

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) S.CT. NO. 19-0109  
 )  
 IRVIN JOHNSON, JR., )  
 )  
 Defendant-Appellant. )

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR BLACK HAWK COUNTY  
HONORABLE DAVID STAUDT, JUDGE

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APPELLANT'S BRIEF AND ARGUMENT

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**CERTIFICATE OF SERVICE**

On the 17th day of July, 2019, 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 Irvin Johnson Jr., No. 6512064, North Central Correctional Facility 313 Lanedale, Rockwell City, IA 50579.

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## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

**I. WHETHER THE OFFENSES FELONY ELUDING, WHILE POSSESSING MARIJUANA, AND POSSESSION OF MARIJUANA MUST MERGE UNDER DOUBLE JEOPARDY AND IOWA CODE SECTION 709.1? STATE V. ECKRICH'S HOLDING THAT THE LEGISLATURE INTENDED SEPARATE PUNISHMENTS FOR THE OFFENSES IS NO LONGER VALID CASE LAW. THE 2018 LEGISLATURE STRUCK IOWA CODE SECTION 901.5(10) WHICH REVOKED SECTION 124.401 VIOLATORS' DRIVERS LICENSES FOR 180 DAYS. SECTION 901.5(1) WAS THE BASIS FOR ECKRICH'S CONCLUSION THE LEGISLATURE INTENDED SEPARATE PUNISHMENTS.**

### Authorities

State v. Bruegger, 773 N.W.2d 862, 869 (Iowa 2009)

State v. Eckrich, 670 N.W.2d 647, 648 (Iowa Ct. App. 2003)

State v. West, 924 N.W.2d 502, 504 (Iowa 2019)

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Iowa Code § 901.5(10) (2017)

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H.F. 2502, § 102

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U.S. Const. amend. V

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Iowa Code § 321J.2(2)(a) (4)

Iowa Code § 901.5(10) (1999)

Iowa Code § 124.401(5)

## **ROUTING STATEMENT**

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is an appeal by the Defendant-Appellant, Irving Johnson, Jr., from the judgment and sentence following appellant's pleas of guilty to these offenses in three different cases: felony eluding, while possessing marijuana, in violation of Iowa Code section 321.279(3) (2017) (count 1), driving while barred in violation of sections 321.561 and 321.555 (2017) (count 2), and possession of marijuana, first offense, in violation of 124.401(5) (2017) (count 3) (FECR219587); possession of marijuana (accommodation offense) in violation of 124.410 (2017) (FECR223080); and felony eluding, while possessing marijuana, in violation of Iowa Code section 321.279(3) (as amended 2017) and (count 1) and possession of marijuana, first offense, in violation of 124.401(5) (as amended 2017) (count 3)

(FECR223777). The Honorable David F. Staudt presided at the plea proceeding and over sentencing in Black Hawk County District Court.

**Course of Proceedings in the District Court:** On June 15, 2017, Johnson was charged by trial information with the offenses felony eluding, while possessing marijuana, in violation of Iowa Code section 321.279(3) (2017) (count 1), driving while barred in violation of sections 321.561 and 321.555 (2017) (count 2), and possession of marijuana, first offense, in violation of 124.401(5) (2017) (count 3) (FECR219587 Trial Information, 6/15/17)(App. pp. 5-7). On February 8, 2018, Johnson was charged with possession of marijuana with intent to deliver in violation of 124.401(1)(d) (as amended 2017). (FECR223080 Trial Information, 2/8/18)(App. pp. 8-9). On February 27, 2018, Johnson was charged by trial information with the offenses felony eluding, while possessing marijuana, in violation of Iowa Code section 321.279(3) (2017) (count 1), driving while barred in violation of sections 321.561 and 321.555 (2017) (count 2), and possession of marijuana, first offense, in violation

of 124.401(5) (as amended 2017) (count 3) (FECR223777 Trial Information, 2/27/18)(App. pp. 10-12).

In the matter of FECR219587 Johnson pled guilty to each of the counts as charged. (FECR219587 Order Following Guilty Plea, 11/5/18)(App. pp. 13-14). In the matter of FECR223080 Johnson pled guilty to the amended charge of possession of marijuana, accommodation offense, in violation of Iowa Code section 124.410. (FECR223080 Order Following Guilty Plea, 11/5/18; FECR223080 Nunc Pro Tunc, 11/8/18) (App. pp. 15-16; 17-18). Finally, in the matter of FECR223777 Johnson pled guilty to felony eluding, while possessing marijuana, in violation of Iowa Code section 321.379(3) and possession of marijuana. (FECR223777 Order Following Guilty Plea, 11/5/18; FECR223080 Nunc Pro Tunc, 11/8/18) (App. pp. 19-20; 21-22).

In the matter of FECR219587, the district court adjudged Johnson guilty of: (1) felony eluding, for possession of marijuana, in violation 321.279(3), sentenced him to five years, and imposed a \$750 that was suspended; (2) driving while

barred in violation of sections 321.360 and 321.555, sentenced him to two years, and imposed a \$625 fine which was suspended; and (3) possession of marijuana in violation of section 124.401(5) and sentenced him to 180 days in jail. (FECR219587 Order Judgment and Sentence, ¶¶1-2, 1/4/19) (App. pp. 23-24). The district court ordered the sentences be served concurrent to each other. (Id. ¶4)(App. p. 24). For the matter of FECR223080, the district court adjudged Johnson guilty of possession of marijuana, accommodation offense, sentenced him to 180 days in jail, and fined him \$315 (not suspended). (FECR223080 Order Judgment and Sentence, pp. 1-2, 1/4/19)(App. pp. 28-29). The sentences were ordered to be served current to the other sentences. (Id. p.2)(App. p. 29). Finally, in FECR223777 the district court adjudged Johnson guilty of (1) felony eluding for possession of marijuana in violation 321.279(3), sentenced him to five years, and imposed a \$750 fine that was suspended; and (2) possession of marijuana in violation of section 124.401(5) and sentenced him to 180 days in jail. (FECR223777 Order Judgment and

Sentence, ¶¶1-2, 1/4/19)(App. pp. 32-33). The sentences were ordered to be served concurrent to each other and all sentences imposed in FECR219587 and FECR223080. (Id. ¶4)(App. p. 33). Count 2, driving while barred, was dismissed. (Id. ¶17) (App. p. 34).

Notice of appeal was timely filed. (FECR219587 Notice, 1/10/19; FECR223080 Notice, 1/10/19; FECR223777 Notice, 1/10/19) (App. pp. 37-38; 39-40; 41-42).

**Facts:** Johnson agreed that the minutes of testimony were substantially correct. (Plea tr. p.12 L.7-10).

On May 24, 2017, Waterloo police officer Tyler Brownell observed Johnson driving on Franklin Street. Brownell knew that Johnson's driver's license was barred. Brownell, who was driving a marked squad car, turned on his emergency lights and initiated a traffic stop. Johnson did not stop. Brownell then turned on his siren. Johnson sped away at 55 mph in a 25 mph hour zone. Johnson eventually crashed his vehicle into another vehicle. Johnson fled on foot, but was later apprehended. In a search of the area around the vehicle

officers found a pill bottle containing marijuana 10 to 15 feet from the driver's side. (FECR219587 Minutes, Brownell incident report, 6/15/17)(Conf. App. pp. 31-35).

On January 1, 1018, Tindall pulled over a car for having expired license plate tags. During the stop Tindall could smell marijuana and observed loose marijuana on the lap of passenger Kelvin Plain. Plain also had an open bottle of beer at his feet. Plain was asked to exit the vehicle. After he exited, Tindall observed a baggie with green leafy substance residue between the seat and the door. Johnson was also asked to exit the vehicle. When Johnson stepped out a blunt fell to the ground at his feet. The blunt contained marijuana.

(FECR223080 Minutes, Tindall incident report, 2/8/18)(Conf. App. pp. 37-40).

On February 16, 2018, Waterloo police officer Andrew Tindall attempted to conduct a traffic stop on Johnson because he knew Johnson did not have a valid license. Tindall activated his lights and siren. He was driving a marked squad car. Johnson did not stop, and at times, reached speeds of 60

mph in a 25 mph zone. Tindall observed Johnson throw something out his window at an intersection. Ultimately, Johnson crashed into a tree and was seized. Officers were directed to search the intersection where Tindall saw Johnson throw something out his window. A small plastic bag containing marijuana was found. (FECR223777 Complaint and Affidavit for eluding, p.2, 2/16/18; FECR223777 Minutes, Tindall incident report, 2/27/18)(Conf. App. p. 5; 55-59).

Any additional facts relevant to the appeal will be discussed in the argument below.

## **ARGUMENT**

**I. THE OFFENSES FELONY ELUDING, WHILE POSSESSING MARIJUANA, AND POSSESSION OF MARIJUANA MUST MERGE UNDER DOUBLE JEOPARDY AND IOWA CODE SECTION 709.1. STATE V. ECKRICH'S HOLDING THAT THE LEGISLATURE INTENDED SEPARATE PUNISHMENTS FOR THE OFFENSES IS NO LONGER VALID CASE LAW. THE 2018 LEGISLATURE STRUCK IOWA CODE SECTION 901.5(10) WHICH REVOKED SECTION 124.401 VIOLATORS' DRIVERS LICENSES FOR 180 DAYS. SECTION 901.5(1) WAS THE BASIS FOR ECKRICH'S CONCLUSION THE LEGISLATURE INTENDED SEPARATE PUNISHMENTS.**

**Preservation of Error:** The court's entry of a judgment

and sentence for both felony eluding, while possessing marijuana, and possession of marijuana was a violation of double jeopardy and Iowa Code 701.9 (2019), and therefore, an illegal sentence. An illegal sentence may be raised at any time. State v. Bruegger, 773 N.W.2d 862, 869 (Iowa 2009).

**Scope of Review:** Constitutional violations are reviewed de novo. State v. Eckrich, 670 N.W.2d 647, 648 (Iowa Ct. App. 2003). Failure to merge convictions as required by statute is reviewed for correction of errors at law. See State v. West, 924 N.W.2d 502, 504 (Iowa 2019)(citing State v. Love, 858 N.W.2d 721, 724 (Iowa 2015)).

**Merits:** Johnson submits that his convictions for felony eluding, while possessing marijuana, and possession of marijuana should merge. Prior to 2018, the controlling case on the matter was State v. Eckrich, 670 N.W.2d 647 (Iowa Ct. App. 2003). Eckrich held, in part, that the legislature did not intend for these two offenses to merge as evidenced by the fact that felony eluding did not include all the same punishments as possession of marijuana. Specifically, a violation of Iowa Code

section 124.401 required the department of transportation to revoke a person's driver's license for 180 days. See Iowa Code § 901.5(10) (2017) ("the court shall order the department of transportation to revoke the defendant's driver's license...for one hundred eighty days...if the defendant is being sentenced for any of the following offenses: (1) A controlled substance offense under 124.401...."). The license revocation was the only additional punishment for possession of marijuana. In 2018 the Iowa legislature struck Iowa Code section 901.5(10). Acts 2018 (87 G.A.) ch. 1172, H.F. 2502, § 102. This change undermines the Eckrich court's reasoning for not merging felony eluding, while possessing marijuana, and possession of marijuana. Re-analyzing the offenses felony eluding while possessing marijuana and possession of marijuana under current case law demonstrates that they should have been merged.

Johnson was convicted of a class "D" eluding, referred to as felony eluding, in both FECR219587 and FECR223777.

Felony eluding is defined as a follows:

The driver of a motor vehicle commits a class “D” felony if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle that is driven by a uniformed peace officer after being given a visual and audible signal as provided in this section, and in doing so exceeds the speed limit by twenty-five miles per hour or more, and if any of the following occurs:

- a. The driver is participating in a public offense, as defined in section 702.13, that is a felony.
- b. *The driver is in violation of section 321J.2 or 124.401.*
- c. The offense results in bodily injury to a person other than the driver.

Iowa Code § 321.279(3)(b). In both FECR219587 and FECR223777 the underlying alternative was possession of marijuana a violation of section 124.401(5). (Plea tr. p.15 L.12-24, p.16 L.18-p.17 L.6). Johnson was also convicted in each in those cases of possession of marijuana in violation of Iowa Code section 124.401(5).

The Fifth Amendment to the United States Constitution holds that no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V.

This provision is applicable to the States through the Fourteenth Amendment to the United States Constitution. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187, 194 (1977). The amendment provides a criminal defendant with three basic protections: “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” State v. Schmitz, 610 N.W.2d 514, 515 (Iowa 2000).

The Iowa Code provides:

No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code § 701.9 (2015). Likewise, Iowa Rule of Criminal Procedure 2.6(2) provides: “upon prosecution for a public offense, the defendant may be convicted of either the public offense charged or an included offense, but not both.” Iowa R.

Crim. P. 2.6(2) (2015). The statute and the rule express the merger doctrine in Iowa. State v. Anderson, 565 N.W.2d 340, 343 (Iowa 1997). Section 701.9 is a codification of double jeopardy protection against cumulative punishment. State v. Ceretti, 871 N.W.2d 88, 92 (Iowa 2015); State v. Halliburton, 539 N.W.2d 339, 344 (Iowa 1995). This court uses the same approach for both the double jeopardy challenges and 701.9 challenges. State v. West, 924 N.W.2d 502, 509 (Iowa 2019).

Iowa courts apply a strict statutory approach when considering merger issues. State v. Anderson, 565 N.W.2d at 343. “Under this approach, if the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater.” Id. (citing State v. Jeffries, 430 N.W.2d 728, 730 (Iowa 1988)). Courts also adhere to the impossibility test, which provides that “one offense is a lesser-included offense of the greater when the greater offense cannot be committed without also committing the lesser.” Id. (citing State v. McNitt, 451 N.W.2d 824, 825 (Iowa 1990)).

The court, however, also requires a second step in the merger analysis: whether the legislature intended cumulative punishment. West, 924 N.W.2d at 511-12 (the court noted, however, Justice Carter argued against the legislative intent analysis for section 709.1 as going beyond the statutory language). In determining whether the legislature intended one offense to merge into another, this court has looked at the penalties assigned each offense. “[W]here a greater offense has a penalty that is not in excess of the lesser included offense, a legislative intent to permit multiple punishments arises.” Id. at 511 (citing Halliburton, 539 N.W.2d at 344–45; State v. Lewis, 514 N.W.2d 63, 69 (Iowa 1994)). “Otherwise there would be little point to the greater offense.” Id.

In State v. West the problem was the offense with the greater penalty (delivery of controlled substance) would be merged into an offense with a lesser penalty (involuntary manslaughter by public offense), thereby, resulting in a person receiving a lesser penalty than a person only convicted of the offense with the greater penalty. Id. at 511-12.

In State v. Eckrich the court determined that the legislature intended cumulative punishment because there were *different* penalties for the two offenses in question. Eckrich was charged with felony eluding, operating while under the influence, and possession of a controlled substance (marijuana) all involving the same conduct. Eckrich argued the OWI and the possession offenses merged into the felony eluding. Id. at 649. This court concluded the legislature intended cumulative punishment because even though the OWI merged into the felony eluding, the OWI conviction carries several additional penalties not included in the felony eluding conviction. Id. at 649-50. Specifically, an OWI conviction has the additional penalties of revocation of a driver's license, substance abuse evaluation and treatment, attending a drinking driver's course, and, when available and appropriate, attending a reality education substance abuse prevention program. Id. (citing section 321J.2(2)(a)(3) and (4)).

Eckrich went on to address felony eluding and possession of marijuana. And possession of a controlled had the

additional penalty of revocation of one's driver's license for 180 days. Id. at 650; see Iowa Code § 901.5(10) (1999). This court concluded that the additional penalty demonstrated that the legislature intended cumulative punishment. Id.

Eckrich is no longer good law as to its holding that felony eluding and possession were intended to have cumulative punishment. In 2018 the Iowa legislature struck Iowa Code section 901.5(10). Acts 2018 (87 G.A.) ch. 1172, H.F. 2502, § 102. There is no longer any penalties applying to the possession offense that do not apply to the felony offense.

So applying the legislative intent analysis of West and Eckrich, there is no longer an indication the legislature intended cumulative punishment. Looking strictly at the elements, the possession offense merges into the felony eluding offense. Then punishment for felony eluding is five years. Iowa Code § 321.279(3)(b). The penalty for possession of marijuana, first offense, is no more than six month in the county jail; second marijuana offense is a penalty of no more than one year; and third marijuana offense is an aggravated

offense of no more than one year. Iowa Code § 124.401(5).

Even if the controlled substance is other than marijuana or the prior offenses were not marijuana, the greatest possible penalty for possession is five years. Id. At no point does the penalty for the included possession offense ever exceed the penalty for the felony eluding. Cf. West, 924 N.W.2d 510-12 (greater offense had a lesser penalty).

Therefore, there was no showing that the legislature intended to authorize cumulative punishment for felony eluding and possession of marijuana arising out of the same conduct. The two offenses should have been merged in both FECR219587 and FECR223777.

### **CONCLUSION**

For the reasons stated above, the defendant respectfully requests this court to vacate his sentence and remand for resentencing.

### **NONORAL SUBMISSION**

Counsel does not request to be heard in oral argument.

**ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 2.48, 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 BRIEFS**

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) because:

this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 2,703 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

  
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