IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1561

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM FRANK FETNER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
THE HONORABLE KAREN KAUFMAN SALIC, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Because this case involves the application of existing legal principles, 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

William Frank Fetner pleaded guilty to possession of a controlled substance (marijuana) third or subsequent offense and driving while barred, in violation of Iowa Code sections 124.401(5) and 321.561. AGCR028389 Sent. Order; AGCR028473 Sent. Order; App. 37–42. The district court sentenced Fetner to consecutive sentences of incarceration not to exceed two years for both charges. AGCR028389 Sent. Order; AGCR028473 Sent. Order; App. 37–42. On appeal, Fetner argues that the sentencing court considered improper and irrelevant factors. The State disagrees and additionally submits that Fetner's appeal is precluded by recently enacted legislation.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

In his written pleas of guilty, Fetner admitted that (1) on March 6, 2019, he operated a vehicle while his license was barred and (2) on April 5, 2019, he knowingly and intentionally possessed marijuana with at least two prior convictions for possession of marijuana. AGCR028389 Written Plea; AGCR028473 Written Plea; App. 29–36.

ARGUMENT

I. Because Fetner Pleaded Guilty, He has No Right to a Direct Appeal. This Appeal Should be Dismissed.

Effective July 1, 2019, defendants have no right to appeal a final judgment of sentence for a conviction obtained by guilty plea. Iowa Code § 814.6(1)(a)(3). The Iowa Supreme Court has used the date that "judgment and sentence" are entered to determine whether section 814.6's appeal prohibition applies. *See State v. Macke*, 933 N.W.2d 226, 228 (Iowa 2019). Here, the district court entered judgment on Fetner's conviction on September 16, 2019. AGCR028389 Sent. Order; AGCR028473 Sent. Order; App. 37–42. Because judgment was entered after July 1, 2019, Fetner has no right to appeal. Iowa Code § 814.6(1)(a)(3); *see* AGCR028389 Sent. Order p.2 ("Pursuant to Iowa Code section 814.6(1)(a)(3) Defendant may not appeal the issue of guilt following a guilty plea without a showing

of good cause."); AGCR028473 Sent. Order p.2 (same); App. 38, 41. Fetner's conviction was not for an A felony. And Fetner has not alleged or established "good cause" as to why the appeal should be permitted to proceed. This Court should dismiss the appeal.

II. The Sentencing Court was Permitted to Rely on the Information Provided by Fetner's Attorney During the Sentencing Hearing.

Preservation of Error

The normal rules of error preservation do not apply to a direct appeal of a sentence. *See State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998). The State does not contest error preservation.

Standard of Review

Review is for correction of errors at law. *See State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." *Id.* (citing *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983)). It is the defendant's duty to overcome the presumption of regularity when challenging a court's sentence. *See State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). "Sentencing decisions of the district court are cloaked with a strong presumption in their favor." *State v. Thomas*, 547 N.W.2d

223, 225 (Iowa 1996) (citing *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995)). To the extent Fetner's sentencing challenge raises constitutional questions, review is de novo. *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009).

Merits

Generally, the reliance on improper factors by the sentencing court would require a remand for resentencing. *See State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998). The same is true even if the sentencing factor was secondary, as the court will not speculate about the weight given to a particular factor. *See State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981). Our appellate courts recognize that "the sentencing process can be especially demanding and requires trial judges to detail, usually extemporaneously, the specific reasons for imposing the sentence. The performance of this judicial duty can produce 'unfortunate phraseology' and unintended or misconstrued remarks. Comments can also be taken out of context." *State v. Thomas*, 520 N.W.2d 311, 314–15 (Iowa Ct. App. 1994).

Fetner argues the district court improperly considered an impermissible and irrelevant sentencing factor.[1] *See* Appellant's Br. pp.13–25. He challenges the court's reliance on information that Fetner worked at a day care center and that he may have been doing so while under the influence of controlled substances. *See* Plea/Sent. Tr. 11:19–12:1. Fetner submits that the consideration of this information violated his due process and equal protection rights. *See id.* The State submits the sentencing court was permitted to rely on the information because it was specifically provided to the court by Fetner's attorney for the purpose of considering it in making a sentencing determination. Thus, Fetner has failed to overcome the presumption of regularity.

Fetner specifically takes issue with the following portion of the reasoning the sentencing court provided for imposing the two sentences:

> [I]t's clear that, you know, you are persistent in your use of an illegal substance. I am terrified you've been helping in a day care. I would think that if the parents knew your history, they

[1] Fetner has split his single sentencing challenge into two separate sections (i.e., one section arguing the factor was impermissible and the other arguing the same factor was irrelevant). *See* Appellant's Br. pp.13–25. Because both challenges address the same issue, the State has combined its response.

> would definitely pull their children out of, you know, any day care. It's not safe for you to be caring for children if you're under the influence.

Plea/Sent. Tr. 11:20–12:1. The court's remarks do not reflect the consideration of an improper or irrelevant factor.

In making a recommendation for a suspended sentence, Fetner's attorney attempted to argue to the court there was mitigating information. *See* Plea/Sent. Tr. 7:23–10:5. Included in his attorney's argument was information that Fetner was running a day care center:

> He has a home there with a significant other and the two of them, along with, I believe, a third person, are running a day care center and so he helps where he can there in an effort to keep the expenses down for their home but also to provide for the family . . . .

Plea/Sent. Tr. 8:25–9:5. Inexplicably, Fetner now argues "there is nothing in the record to support the allegation that Fetner worked in a daycare center." Appellant's Br. p.15. Fetner also argues "[e]ven if there were evidence in the record that Fetner worked at a daycare center, such evidence would not be relevant . . . ." Appellant's Br. p.22.

The sentencing court did not err by considering Fetner's employment at a day care center. First, the sentencing court only

considered this information because it was admitted by Fetner. *See, e.g.*, *State v. Manser*, 626 N.W.2d 872, 874 (Iowa Ct. App. 2001) (citing *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982)) ("A sentencing court may consider or rely on unprosecuted charges if they are *admitted by the defendant* or otherwise proven." (emphasis added)). Second, when a sentencing court is considering a suspended sentence (as Fetner was requesting), a defendant's employment circumstances is a required sentencing consideration. Iowa Code § 907.5(1)(c). Information about Fetner running a day care center was neither unproven nor irrelevant.

Next, immediately before informing the court that Fetner was running a day care center, Fetner's attorney also informed the court that Fetner was self-medicating his anxiety with marijuana:

> One of the issues [Fetner] does have is the anxiety. He's, I guess, not very consistent with taking his medications so the marijuana seems like basically a way to self-medicate for the anxiety that he feels.

Plea/Sent. Tr. 8:19–:22. But despite this admission, Fetner now claims the court improperly speculated that he may have been under the influence of controlled substances while working in the day care center. *See* Appellant's Br. p.17. Additionally, Fetner asserts that

"[e]ven if there were evidence in the record showing Fetner worked at a daycare center while under the influence of a controlled substance, such evidence would not be relevant . . . ." Appellant's Br. p.21.

Because Fetner admitted to self-medicating his anxiety with marijuana, and because Fetner also admitted to running a day care center, the court reasonably concluded that Fetner was admitting that he may have been under the influence of marijuana during his work at the day care center. Sentencing courts may rely on information or conduct admitted by the defendant. *See Manser*, 626 N.W.2d at 874. Even looking beyond Fetner's self-medicating admission, Fetner's criminal history revealed that he was "persistent in [his] use of an illegal substance." Sent. Tr. 11:10–:21. Besides the present marijuana conviction Fetner was being sentenced for, he also "had six prior marijuana convictions" and he had "been to prison on drug charges." Sent. Tr. 7:11–:15; *see* AGCR028473 Trial Info.; App. 26–28. Fetner's employment at a day care center despite his continued possession—and admitted use—of controlled substances is relevant to the "protection of the community from further offenses by the defendant," and it is also relevant to the consideration of the defendant's "employment circumstances" and "substance abuse

history," which are factors a sentencing court must consider. Iowa Code §§ 901.5, 907.5(1)(c), 907.5(1)(e). Fetner's admitted conduct was relevant.

Fetner has failed to overcome the presumption of regularity and he has failed to demonstrate a violation of his constitutional rights. This Court should reject Fetner's claim and affirm.

CONCLUSION

This Court should affirm William Frank Fetner's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

Oral submission is unnecessary.

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:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **1,633** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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