

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1259

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HOWARD J. THOMPSON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE HENRY W. LATHAM II, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Iowa Code Section 814.6A Does Not Violate the Separation of Powers Clause.

Authorities

Andrews v. Brudick, 16 N.W. 275 (Iowa 1883)
Butler v. Woodbury Cty., 547 N.W.2d 17 (Iowa Ct. App. 1996)
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Iowa Code § 814.17
Iowa Code § 814.25
Iowa Code § 602.4201
Iowa Code § 602.4202(4)
Iowa Code § 814.6(1)(a)
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Iowa R. App. P. 6.907

II. The State is Prohibited from Responding to Thompson's Pro Se Supplemental Brief.

Authorities

Iowa Code § 814.6A(1)

III. The District Court Did Not Err When It Allowed Evidence of a False Address Provided by Thompson.

Authorities

State v. Paredes, 775 N.W.2d 554 (Iowa 2009)

State v. Sallis, 574 N.W.2d 15 (Iowa 1998)

State v. Tipton, 897 N.W.2d 653 (Iowa 2017)

State v. Trudo, 253 N.W.2d 101 (Iowa 1977)

Iowa R. Evid. 5.103(a)

Iowa R. Evid. 5.401

Iowa R. Evid. 5.402

Iowa R. Evid. 5.403

ROUTING STATEMENT

The Defendant-Appellant, Howard J. Thompson, filed a proof brief through counsel on December 12, 2019. He also filed a motion to accept a pro se supplemental brief pursuant to Iowa Rule of Appellate Procedure 6.901(2) on the same date. The State resisted Thompson's motion on the ground that Iowa Code section 814.6A(1), effective July 1, 2019, supersedes the rule and prohibits the filing of pro se documents by defendants who are represented by counsel. This Court

ordered the motion and resistance submitted with the appeal and ordered the parties to brief the question whether the Court can consider a pro se supplemental brief filed after the effective date of section 814.6A(1).

In an amended proof brief, Thompson argues that section 814.6A(1) violates the separation of powers clause in the Iowa constitution. The State agrees that this Court must ultimately decide that question. *See* Ia. R. App. P. 6.1101(2)(a). The State also understands that this is not the only pending appeal presenting it. If this Court retains a suitable case presenting the same question before a routing decision is made on this appeal, the remaining issues do not warrant retention and transfer to the court of appeals is appropriate. *See* Ia. R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal from a guilty verdict on two counts of attempting to obtain a prescription drug by deceit and one count of conspiracy to commit a non-forcible felony. Thompson argues that the district court erred when it admitted a written arraignment form

showing Thompson's address. He also argues in a pro se supplemental brief that the evidence was insufficient and the district court erred when it denied his motion for judgment of acquittal.

Course of Proceedings

The State accepts the course of proceedings as set forth in Thompson's brief as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On June 5, 2017, Thompson and Markita Elverton traveled together to two Bettendorf pharmacies, Walgreen's and Hy-Vee. Trial Tr. P.291 L.7 – P.295 L.10. At Walgreen's, Thompson dropped off a prescription for hydrocodone from a doctor in Chicago. Trial Tr. P.208 L.9 – P.213 L.15; State's Exh. 4. At Hy-Vee, Elverton dropped off a prescription for oxycodone from the same Chicago doctor. Trial Tr. P.325 L.16 – P.328 L.25; State's Exh. 16.

At Walgreen's, employees noticed several red flags with Thompson's prescription. First, pharmacies in Bettendorf do not typically fill prescriptions from Chicago. Trial Tr. P.213 Ls.5-25. Second, it prescribed a powerful opioid painkiller at an uncommonly

high strength. Trial Tr. P.213 Ls.5-25. In any event, the pharmacy always calls doctors to confirm opioid prescriptions because they are sometimes not legitimate. Trial Tr. P.222 Ls.12-19. A call to the doctor's office revealed that prescription pads had been stolen and the pharmacist was asked to call police to report a fraudulent prescription. Trial Tr. P.224 Ls.10-24. Walgreen's called police and notified other area pharmacies, including Hy-Vee. Trial Tr. P.226 L.23 – P.228 L.2.

Meanwhile, officers responded to a similar call for a fraudulent prescription at Hy-Vee. Trial Tr. P.283 Ls.17-24. Upon arrival, officers located Thompson waiting to pick up the prescription that Elverton had dropped off earlier. Trial Tr. P.284 L.21 – P.285 L.10. When confronted and asked for identification, Thompson fled the store. Trial Tr. P.285 Ls.11-21.

ARGUMENT

I. Iowa Code Section 814.6A Does Not Violate the Separation of Powers Clause.

Preservation of Error

The State does not contest error preservation.

Standard of Review

This Court’s review of constitutional challenges to statutes is well established:

We review constitutional challenges to a statute de novo. In doing so, we must remember that statutes are cloaked with a presumption of constitutionality. The challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt. Moreover, “the challenger must refute every reasonable basis upon which the statute could be found to be constitutional.” Furthermore, if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction.

State v. Hernandez–Lopez, 639 N.W.2d 226, 233 (Iowa 2002)

(citations omitted).

Merits

Thompson argues that recently enacted legislation prohibiting represented defendants from filing pro se documents violates the separation of powers clause in the Iowa constitution. The new statute changes the appellate procedure concerning pro se supplemental briefs. By rule, this Court permitted defendants to file pro se supplemental briefs in addition to briefs filed by counsel. *See Iowa R.*

App. P. 6.901(2). The legislature addressed that practice by limiting pro se filings from criminal defendants who are represented by counsel. The statute instructs:

A defendant who is currently represented by counsel shall not file any pro se document, including a brief, reply brief, or motion, in any Iowa court. The court shall not consider, and opposing counsel shall not respond to, such pro se filings.

Iowa Code § 814.6A(1) (Westlaw 2019) (codifying 2019 Iowa Acts ch. 140, § 30). This limitation of pro se filings comes with two exceptions—criminal defendants may still exercise their right to proceed without assistance of counsel, and represented defendants may still file a motion to disqualify counsel. Iowa Code §§ 814.6A(2), (3).

The Iowa constitution defines the jurisdiction of this Court and grants the legislature authority to prescribe restrictions on its review:

The supreme court shall have appellate jurisdiction only in cases in chancery, *and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe*; and 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 (emphasis added). When an appellate court reviews a criminal conviction, it acts as a court for correction of errors at law. *See* Iowa R. App. P. 6.907 (“Review in equity cases shall be de novo. In all other cases the appellate courts shall constitute courts for correction of errors at law . . .”). Therefore, the constitution subjects the appellate courts’ consideration of criminal appeals to “such restrictions as the general assembly may, by law, prescribe.”

Article V, section 4 grants the legislature authority to limit the types of appeals the Court may consider. “[W]e note that the right of appeal is not an inherent or constitutional right; it is a purely statutory right that may be granted or denied by the legislature as it determines.” *James v. State*, 479 N.W.2d 287, 290 (Iowa 1991). The legislature, for example, may set deadlines for the invocation of appellate jurisdiction. *See State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917) (recognizing that “The right to appeal is purely statutory” and dismissing the appeal filed later than permitted by statute). Similarly, the legislature may place amount-in-controversy limits on appeals.

See Andrews v. Brudick, 16 N.W. 275, 278–79 (Iowa 1883)

(upholding a statute that precluded appeals in the Supreme Court in cases that involved amounts less than \$100). Over time, the legislature has used this authority to grant or limit appeals from different categories of criminal cases. *See, e.g.*, Iowa Code § 814.6(1)(a) (denying the right to appeal judgment of sentence for a simple misdemeanor).

Article V, section 4 also grants the legislature authority to enact procedures for the appellate courts. For example, the legislature can exercise its constitutional authority to discontinue the practice of filing a separate pleading assigning error. *See Wine v. Jones*, 168 N.W.2d 318, 321 (Iowa 1918). Or it can enact its own time-computation statutes that supersede a supervisory order from this Court on the subject. *See Root v. Toney*, 841 N.W.2d 83, 87 (Iowa 2013). In the realm of criminal appeals, the legislature has acted to expedite criminal appeals over civil appeals (Iowa Code section 814.15), to not require the personal appearance of the defendant in

the appellate courts (section 814.17), and to end appellate jurisdiction when procedendo issues (section 814.25).

Most importantly, the legislature has independent constitutional authority to enact procedural rules for the courts to follow. The constitution states, “It shall be the duty of the general assembly to provide for the carrying into effect of this article, and *to provide for a general system of practice in all the courts of this state.*” Iowa Const. art. V, § 14 (emphasis added). “We recognize our legislature possesses the fundamental responsibility to adopt rules of practice for our courts.” *Butler v. Woodbury Cty.*, 547 N.W.2d 17, 20 (Iowa Ct. App. 1996) (citing *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 568– 69 (Iowa 1976)). The legislature has delegated some of that authority to this Court. See Iowa Code § 602.4201 (“The supreme court may prescribe all rules of pleading, practice, evidence, and procedure . . .”). However, it retains the power to supersede any rule adopted by this Court. See Iowa Code § 602.4202(4) (“If the general assembly enacts a bill changing a rule or form, the general assembly’s enactment supersedes a conflicting provision in the rule or

form as submitted by the supreme court.”). And to any extent the courts possess an inherent power to enact rules of practice, that authority ends when the legislature enacts a conflicting statute. *See Critelli*, 244 N.W.2d at 568–69 (recognizing an inherent common-law power to adopt rules “in the absence of statute”).

Section 814.6A is a proper exercise of the legislature’s constitutional authority to provide rules of practice for the courts and it supersedes rule 6.901(2). Thompson’s argument to the contrary relies on this Court’s constitutional authority to “issue all writs and process necessary to secure justice to parties,” art. V § 4, and its decision in *Klouda v. Sixth Judicial Dist. Dept. of Correctional Services*, 642 N.W.2d 255 (Iowa 2002). Neither argument is persuasive. First, Thompson argues that limiting pro se filings by represented defendants “impairs the Court in its [constitutional] duty to secure justice for parties to litigation.” Appellant’s Br. P.35. But the Court does not have a constitutional duty to “secure justice.” The constitution gives the Court power to “issue all writs and process necessary to secure justice.” Section 814.6A does not interfere with

the Court's authority to issue any writ or process; it provides a rule of practice for the courts as an exercise of an explicit *legislative* constitutional duty. *See* Iowa Const. art. V, § 14.

Klouda is also inapposite. It involved a legislative co-opt of judicial power, that is, “the power to decide and pronounce a judgment and carry it into effect.” *Klouda*, 642 N.W.2d at 261. The statutes at issue transferred power to suspend a sentence, grant probation, revoke probation, or continue probation to administrative law judges under a pilot program in the sixth judicial district. *Id.* at 262. This Court held that those powers were “judicial functions which result in a court deciding and pronouncing a judgment and carrying it into effect.” *Id.* By contrast, providing rules of practice for the courts is explicitly a *legislative* function under the Iowa constitution. Because the statute does just and only that, it is a proper exercise of the legislature's constitutional authority. This Court cannot consider the pro se supplemental brief filed on December 12, 2019.

II. The State is Prohibited from Responding to Thompson's Pro Se Supplemental Brief.

In the brief filed by Thompson's counsel, he argues that this Court must consider the sufficiency challenge in Thompson's pro se supplemental brief prior to addressing the evidentiary issue in his counsel's brief. Appellant's Br. P.36. The new statute prohibits the State from responding to Thompson's pro se supplemental brief. *See* Iowa Code § 814.6A(1) (effective July 1, 2019) ("The court shall not consider, and opposing counsel shall not respond to, such pro se filings."). Following Thompson's motion to accept his pro se supplemental brief, this Court ordered the parties to address "the issue as to whether the court can consider an appellant's pro se supplemental brief in an appeal filed after July 1, 2019." Order 12/31/19. This Court did not order the State to respond to the pro se supplemental brief itself and, unless and until this Court declares the new statute unconstitutional, the State remains prohibited from doing so.

III. The District Court Did Not Err When It Allowed Evidence of a False Address Provided by Thompson.

Preservation of Error

Thompson challenges the district court's decision to allow an officer to refresh his recollection of Thompson's address by reviewing the complaint and affidavit and admitting as an exhibit a redacted version of the written arraignment signed by Thompson to prove his address. The State does not contest error preservation as to those two rulings. 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.

Standard of Review

Review of the district court rulings on relevance and admissibility under rule 5.403 are reviewed for abuse of discretion. *State v. Tipton*, 897 N.W.2d 653, 691 (Iowa 2017). Even where a district court has abused its discretion, the error is reversible only if it is not harmless. *State v. Paredes*, 775 N.W.2d 554, 571 (Iowa 2009); Ia. R. Evid. 5.103(a). Nonconstitutional errors are harmless unless it

“appear[s] that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice[.]” *State v. Trudo*, 253 N.W.2d 101, 107 (Iowa 1977). “[A] defendant may not claim prejudice where the same evidence is otherwise supplied by the defendant or is made overwhelmingly clear in the record.” *Id.* at 108.

Merits

Thompson challenges the district court’s decision to allow an officer to refresh his recollection of Thompson’s address by reviewing the complaint and to admit a redacted version of the written arraignment showing Thompson’s address. The State offered evidence of Thompson’s address in part to prove that the address he provided to the pharmacy technician at Walgreen’s was false. Thompson argues that the evidence was irrelevant and unfairly prejudicial.

Evidence is relevant if it “has any tendency to make a fact more or less probable” and the “fact is of consequence.” Iowa R. Evid. 5.401. Relevant evidence is admissible unless it is prohibited by a constitution, statute, or rule. Iowa R. Evid. 5.402. Otherwise relevant

evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. Iowa R. Evid. 5.403. This Court grants “wide latitude” to district court decisions regarding admissibility of evidence. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998).

Thompson’s challenge to the relevance of the officer’s testimony focuses on an apparent contradiction between that testimony and the testimony of the Walgreen’s pharmacy technician who took the prescription from Thompson. The prescription that Thompson passed at Walgreen’s was written for “Claudia Williamson” and Thompson gave the pharmacy technician an address of 1303 6th Avenue in DeWitt. Trial Tr. P.208 L.24 – P.209 L.25. The officer testified that the 6th Avenue address was supposed to have been Thompson’s address. Trial Tr. P.274 Ls.21-25. Thompson argues that the officer was wrong about that; he claims that the 6th Avenue address was supposed to be that of “Claudia Williamson” and the error affected the relevance of other evidence showing that Thompson’s address was in fact 1303 14th Street in DeWitt.

But the relevance of the challenged testimony need not be decided on appeal because it could not have harmed Thompson at trial. The key evidence for the State on this point came from the officer's testimony that he had discovered during his investigation that Thompson's address was different from the 1303 6th Avenue address that he gave the pharmacy technician. Trial Tr. P.258 L.11 – P.259 L.12. Thompson did not object to that testimony and it is not challenged in this appeal. 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 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.

The evidence that Thompson objected to and that he now challenges on appeal is not the officer's testimony that his address was different from 1303 6th Avenue in DeWitt, but rather that his address was 1303 14th Street in DeWitt. But that evidence could not unfairly prejudice him in light of the testimony that his address was

not 1303 6th Avenue. In fact, the specific evidence that he challenges on appeal was arguably helpful to him at trial because it allowed his counsel to argue in closing that the pharmacy technician may have misheard the address he provided given the similarity between 1303 6th Avenue and 1303 14th Street, both in DeWitt. Trial Tr. P.409 L.25 – P.411 L.17.

The question for the jury with respect to the false address theory was not whether he had provided his own address to the pharmacy technician, but rather whether the address he provided was false. The unchallenged testimony that the address he provided was not his address was relevant for the jury's determination of that question. Thompson's counsel was free to cross-examine the officer about how he had discovered that Thompson's address was not the same as the one provided to the pharmacy technician but he did not do so. Given that testimony, the district court did not abuse its discretion when it permitted the officer to refresh his recollection of Thompson's address or when it admitted the redacted arraignment showing the address. And even if it did, Thompson has not shown

that his rights were injuriously affected or that he suffered a miscarriage of justice. *See Trudo*, 253 N.W.2d at 107.

CONCLUSION

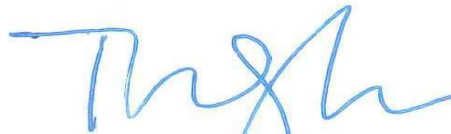
For the foregoing reasons, Thompson's convictions should be affirmed.

REQUEST FOR NONORAL SUBMISSION

Nonoral submission is appropriate for this case.

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 **2,987** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: May 27, 2020



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