ELECTRONICALLY FILED JUL 21, 2014 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 13-0988

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD B.E. REED,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE TODD A. GEER, JUDGE

APPELLEE'S BRIEF

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FINAL

CERTIFICATE OF SERVICE

On the 21st day of July, 2014, the State served the within Appellee's Brief and Argument on all other parties to this appeal by electronic and mailing one copy thereof to the respective counsel for said parties:

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ROUTING STATEMENT

Because this case involves the application of existing legal principles to the facts herein, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(*a*).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Donald Benjamin Earl Reed, appeals the judgment and sentence entered upon his convictions of possession of more than 10 grams of cocaine base with intent to deliver, while in possession of a firearm and as a second offender, failure to affix a drug tax stamp, possession of a firearm as a felon, two counts of child endangerment, and possession of marijuana in violation of Iowa Code sections 124.401(1)(b)(3), 124.401(1)(e), 124.411, 453B.12, 726.6, 726.24, 726.26, and 124.401(5) (2011).

Course of Proceedings

The State accepts Reed's rendition of the course of the proceedings as essentially correct.

Facts

In the spring of 2012, Waterloo police began surveillance on the residence at 1320 Randolph Street in Waterloo, Iowa. Trial Tr. 68, lines 13-23; App. 28. Police observed many cars pulling up in the

alley next to the residence and watched as people entered the home and then exited after only being inside a short time. Trial Tr. p. 69, line 3—p. 70, line 5; App. 29-30. Police observed Reed at the residence; once he was seen taking out the garbage and on various occasions he parked his white Buick in the driveway and entered the home without knocking. Trial Tr. p. 70, line 18-p. 71, line 2; App. 31. Reed appeared to be living at the house along with Alicia Buchanan and two young children. Trial Tr. p. 71, line 15-p. 72, line 11; App. 32.

On April 5, 2012, police conducted a trash rip at 1320 Randolph Street. Trial Tr. p. 167, lines 17-19; App. 75. In the search of the trash police found various plastic bags with torn corners and dryer sheets. Trial Tr. p. 168, lines 12-19; App. 76-77. The plastic bags with torn corners are used in the distribution of narcotics and the dryer sheets are used to conceal the smell of narcotics. Trial Tr. p. 168, lines 14-19, p. 169, line 18-p. 170, line 8, p. 173, lines 9-13; App. 76-77, 80. Additionally, police found a bill from Rent-A-Center addressed to Reed and Alicia Buchanan at the Randolph Street address. Trial Tr. 168, lines 14-19, p. 171, lines 2-19; App. 76-77, 78-79.

At approximately 9:00 p.m. on the night of April 11, 2012, police observed Reed pull into the driveway, park his Buick and enter the house. Trial Tr. p. 73, lines 2-6; App. 33-34. Police sureveilled the house until approximately midnight and did not see Reed exit. Trial Tr. p. 73, lines 15-20; App. 34.

Officer Savage and Officer Girsch applied for and obtained a search warrant for the house and Reed's Buick. Trial Tr. p. 74, lines 11-15; App. 35. On the morning of April 12, 2012, at approximately 9:30 a.m., police returned to their surveillance of 1320 Randolph Street and saw that the Buick was parked where it had been left the night before. Trial Tr. p. 75, lines 5-8, p. 193, line 11—p. 194, line 25; App. 36, 94-95. At approximately 11:00 a.m. Reed exited the house and drove away in his Buick. Trial Tr. p. 75, lines 2-4; App. 36.

Officer Savage stopped Reed's car and transported him to the Waterloo Police Department. Trial Tr. 174, line 14 - p. 175, line 22; App. 81-83. Reed had $523 of currency in his pants pocket and a cell phone. Trial Tr. p. 175, line 23 - p. 176, line 16; App. 83-84.

An examination of the cell phone revealed a high volume of short-term phone calls that were not what would be expected to see in

the record of an "everyday person's phone." Trial Tr. p. 240, lines 11-22; App. 111-112. An incoming text to Reed's phone on March 11, 2012, read "here I cum." Trial Tr. p. 237, lines 5—23; App. 107-108 . The reply, although unsent, read "AM come to you. I'll call you, he it crack, free my niggas." Trial Tr. p. 237, line 24—p. 238, line 12; App. 108-109.

While Reed was in the holding cell at the Waterloo Police Department he called to Officer Savage. Trial Tr. p. 180, lines 7-18; App. 84. Reed told Officer Savage, "I need to talk to you, but I can't do shit, man." Trial Tr. p. 181, lines 13-15; App. 85. Reed further stated, "I got to make sure my girl, she –I mean, we've got to do it together or something, because, I mean, we can help you out, dude." Trial Tr. p. 181, lines 18-22; App. 86. Then Reed said, "The only thing, sir, me and my girl, we would help you. We would help you get – to get some because, you know what I saying, because I want her to look like I know mother fuckers." Trial Tr. p. 181, line 24—p. 182, line 4; App. 86.

Officer Girsch arrived at 1320 Randolph Street to execute the search warrant. Trial Tr. p. 75, line 20-p. 76, line 2; App. 37. When he knocked on the front door, a young girl appeared and he heard

Buchanan tell her to get away from the door. Trial Tr. 76, lines 18-25; App. 38. Officer Girsch identified himself to Buchanan, who had peered out the window, and asked her to open the door. Trial Tr. p. 77, lines 1-12; App. 38-39. Officer Girsch explained to Buchanan that he had a warrant to search the house and heard her run towards the kitchen. Trial Tr. p. 77, lines 1-12; App. 38-39. He then went through the knock-and-announce procedures and forced entry into the house. Trial Tr. p. 77, lines 1-12; App. 38-39.

Buchanan and her two children, Akeyla Buchanan and Amariana Reed, were placed in the living room while the police conducted a search. Trial Tr. p. 78, lines 16-25, p. 80, lines 5-18; App. 40, 42. Officer Girsch detected a strong odor of recently smoked marijuana in the house. Trial Tr. p. 83, lines 1-6, 12-p. 84, lines 5; App. 45-46. In the kitchen Officer Girsch observed loose marijuana scattered on the table as well as a white powdery substance. Trial Tr. p. 82, line 25—p. 83, line 6, p. 92, line 8-18, p. 269, line 17—p. 270, line 9; App. 45-46, 48, 120-121. Also, on the kitchen counter police observed a plastic baggie next to powder residue; the baggie was consistent with narcotics packaging. Trial Tr. p. 93, line 16-p. 94, line 11; App. 49-50.

In a bedroom that appeared to be shared by an adult male and female, police found a box of sandwich baggies and ripped baggies consistent with narcotics packaging and sales as well as a silver digital scale. Trial Tr. p. 94, lines 16-25, p. 95, lines 7-12; App. 50-51. Police observed a white powdery substance on top of the dresser and a Wisconsin identification bearing the name of Raymond Brumfield. Trial Tr. p. 96, lines 12-20, p. 97, lines 10-19; App. 52-54. The ID also had a white powder substance on it. Trial Tr. p. 97, lines 15-19; App. 54. Reed is originally from Wisconsin. Trial Tr. p. 108, lines 10-15; App. 62.

In a shelf above the TV, behind an Xbox, police located two handguns: a Jennings 9 millimeter and a Springfield .45 automatic. Trial Tr. p. 98, line 8—p. 100, line 6; App. 54-56. The barrel of one of handguns was visible sticking out from behind the Xbox. Trial Tr. p. 98, lines 12-17; App. 54-55. Both guns contained ammunition. Trial Tr. p. 100, lines 3-6; App. 56. Partial fingerprints were found on both guns; however, these prints did not match those of Reed or Buchanan. Trial Tr. p. 272, line 25—p. 273, line 16; App. 122-123.

Near the television set, within approximately three to four feet, was a cabinet with cubbyholes used to store clothing. Trial Tr. p. 100,

line 25—p. 101, line 2, p. 138, line 21- p. 139, line 3; App. 57, 68-69. When police removed a pair of men's jeans they located a large quantity of crack cocaine, 27.24 grams, inside a plastic baggie on a plate. Trial Tr. 101, lines 5-14, p. 260, line 15-p. 261, line 1; App. 58, 117. A baggie containing 1.9 grams of marijuana fell to the floor as the police removed the jeans. Trial Tr. p. 102, lines 13-25, p. 126, lines 3-24, p. 267, line 23—p. 268, line 7; App. 59, 65-66, 118-119. Left of the TV cabinet police located more crack cocaine. Trial Tr. p. 124, line 16—p. 126, line 1, p. 261, lines 10-19; App. 63-65, 118. On the bed area police located the remnants of a marijuana roach. Trial Tr. p. 133, line 17—p. 134, line 13, p. 268, lines 8-22; App. 67-68, 119.

In what appeared to be the children's bedroom, police located a quantity of loose marijuana in the pocket of a coat hanging in the closet and in a nylon bag. Trial Tr. p. 103, lines 3-22, p. 220, line 20—p. 221, line 9, p. 268, line 23—p. 269, line 16, p. 270, lines 10-25; App. 60-61, 101-02, 119-122. Police found more ripped plastic baggies in a hallway closet and in the living room. Trial Tr. p. 104, lines 8-20, p. 202, lines 2-4, line 22—p. 203, line 5, line 6 --p. 204, line 8; App. 61, 97-100.

Additional facts will be set forth below as relevant to the State's argument.

ARGUMENT

I. The State Presented Sufficient Evidence that Reed Constructively Possessed the Cocaine, Marijuana and Guns to Support Reed's Convictions.

Preservation of Error

At the close of the State's case Reed moved for a judgment of acquittal on all charges. Trial Tr. p. 278, line 20—p. 279, line 2, p. 281, line 6—p. 284, line 16; App. 124-128. The district court denied the motion. Trial Tr. p. 287, line 11—p. 289, line 9; App. 129-131. The State agrees that Reed preserved error on this issue. *See State v. Walker*, 574 N.W.2d 280, 283 (Iowa 1998) (error on issue of sufficiency of evidence by making timely motion for judgment of acquittal).

Standard of Review

Review of a challenge to the sufficiency of the evidence is on assigned error. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998). The reviewing court will uphold the denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. *Id.* at 752. Substantial evidence is evidence that could convince a trier of fact that the defendant is

guilty of the crime charged beyond a reasonable doubt. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). In determining whether there is sufficient evidence, the court considers all the evidence. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). However, the court views the evidence in a light most favorable to the State and makes all reasonable inferences that may be drawn from the evidence. *McPhillips*, 580 N.W.2d at 752.

Merits

In both the brief filed by counsel and in a pro se brief Reed maintains the State did not present sufficient evidence to prove he constructively possessed the drugs and guns found inside the Randolph Street house; therefore, he argues, the State failed to prove he was guilty of any of the crimes with which he was convicted.

To prove possession of a controlled substance the State must "prove three elements: '(1) the accused exercised dominion and control (i.e., possession) over the contraband, (2) [the accused] had knowledge of the [contraband's] presence, and (3) the accused had knowledge that the material was a narcotic.'" *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002) (quoting *State v. Reeves,* 209 N.W.2d 18, 23 (Iowa 1973)). "[W]here the accused has not been in exclusive

possession of the premises but only in joint possession, knowledge of the presence of the substances on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof." *Reeves,* 209 N.W.2d at 23. "A number of factors may support a finding that a defendant had knowledge of the presence of drugs and the right to exercise control over them as well as access and control of the place and premises where the drugs are found. Such factors include incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of drugs among or near the defendant's personal belongings, the defendant's fingerprints on the packages containing the drugs, and any other circumstances linking the defendant to the drugs." *Webb*, 648 N.W.2d at 79. "The existence of constructive possession turns on the peculiar facts of each case." *Id.*

Reed primarily relies upon *State v. Webb*, 648 N.W.2d 72 (Iowa 2002) in urging the evidence of his constructive possession was lacking. In *Webb*, the Court found insufficient evidence to prove the defendant possessed controlled substances and therefore that the district court erred in denying his motion for judgment of acquittal on two drug charges. *Webb,* 648 N.W.2d at 81. Reed contends the facts

of his case are similar to those in *Webb* because he, like *Webb*, was not present when the search warrant of the residence was executed, he shared the residence with another person and he made no incriminating statements to police. *Id.* at 79-80. Reed contends that as in *Webb*, no drugs or guns were found among his personal belongings.

However, the facts of Reed's case are distinguishable from *Webb*. First, unlike *Webb*, where the State did not present evidence about when the defendant was last present at the residence, the State here proved that Reed left the home immediately prior to the execution of the search warrant. Trial Tr. p. 75, lines 1-19; App. 36-37. Moreover, Reed ignores the evidence presented by the State that there was a copious amount of drugs found near a man's pair of jeans in a bedroom that was shared by a male and a female. Trial Tr. p. 89, lines 9-20; App. 47. It was apparent to police that Reed and Buchanan shared the residence with two children, one of which was Reed's daughter. Trial Tr. p. 81, lines 4-14; App. 43-44. It was equally evident that the jeans were too large to belong to the female adult living in the house because Buchanan was five feet, three inches tall and weighed approximately 140 pounds. Trial Tr. p. 158, lines 4-

10, p. 160, lines 15-25; App. 72-73. Reed was over six feet inches tall and weighed approximately 210 pounds. Trial Tr. p. 161, lines 1-11; App. 73. Therefore, the jury could reasonably conclude the cocaine and marijuana were found among Reed's personal belongings.

Further, while Reed did not make explicitly incriminating statements to police, his offer, after being arrested for drug possession with intent to deliver, that he and Buchanan could help police indicated they were knowledgeable of drug dealing and the jury could infer it was an incriminating statement.

Other evidence connected Reed to the drugs and guns. Reed's text message referenced "crack" and the volume of his cell phone calls was indicative of more than casual cell phone use. Trial Tr. p. 237, line 19—p. 238, line 24, p. 239, line 17-p. 240, line 22; App. 108-112. Moreover, police observed a pattern of comings and goings to the house that was consistent with drug dealing. Trial Tr. p. 69, line 3—p. 70, line 5; App. 29-30. Reed was not known to run a legitimate business out of his home. Trial Tr. p. 70, lines 11-17, p. 240, line 23—p. 241, line 6; App. 30. Finally, from Reed's possession of $523 in currency, and the lack of evidence that he had a job, the jury could

infer he was engaged in drug sales. Trial Tr. p. 175, line 23 - p. 178, line 7; App. 83-84.

As for the guns, they were located in plain sight in the bedroom shared by Reed and Buchanan. One of the gun's barrels could be seen sticking out behind the Xbox. Trial Tr. p. 98, lines 12-17; App. 54-55. Officer Girsh testified that in his experience "people selling narcotics are going to have firearms because they want to protect their stash, protect their money when they've got large quantities of money in the house." Trial Tr. p. 130, line 12- p. 131, line 3; App. 66-67. It was reasonable for the jury to infer that Reed had knowledge of the presence of the guns when they were found practically in plain sight and drugs were found near them among Reed's personal belongings. It was further reasonable for the jury to conclude that Reed had the ability, as an inhabitant of the shared bedroom, to exercise dominion and control over them.

The State presented sufficient evidence to prove Reed had constructive possession of cocaine, marijuana and guns. Reed does not challenge the remaining elements of each offense; therefore, there was sufficient evidence to prove Reed guilty as charged beyond a reasonable doubt.

II. Counsel was Not Ineffective.

Preservation of Error

A claim of ineffective assistance is an exception to the normal rules of error preservation. *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982).

Standard of Review

The court reviews ineffective-assistance-of-counsel claims de novo. *State v. Williams*, 574 N.W.2d 293, 300 (Iowa 1998).

Merits

Reed contends his counsel was ineffective for failing to file a motion to suppress alleging the search warrant was insufficient, for failing to investigate and present evidence that Reed did not reside at the Randolph Street house, and for failing to object to the admission of a photo of an assault rifle.

To prove counsel was ineffective, Redd must show: (1) trial counsel failed to perform an essential duty; and (2) prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). The Court can affirm on appeal if either element is absent. *McPhillips,* 580 N.W.2d at 754.

To prove the first prong of an ineffective assistance of counsel claim, Reed must prove his counsel's performance was not within the normal range of competence. *Id.* The court presumes counsel is competent. *State v. Spurgeon*, 533 N.W.2d 218, 219 (Iowa 1995). Reed "must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency." *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

"The defendant establishes prejudice by showing there is a 'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Hopkins,* 576 N.W.2d 374, 378 (Iowa 1998) (citing *Strickland,* 466 U.S. at 694). A "'reasonable probability is a probability sufficient to undermine confidence in the outcome of the defendant's trial.'" *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997) (citing *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

Failure to move to suppress search warrant. Reed contends the search warrant application was defective because it did not establish the credibility of the informants or the information given by

them and because the information provided by police officers was stale and vague.

"The test for determining whether probable cause supported the search warrant is 'whether a reasonable person would believe a crime was committed on the premises or that evidence of a crime could be located there.'" *State v. Wells*, 629 N.W.2d 346, 355 (Iowa 2001) (quoting *State v. Simpson*, 528 N.W.2d 627, 634 (Iowa 1995)). A "warrant applicant must show 'a nexus between the criminal activity, the things to be seized and the place to be searched.'" *State v. Randle*, 555 N.W.2d 666, 670 (Iowa 1996) (quoting *State v. Thomas*, 540 N.W.2d 658, 663 (Iowa 1995)). "The facts and information presented to establish this finding need not rise to the level of absolute certainty, rather, it must supply sufficient facts to constitute a fair probability that contraband or evidence will be found on the person or in the place to be searched." *Thomas*, 540 N.W.2d at 662–63.

Probable cause to search the residence at 1320 Randolph Street and Reed's car was established in the warrant application; therefore, counsel did not breach an essential duty by failing to file a motion to suppress the search warrant. Among other information that was

relevant to a finding of probable cause, the information provided by Confidential Informant 1 was particularly compelling. Officer Zubak stated in his affidavit that Confidential Informant 1 was reliable because he had known him or her for six years, the informant had demonstrated truthfulness in the past, supplied information over 25 times in the past, twice this information led to arrests, and the information given was corroborated by the officer. Informant's Attachment (Confidential Informant 1); App. 7. Reed contends there is no further record to support Officer Zubak's conclusion that the information provided by Confidential Informant 1 was corroborated. However, the Addendum provides that this informant conducted a controlled buy for Officer Zubak within 72 hours of the warrant application. Addendum; App. 11. The informant was given pre-serialized money, entered 1320 Randolph Street and purchased marijuana. Addendum; App. 11. Informant 1 told another officer that Reed lived at 1320 Randolph Street with his girlfriend, Alica Buchanan. Addendum; App. 11. The Addendum's description of a controlled buy corroborates Informant 1's assertions about the drug sales by residents of the Randolph Street house. Further, this

information, obtained 72 hours prior to the application for a search warrant, was neither stale nor vague.

The district court made a specific credibility finding as required pursuant to Iowa Code section 808.3 ("The application or sworn testimony supplied in support of the application must establish the credibility of the informant or the credibility of the information given by the informant."). Similar facts have been found "sufficient to establish the informant's reliability." *See Randle*, 555 N.W.2d at 670.

Reed cannot show there is a reasonable probability that a motion to suppress the evidence obtained in the search of his house would have been granted. *See State v. Beckett,* 532 N.W.2d 751, (Iowa 1995) ("Because there is a preference for warrants, [the reviewing courts] resolve doubtful cases in favor of their validity.").

Failure to investigate and present evidence Reed did not reside at Randolph Street house. Counsel did not breach an essential duty by fialing to investigate and present evidence that Reed did not live at the Randolph Street house.

Reed's counsel made a continued effort during the trial to highlight any evidence that supported his defense that he did not reside at 1320 Randolph Street. For example, on cross-examination

counsel illicited from Officer Savage that Reed's car registration address was 548 1/2 Riehl Street and that the officer had seen Reed at this address. Trial Tr. p. 182, line 24—p. 183, line 13; App. 87-88. Counsel also asked Officer Savage to examine the Rent-A-Center contract and had him acknowledge that only Buchanan's signature was present. Trial Tr. p. 185, line 14—p. 187, line 13; App. 89-91. Finally, counsel highlighted in his closing argument that the house at 1320 Randolph Street was rented by Chad Wolf. Trial Tr. p. 325, line 12, p. 326, line 17; App. 134-135.

The other evidence Reed contends counsel should have used to help cast doubt that he resided at 1320 Randolph Street was obtained from the PSI and would have required Reed to testify; however, Reed does not allege counsel ineffective for failing to call him as a witness. Counsel did not breach an essential duty by failing to present more evidence that Reed did not reside at 1320 Randolph Street.

Moreover, Reed was not prejudicied by counsel's alleged breach of duty. Had counsel presented the evidence Reed relies upon in support of this ineffective-assistance-of-counsel claim, it would not have changed the result of his trial because it would not have negated

the State's evidence showing that Reed did indeed reside at 1320 Randolph Street.

Failure to object to admission of photo of an assault rifle. Reed contends counsel breached an essential duty by failing to object to the admission of photo of an assault rifle. However, the photo was part of Exhibit D, a printout of calls, texts and pictures obtained from Reed's cell phone. Trial Tr. p. 235, line 7-18; App. 106. Counsel did object to the admission of Exhibit D as a whole and to the pictures in general. Trial Tr. p. 227, line 12—p. 228, line 21; App. 102-104. The district court overruled the objection. Trial Tr. p. 229, line 14—p. 230, line 6; App. 105. The district court specifically found that the pictures from the cell phone were not "so inflammatory or unfairly prejudicial that they would need to be excluded." Trial Tr. p. 230, lines 1-2; App. 105. Therefore, counsel did not breach an essential duty by faililng to object to the State's admission of a photo of an assault rifle.

Moreover, because the State presented strong evidence of Reed's guilt on all counts, Reed cannot show a reasonable probability that even if counsel had objected to the admission of the photo of the

assault rifle more specifically, and even if the objection had been sustained, the result of his trial would have been different.

III. The Sentence Imposed Upon Reed's Conviction of Possession of a Controlled Substance with Intent to Deliver, Second Offense, was Not Cruel and Unusual in Violation of the Iowa Constitution.

Preservation of Error

A "claim [...] that the sentence itself is inherently illegal, whether based on constitution or statute," may be brought at any time. *State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009).

Standard of Review

Review of "constitutional challenges to illegal sentences [is] de novo." *State v. Pearson*, 836 N.W.2d 88, 94 (Iowa 2013).

Merits

Pursuant to Iowa Code section 124.411(1), "[a]ny person convicted of a second or subsequent offense[1] under this chapter, may be punished by imprisonment for a period not to exceed three times the term otherwise authorized, or fined not more than three times the amount otherwise authorized, or punished by both such

[1] Iowa Code § 124.411(2) provides "an offense is considered a second or subsequent offense, if, prior to the person's having been convicted of the offense, the offender has ever been convicted under this chapter or under any state or federal statute relating to narcotic drugs or cocaine, marijuana, depressant, stimulant, or hallucinogenic drugs."

imprisonment and fine." Because he was seventeen when he committed his prior offense, Reed contends the enhanced sentence imposed pursuant to section 124.411 upon his conviction of possession with intent to deliver a controlled substance was grossly disproportionate in violation of article I, section 17 of the Iowa Constitution. He maintains he should be allowed to "make an individualized showing that the sentence is cruel and unusual as applied to him." *Bruegger*, 773 N.W.2d at 884-85.

The "threshold inquiry" is whether Reed's sentence is "grossly disproportionate" to the crime he committed. *See State v. Oliver*, 812 N.W.2d 636, 650 (Iowa 2012) (when defendant challenges his sentence by emphasizing the specific facts of the case, "threshold inquiry" is to determine whether sentence leads to an inference of gross disproportionality). "This preliminary test involves a balancing of the gravity of the crime against the severity of the sentence." *Bruegger,* 773 N.W.2d at 873. "If the sentence does not create an inference of gross disproportionality, then "no further analysis is necessary." *Oliver*, at 650-51 (internal citations omitted). If there is an inference of gross disproportionality, the next two steps "require the court to engage in an intrajurisdictional and interjurisdictional

analysis to determine whether the sentence is in fact grossly disproportionate." *Id.* at 647.

In determining whether a sentence is grossly disproportionate, there are three general principles to consider: (1) "substantial deference" is given to "the penalties the legislature has established;" (2) a sentence rarely will be found to be grossly disproportionate; and (3) an offender's criminal history is relevant to the analysis. *Oliver*, 812 N.W.2d at 651. Additionally, the unique features of a case can "converge to generate a high risk of potential gross disproportionality." *Bruegger*, 773 N.W.2d at 884. Unique features include but are not limited to "a broadly framed crime, the permissible use of preteen adjudications as prior convictions to enhance the crime, and a dramatic sentence enhancement for repeat offenders." *Oliver*, 812 N.W.2d at 651 (quoting *Bruegger*, 773 N.W.2d at 884).

Reed's crime, possession of cocaine with the intent to deliver is, unlike the crime of statutory rape at issue in *Bruegger,* not broadly framed. Moreover, unlike the defendant in *Bruegger*, who committed his prior offense when he was twelve and who was thus ineligible for adult prosecution pursuant to Iowa Code section

232.45(6)(a), Reed was just shy of turning eighteen when he committed his prior offense and was, in fact, convicted when he was eighteen. PSI; App. 162. The prior offense used to enhance Reed's sentence was not a preteen adjudication. PSI; App. 162.

It is true that the penalty imposed upon a second offender pursuant to section 124.411 does result in a substantial increase in punishment as was true in *Bruegger*. However, the sentence imposed upon Reed's conviction of possession of a controlled substance with intent to deliver as a second offender, 100 years with a one-third mandatory minimum, fails the threshold test---that is, it does not lead to an inference of gross disproportionality. *See Harmelin v. Michigan*, 501 U.S. 957, 1005, (1991) (Kennedy, J., concurring in part and concurring in the judgment) (finding comparison of defendant's crime, possession of more than 650 grams of cocaine, with sentence, life in prison without the possibility of parole, "does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed"). The Supreme Court noted in *Harmelin* that "[p]ossession, use, and distribution of illegal drugs represent 'one of the greatest problems affecting the health and welfare of our

population.' ... [The defendant's] crime threatened to cause grave harm to society." *Id.,* 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, as the district court here observered:

> those serious crimes [for which Reed was being sentenced] carry severe penalties because society recognizes the dangerous combination between repeat drug offenders, firearms, and dealing in large amounts of controlled substances, which are very dangerous to be distributed out in the community.

Sentencing Tr. p. 11, lines 16-21; App. 184.

Moreover, the district court did not impose the maximum possible sentence, 150 years, upon Reed's conviction of possession with intent to deliver. Iowa Code § 124.411. Rather, the district court explained:

> But it's my hope that in fashioning this sentence, when you do earn parole, you are going to come out someone who is --- who is ready to change his life, who has absolutely no interest in going back to the type of lifestyle and the type of dangerous criminal activities that bring you here today. You're going to be older, so perhaps you're just going to be tired of it. You're going to have your liberty deprived for an extended period of time so perhaps you will value and appreciate your liberty more when you get out and that will be enough to convince you that you're not going to engage in these types of behaviors again. You're a young person, at least in my book. You're 28[.]
>
> [. . .]

> Even though the law prescribes a 150-year sentence, I'm not going to triple the sentence; I'm going to double the sentence. I'm going to double it because it's appropriate because of your being in the immediate possession of a firearm and the fact that you are a repeat offender. But also, by only doubling it rather than tripling it and still applying the one-third minimum sentence, you're going be young enough by the time you earn parole, assuming you're going to be a good --- a good prisoner and not have a bunch of rules violations, you're going to be young enough when you do earn parole to still be able to do something productive in our society, and I'm very hopeful that you will.

Sentencing Tr. p. 12, line 13—p. 14, line 11; App. 185-87. Therefore, the district court engaged in an individualized assessment of the appropriate punishment to impose upon Reed's conviction. Remand for an individualized assessment would be redundant.

The sentence imposed upon Reed's conviction of possession of a controlled substance with intent to deliver as a second offender is not grossly disproportionate in violation of the Iowa Constitution.

CONCLUSION

For all the reasons stated above, the State respectfully requests this court affirm Reed's convictions and sentence.

REQUEST FOR NONORAL SUBMISSION

Reed has requested oral argument. The State believes that this case can be resolved by reference to the briefs without further elaboration at oral argument. However, in the event the defendant is granted oral argument, counsel for the State asks to be heard as well.

Respectfully submitted,

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/s/

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Dated: July 21, 2014

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