#31389-vacate & remand-RG
2026 S.D. 56

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Plaintiff and Appellee,

v.

ASHLEE PRAY, Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHAEL W. DAY
Retired Judge

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CONSIDERED ON BRIEFS
OCTOBER 6, 2026
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#31389

GUSINSKY, Justice

[¶1.] AshLee Pray worked as a chemical dependency counselor and clinical supervisor at a counseling agency. She also served as the treatment team representative for the Fourth Circuit drug court program. There, she befriended E.G., a drug court coordinator. E.G. eventually asked Pray to obtain drugs for her, which Pray did through her boyfriend, K.W. Months later, law enforcement found E.G. deceased in her home from an overdose. An investigation traced the drugs to Pray and K.W., and a grand jury indicted Pray on one count of conspiracy to distribute a controlled substance. After reaching a plea agreement, Pray pleaded guilty to conspiracy to possess a controlled substance. The circuit court sentenced Pray to five years in the state penitentiary, with one year suspended. Pray appeals, asserting in part that the sentence imposed exceeds the statutory maximum for her offense.[1] We vacate the sentence and remand for resentencing.

Factual and Procedural Background

[¶2.] On December 14, 2023, law enforcement conducted a wellness check on E.G., finding her deceased at home. E.G.'s autopsy revealed that she died from fentanyl toxicity. The ensuing investigation revealed a connection between the drugs found in E.G.'s possession, Pray, and Pray's boyfriend, K.W. At the time, Pray was employed as a chemical dependency counselor and clinical supervisor at a counseling agency. Pray also served as the treatment team representative for the Fourth Circuit drug court program. Through the drug court program, Pray met

1. Pray's appellate counsel is different from trial counsel.

E.G., who served as the drug court coordinator, and the two became friends. Pray, E.G., and K.W. all had a history of drug use.

[¶3.] Beginning in October 2023, E.G. asked Pray to obtain drugs for her. Pray communicated with K.W. through phone calls and text messages and asked K.W. to obtain drugs for E.G. Although K.W. was initially resistant, he obtained pills on several occasions and gave them to Pray, who then gave them to E.G. In December 2023, Pray became aware of E.G. throwing up and feeling ill, causing K.W. to believe E.G. was overdosing. Pray and K.W. learned about E.G.'s death a few hours after Pray drove by E.G.'s house and saw law enforcement there. After learning about E.G.'s death, Pray and K.W. traveled to Colorado for a couple of weeks, believing they may be connected to E.G.'s passing.

[¶4.] On September 23, 2024, a Meade County grand jury returned a one-count indictment, charging Pray with conspiracy to distribute a controlled drug or substance (fentanyl) in violation of SDCL 22-42-2.4, SDCL 22-42-2, SDCL 22-42-5, and SDCL 22-3-8. The indictment was filed by the State the same day. Ultimately, the parties reached a plea agreement under which Pray would plead guilty to an amended charge in exchange for the State's recommendation of a probationary sentence.

[¶5.] On November 7, 2025, the State filed an amended complaint charging Pray with conspiracy to possess a controlled drug or substance (methamphetamine) in violation of SDCL 22-42-5 and SDCL 22-3-8. Both the plea agreement and the information stated that the amended charge was a Class 5 felony. During the change of plea hearing, on November 7, 2025, the court likewise stated, "[t]his is a

Class 5 felony. Carries a maximum sentence of five years in the state penitentiary or a $10,000 fine or both." Pray's counsel confirmed that he discussed the nature of the charge and maximum penalties with Pray. Pray pleaded guilty to the amended charge, admitting she conspired to possess methamphetamine and sent electronic messages to third parties in an effort to obtain methamphetamine.

[¶6.] Before accepting the plea, the circuit court advised Pray of the rights she would waive by pleading guilty and ensured that Pray understood. The circuit court found that Pray understood her rights and the nature of the charge. Pray also stated, "it's important for me that it's specified the substance that I conspired to possess on the record." The circuit court confirmed that the drug referred to in the amended charge was indeed methamphetamine. The circuit court ordered a presentence investigation (PSI) and stated, "I'm going to order that you cooperate with Court Services in the preparation of that report."

[¶7.] On January 23, 2026, the sentencing hearing was held, and the circuit court confirmed Pray pleaded guilty to a Class 5 felony of "conspiracy to possess a controlled drug or substance, methamphetamine." At sentencing, the State explained, "[w]e made an offer based upon the facts of this case and based upon the fact that the person that actually gave the drugs is now serving 20 years in the penitentiary." The State acknowledged that the plea agreement called for a recommendation of a probationary sentence but then added that the plea agreement required Pray to "be honest with her Court Services Officer and cooperate. She did not do that. She chose not to and that is disheartening to the State. [The State] think[s] the Court should sentence appropriately under the terms of the plea

agreement." In response, the defense described Pray's ongoing struggles with drug addiction and her efforts towards treatment, including her acceptance into the Adult and Teen Challenge program in North Dakota.

[¶8.] The circuit court then reviewed Pray's criminal history, noting this was Pray's first felony conviction. Pray's prior criminal history consisted of a DUI in 2002 and felony drug charges that were dismissed in 2023. The circuit court detailed the failed cooperation regarding the PSI, noting that the PSI was filed without Pray's involvement but acknowledging that Pray's father delivered her PSI days before sentencing.

[¶9.] In addressing the appropriate sentence, the circuit court returned to the PSI and Pray's belief that treatment, rather than punishment, was appropriate. The circuit court stated, "[y]ou feel that because you're an addict, you should get treatment, not punishment;" and also noted that Pray "didn't even feel that probation was necessary or needed." The circuit court finished by finding "aggravating circumstances exist that pose a significant risk to the public . . . requir[ing] a departure from presumptive probation under [SDCL 22-6-11]." The circuit court noted Pray's failure to comply with the PSI process, her use of methamphetamine while employed as a counselor, a sexual relationship with her former client, and her general abuse of the trust placed upon her as a result of her position. The circuit court sentenced Pray to "five years in the South Dakota State Women's Prison with credit for all time served in the Meade County Jail," with a year suspended contingent upon compliance with treatment and payment of costs.

[¶10.] Regarding presumptive probation under SDCL 22-6-11, the circuit court, in the judgment of conviction, identified five aggravating circumstances that posed a significant risk to the public, justifying departure from presumptive probation:

> (1) Failure to comply with the PSI;
> (2) Using meth while serving as a counselor and with the Fourth Circuit Specialty Court;
> (3) Not taking responsibility for her actions;
> (4) Multiple attempts at treatment have failed; and
> (5) Her actions were connected to the death of another.

[¶11.] Pray appeals, raising two issues, which we restate as follows:

1. Whether the circuit court illegally sentenced Pray by exceeding the statutory maximum pursuant to SDCL 22-3-8 and SDCL 22-42-5.

2. Whether the circuit court erred in its application of SDCL 22-6-11.

Standard of Review

[¶12.] Neither party objected before the circuit court that the court's sentence exceeded the statutory maximum. Thus, we review this issue under a plain error analysis. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of a court." SDCL 23A-44-15. "We invoke *our discretion* under the plain error rule cautiously and only in '*exceptional circumstances*.'" *State v. McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d 725, 729 (quoting *State v. Fischer*, 2016 S.D. 1, ¶ 15, 873 N.W.2d 681, 687).

[¶13.] "To establish plain error, an appellant must show '(1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if, (4) it seriously affects the fairness, integrity, or

public reputation of judicial proceedings.'" *Id.* ¶ 13, 931 N.W.2d at 729–30 (citations omitted). "Additionally, 'with plain error analysis, the defendant bears the burden of showing the error was prejudicial.'" *Id.* ¶ 13, 931 N.W.2d at 730 (citations omitted).

Analysis

1. Whether the circuit court illegally sentenced Pray by exceeding the statutory maximum under SDCL 22-3-8 and SDCL 22-42-5.

[¶14.] Pray was originally indicted by a grand jury on one count of conspiracy to distribute a controlled drug or substance (fentanyl) in violation of SDCL 22-42-2.4, SDCL 22-42-2, SDCL 22-42-5, and SDCL 22-3-8. Pursuant to a plea agreement, Pray pleaded guilty to one count of conspiracy to *possess* a controlled drug or substance (methamphetamine), a Class 5 felony.

[¶15.] SDCL 22-3-8 states that "each of the parties to such conspiracy is guilty of conspiracy and may be punished up to the maximum penalty which may be imposed for a crime which is one level below the penalty prescribed for the crime underlying the conspiracy." We have explained that "a sentence for conspiracy to commit a felony shall be 'one classification less severe than the felony to be committed.'" *State v. Kaiser*, 526 N.W.2d 722, 725 (S.D. 1995). Thus, under SDCL 22-3-8, the maximum sentence Pray could receive was that allowed for a Class 6 felony, which is "two years imprisonment in a state correctional facility or a fine of four thousand dollars, or both." SDCL 22-6-1(9).

[¶16.] On appeal, both parties agree that the sentence the circuit court imposed for Pray's conspiracy conviction exceeds the maximum. The court therefore

erred when imposing Pray's sentence, and the error is plain, because it violates the statutory sentencing limitation. This error affected Pray's substantial rights because she received a sentence exceeding the maximum authorized sentence. Imposing an illegal sentence seriously affects the fairness, integrity, and public reputation of judicial proceedings. The five-year sentence must be vacated, and the matter remanded for resentencing within the statutory limits for a Class 6 felony.[2] Because this matter is remanded for resentencing, we need not address whether the circuit court complied with the mandates of SDCL 22-6-11.

Conclusion

[¶17.] The circuit court plainly erred when it sentenced Pray to a punishment authorized by a Class 5 felony instead of a Class 6 felony. We vacate Pray's sentence and remand for sentencing consistent with this opinion.

[¶18.] JENSEN, Chief Justice, and SALTER, DEVANEY, and MYREN, Justices, concur.

2. Though Pray was careful to note that the drug mentioned in the information was methamphetamine, not fentanyl, perhaps the more substantive distinction with the indictment lies in the differences between the objects of the conspiracy charges. As originally alleged, the indictment charged Pray with conspiracy *to distribute* a controlled substance—a charge which is not subject to SDCL 22-3-8's one-grade sentencing range reduction. The provisions of SDCL 22-42-2.4 specifically exempt from SDCL 22-3-8 conspiracies for distributing controlled substances and other prohibited acts listed in SDCL 22-42-2. However, there is no such exemption for a conspiracy *to possess* a controlled substance which is the charge contained in the information, and SDCL 22-3-8 applied at Pray's sentencing.