

IN THE SUPREME COURT OF IOWA

Supreme Court No. 19-1139

STATE OF IOWA
PLAINTIFF-APPELLEE

vs.

MERCEDES JOJEAN DAMME
DEFENDANT-APPELLANT

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR GRUNDY COUNTY

Nos. AGCR15098 and AGCR15099

The Honorable Jeffrey L Harris

APPELLANT'S FINAL BRIEF AND ARGUMENT

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**THE COURT ERRED AND ABUSED DISCRETION IN
CONSIDERING IMPROPER FACTORS WHEN SENTENCING
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Authorities**

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State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981)

**II THE COURT ERRED BY NOT ADVISING DAMME OF
HER RIGHT TO FILE A MOTION IN ARREST OF
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Authorities

State v. Hughes, 863 N.W.2d 301 (Iowa App., 2015)

State v. Hinners, 471 N.W.2d 841, 845 (Iowa 1991)

**II COUNSEL WAS INEFFECTIVE BY BREACHING
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ROUTING STATEMENT

Pursuant to Iowa R. of App. P. 6.1101(3)(a), the Appellant requests that this case be transferred to the Court of Appeals, as it involves the application of existing legal principles to the questions presented.

STATEMENT OF THE CASE

1. NATURE OF THE CASE

This is an appeal by Mercedes JoJean Damme from her conviction for two charges of Theft 3rd Degree in Grundy County, Iowa. Damme entered Guilty Pleas in both cases in Court on March 18, 2019, with sentencing hearing on July 1, 2019. Damme was sentenced in each case to be committed to the custody of the Department of Corrections for an indeterminate term of 2 years, with the terms running concurrently. Defendant appeals.

2. COURSE OF PROCEEDING

Mercedes JoJean Damme (“Damme”) was charged with Theft 3rd Degree, in two separate cases by trial information on May 22, 2018, in Grundy County, in violation of Iowa Code Section(s) 714.1(1) & 714.2(3). (AGCR015098 and AGCR015099 Trial Informations 5/22/2018) (Appx. 4-7). Damme

qualified for and was appointed counsel. (AGCR015098 and AGCR015099 Orders of Appt of Counsel 4/23/2018).

Damme entered a Written Guilty Plea in both cases on March 18, 2019, to the Theft 3rd Degree charges (AGCR015098 and AGCR015099 Pleas, 3/18/2019) (Appx. 8-21). A sentencing hearing was held on July 1, 2019, for both cases, in which the court rejected the guilty pleas and sentenced Damme to serve an indeterminate term not to exceed two years, with the two charges running concurrently. (AGCR015098 and AGCR015099 Sentence, 7/1/2019) (Appx. 26-35). On July 8, 2019, Damme filed a Notice of Appeal. (AGCR015098 and AGCR015099 Notices of Appeal, 7/8/2019) (Appx. 36-39).

STATEMENT OF FACTS

On March 25, 2018, Kathy Grittmann contacted the Grundy County Police Department and reported a stolen wallet. (AGCR015099 Minutes of Testimony 5/22/2018, P.3) (Conf. Appx. 28-34). Grittmann suspected Damme, and so advised the police. Id. (Conf. Appx. 28-34).

On March 26, 2018, Christopher Conway left his house unlocked as he left for work. (AGCR015098 Minutes of Testimony 5/22/2018, P.3) (Conf. Appx. 24-26). When he returned, he noticed several missing items, including his laptop, and lockbox which contained Christopher and his father's tax information, keys to his 1994 Pontiac Grand Prix, and rare coins. Id. (Conf. Appx. 24-26). Conway suspected Damme, and so advised the sheriff. Id. (Conf. Appx. 24-26).

Deputies from the Grundy County Sheriff's Office executed a search warrant on Damme's residence. Id. (Conf. Appx. 17-20). Some of the stolen items belonging to Conway and Grittmann's wallet were located at Damme's residence. Id. (Conf. Appx. 17-20). Damme was charged with Theft 3rd Degree in case number AGCR0155098 (regarding the Conway items) and

AGCR 0155099 (regarding the Gritman wallet). (AGCR0155098 and AGCR 0155099 Trial Information, 5/22/2018) (Appx. 4-7).

Damme entered written pleas of guilty in both cases, pursuant to a plea agreement. (AGCR0155098 and AGCR 0155099 Pleas 3/18/2019) (Appx. 8-21). Each of the pleas of guilty included a factual basis admitting the thefts. Id. At 2. (Appx. p11 ¶13, p12 ¶17, p18, ¶13, p19, ¶17). The pleas of guilty also included a statement that the parties could argue sentencing, but that the state would not ask for more than a two-year sentence, suspended if the Waterloo Women's Center for Change accepted Damme for one year or until maximum benefits achieved. Id. (Appx. P9 ¶5, p16 ¶5). The pleas also included an agreement that the fine of \$625.00, plus 35% surcharge would be suspended, but she would have to pay victim restitution, attorney's fees, court costs, and the Law Enforcement initiative surcharge, as well as provide a DNA sample. Id. (Appx. P9 ¶9, p16 ¶9). The state agreed to a more lenient sentence if recommended in her Pre-Sentence Investigation Report. Id. (Appx. P9 ¶5, p16 ¶5). The sentences in both cases would run concurrent. Id. (Appx. P9 ¶5, p16 ¶5).

On July 1, 2019, the court rejected the plea agreement and sentenced Dame to be committed to the Director of the Department of Corrections for a term

not to exceed two years, with the sentences running concurrently.

(AGCR0155098 and AGCR 0155099 Sentences 7/1/2019) (Appx. 26-35).

During the sentencing hearing, the court explicitly referred to the Pre-Sentencing Investigation Report information that Damme was sexually abused by her step-father. 7/1/2019 Sent. Tr. P 8, L. 10-13. Although her grandmother and mother did not believe the abuse occurred, her abuser was sentenced to prison. Id. At L. 13-14. The PSI also contained information regarding Damme's mental health issues and substance abuse. Id at L. 17-20. However, the PSI also indicated that Damme had rights terminated to three of her four children. Id at L. 20-25. The court stated that Damme's "family stock is not good." Id P 9, L. 10-12. The court stated: "You clearly have not had positive role models in your life. Your father served four prior prison terms. Your stepfather served ten years in prison on the sexual abuse convictions involving you. Your mother has prior convictions and probation but no prison. Your first half-sister has prior arrests but no prison. A half-brother – your first half-brother has prior felony convictions. Your second half-brother – has multiple misdemeanor convictions and five separate prison terms, and a second half-sister has been put on probation for

operating while intoxicated first.” Id. At P 9, L. 13 to 23. The court also referred to Damme as a “train wreck.” Id. At P 17, L. 11.

The Sentencing Order gave Damme one week, or until July 8, 2019, to surrender to the Grundy County Sheriff for transport Damme to the Iowa Correctional Institution for Women, Mitchellville for delivery to the custody of the Director. (AGCR015098 and AGCR015099 Sentence, 7/1/2019) (Appx. 26-35). The Court suspended the fine of \$625.00 plus 35% surcharge in both cases but ordered that she pay fees, court costs, and the Law Enforcement initiative surcharge, as well as provide a DNA sample. Id. (Appx. 26-35). The Court determined after a colloquy that Damme did not have the ability to pay victim restitution under Code of Iowa Section 356.7. Id. (Appx. 26-35).

PRESERVATION OF ERROR:

The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

Iowa Code Section 814.6 was amended to limit direct appeals from guilty please, however, the Iowa Supreme Court decided the amendment is only

applicable prospectively and does not apply to cases pending on July 1, 2019, such as this one. State v. Macke, 933 N.W.2d 226, 235 (Iowa 2019).

ARGUMENT

I. THE COURT ERRED AND ABUSED DISCRETION IN CONSIDERING IMPROPER FACTORS WHEN SENTENCING DAMME.

A. STANDARD OF REVIEW

Sentencing decisions are reviewed for correction of errors at law. Iowa R. App. P. 6.4; State v. Witham, 583 N.W.2d 677 (Iowa, 1998). Sentences will not be disturbed unless the defendant demonstrates an abuse of discretion or a defect in the sentencing procedure. State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002); State v. Gonzalez, 582 N.W.2d 515, 516 (Iowa 1998). A district court's sentencing decision to impose a sentence within the statutory limits is cloaked with a strong presumption in its favor and will only be overturned for an abuse of discretion or defect in the sentencing procedure, such as considering impermissible factors. State v. Grandberry, 619 N.W.2d 399, 401 (Iowa 2000). State v. Ezell, 862 N.W.2d 414 (Iowa App., 2015)

B. MERITS

Damme contends that the District Court abused its discretion when it considered impermissible factors in imposing sentence. The discretion possessed by trial courts to refuse to accept a guilty plea is broad but not unlimited. Farley v. Glanton, 280 N.W.2d 411, 415 (Iowa 1979). Iowa Rule of Criminal Procedure 2.23(3)(d) requires a sentencing court to demonstrate its exercise of discretion by stating “on the record its reason for selecting the particular sentence.” State v. Barnes, 791 N.W.2d 817, 827 (Iowa 2010) (“Although our rules of criminal procedure require a sentencing judge to state the reasons for a particular sentence on the record, the reasons need not be detailed.”); State v. Moreno No. 11-1669 *2012 WL 3196092 (Iowa App., 2012)(“However, at least a cursory explanation must be provided to allow appellate review”.) State v. Hennings, 791 N.W.2d 828, 838 (Iowa 2010)(“While the reasons need not be detailed, the court must provide enough explanation to allow appellate review of the district court's discretion.”). The Code provides that the sentencing court is “free to consider portions of a presentence investigation report that are not challenged by the defendant.” Grandberry, 619 N.W.2d 399, 401 (Iowa 2000). The presentence investigation report “shall” consider a defendant’s

“social history.” Iowa Code §901.3(1)(b). The court took into consideration the presentence investigation report’s social history, which reported that Damme has a young child, that she had been the victim of abuse, but also reported the criminal history of Damme’s family members. PSI, Page 7-9. (Conf. Appx. 41-43). The court turned its rejection of the plea not only on Damme’s criminal history but also on the criminal history of her family members, including her half-siblings and the stepfather that abused her. Sent. Tr. P 3, L. 16-18. The court said it was clear that her family stock is not good. Id. At P 9, L. 10-12.

This was a consideration of improper factors. The court is punishing Damme for the criminal activity of her family members. While the court was able to take into consideration “family circumstances” as reported in the PSI when sentencing Damme, it would be appropriate for the court to consider whether she has children for whom she provides care, or which family members would be supportive of the rules and restrictions imposed by a sentence to probation (whether or not under a deferred judgment) or to a community corrections facility. It isn’t appropriate to give Damme a more severe punishment for the actions of others, most of whom have completed their sentences. The PSI does not show that Damme was involved in any of

the criminal activities of her family members, other than Damme was the victim of the most severe illegal activity perpetrated by her family, but the court uses that to punish her further.

The quality of the defendant's social network and support system – whether considered as “Family circumstances,” “social history,” or “other factors as appropriate” – bears directly whether the defendant will succeed under supervised probation and thus whether supervised probation is an appropriate sentence. State v. Zeien Cox. No. 17-0428, 2017 *WL 6513976 (Iowa Ct. App. 2017). While the court took into consideration the biological or marital relationship of Damme and her family members, the Court did not take into consideration her social relationship with those persons, whether those family members have frequent contact or communication with Damme or if she has disavowed or severed her relationship with them. The PSI reports that Damme was not raised with any of her siblings or half-siblings, and says nothing else regarding the social relationship. PSI, Page 9 (Conf. Appx. 43). The court didn't take into consideration that Damme was the one that reported her own father for manufacturing meth. PSI, Page 7 (Conf Appx. 41).

Consideration of information not supported by the sentencing record is a defect in the sentencing procedures that requires remand for resentencing. State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981). This is true even if the improper factors were only a “secondary consideration.” Grandberry, 619 N.W.2d at 401. Damme’s sentence should be vacated and remanded for sentencing.

II. THE COURT ERRED BY NOT ADVISING DAMME OF HER RIGHT TO FILE A MOTION IN ARREST OF JUDGMENT

A. STANDARD OF REVIEW

The court employs a substantial compliance standard when determining whether it discharged its duty to advise a defendant of his right to file a motion in arrest of judgment and the penalties for failure to file. State v. Hughes, 863 N.W.2d 301 (Iowa App., 2015).

B. MERITS

The Written Guilty Pleas, filed on March 18, 2019, advised Damme of several rights to which she was waiving, including the right to a Motion in Arrest of Judgment. (AGCR015098 and AGCR015099 Pleas 3/18/2019). (Appx. p. 13 ¶¶24 and 27, p. 20 ¶¶24 and 27).

However, the Order from the court accepting the guilty plea and setting sentencing does not advise Damme of her right to file the Motion in Arrest of Judgment or of the consequences of failure to file. (AGCR015098 and AGCR015099 Orders 3/18/2019) (Appx. 22-25). The Judgment entry does not address a Motion in Arrest of Judgment. *Id.* (Appx. 26-35).

The Sentencing Order advises Damme of her right to appeal but does not advise she has waived that right by not filing a Motion in Arrest of Judgment. (Sentence, AGCR015098 and Sentence, AGCR015099 7/1/2019) (Appx. 29 and 34). In State v. Hinnners, 471 N.W.2d 841, 845 (Iowa 1991), the Court held that the waiver of the right to appeal should be voluntary, knowing and intelligent. There is a presumption that a defendant has been advised of his right to appeal and intentionally waived the right. *Id.* Because Damme was denied the opportunity to file a Motion in arrest of judgment, her waiver was not voluntary, knowing or intelligent. Thus, Damme's sentence should be vacated for that reason and remanded for sentencing.

III. COUNSEL WAS INEFFECTIVE BY BREACHING ESSENTIAL DUTIES WHICH CAUSED PREJUDICE TO DAMME

A. STANDARD OF REVIEW

Claims of ineffective assistance of counsel are reviewed *de novo*.

Ennenga v. State, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied the applicant a fair trial. State v. Carroll, 767 N.W.2d 638, 641 (Iowa 2009), Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674, 693 (1984).

B. MERITS

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the U.S. Constitution and Article I, Section 10 of the Iowa Constitution. To establish a claim of ineffective assistance of counsel, a defendant must show 1) counsel's performance fell outside the normal range of competency ("essential duty") and 2) the deficient performance so prejudiced defendant as to give rise to a reasonable probability that, but for counsel's errors, the result would have been different. State v. Heacock, 521 N.W.2d 707, 710 (Iowa 1994)), Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674, 693 (1984). Damme's counsel

was ineffective in two areas, in that counsel: 1) failed to object to the court's consideration of inappropriate factors in sentencing, and 2) failed to file a motion to reconsider sentence.

The burden of proof is the preponderance of the evidence that counsel rendered ineffective assistance. State v. Adape, 307 N.W.2d 32, 42 (Iowa 1981). The circumstances of the representation must show "an affirmative factual basis demonstrating counsel's inadequacy of representation." Id.

Counsel's failure to object to the court's use of improper considerations during sentencing was a breach of an essential duty, which resulted in prejudice. The use of Damme's family members' criminal history was inappropriate for the court to consider in sentencing. While counsel requested reconsideration when the court rejected the plea agreement, counsel did not object to the court's use of the family members' criminal history and imposed a harsher sentence than had been agreed to by Damme and the State in the plea agreement. This was a breach of an essential duty. Prejudice exists because the court did not have an opportunity to reconsider the sentence without considering her family criminal history.

Finally, counsel's failure to file a motion to reconsider sentence was a breach of an essential duty which resulted in prejudice. While counsel made

an oral motion at the sentencing hearing. Sent Tr. P 3, Line 20 to P 4, Line 23. Counsel did not file a written reconsideration of sentencing after the hearing. Instead, Counsel filed a Notice of Appeal in each case (AGCR015098 and AGCR015099 Notice of Appeal 7/8/2019). (Appx. 36-39). This was a breach of an essential duty. Prejudice exists because Damme was denied the opportunity to argue to the court that the improper family members' criminal histories, with which she was not involved, should be excluded from consideration of her sentence.

Damme's sentence should be vacated and remanded due to ineffective assistance of counsel.

CONCLUSION

The Sentence imposed on Damme should be reversed. This case should be remanded to the District Court for further proceedings.

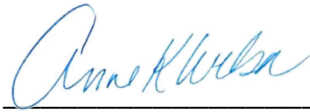
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REQUEST FOR NONORAL SUBMISSION

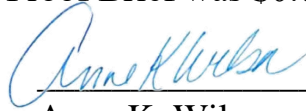
Appellant requests that this appeal be submitted without oral argument.



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ATTORNEY'S CERTIFICATE OF COSTS

I, Anne K. Wilson, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Proof Brief was \$0.00.



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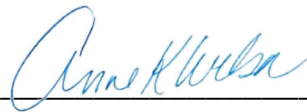
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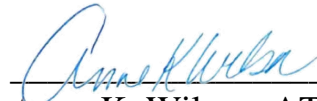


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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2732 words, excluding the 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. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in Microsoft Word 2016 in 14 point font.



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