IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-0955

STATE OF IOWA,
Plaintiff-Appellee,
vs.
GUILLERMO AVALOS VALDEZ,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY

The Honorable John. D. Ackerman

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTFICIATE OF SERVICE

The undersigned certifies that on February 1, 2019, a true copy of the foregoing instrument was served upon Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Guillermo Avalos Valdez, Fort Dodge Correctional Facility, 1550 L Street, Fort Dodge, IA 50501-5767.

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STATEMENT OF THE CASE

COMES NOW the Defendant-Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's proof brief filed on or about January 15, 2019. While the defendant's brief adequately addresses the issues presented for review, a short reply is appropriate to address certain contentions raised by the State.

ARGUMENT

In its attempt to backfill the holes in the sentencing hearing, the State invites the Court to reimagine the factors the district court *could* have relied on, not what the district court *did* rely on. The sentencing transcript, however, speaks for itself and establishes that the Court denied probation based on Valdez's immigration status. Valdez's sentence must be vacated.

First, the State's assertion that Valdez's undocumented status was not the sole factor or primary reason for denying probation is unsupported in the record. The district court did not state, although the State now argues, that the "facts support that Valdez was a significant drug trafficker deserving of harsh

punishment regardless of his immigration status." (State's Brief at 20). The *opposite* is in fact true: At sentencing the district court made it clear that it was denying probation based on Valdez's immigration status, stating: "I don't think probation would be appropriate with pleading to this charge *given his immigration status.*" (APP-29, Sentencing Tr. 33:1–3 (emphasis added)). This statement followed immediately after the district court's disclaimer concerning the significance of Valdez's immigration status[1] and belies the State's argument that Valdez's immigration status was not the sole or primary reason for denying probation.

Second, during sentencing the district court did not mention the factors the State now emphasizes in its attempt to cast Valdez as a "Mexican drug cartel trafficker[]." (State's Brief at 19–20). The district court made no mention of a "tattoo of a marijuana leaf and a grim reaper" or any affiliation with "Mexican cartel drug traffickers" during sentencing. Indeed, the Pre-Sentence Investigation Report (PSI) did not conclude that Valdez was a

[1] APP-28, Sentencing Tr. 32:21–23 ("The statement that you think this Court would give a U.S. citizen with the same record a suspended sentence is not accurate.").

danger to the community or that he was a member of a drug cartel, and in fact the PSI specifically stated that Valdez "scored in the *low* category of future violence and the *low* category for future victimization" and would "be supervised initially at the *low* normal level of supervision" based on his background. (CONF. APP-33, PSI at 8 (emphasis added)). Not even the *prosecutor* mentioned any tattoos or "Mexican drug cartel" affiliation during sentencing. (APP-24–25, Sentencing Tr. 28–29). But the State now, for the first time, strikes these rhetorical chords in its attempt to uphold Valdez's sentence on appeal, illustrating why scholars believe "[h]ispanics may have replaced African Americans as the most disadvantaged group at criminal sentencing." Michael T. Light, *The New Face of Legal Inequality: Noncitizens and the Long-Term Trends in Sentencing Disparities Across U.S. District Courts, 1992–2009*, 48 Law & Soc'y Rev. 447, 465 (2014).

Third, the State discusses in detail the "purposes" supplied by other courts to justify consideration of one's immigration status in sentencing. Each of those jurisdictions, however, prohibit at a minimum the use of one's immigration status as the sole factor

during sentencing. Moreover, in this case the district court failed to link Valdez's immigration status to the "purposes" the State asserts justifies consideration of immigration status, such as "[d]eported people cannot comply with the normal conditions of probation or achieve the rehabilitative purposes of probation," [u]ndocumented immigrants who are not deported cannot gain lawful employment," or "[d]isregard for immigration law could bear on the person's willingness to comply with probation." (State's Brief at 15–16). Had the district court intended to rely on other facts or "purposes" the State now recites on appeal, it should have said so. *See State v. Hill*, 878 N.W.2d 269, 275 (Iowa 2016); *State v. Thacker*, 862 N.W.2d 402 (Iowa 2015).

Fourth, the sentencing court's reference to the large quantity of marijuana merely references the crime to which Valdez pleaded guilty to and is not, by itself, an aggravating factor mandating prison. Drug offenses are classified by quantity. *See generally* Iowa Code § 124.401. It is a Class "C" felony to possess fifty- to one-hundred kilograms of marijuana. The district court's statement that "180 pounds [or approximately 80 kilograms] of marijuana is

one big deal" is simply a restatement of the charge and a recognition that a Class "C" felony is a "big deal." Any felony is a potentially a "big deal." But the legislature chose to give felons (including those who possessed 80 kilograms of marijuana) an opportunity for probation before the prison door is closed. This door should not have been shut based on Valdez's immigration status.

Finally, the State asserts "Valdez will be deported," but this argument overlooks the statutory and due process guarantees afforded to undocumented immigrants. *See Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439, 1449, 123 L. Ed. 2d 1 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S. Ct. 374, 376, 92 L. Ed. 2d 433 (1948). As the United States Supreme Court has observed, "Deportation is a drastic measure and at times the equivalent of banishment or exile," *Fong Haw Tan*, 333 U.S. at 10, and may "result in the loss of 'all that makes life worth living,' " *Bridges v. Wixon*, 326 U.S. 135, 147, 65 S. Ct. 1443, 1449, 89 L. Ed. 2d 2103 (1945). Allowing courts to deny probation based on presumed deportation threatens to

undermine statutory protections and due process guarantees of the Iowa and United States Constitutions to the extent the sentencing decision is made *before* the immigrant has received the process that is required. *See* U.S. Const. amends V, XIV; Iowa Const. art. I, § 9; *see* 8 U.S.C. § 1228(b)(4)(A)–(F) (stating an alien subject to expedited removal proceedings is entitled to, *inter alia*, reasonable notice of the charges and an opportunity to inspect evidence and rebut the charges, representation by counsel at no expense, a determination that the immigrant is the immigrant identified in the notice, and a record of the proceedings); *see also Bamba v. Elwood*, 252 F. Supp. 2d 195, 203–04 (E.D. Pa. 2003) (addressing due process challenges to expedited removal procedure).

CONCLUSION

In the proceedings below, the district court placed too great of weight on Valdez's immigration status when denying probation under either the sole basis test or a more muscular test under the Iowa Constitution. The State's attempt to rewrite the district court's sentencing decision should be rejected. For the reasons

stated above and in Valdez's opening Brief, Valdez's sentence should be vacated.

Respectfully submitted,

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CERTIFICATE OF COST

I, Scott M. Wadding, certify that there was no cost to reproduce copies of the preceding brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

Certified by: /s/ *Scott M. Wadding*

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, 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) because this brief contains 1,206 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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 2016 in 14-point font size in Century type style.

Certified by: /s/ *Scott M. Wadding*

PROOF OF SERVICE AND CERTIFICATE OF FILING

I, Scott M. Wadding, certify that on February 1, 2019, I served this document by filing an electronic copy of this document with Electronic Document Management System to all registered filers for this case. A review of the filers in this matter indicates that all necessary parties have been and will be served in full compliance with the provisions of the Rules of Appellate Procedure.

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