ELECTRONICALLY FILED JUN 12, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. DAVID J. TREPTOW, Defendant-Appellant.	)	SUPREME COURT 19-1276

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUCHANAN COUNTY
HONORABLE KELLYANN LEKAR, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 12th day of June, 2020, 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 David J. Treptow, # 6558592, Newton Correctional Facility, 307 S. 60th Avenue, W., PO Box 218, Newton, IA 50208.

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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 plaintiff-appellee's brief.

ARGUMENT

I. Iowa Code section 814.6(1)(a)(3) (Supp. 2020), Iowa Code section 814.7 (Supp. 2020), and Iowa Code section 814.29 (Supp. 2020) must be invalidated for improperly restricting the role and jurisdiction of Iowa's appellate courts.

Article V, section 4 of the Iowa Constitution provides that the Iowa Supreme Court "*shall* have appellate jurisdiction only in cases in chancery, and" that in non-Chancery cases it "*shall* constitute a court for correction of errors at law…." Iowa Const. art. V, § 4 (emphasis added). In this way, "the constitution has constituted [the Iowa Supreme Court] an appellate court in chancery, and a court of errors at law…". Stockwell v. David, 1 Greene 115, 117 (Iowa 1848). See also Sherwood v. Sherwood, 44 Iowa 192, 195 (Iowa 1876) ("This court has appellate jurisdiction only in cases in chancery, and

is a court for the correction of errors in actions at law.")(citing Iowa Const. art. V, § 4). In understanding the jurisdiction conferred by the Constitution upon the Iowa Supreme Court, the distinction between an "appeal" (in chancery cases) and a review "for correction of errors at law" (in non-chancery cases) must be understood. See State v. Briggs, 666 N.W.2d 573, 578 (Iowa 2003)("the changing understanding of… terminology from the time of our constitution's drafting to the present" must be considered when interpreting the words of the constitution).

Review for errors at law (also referred to as review on "a writ of error") is "of common law origin, and removes [to the Supreme Court] nothing for examination but the law", meaning the Supreme Court may correct legal errors "which appear of record" from the district court proceeding. Stockwell v. David, 1 Greene 115, 116-17 (Iowa 1848). In contrast, an "appeal"[1] "has its origin from the civil law", and "removes a

[1]At one time Iowa statutes provided that "law actions were removed to the Supreme Court by writ of error, chancery cases

cause entirely, subjecting the fact as well as the law to a review and new trial" in the Supreme Court "as if it had not been tried before…." Id. In this way, "an appeal secures to the party all the benefits of a writ of error" (correction of the inferior court's legal errors), "*as well as* [the additional benefit of] a hearing upon the merits…." Id. at 117 (emphasis added).

After providing the Supreme Court "*shall* have appellate jurisdiction only in cases in chancery, and" that in non-Chancery cases it "*shall* constitute a court for correction of errors at law…", the final clause of article V section 4 (preceding the semicolon) references the legislature's ability to enact certain prescriptions or restrictions. See Iowa Const. art. V, § 4 (2019) (", under such restrictions as the general assembly may, by law, prescribe"). A similar reference to legislative prescriptions is also included in Article V, section 6,

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by appeal." Sherwood v. Sherwood, 44 Iowa 192, 197 (1876). "Now writs of error are dispensed with and one course is pursued in bringing up all cases." Id.

pertaining to district court jurisdiction. See Iowa Const. art. V, § 6 (2019) (", in such manner as shall be prescribed by law."). In understanding such references to legislative restrictions or prescriptions, however, it is important not to confuse the legislature's ability to reasonably prescribe or restrict the *manner* of jurisdiction with an ability to *remove* constitutionally conferred jurisdiction from the courts. In re Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988))("Subject matter jurisdiction is conferred upon our district courts *by our constitution*."; "'The legislature may not *deprive* the District Court of its jurisdiction, nor, in the least, *limit* it; all that it is authorized to do is to prescribe the *manner* of its exercise.'")(emphasis added); Laird Brothers v. Dickerson, 40 Iowa 665, 670 (1875).

Article V, section 4 of the Iowa Constitution confers on the Iowa Supreme Court jurisdiction over appeals and over correction of lower court errors, and the legislature can impose only reasonable restrictions and procedures which do not alter

or destroy this fundamental character and function of the Supreme Court. See Stockwell v. David, 1 Greene at 116 ("The [Iowa] constitution has clearly defined the jurisdiction of this court, giving it upon the one side appellate jurisdiction in all cases in chancery, and constituting it, upon the other, a court for the correction of errors at law."); Dunbarton Realty Co. v. Erickson, 120 N.W. 1025, 1027 (Iowa 1909) (equity action; "It is true that our state Constitution (article 5, § 4) gives to the Supreme Court appellate jurisdiction in equitable cases", but legislature can impose "*reasonable* rules and regulations" concerning how an appeal shall be taken and the time within which the right may be exercised) (emphasis added); Tuttle v. Pockert, 125 N.W. 841, 842 (Iowa 1910) (equity action; legislature can prescribe procedure for appeal, meaning trial de novo, and "The form of procedure is unimportant *if such right be not thereby destroyed*.") (emphasis added); Sherwood v. Sherwood, 44 Iowa at 194, 196 (1876) (Legislature may enact "regulation affecting the manner of appeal" including

"the proceedings necessary to be taken prior to an appeal"; however, once the legislature statutorily established divorce cases as chancery actions, it could not enact a statute that "deprives parties to [such] chancery actions *the right to trials in this [Supreme] court de novo [i.e., the right of appeal], a right secured by the constitution*"; "since the action of divorce is [statutorily established as] an equitable action, it comes to this court by appeal proper and is triable here anew, under the Constitution, *regardless of the general provisions of [the statute].*") (emphasis added); Brenton v. Lewiston, 236 N.W. 28, 29–30, modified, 238 N.W. 714 (Iowa 1931) (law action; "The Legislature may impose restrictions as by limiting appeals by the amounts in controversy..., *but it may not, by the enactment of restrictions, so change the character of the court as that it shall be other in reviewing a law action than 'a court for the correction of errors at law.*") (emphasis added).

Such understanding is reinforced by the second half of Article V, section 4 (after the semicolon), which currently

provides the Iowa Supreme Court "shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state." Iowa Const. art. V, § 4 (2019). Originally, this provision stated only that the Supreme Court "shall have power to… exercise a supervisory control" over inferior courts. Iowa Const. art. V, § 4 (1857). But a 1962 amendment made explicit that the Supreme Court has not only a power but also a duty to exercise its supervisory (and now also administrative) control over inferior courts. Const. art. V, § 4 (1962) ("shall exercise a supervisory and administrative"). Pursuant to this language, the Supreme Court has both the inherent power *and the constitutionally conferred duty* ("shall") to "exercise a supervisory and administrative control over all inferior judicial tribunals", including the "power to issue all writs and process necessary to secure justice to parties". Iowa Const. art. V, § 4. And (unlike the language preceding the semicolon), the powers

and duties conferred upon the Supreme Court by this latter language is not qualified by the phrase "under such restrictions as the general assembly may, by law, prescribe." Id.

Both constitutionally and statutorily, our Supreme Court (and the Court of Appeals) is "a court for the correction of errors at law." Iowa Const. art I, § 4; Iowa Code §§ 602.4102, 602.5103 (2019). By seeking to divest Iowa's appellate courts of their ability to decide and remedy claimed errors inhering in lower court guilty plea and sentencing proceedings, the section 814.6 amendment improperly intrudes upon the inherent role, Jurisdiction, and duty of the Iowa Supreme Court, as well as the inherent right of review for correction of legal errors which is conferred on criminal defendants convicted of indictable offenses under the Iowa Constitution.

II. Iowa Code section 814.6(1)(a)(3) (Supp. 2020) and Iowa Code section 814.7 (Supp. 2020) violate equal protection.

"Once the right to appeal has been granted…, it must

apply equally to all. It may not be extended to some and denied to others." Waldon v. District Court of Lee County, 130 N.W.2d 728, 731 (Iowa 1964). The amendment to section 814.6 violates equal protection by treating persons who are similarly situated with respect to the purposes of the law differently. U.S. Const. amend. XIV; Iowa Const. art. I § 6; State v. Doe, 927 N.W.2d 656, 662 (Iowa 2019); Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009).

Within the group of guilty plea defendants, the amendment to section 814.6 makes a distinction between those that plead guilty to a class "A" felony and those that plead guilty to any other classification of crime – providing an automatic right of review of Class A Felony guilty pleas, while denying the same to all other guilty pleas.

The amended statute's distinction between the right to appeal a conviction based on whether a defendant pled guilty or went to trial is neither narrowly tailored nor rationally related to the stated legislative purpose. Any presumption of

the validity of a guilty plea conviction (as distinct from a trial conviction) turns on whether the procedural prerequisites for a constitutionally valid plea, including necessary on-the-record advisements as well as a proper factual basis. Any failure of substantial compliance will be apparent from the face of the guilty plea record itself without any need for additional record development, making such claims at least as amenable to resolution on direct appeal as claims seeking to challenge a trial conviction. See e.g., State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004) (preservation for PCR of ineffective claims that can be decided on direct appeal results in waste of resources).

Second, given that the same general categories of challenges to guilty plea convictions (such as inadequacy of plea-record advisements or absence of factual basis) would be available on direct appeal regardless of whether the crime underlying the plea was a Class A felony or some other crime, no basis exists for the statute's distinction between allowing an automatic right of appeal for Class A guilty plea convictions

but not for any other guilty plea convictions.

Finally, the statute's replacement of automatic review with "good cause" review in guilty plea cases does not function to conserve resources. It fails to eliminate the burden either to the appellate court (which will still likely need to review the record and briefing to determine if "good cause" exists) nor elsewhere in the criminal justice system and appellate process (as defense attorneys will still have to review the merits of the case and present arguments accordingly and the Attorney General's Office will still respond). Therefore, not only does the amendment fail to be narrowly tailored or rationally related to the government's professed purpose, but it also directly contravenes that purpose.

Because the amendment to section 814.6 violates equal protection under the United States and Iowa Constitutions, it must be invalidated and Treptow must be allowed to directly appeal as a matter of right.

IV. If the amendment to section 814.6 does apply to this appeal, Treptow has good cause.

The appeal should not be dismissed for failing to following a non-existent procedure.

There currently is not an established procedure for the determination whether the defendant has "good cause" to appeal from a guilty plea. See Iowa Code § 814.6(1)(a)(3) (Supp. 2020)(exception to right of appeal from final judgment); Iowa R. Crim. P. 2.29 (Appointment of appellate counsel in criminal cases); Iowa R. Crim. P. 2.30 (Duty of continuing representation; withdrawal); Iowa R. App. P. 6.102 (Initiation of appeal from a final judgment); Iowa R. App. P. 6.103 (Review of final orders and judgments); Iowa R. App. P. 6.106 (Discretionary review); Iowa R. Crim. P. 6.107 (Original certiorari proceedings); Iowa R. Crim. P. 6.108 (Form of Review).

The Iowa Supreme Court recently addressed "good cause" to appeal in the context of an alleged sentencing error. State v. Damme, No. 19-1139, 2020 WL 2781465 (Iowa May 29, 2020). The Court stated the Damme case was its first

opportunity to adjudicate the "good cause" requirement under Iowa Code section 814.6. Id., at *1. The Court acknowledged the statute does not define "good cause." Id. The Court did not dismiss Damme's appeal based upon the failure to seek leave to appeal. Instead, the Court determined "good cause" from the party's briefs. Id., at *3 (Damme appealed. The State argued Damme had not established good cause and the Court should dismiss the appeal.). This is the same practice employed in challenges to appeals pending prior to the effective date of 2019 Iowa Acts chapter 140 (Senate File 589). See e.g. State v. Macke, 933 N.W.2d 226, 230 (Iowa 2019) (Court ordered supplemental briefing whether new legislation governed appeal.); State v. Syperda, No. 18-1471, 2019 WL 6893791, at *12 (Iowa Ct. App. Dec. 18, 2019) (same). This is also the same practice used in other appeals from guilty pleas post-July 1, 2019. See e.g. State v. Henderson, No. 19-1425,

2020 WL 2781463, at *1 (Iowa May 29, 2019) (per curiam).[2]

Treptow *has established good cause to appeal.*

In Damme, this Court recognized that what constitutes "good cause" is context-specific. State v. Damme, 2020 WL 2781465, at *5. The Court in Damme ruled that "good cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea." Id., at *6. The Court interpreted "good cause" to mean "legally sufficient." Id., at *1 ("We conclude that "good cause" means a "legally sufficient reason."); Id., at *6 (timing of sentencing error "provides legally sufficient reason to appeal notwithstanding the guilty plea."). The Court "saved for another day the question of what constitutes good cause to appeal to challenge a guilty plea." Id.

[2]The Supreme Court has specifically ordered Senate File 589 issues briefed and submitted with the appeal. See e.g. State v. Robinson, # 20-0449 (3/19/20 Order); State v. Gonzales, # 20-0631 (6/5/20 Order); State v. Egdorf, # 20-0554 (5/27/20 Order).

This Court should adopt a similar definition of "good cause" to directly appeal a guilty plea which lacks a factual basis. A challenge to the lack of a factual basis is not frivolous, and thereby is a "legally sufficient reason to appeal" as permitted by Iowa Code section 814.6(1)(a)(3) (Supp. 2020). The determination of a legally sufficient reason ("good cause") will always be tied to the substantive claim of error. With continued litigation in this area, this Court may establish categories[3] of "good cause" but there will likely be unique case-specific issues that will arise. Therefore, Treptow urges this Court to provide a consistent definition of "good cause" and hold that "good cause" means "legally sufficient reason."

V. The Minutes of Testimony do not establish a factual basis for Treptow's Alford plea to gatherings where controlled substances used.

The State does not argue that Treptow's guilty plea to gathering where controlled substances used is supported by a

[3] Categories of errors may include sentencing errors, lack of a factual basis for the offense to which the plea was entered or a breach of the plea agreement.

factual basis. Instead, the State contends that Iowa Code section 814.29 (Supp. 2020) prevents him from obtaining any relief. State's Brief pp. 37-38. In essence, because Treptow was given such a favorable plea agreement, it is of no concern that he may not be, in fact, criminally responsible for this offense.

> [] innocent defendants plead guilty for reduced charges and shorter sentences. Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1034 (2006) [hereinafter Barkow]; see also Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992) [hereinafter Scott & Stuntz] ("Defendants accept bargains because of the threat of much harsher penalties after trial; they are thus forced to give up the protections that the trial system's many formalities provide."). The reality of plea bargaining is that "[defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes." Barkow, 58 Stan. L. Rev. at 1034.

Schmidt v. State, 909 N.W.2d 778, 787 (Iowa 2018).

If the legislature actually enacted a statute which established a public policy that a "favorable" plea agreement which includes an offense which lacks a factual basis on the record violates the Iowa Constitution. "Holding a person who

has committed no crime in prison strikes the very essence of the constitutional guarantee of substantive due process." Schmidt v. State, 909 N.W.2d 778, 793 (Iowa 2018). The problem of wrongful convictions is not limited to those who contest their guilt at trial. The manner of conviction makes little difference to the reliability of the underlying conviction. Rhoads v. State, 880 N.W.2d 431, 438 (Iowa 2016).

If a factual basis cannot be established on remand, the plea must be vacated. State v. Schminkey, 597 N.W.2d 785, 792 (Iowa 1999). If the plea is vacated, it is the duty of Buchanan County Attorney, within the county prosecutor's discretion, to determine if he/she desires to enforce the plea agreement requiring vacation of all of the convictions and return Treptow to the same position as he was prior to the entry of the guilty pleas. See Iowa Code § 331.756(1) (2019) (County attorney's duty to "[d]iligently enforce or cause to be enforced in the county, state laws and county ordinances, violations of which may be commenced or prosecuted in the

name of the state, county, or as county attorney, except as otherwise provided."); Iowa Code § 13.2(1)(a) (2019) (Duty of the Attorney General to "[p]rosecute and defend all causes in the appellate courts in which the state is a party or interested.").

This case is in a much different posture than Ceretti. In Ceretti, the Court held that the defendant plea violated the one-homicide-rule. Therefore, the Court vacated all of the convictions and remanded to the district court. State v. Ceretti, 871 N.W.2d 88, 96-97 (Iowa 2015). Here, under this Court's jurisprudence, the proper remedy is a remand to allow the State an opportunity to establish a factual basis. It is premature to vacate all of the guilty pleas and convictions.

CONCLUSION

David Treptow respectfully requests this Court vacate his guilty plea and sentence for gatherings where controlled substances used in violation of Iowa Code section 124.407

(2017) and remand to the district court for further proceedings.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.76, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 3,126 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Martha J. Lucey Dated: *6/12/20*

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