not object to the information contained in it. *Id.* at 25. Therefore, under the unique facts of the case, the Court held that the defendant failed to preserve error on his due process claim. *Id.*

This case is distinguishable from the unique facts of the *Gordon* case. Jason does not argue on appeal that information contained in a PSI is inaccurate or incorrect and that trial court could not rely upon that information in making its decision in terms of the proper sentence to impose. Rather, Jason's claim involves the manner in which the sentencing hearing was held and whether the remote sentencing proceeding complied with the constitution and the Iowa Supreme Court's COVID-19 supervisory orders. His claim involves a "procedurally defective sentence," in which ordinary error preservation rules do not apply. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). There is no "further evidence" that would have needed to be presented below for the trial court to make a proper determination of the

propriety of a sentencing factor. Either the trial court followed the proper procedures, or it did not. And Jason argues that the trial court did not follow proper procedures in holding his sentencing hearing remotely.

Contrary to the State's argument, Jason did not consent to holding the sentencing hearing remotely—either expressly or impliedly. (Appellee's Final Brief p. 23). Just because Jason consented to proceeding with the probation revocation disposition hearing after admitting to the probation violations does not mean he consented to holding the sentencing hearing remotely. (Sent. Tr. 10:10-17). This is quite a leap to say that being amenable to proceeding to immediate disposition on the probation violation also means Jason was amenable to holding the sentencing hearing remotely. It is undisputed that nowhere in the record did Jason or his trial attorney consent to holding the sentencing hearing remotely. And it is undisputed that the sentencing hearing was contested and was testimonial. Therefore, the Supreme Court's COVID-19 supervisory order, which requires that "[a]ll contested court proceedings are presumed to occur in person" and "[a] contested testimonial proceeding may occur by videoconference or telephone only with the consent of all the parties and in the court's discretion," was violated. Iowa Supreme Ct. Supervisory Order, *In the Matter of Remote Judicial Proceedings* ¶ 3 (Nov. 4, 2022).

CONCLUSION

Jason requests that the appellate court reverse and remand for recusal of the trial judge and a new trial, and in the alternative, vacate his sentence and remand for resentencing in front of a different judge.

NONORAL SUBMISSION

Counsel requests that the appellate court set the case for nonoral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Final Reply Brief and Argument was \$1.10.

/s/ Leah Patton _____
Leah Patton

**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because: this brief contains 1,234 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or (2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word in New Times Roman, font 14 point.

/s/ Leah Patton _____
Leah Patton

Dated: __ March 23, 2024 __