IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. RYAN JACOB WIENEKE, Defendant-Appellant.	)))))))))	S.CT. NO. 20-0126

APPEAL FROM THE IOWA DISTRICT COURT
FOR BENTON COUNTY
HONORABLE CHRISTOPHER L. BRUNS, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED OCTOBER 7, 2020

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CERTIFICATE OF SERVICE

On the 21st day of October, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Ryan Wieneke, 4500 Fairlane Dr. NE, Cedar Rapids, IA 52402.

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the district court abused its sentencing discretion by considering information outside the case record?

II. Whether under S.F. 589, this court should interpret "good cause" broadly and implement an adequate procedure to avoid due process and equal protection violations related to guilty pleas?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

Wieneke requests that the Iowa Supreme Court grant further review to determine whether the district court erred by considering sentencing factors outside the record to determine Wieneke's sentence. The Court of Appeals erroneously found that the court did not rely on improper factors but in this case, the district court used its personal knowledge of other cases involving knives as reasoning to sentence Wieneke. The Supreme Court should determine that the Court of Appeals was incorrect.

STATEMENT OF THE CASE

Nature of Case

Defendant-Appellant Ryan Wieneke appeals his conviction, sentence and judgment following a guilty plea for Assault While Displaying a Dangerous Weapon, an aggravated misdemeanor, in violation of Iowa Code § 708.2 A(1) and 708.2A(2)(c).

Course of Proceeding

On October 9, 2019, the State filed a trial information charging Grady with one count of domestic assault abuse in violation of Iowa Code §§ 708.2A(1) and 708.2A(2)(c). (Trial Information)(App. pp. 4-5). Wieneke pled not guilty and waived his right to a speedy trial on October 22, 2020. (Written Arraignment and Plea of Not Guilty)(App. p. 6). Wieneke waived his rights to a trial and pled guilty as charged on November 21, 2019. (Waiver)(App. pp. 7-10). There was a plea agreement between Weineke and the State which stated that Wieneke would plead guilty as charged to Domestic Abuse

Assault for a deferred judgment and the county attorney agreed not to resist a deferred judgement by standing silent during sentencing. (Sent. Tr. p. 2, L21-p.3, L11). On January 9, 2020, Wienke was sentenced by the district court to an indeterminate term of incarceration not to exceed two years with all but six days suspended and $625.00 fine suspended. (Order of Disposition)(App. pp. 11-14). Wieneke filed a notice of appeal on January 16, 2020. (Notice)(App. p. 15).

Facts

According to the minutes of testimony, Lydia Wieneke over a few days prior to September 19, 2019, Wieneke had not been taking his prescription medication. (MT p. 1)(Conf. App. p. 4). On September 19, 2019, Wieneke became angry with her and told her to "get out". (MT p. 1)(Conf. App. p.4). Lydia Wieneke took their daughter and left the home and at some point Wieneke followed both of them out to the car. Lydia had already placed their daughter into her car seat and

locked the doors. (MT. p. 1)(Conf. App. p. 4). Wieneke, who had a knife in his hand, told Lydia that she was not leaving. (Mt. p. 1)(Conf. App. p. 4). Wieneke swung the knife in an upward motion and Lydia received a two-inch cut on the left side of her chest. Wieneke then went to the passenger front tire and stabbed it. (MT p. 1)(Conf. App. p. 4).

To establish a factual basis, Wieneke admitted that on September 19, 2019 in Benton County, Iowa, he assaulted Lydia Wieneke, a person he had a domestic relationship with at the time, while displaying a dangerous weapon. (Waiver of Rights and Plea of Guilty)(App. pp. 7-10). Any additional relevant facts will be discussed below.

Argument

I. The district court abused its sentencing discretion by considering information outside the case record.

A. Preservation of Error: Reviews of the sentencing is properly before this court upon direct appeal despite the absence of objection in the trial court. See State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). See also State v.

Young, 292 N.W.2d 432, 434-435 (Iowa 1980) (improper sentencing factor claim reviewed despite lack of objection at sentencing).

B. Scope of Review: This court reviews the district court's sentencing decision for the correction of errors of law. See State v. Valin, 724 N.W.2d 440, 444 (Iowa 2006). Because the sentence imposed is within the statutory limits, this court will only reverse if the lower court abused its discretion in imposing the sentence. See id. An abuse of discretion occurs when the sentence imposed is unreasonable or based on untenable grounds. See Id at 445.

C. Discussion: In exercising discretion, "The district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant's age, character, and propensities or chances to reform." State v. Lloyd, 530 N.W.2d 708, 713 (Iowa1995) (quoting State v. Johnson, 513 N.W.2d 717, 719 (Iowa 1994)). The punishment must fit the

particular person and the circumstances under consideration; each decision must be made on an individual basis, and no single factor, including the nature of the offense, will be solely determinative. State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979).

When the district court has sentencing discretion, it must properly exercise that discretion. State v. Ayers, 590 N.W.2d 25, 27 (Iowa 1999). When sentencing a defendant, the court may not consider factors or allegations that are not established by the evidence or admitted by the defendant. State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998); State v. Black, 324 N.W.2d 313, 316 (Iowa 1982).

A sentencing court's "consideration of [facts or] information obtained from outside the [defendant's case] record is a defect in the sentencing procedures that requires a remand for resentencing." State v. Wygle, 834 N.W.2d 817 (Iowa Ct. App. 2013)(a sentencing court's statement that "I couldn't cite you the particular statistics but the Court's

understanding is that somebody has been abused as a child is significantly more likely to…abuse other children…" revealed that the court "improperly considered facts outside Wygle's case record" which "requires a remand for resentencing."). See also State v. Porath, 842 N.W.2d 680 (Iowa Ct. App. 2013) (sentencing court's statements that the characteristics of defendant's offense "carry signs and indications that the court has seen in other situations where somebody, um, is a sexual deviant and has perpetrated against many victims" demonstrated that the court "considered…facts outside Porath's case record" which "requires a remand a remand for resentencing.").

To constitute reversible error, there must be some showing that the sentencing judge was not "merely aware" of the improper factor but also "impermissibly considered" or "relied on" it in rending the sentence. State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990). Where such a showing is made, however, the reviewing court "cannot speculate about

the weight a sentencing court assigned to [the] improper consideration and the defendant's sentence [] must be vacated and the case remanded for resentencing." State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998). See also State v. Lovell, 857 N.W.2d 241, 242-43 (Iowa 2014); State v. Jorgenson, 588 N.W.2d 686, 687 (Iowa 1998); State v. Black, 324 N.W.2d at 315-16. This is even so if the impermissible factor was merely a secondary consideration." Lovell, 857 N.W.2d at 243 (internal quotations marks omitted). Additionally, "[i]n order to protect the integrity of our judicial system from the appearance of impropriety," resentencing must be "before a different judge." Id. at 243.

In the present case, the district court considered impermissible factors when it sentenced Weineke and ordered an indeterminate two years with all but six days suspended. (Order of Disposition)(App. pp. 11-14). Wieneke is entitled to a new sentencing before a different judge.

A sentencing court's "consideration of [facts or information] obtained from outside the [defendant's case' record is a defect in the sentencing procedures that requires a remand for resentencing. State v. Wygle, 834 N.W.2d 817 (Iowa Ct. App. 2013).

In this case, when discussing and issuing its sentence decision and the factors it found important in Wieneke's case, the district court stated the following, in relevant part:

> So Mr. Wieneke, a couple of things strike me about what I have heard today and what I read in the court file. This is a very serious underlying event. This is not an event where somebody in anger pushed another person or did something of that nature. This is an event where someone went to the trouble of finding a knife and carrying a knife.
>
> And it's an event where what's described is you initially cutting your wife with the knife and I'm being asked to chalk that up as an accident by your side here. You didn't accidentally stab the tire of the vehicle, the flattened vehicle.
>
> And this is a very serious underlying assault. ***In my personal view of people who commit crimes with knives is they are willing to get up close and personal to someone else in causing harm***. And you've told me you're to a previous member of the Armed Forces, so I have to presume that you have

some combat training. Is that accurate?

(Sent. Tr. p. 16, L5-16)(emphasis added).

These emphasized statements made by the court "reveal [] it improperly considered facts outside [Wieneke's] case record. State v. Jose, 636 N.W.2d 38, 43 (Iowa 2001). (Where "the sentencing court"[]… ma[kes] specific reference to "the impermissible factor, an "affirmative showing" is made that the court considered that factor.) The Court's personal experience with cases involving assailants with knives and the Court's personal understanding of military personnel training were impermissible factors that should not have been considered during the sentencing hearing. See State v. Porath, 842 N.W.2d 680 (Iowa Ct. App. 2013)(sentencing court's statements that the characteristics of defendant's offense "carry signs and indications that the court has seen in other situations where somebody, um, is a sexual deviant and has perpetrated against many victims" demonstrated that the court "considered…facts outside Porath's case record" which

"requires a remand a remand for resentencing.") Accordingly, Wieneke's sentences must be vacated and this matter should be remanded for resentencing before a different judge. Lovell, 857 N.W.2d at 243.

II. Under S.F. 589, this court should interpret "good cause" broadly and implement an adequate procedure to avoid due process and equal protection violations related to guilty pleas.

On July 1, 2019, Senate File 589 went into effect. The legislation made several changes to the Iowa Code, including several affecting criminal appeals. In particular, Senate File 589 amended Iowa Code section 814.6(1) to only grant a right of appeal from a final judgment of sentence from "[a] conviction where the defendant has pled guilty" to a class "A" felony or in cases "where the defendant establishes good cause." Iowa Code § 814.6(1) (2019).

Iowa Code § 814.7 (2019). The amendment to section 814.6(1) provides that a defendant who has pled guilty may only appeal when he "establishes good cause." Iowa Code § 814.6(1)(a)(3) (2019). "Good cause" is not defined in the

statute, and the statute does not prescribe the procedure to be used by a defendant to establish good cause. Id. Thus, the determination of both is left to the discretion of the court. See Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564, 568–69 (Iowa 1976) (Iowa courts maintain an "inherent common-law power . . . to adopt rules for the management of cases on their dockets in the absence of statute.").

Because "good cause" is not defined or limited in the statute, the court will give the term its common meaning. State v. Tesch, 704 N.W.2d 440, 452 (Iowa 2005). "Good cause" is commonly defined as "[a] legally sufficient reason." CAUSE, Black's Law Dictionary (11th ed. 2019). It is a broad and flexible term, found throughout Iowa law where its definition is situational and varies depending on the context in which it is being applied. See, e.g, Iowa R. Crim. P. 2.33 (violations of speedy indictment and speedy trial warrant dismissal unless "good cause to the contrary is shown."); Iowa R. Civ. P. 1.977 (court may set aside default upon showing of

"good cause"); Iowa Code §§ 322A.2 & .15 (2019) (providing motor vehicle franchise may not be terminated unless "good cause" is shown and identifying factors to evaluate in that determination); Iowa Code § 915.84(1) (allowing for waiver of time limitation to file for crime victim compensation if "good cause" is shown); State v. Winters, 690 N.W.2d 903, 907-08 (Iowa 2005) (discussing that grounds for "good cause" to grant trial continuance is narrower in a criminal case where speedy trial rights are at stake than in a civil case); Wilson v. Ribbens, 678 N.W.2d 417, 420-21 (Iowa 2004) (discussing factors to be considered when determining if "good cause" has been shown to excuse failure of service pursuant to rule 1.302).

The court will usually interpret statutes in a way that avoids a constitutional problem. Simmons v. State Pub. Def., 791 N.W.2d 69, 74 (Iowa 2010). The legislature's assignment of discretion to the court to define "good cause" and implement the procedure utilized to establish such cause ensures both can be accomplished in a manner consistent with constitutional

dictates. An interpretation effectively prohibiting the right of appeal for defendants who plead guilty would raise concerns about due process and equal protection under both the Iowa and the federal constitutions. U.S. Const. amend. V; amend. XIV § 1; Iowa Const. art. I, §§ 6, 9.

Article V, section 4 provides the supreme court shall have appellate jurisdiction, "under such restrictions as the general assembly may, by law, prescribe." Iowa Const. art. V, § 4. This court has long acknowledged the ability of the legislature to place limitations on the right to appeal. See In re Durant Comm. Sch. Dist., 252 Iowa 237, 245, 106 N.W.2d 670, 676 (1960) ("We have repeatedly held the right of appeal is a creature of statute. It was unknown at common law. It is not an inherent or constitutional right and the legislature may grant or deny it at pleasure."). See also Wissenberg v. Bradley, 209 Iowa 813, 229 N.W. 205, 209 (Iowa 1929). The United States Supreme Court has held similarly. McKane v. Durston, 153 U.S. 684, 687-88 (1894) ("A review by an appellate court of the

final judgment in a criminal case, however grave the offence of which the accused is convicted, . . . is not now a necessary element of due process of law."). However, these holdings are subject to criticism. See Cassandra Burke Robinson, The Right to Appeal, 91 N.C.L.Rev. 1219, 1221 (2013) (arguing U.S. Supreme Court has relied on "nineteenth century dicta" for the proposition that due process does not require a right of appeal and expressing concerns that states will attempt to eliminate appeals as of right "in order to save fiscal and administrative resources."); Marc M. Arkin, Rethinking the Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992); Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983) (Brennan, J. dissenting) (predicting that if the court were squarely faced with the issue, it would hold that due process requires a right to appeal a criminal conviction).

However, assuming the legislature can grant or deny the right to appeal at its pleasure, equal protection guarantees dictate that "[o]nce the right to appeal has been granted . . . it

must apply equally to all. It may not be extended to some and denied to others." Waldon v. District Court of Lee County, 256 Iowa 1311, 1316, 130 N.W.2d 728, 731 (1964).

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. *Consequently, at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.*

Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L. Ed. 891 (1956) (internal citations omitted) (emphasis added). See also Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577, 581 (1966) (once right of appeal is established "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the

courts."); Shortridge v. State, 478 N.W.2d 613, 615 (Iowa 1991) (superseded by statute, 1990 Iowa Acts ch. 1043, § 1, as recognized in James v. State, 541 N.W.2d 864, 868 (Iowa 1995)) (finding statute limiting right of appeal by inmate from denial of postconviction relief unconstitutional on equal protection grounds because State was not similarly limited). State v. Hinners, 471 N.W.2d 841, 843 (Iowa 1991) (defendant may waive right to appeal, but must do so voluntarily, knowingly, and intelligently to meet due process requirements).

As well, the procedure by which the appeal is considered must also comport with due process. See Evitts v. Lucey, 469 U.S. 387, 400–01, 105 S. Ct. 830, 838–39, 83 L. Ed. 2d 821 (1985) ("The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. . . . In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due

Process Clause."): Billotti v. Legursky, 975 F.2d 113, 115 (4th Cir. 1992) (West Virginia's discretionary right of appeal did not violate due process because procedure for seeking appeal included right to court-appointed counsel, preparation of transcripts, opportunity to present oral argument, and submission of written petition to the appellate court including statement of facts, procedure, assignments of error, and legal authority).

a. Wieneke has established "good cause" justifying his appeal.

Because Wieneke has no other avenue by which to raise his claim and because his claims are non-frivolous, Wieneke has established good cause to appeal. The issue that Wieneke raises in his appeal – that the district court used improper sentencing factors – are claims that cannot be addressed by any other forum.

b. Wieneke's appeal is non-frivolous.

To satisfy a "good cause" standard, the defendant should not have to show that he would definitively win on the merits

of the claim he seeks to raise in the appeal. Instead, the court's consideration of whether good cause has been established should include whether the defendant has a colorable or non-frivolous claim. In other discretionary review situations, a petitioner does not have a burden to show he will ultimately prevail on the merits of the claim to get review granted. See Gibb v. Hansen, 286 N.W.2d 180, 188 (Iowa 1979) (Supreme Court considered claims raised in petition for writ of certiorari and ultimately ruled against petitioner and annulled writ); Farrell v. Iowa Dist. Court, 747 N.W.2d 789, 790-792 (Iowa Ct. App. 2008) (Supreme Court granted petition for writ of certiorari but petitioner ultimately lost on one issue and prevailed on others).

In this case, the district court had a legal obligation to use proper sentencing factors when deciding on sentence for Wieneke. The record supports Wieneke's claim, and Wieneke has established good cause for his appeal.

CONCLUSION

For all the above reasons, the defendant requests this court vacate his sentence, and judgment and remand the case.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $2.77, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,163 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Dated: 10/21/20

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