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IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1425

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRYAN DWIGHT HENDERSON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE FAE HOOVER GRINDE, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Henderson has no right to appeal from his guilty plea, so this Court should dismiss his appeal.

Authorities

Kucera v. Baldazo, 745 N.W.2d 481 (Iowa 2008)
State v. Macke, 933 N.W.2d 226 (Iowa 2019)
Struve v. Struve, 930 N.W.2d 368 (Iowa 2019)
Iowa Code § 814.6(1)(a)(3)
Iowa Code § 814.6

II. The district court properly exercised its discretion in imposing a two-year prison sentence on Henderson.

Authorities

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Iowa Code § 709.12(1)
Iowa Code § 901.5
Iowa Code § 907.5(1)(b), (f)
Iowa Code §§ 709.1, 709.12(1)(d)
Iowa Code §§ 709.12, 903.1(2)

III. Henderson did not preserve his claim that Iowa Code section 901.4B says he should have spoken first at sentencing. Also, any error warrants no relief.

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State v. Lohr, 266 N.W.2d 1 (Iowa 1978)
Iowa Code § 901.4B
Iowa Code § 901.4B(2)
Iowa Code § 901.5(9)

ROUTING STATEMENT

None of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

STATEMENT OF THE CASE

Nature of the Case

Defendant Bryan Dwight Henderson appeals his sentence following his *Alford*[1] plea to indecent contact with a child in violation of Iowa Code sections 709.1 and 709.12(1)(d).

Course of Proceedings and Facts

LH was 13 when she helped Henderson carry a toolbox into his home. Mins. Test. (4/25/2018) at 1; App.5. Inside, Henderson showed her a pornographic video. *Id.*; App.5. He pulled his pants down, grabbed LH's hand, and made her touch his penis. *Id.*; App.5. He forced her to put her mouth on his penis and "perform oral sex."

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

Id.; App.5. When a noise spooked Henderson, he told LH not to tell anyone or he would lose his kids. *Id.*; App.5.

After assessing the noise, Henderson made LH show him her "bottom" "so that he would have something against her." *Id.*; App.5. Then he rubbed the outside of her vagina. *Id.*; App.5. He took her to his bedroom and masturbated. *Id.* at 2; App.6. He made her perform oral sex again. *Id.*; App.5. LH told Henderson it was getting late and she needed to get home, and he agreed. *Id.*; App.5.

The State charged Henderson with third-degree sexual abuse and exhibition of obscene materials to minors. Trial Info. (4/25/2018); App.9. He entered an *Alford* plea to one count of indecent contact with a child. Written Plea (5/6/2019) at 2; App.18. The district court imposed a two-year prison sentence. J. & Sentence (8/26/2019) at 1; App.35. It did so due to the nature of the offense, Henderson's prior conviction involving a child, to hold Henderson accountable, and to deter future crimes. *Id.* at 2–3; App.36–37; Tr. Sentencing, 19:15–21. He timely appealed. Notice of Appeal (8/26/2019); App.65.

ARGUMENT

I. Henderson has no right to appeal from his guilty plea, so this Court should dismiss his appeal.

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 Henderson's indecent-contact-with-a-child conviction on August 26, 2019. J. & Sentence (8/26/2019); App.35. Because that is after July 1, 2019, he has no right to appeal. Iowa Code § 814.6(1)(a)(3); *see also* Tr. Sent. Hr'g, 21:10–13.

Acknowledging this problem, Henderson argues that he established good cause to appeal because he "pled guilty under an *Alford* plea and … consistently asserted [his] innocence." Henderson Br. at 12; *see also* Iowa Code § 814.6(1)(a)(3). But entering an *Alford* plea is not good cause to appeal. Section 814.6 provides a new rule: no right to appeal following a guilty plea. Iowa Code § 814.6(1)(a)(3). It then offers a categorical exception to that rule to allow appeals following guilty pleas to class "A" felonies. *Id.* Finally, it creates a

case-by-case exception for those who can show good cause to appeal. *Id.* But it does not provide a categorical rule to allow appeals from *Alford* pleas. *Id.* Because section 814.6 creates a categorical exception for class "A" felonies but not *Alford* pleas, the legislature must not have believed that an *Alford* plea alone provided good cause to appeal or it would have said so. *E.g.*, *Struve v. Struve*, 930 N.W.2d 368, 377 (Iowa 2019) ("[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.'" (quoting *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008))).

Henderson has no right to appeal following his guilty plea and he has not shown good cause. This Court should dismiss his appeal.

II. The district court properly exercised its discretion in imposing a two-year prison sentence on Henderson.

Preservation of Error

A defendant can assert an abuse of sentencing discretion for the first time on appeal. *State v. Gordon*, 921 N.W.2d 19, 22 (Iowa 2018) (citing *State v. Ayers*, 590 N.W.2d 25, 27 (Iowa 1999)).

Standard of Review

This Court reviews sentences like Henderson's that are "within statutory limits" for "abuse of discretion." *See State v. Seats*, 865

N.W.2d 545, 552 (Iowa 2015). Such a sentence is "cloaked with a strong presumption in its favor." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002) (citing *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983)). "An abuse of discretion will not be found unless [the court is] able to discern that the decision was exercised on grounds or for reasons that were clearly untenable or unreasonable." *Id.* (citing *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995)).

Merits

Henderson entered an *Alford* plea to indecent contact with a child, an aggravated misdemeanor. J. & Sentence (8/26/2019) at 1; App.35; Iowa Code §§ 709.1, 709.12(1)(d). The district court sentenced him to two years in prison and denied his request for a suspended sentence. J. & Sentence (8/26/2019) at 1; App.35; Tr. Sentencing, 11:19 to 12:3. That sentence was authorized by law and therefore receives a strong presumption in its favor. Iowa Code §§ 709.12, 903.1(2); *see also Formaro*, 638 N.W.2d at 724.

The district court explained why it imposed a two-year sentence:

> The reasons for the Court's sentence today include the nature of the charge. I have reviewed Mr. Henderson's prior criminal history. This is the second offense involving --

> an offense involving a minor. The Court finds that imposing a prison term will certainly hold Mr. Henderson accountable for his behavior, and it will deter others in the community from similar behavior.

Tr. Sentencing, 19:15–21. The sentencing order confirmed this reasoning and added that the sentence "will provide the greatest benefit to the Defendant and the community." J. & Sentence (8/26/219) at 2–3; App.36–37. The nature of the offense and prior convictions are valid sentencing considerations. Iowa Code § 907.5(1)(b), (f). And deterring future offenses by Henderson and others, as well as "benefit[ing]"—*i.e.* rehabilitating—Henderson are the primary goals of sentencing. Iowa Code § 901.5. Because the district court exercised its discretion for proper reasons, this Court should affirm the sentence.

Henderson counters that the district court improperly considered his prior child endangerment conviction. Henderson Br. at 16. He worries that because "that case involved allegations of sexual contact with a minor," the judge must have wrongly considered those allegations. *Id.* But the record does not support his argument. At sentencing, the court said that it imposed prison in part because "[t]his is the second offense involving—an offense involving a minor."

Tr. Sentencing, 19:17–18. And the judgment said the same thing. J. & Sentence (8/26/2019) at 2; App.36. Those statements are both true. Child endangerment involves a minor victim. Iowa Code § 709.12(1). But saying the case "involv[ed] a minor" does not show that the court considered that the allegations involved sexual contact with a minor.

Next, Henderson complains that the district court did not tell him about statutory earned time credit and thus violated Iowa Code section 901.5(9). Henderson Br. at 20. But even though he is right on that point, such an omission does not warrant resentencing. *State v. Johnson*, 513 N.W.2d 717, 720 (Iowa 1994) (per curiam) (concluding that informing a defendant of statutory earned time under section 901.5(9) is not "necessary for a valid plea and sentencing").

Finally, Henderson says that the district court did not consider the information he presented at sentencing or properly consider mitigating factors. Henderson Br. at 15, 20. But the district court explained why the sentence it picked fulfilled the goals of sentencing. It had no obligation to mention every argument or piece of information submitted in mitigation. Henderson's claim fails.

III. Henderson did not preserve his claim that Iowa Code section 901.4B says he should have spoken first at sentencing. Also, any error warrants no relief.

Preservation of Error

Henderson failed to preserve his claim that the district court violated Iowa Code section 901.4B at sentencing. That statute says that a victim should have the opportunity to speak after the defendant does at sentencing and lists the defendant before the State in providing who speaks. Iowa Code § 901.4B. But he did not object when the district court allowed the victim and the State to speak before him at sentencing. *See* Tr. Sentencing, 3:19 to 4:22, 7:3–5.

Normal error reservation rules apply to this sentencing claim. The claim does not implicate the court's power to impose a sentence. *See Gordon*, 921 N.W.2d at 23. Rather, it deals with procedure at sentencing: the order the stake holders address the court. Thus, Henderson had to preserve error. *See id*. And because Henderson neither raised the issue nor secured a ruling, his claim is unpreserved. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Standard of Review

This Court reviews a rules-based claim for errors at law. *State v. Bruce*, 795 N.W.2d 1, 2 (Iowa 2011).

Merits

Henderson argues that "the court failed to follow the procedure provided by Iowa Code section 901.4B" because the "section now requires that the procedure of sentencing hearings is presentation by the Defense first, then the State[but] [t]hat did not happen in this case." Henderson Br. at 22, 23 (typography altered). He is probably right that the statute requires the court to have the victim speak after the defendant and State. *See* Iowa Code § 901.4B(2) ("After hearing any statements presented pursuant to subsection 1, the court … shall allow any victim to be reasonably heard."). But that does not entitle Henderson to resentencing.

Indeed, he is not entitled to resentencing for four reasons. First, while the statute is likely obligatory and not permissive, it is only directory, not mandatory. *See State v. Lohr*, 266 N.W.2d 1, 5 (Iowa 1978) (describing the difference between obligatory-permissive and mandatory-directory legal concepts). It is directory because the statute assures orderly sentencing proceedings; the order of sentencing is not "essential to the main objective of the statute." *See In re Fowler*, 784 N.W.2d 184, 190 (Iowa 2010). And because its only a directory statute, a violation does not invalidate the sentencing

absent a defendant proving prejudice. *Id.*; *Lohr*, 266 N.W.2d at 5. Second, speaking last at sentencing caused Henderson no harm. In fact, going last is usually considered an advantage. For example, Defendants routinely complain that the State gets a rebuttal closing argument. Third, section 901.4B is likely meant to protect victims, not defendants. That is so because allowing victims to present last prevents defendants from attacking victim impact statements. Because this statute does not exist to protect defendants, a violation does not warrant relief just like violating the rule about explaining parole and earned time credits does not warrant resentencing. *See Johnson*, 513 N.W.2d at 720; Iowa Code § 901.5(9). Fourth, Henderson got to make his sentencing argument and allocute. Tr. Sentencing Hr'g, 10:9 to 16:25. He does not say how he would have changed his arguments had he gone first or why that would have changed the sentence.

Because violating section 901.4B caused Henderson no harm, this Court should not grant resentencing.

CONCLUSION

For the foregoing reasons the State respectfully requests that this Court dismiss Henderson's appeal. Alternatively, it requests that this Court affirm his sentence.

REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

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 **1,935** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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