ELECTRONICALLY FILED MAY 27, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

No. 19-1259

STATE OF IOWA

Plaintiff-Appellee,

vs.

HOWARD J. THOMPSON

Defendant-Appellant

APPEAL FROM THE SCOTT COUNTY DISTRICT COURT

THE HONORABLE HENRY W. LATHAM II

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

- this brief contains 2,412 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903.

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- this brief has been prepared in a proportionally spaced typeface based on Word 14 in Times New Roman font.

/s/ Kent A. Simmons

KENT A. SIMMONS

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ARGUMENT

I.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO USE INFORMATION FROM COURT DOCUMENTS THAT WAS WITHOUT FOUNDATION AND IRRELEVANT TO PROVE THAT DEFENDANT ACTED WITH FRAUDULENT KNOWLEDGE AND INTENT, AND THE EVIDENCE WAS UNFAIRLY PREJUDICIAL

At **page 18** of its brief, the State correctly notes that trial counsel for Mr. Thompson waived error in part:

> Thompson's counsel did specifically disclaim any objection to the officer's testimony that he had obtained an address for Thompson during his investigation and any argument that such testimony was improper is not preserved. Trial Tr. p.279 L.10 – p.280 L.16.

It is true counsel did not object to the officer's affirmance that he had come up with an address for the Defendant. The objection remained in force, however, as to whether the officer should be allowed to state the address he found. In chambers, the defense attorney discussed testimony from Officer Denain with the trial judge and counsel. The discussion was for the purpose of making a record of objections and proceedings that had previously transpired with Denain. The defense attorney correctly stated that he had failed to object

to Denain's testimony that he had come up with an address for Mr. Thompson and that he had entered that address on the Complaint and Affidavit that charged Defendant with the offense. The defense attorney also correctly recounted that he had then objected when the prosecutor asked Denain to tell the jury the address that he had entered on the Complaint, and that his objection was made pursuant to the judge's prior ruling in limine that had excluded the Complaint and Affidavit from evidence. That objection was then overruled. (Tr. 240, L. 5-16, p. 249, L. 8-18; pp. 258-260, L. 11-14; pp. 278-280, L. 14-16)

The odd part of the record is that at the end of his statement the defense attorney said this: "I still believe that if they had merely asked were you able to obtain address information and the witness had simply stated yes, and this is what we obtained, then I would not have had a problem." The attorney then said his "problem" was with Officer Denain specifically testifying as to the address that appears on the Complaint because the contents of the Complaint had been excluded by the judge's prior ruling on the Motion in Limine. (Tr. 280, L. 7-16) The statement did not "disclaim" any objection. Counsel's statement was simply speculative as to what he might have done under

different circumstances. The fact remains that the defense properly objected to the witness specifically referring to the Complaint and reading from it for the jury. The defense properly objected to the trial judge reversing himself on the ruling in limine.

Discussion below suggests that defense counsel should have objected to any alleged inconsistency in Mr. Thompson's address as rooted in hearsay, but Defendant has not raised a hearsay issue on that particular point in this direct appeal. The attorney did allow Denain to testify the address on the Complaint was different from the address the Walgreens pharmacy tech gave him. The instant argument is that the judge should not have allowed Denain to read from the Complaint, and he should not have allowed the redacted Written Arraignment to be admitted in evidence.

The Merits

The State returns to the foregoing argument on the evidence at **page 21** of its brief. In slicing an extremely thin hair, the State argues, "Thompson does misstate the testimony in his brief when he claims that the officer could not recall how he had 'come up' with Thompson's address. Appellant's Br. P.25."

The State then goes on to correctly state, “The officer was asked how he would generally obtain an address for a suspect but was never asked specifically how he obtained Thompson’s address. Trial Tr. P.258 L.23 – P.259 L.8.” In fact, the prosecutor asked the officer how he would generally “come up” with an address for a defendant. To further split the semantic hairs, Mr. Thompson now points out that at **pages 25-26** of his own brief he did *not* claim Denain “could not” recall how he had come up with the Defendant’s alleged address. The statement was, “There was no evidence Mr. Thompson had ever given that 14th Street address to anyone, and Officer Denain *had* no recollection of how he had ‘come up’ with an address.” (emphasis added) The fact is the officer had given the jury no recollection as to how he came up with an address for the Defendant. He only recited different ways addresses are generally found. He was not asked for a specific recollection, and he did not provide one. He *had* no recollection for the specific source of Mr. Thompson’s alleged address. The State emphasizes the difference between “could not” and “did not”. That difference does not matter. The point is the officer did not provide any specific recollection. The jury could easily infer he could not recall the specific source, or the prosecutor would have asked him. Again, that point is immaterial. The point is that the judge should have adhered to his original ruling in limine and

prohibited any testimony as to the address stated on the Complaint. The crux of the State's argument is on the question of prejudice. The State agrees the evidence in question was properly framed in objections, as well as the motion and ruling in limine, but maintains the evidence was not unfairly prejudicial. (St. Br. 21-22) The foregoing discussion of the testimony related to addresses attributed to Mr. Thompson is germane to weighing the unfair prejudice that was created, despite proper defense objections.

Prejudice

Unfair prejudice arises when admitted evidence "may cause a jury to base its decision on something other than the established propositions in the case." The unfair prejudice outweighs the probative value of the evidence if the jury "will be prompted to decide the case on an improper basis." *State v. Wilson,* 878 NW 2d 203, 215-216 (Iowa 2016)

The Court must remember that Mr. Thompson's defense was solely focused on the claim he did not know his co-defendant, Markita Elvington, was passing fraudulent prescriptions on stolen paper. Markita testified in full support of that defense. The prosecution only had two factual theories that

could show Mr. Thompson's guilty knowledge in regard to the fraud. One fact was that Mr. Thompson had immediately run from the scene when a police officer approached to question him at Hy-Vee. The other allegation as to guilty knowledge was that Mr. Thompson had given his own address to the pharmacy tech at Walgreens, and that address was inconsistent with his actual address. This second allegation from the State is shown to be false by the trial testimony, but the State was allowed to completely obfuscate the facts on that allegation. Correct rulings on the evidence would have excluded the false and misleading testimony that was offered in support of the allegation. The result was that the State was able to confuse the jury into believing Mr. Thompson had given a false address.

The State has no answer for this summary of the Walgreens evidence that Mr. Thompson stated in his opening brief:

> The State provided no evidence as to what Mr. Thompson's actual address actually was. The basic indisputable facts are that the Walgreens tech did not ask Mr. Thompson for his address, and Officer Denain did not know where he got the 14th Street address. (Op. Br. 26)

The State has no response to the detailed explanation of the Walgreens evidence that Mr. Thompson set out at **pages 21-24** of his opening brief. The

pharmacy tech at Walgreens testified the store does not ask for the address of the person dropping off the prescription. She also specifically testified the address she asked of Mr. Thompson was the address for Claudia Williamson, i.e. the person whose name was on the prescription. (Tr. 209, L.2-25) (Ex. 4; App. 13) The State does not mention that very specific testimony from the Walgreens pharmacy tech. Officer Denain was clearly mistaken about who that address on the prescription had been attributed to. Still, the officer was allowed to testify and insist that the tech had said that address "was supposed to be the suspect's address". (Tr. 274-276, L. 21-18) The pharmacy tech would have absolutely no reason to say that. The only address she wanted was Claudia Williamson's. The State offered no evidence as to who Claudia Williamson was or where she lived. The bottom line is that there was no "true" evidence that Mr. Thompson had ever given inconsistent or false statements about his address. There is no evidence he had ever given his address to anyone. The Written Arraignment form was wholly unreliable because the attorney who prepared it was not produced. Did that attorney simply copy down the address Denain had previously entered on the Complaint and Affidavit as a matter of routine? Is there any evidence Mr. Thompson read the Written Arraignment before signing it, or did the attorney simply summarize

the important parts of the document for him?

The State's assertion that the defense attorney was free to cross-examine Denain about the address confusion, but chose not to, is completely belied by the record. Defense counsel extensively cross-examined the officer on the subject on cross-examination and recross. (Tr. 266- 268, L. 5-6; pp. 275-276, L. 9-18) (St. Br. p. 22)

In closing argument, defense counsel argued there is an innocent explanation for the fact a black man from Chicago would run if he believed he was being wrongly arrested. (Tr. 411-413, L. 18-13) There is good reason to believe that argument would ring true to members of a jury. The highly prejudicial problem that argument faced at that point was that the prosecution had already fully muddied the waters in its first closing with its argument upon the false factual allegation that Mr. Thompson had given a false address to the pharmacy tech at Walgreens. There was no effective way to unravel and explain to the jury the incorrect and unsubstantiated evidence about the address confusion by the time closing arguments proceeded. The prosecutor capitalized on that confusion and argued it was the critical evidence of fraud. (Tr. 394-396, L. 19-6) The unfair prejudice is clear, and it clearly outweighs the probative

value of the confused evidence that contradicts the established proposition that the pharmacy tech at Walgreens did not ask Mr. Thompson for his address. The jury was led to decide the case on an improper basis. The case must be reversed for a new trial. *Wilson,* 878 NW 2d at 215-216.

II.

SECTION 814.6A(4), THE CODE, IMPAIRS THIS COURT'S CONSTITUTIONAL DUTY TO SECURE JUSTICE FOR APPELLATE LITIGANTS AND THEREBY VIOLATES THE IOWA CONSTITUTION'S PROTECTION IN THE SEPARATION OF POWERS GUARANTEED BY ARTICLE III, SECTION 1

Under Article V, Section 4, of the Iowa Constitution, this Court is granted constitutional power to establish processes to secure justice for parties in litigation by correcting the errors of the trial courts. While Article V, Section 14 grants the legislature the power to establish a *general* system of practice to *enable* the Court to carry out its constitutional duties, the legislature is barred by Article III, Section 1, from instituting any rule that will *impair* this Court's ability to perform its constitutional duties to correct errors and secure justice.

Without citing authority or providing analysis, the State summarily concludes that "the Court does not have a [constitutional] duty to secure justice."

The conclusory assertion is offered to attempt to counter Defendant's argument that the legislature's prohibition of *pro se* filings impairs this Court's constitutional duty to secure justice. There is no authority for the State's argument. It is built upon a simple parsing of words in Article V, Section 4. That constitutional sentence describes the Court's power "to issue all writs and process necessary to secure justice to parties." The nonsensical argument the State makes is that this Court does not have the constitutional "power to secure justice", it only has the constitutional power "to issue the writs and process necessary to secure justice." (St. Br., p. 15) This attempted distinction is so narrow that it cannot be seen.

In addition to that power on writs and process, Article V, Section 4, also confers upon the Judicial Branch the constitutional power and duty to correct errors of law in the trial courts. Article III, Section 1, prohibits a branch of the government from exercising "any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted." The subsequent Article V, Section 14, is one of those "cases" where the Constitution does "direct or permit" the legislature to take some rule-making action "appertaining" to the powers of the Judicial Branch. That section permits only legislative power to "provide for a *general system* of practice." (emphasis added) As argued in the opening brief, Mr. Thompson maintains the legislature abuses that *general* power

when it asserts a *specific* rule that impairs the Judicial Branch's ability to exercise the powers properly belonging to it. That is the Separation of Powers Clause. This Court has explained that clause succinctly: "The doctrine requires that a branch of government not impair another in the performance of its *constitutional* duties." (emphasis supplied) *Klouda v. Sixth Judicial District Dept. of Correctional Services,* 642 NW 2d 255, 260-261 (Iowa 2002)." This Court has determined that *pro se* briefs from represented litigants are necessary to proper performance of the Court's constitutional duties to secure justice through the correction of errors. The legislature's attempt to impair the performance of those constitutional duties violates Article III, Section 1, and Section 814.6A(1) must be struck down as unconstitutional. *Klouda*, 642 N.W. 2d at 260-261.

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