IN THE SUPREME COURT OF IOWA
Supreme Court No. 16–0203

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER JEPSEN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CRAWFORD COUNTY
THE HON. STEVEN J. ANDREASEN, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Was the Defendant's Counsel Ineffective for Declining to Argue That the Defendant Was Entitled to Credit for Time Served on Probation While His Mandatory Sentence of Incarceration Was Illegally Suspended?

Authorities

North Carolina v. Pearce, 395 U.S. 711 (1969)
Strickland v. Washington, 466 U.S. 668 (1984)
United States v. DiFrancesco, 449 U.S. 117 (1980)
United States v. Martin, 363 F.3d 25 (1st Cir. 2004)
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State v. Canas, 571 N.W.2d 20 (Iowa 1997)
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State v. Valin, 724 N.W.2d 440 (Iowa 2006)
State v. Weise, 201 N.W.2d 734 (Iowa 1972)
Trecker v. State, 320 N.W.2d 594 (Iowa 1982)

ROUTING STATEMENT

The issue raised here can be resolved through the application of settled legal principles. *See Trecker v. State*, 320 N.W.2d 594, 595 (Iowa 1982). As such, this case meets the criteria for transfer to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Christopher Jepsen was convicted on one count of sexual abuse in the third-degree, a Class C felony, in violation of Iowa Code section 709.4(2)(c) (2009), and one count of sexual abuse in the third degree, a Class C felony, in violation of Iowa Code section 709.4(2)(b) (2009). His second conviction was a forcible felony under section 702.11, because the victim was thirteen years old—which meant the resultant term of incarceration could not be suspended under section 907.3. Nonetheless, the sentencing court imposed ten-year prison sentences for each conviction and suspended them, and the defendant was placed on probation. *See* Judgment/Sentence (9/23/11); App. 80.

Subsequently, after he violated the terms of his probation, the State noticed the illegality of the original sentence and filed a motion to correct it pursuant to Iowa R. Crim. P. 2.24(5). *See* Mot. to Correct Illegal Sentence (12/21/15); App. 87.

The district court held a hearing on the State's motion, and found it "did not have the authority under Section 907.3 to suspend the sentence for Count 2 and place the defendant on probation." *See* Motion Tr. p.11,ln.16–p.12,ln.21. The court proceeded to resentence the defendant, with reference to an updated PSI report and materials filed in relation to an anticipated revocation hearing. *See* Motion Tr. p.15,ln.23–p.23,ln.7. The court sentenced the defendant to serve two concurrent ten-year terms of incarceration. *See* Motion Tr. p.36,ln.18–p.37,ln.7; *see also* Corrected Judgment/Sentence (1/29/16); App. 172. Regarding credit for time served on probation, the court said this:

> The defendant is given credit for time served in this case pursuant to Iowa Code Section 903A.5. This Court does not believe that any *Anderson* credit under Section 907.3 applies under the circumstances. To the extent the defendant has administrative claims that he can request in regard to that credit issue with the Department of Corrections, I don't believe I have the authority to preclude those claims at this time, but the Court's sentence is going to be limited to credit under Section 903A.5.

Motion Tr. p.37,ln.8–18 (citing *Anderson v. State*, 801 N.W.2d 1 (Iowa 2011)). On appeal, the defendant argues that his counsel was ineffective for failing to raise a Double Jeopardy argument and insist the resentencing court order that he receive credit for time served on probation, to be applied to his new sentence of incarceration.

Statement of Facts & Course of Proceedings

In 2010, when the defendant was 25 years old, he performed sexual acts with two young teenage girls. During the summer, he digitally penetrated thirteen-year-old H.B. on multiple occasions and performed oral sex on her on one occasion. *See* Trial Tr. p.49,ln.8–p.62,ln.22. During the fall, he had sexual intercourse with E.G. on multiple occasions; the first time was on her 14th birthday. *See* Trial Tr. p.16,ln.5–p.32,ln.12. He was tried and convicted on two counts of sexual abuse in the third degree; the jury specifically found that H.B. "was 12 or 13 years old" when the defendant sexually abused her. *See* Jury Instr. 16 (8/24/11); App. 69.

The defendant was not eligible for a suspended sentence on the third-degree sexual abuse conviction relating to his abuse of H.B. *See* Iowa Code §§ 702.11(2), 709.4(2)(b), & 907.3 (2009). But the sentencing court suspended both of his ten-year sentences and put him on probation. *See* Judgment/Sentence (9/23/11); App. 80.

The defendant violated the terms of his probation—among other violations, he "admitted that that he had been surfing the internet for pornographic images of children." *See* Revocation App. (10/28/14) at 2; App. 85; *see also* Addendum (1/12/16); App. 93.

Subsequently, the State noticed the illegality of the original sentence and filed a motion to correct it pursuant to Iowa R. Crim. P. 2.24(5). *See* Motion to Correct Illegal Sentence (12/21/15); App. 87. The district court ordered preparation of an updated PSI report, and both parties submitted briefs arguing various issues surrounding the State's motion and the possibility of resentencing.

After argument and briefing, the district court concluded that the defendant's original sentence was illegal—which meant that he needed to be resentenced on those convictions.

> The Court in looking at this matter first does conclude that the original sentence imposed was illegal. . . .
>
> [. . .]
>
> Because that Count 2 was a forcible felony, the Court did not have the authority under Section 907.3 to suspend the sentence for Count 2 and place the defendant on probation.

Motion Tr. p.11,ln.16–p.12,ln.21; *see also* Order (2/1/16); App. 181. The district court conducted a full resentencing hearing, and then imposed a ten-year sentence of incarceration on each count, both to run concurrently. *See* Motion Tr. p.15,ln.23–p.37,ln.7.

The court mentioned that it would not order the DOC to give the defendant credit for time served on probation, because *Anderson* was inapposite. *See* Motion Tr. p.37,ln.8–18. After that, counsel for

both sides briefly addressed the issue—the State agreed with the court, and the defendant argued he was entitled to credit for time served on probation. *See* Motion Tr. p.40,ln.4–p.42,ln.5. The court reiterated:

> For the record, the basis of the Court's conclusion is, again, from a procedural standpoint, this is a new sentence. Mr. Jepsen is not being sent to prison based upon a revocation of that probation under Section 907.3, which was applied by the *Anderson* case. That is where the credit is received following a revocation of probation.

Motion Tr. p.42,ln.6–12. As such, the resentencing court ordered that the defendant be "given credit for time served in the county jail awaiting disposition of the within matter pursuant to Iowa Code Section 903A.5." *See* Corrected Judgment/Sentence (1/29/16) at 2; App. 173.

ARGUMENT

I. As a Matter of Law, the Defendant Is Not Entitled to Credit for Time Spent on Probation, Serving an Illegal Sentence.

Preservation of Error

The defendant treats this as an ineffective-assistance claim. Ineffective assistance of counsel represents "an exception to the general rules of error preservation" because failure to preserve error can form the basis for a claim. *State v. Stallings*, 658 N.W.2d 106, 108 (Iowa 2003) (citing *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982)), *overruled on other grounds by State v. Feregrino*, 756 N.W.2d 700 (Iowa 2008). Here, the alleged failure to preserve error is defense counsel's failure to argue for credit for time on probation. While defense counsel made a similar argument, she did not cite to the Fifth Amendment or allege a Double Jeopardy violation, as the defendant now argues on appeal. *See* Motion Tr. p.41,ln.21–p.42,ln.5.

Moreover, if a Double Jeopardy problem existed, this sentence would be illegal. Arguments challenging an illegal sentence may be raised at any time, and generally applicable error preservation rules do not apply. *See, e.g.*, *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009); *Overton v. State*, 493 N.W.2d 857, 859 (Iowa 1992).

Standard of Review

Claims of ineffective assistance of counsel are reviewed *de novo*. *See Dempsey v. State*, 860 N.W.2d 860, 868 (Iowa 2015).

Unlike the challenge in *Anderson*, this is a Double Jeopardy challenge under the Fifth Amendment of the US Constitution. Rulings on constitutional issues would be reviewed *de novo*.

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Here, the alleged breach is a failure to raise a Double Jeopardy challenge to the district court's refusal to order credit for time served. *See* Defendant's Br. at 16–31. "Counsel cannot fail to perform an essential duty by merely failing to make a meritless objection." *See State v. Bearse*, 748 N.W.2d 211, 215 (Iowa 2008). Additionally, the alleged prejudice is the loss of the opportunity for the district court to agree with his Double Jeopardy argument and order that he get credit for time served on probation. Ultimately, this claim succeeds or fails based on the merits of the hypothetical Double Jeopardy challenge.

Here, that hypothetical challenge would have failed because there is no Double Jeopardy problem. "[A]fter a defendant has *completed* a sentence, a legitimate expectation in the finality of the sentence arises and double jeopardy principles prevent reformation of the original, albeit illegal, completed sentence." *See State v. Houston*, No. 09–1623, 2010 WL 5050564, at *3 (Iowa Ct. App. Dec. 8, 2010) (citing *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980)). But since the defendant did not complete his probation (or come close), the defendant "cannot acquire a legitimate expectation of finality in a sentence which is illegal, because such a sentence remains subject to modification." *People v. Williams*, 925 N.E.2d 878, 888 (N.Y. 2010) (quoting *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992)); *see also State v. Bloomer*, 909 N.E.2d 1254, 1261 (Ohio 2009) ("Since his original sentence lacked a statutorily mandated term, it failed to comply with law, and therefore Bloomer had no legitimate expectation in its finality."). Indeed, the defendant would have been expecting *more* punishment from flagrantly violating the terms of his probation: two consecutive ten-year terms of incarceration. *See* Judgment/Sentence (9/23/11); App. 80. So correcting this sentence violated neither the letter nor the spirit of the law.

The defendant focuses on the question of credit for time served on probation. If the defendant had served time in prison, in jail, or under some other level of restraint comparable to incarceration, he would likely receive credit for time served in prison, just as he got "credit for time served in the county jail awaiting disposition" before his illegal sentence was corrected. *See* Corrected Judgment/Sentence (1/29/16) at 2; App. 173. The defendant wants credit for time served on probation to apply towards the time he must serve in prison—on a one-to-one basis—and he claims *North Carolina v. Pearce* supports his claim that doing anything else would violate Double Jeopardy. *See* Defendant's Br. at 18–19 (quoting *Pearce*, 395 U.S. 711, 719 (1969)).

Pearce dealt with a successful appeal from a valid sentence of incarceration, and held that the protection against Double Jeopardy "is violated when punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction for the same offense. *See Pearce*, 395 U.S. at 718. It also mentioned fines:

> We have spoken in terms of imprisonment, but the same rule would be equally applicable where a fine had been actually paid upon the first conviction. Any new fine imposed upon reconviction would have to be decreased by the amount previously paid.

Id. at 718 n.12. *Pearce* suggests that Double Jeopardy demands repayment of "like for like"—time spent incarcerated must be credited against a subsequent sentence of incarceration for the same offense, and fines already paid are credited against subsequent fines—but Iowa courts do not read *Pearce* to suggest that the State must create some exchange rate between two wholly dissimilar punishments.

The defendant argues that he should receive credit for time on probation on a one-to-one basis. But while time spent on probation was part of the punishment imposed, its purpose was to provide the defendant with opportunities to make/demonstrate progress towards rehabilitation and reintegration into society. *See, e.g.*, *State v. Valin*, 724 N.W.2d 440, 445–46 & n.3–4 (Iowa 2006). While on probation, he enjoyed relative freedom from constraint on his daily activities, including his movements, associations, and pursuits—granting credit for time served on probation would be akin to granting credit for time spent on pretrial release or appeal bond. *See also People v. Whitfield*, 888 N.E.2d 1166, 1174–77 (Ill. 2007) (holding "the rule set forth in *Pearce* does not apply to probation credit because probation is not the punitive equivalent of incarceration"). Neither Iowa law nor intuitive conceptions of justice and fair play demand such a result.

The defendant relies extensively on *United States v. Martin*, but his discomfort with *Martin*'s refusal to equate one day on probation with one day of incarceration is illustrative. *See* Defendant's Br. at 19–22 & n.1 (quoting *United States v. Martin*, 363 F.3d 25, 37 (1st Cir. 2004)). The defendant would like Iowa courts to apply *Martin* to give him credit for each day spent on probation without examining the nature of the punishment imposed and partially served, allowing him to escape *any* real punishment if he had been close to running out the clock on his probation. *Martin* clearly stated that such a result would be unacceptable. *See United States v. Martin*, 363 F.3d 25, 40–41 (1st Cir. 2004) ("Allowing Martin to escape a proper sentence because the district court chose home detention in lieu of prison would merely compound judicial error.").

The defendant is correct that "it is impossible to conceive of any formula for equating a certain number of days on probation to a single day of incarceration that is not completely arbitrary." *See* Defendant's Br. at 21 n.1. This illustrates the folly of *Martin* and demolishes his entire advocacy. Constitutional protections against Double Jeopardy demand that he receive credit on a "like for like" basis—but the Constitution does not require that he receive even a single day's credit

against his term of incarceration from the time he spent effectively free on probation (much less the time he spent flagrantly violating its terms, viewing child pornography and posting on dating websites). Even *Martin* noted profound differences between these punishments:

> The record shows that Martin's home detention was not particularly onerous. With prior approval from the probation office, he was allowed to leave his home for medical reasons, work, charitable activities, religious observances, family activities, and to attend to any "ordinary necessities."

See Martin, 363 F.3d at 39 n.24. Refusing to give credit for time spent on probation to offset a term of incarceration recognizes that reality. *Trecker v. State*, 320 N.W.2d 594, 595 (Iowa 1982) ("Denial of credit is appropriate under circumstances where the restrictions imposed cannot be equated with incarceration.").

Moreover, *Martin*'s remedy is framed by the operation of federal sentencing guidelines. *See id.* at 39 ("[T]he proper means for crediting probation, including home detention, against imprisonment is a downward departure by the district court upon remand."). But an Iowa defendant cannot receive sentencing credit for any time served on probation where "no provision specifically authorized such a sentencing credit." *Anderson v. State*, 801 N.W.2d 1, 4 (Iowa 2011). The defendant cannot claim a right to a credit unauthorized by law.

In the end, "[a] court has no authority to mitigate punishment by providing for a sentence not authorized by statute." *See State v. Ohnmacht*, 342 N.W.2d 838, 842 (Iowa 1983). "Such unauthorized sentencing gives the defendant 'no vested right to prevent assessment of penalties authorized by . . . statute even where they are greater.'" *Id.* (quoting *State v. Weise*, 201 N.W.2d 734, 738 (Iowa 1972)). Moreover, "absent a specific provision allowing for it, a court does not err by denying credit for time served on probation." *State v. Canas*, 571 N.W.2d 20, 25 (Iowa 1997) (quoting *Trecker*, 320 N.W.2d at 595). Giving credit for time served on probation under the original sentence would mitigate the statutorily mandated punishment by substituting the defendant's comparatively lenient probation—which would subvert the legislative aim of those prescribed punishments in a way the Constitution does not require and that Iowa law strictly prohibits. This Court should reject the defendant's claim that he is entitled to a windfall reduction in the length of his sentence of incarceration based on judicial error that allowed him to live relatively free of restrictions and resume his hunt for vulnerable victims.

CONCLUSION

The State respectfully requests that this Court affirm the corrected sentencing order and deny the ineffective-assistance claim.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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