

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30928

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

JAMES ROY KINSOLVING,
Defendant and Appellant.

Appealed from the Circuit Court
Third Judicial Circuit, Hand County, South Dakota
The Honorable Kent A. Shelton, presiding

APPELLANT'S BRIEF

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Notice of Appeal filed December 10, 2024

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PRELIMINARY STATEMENT

The Defendant and Appellant, James Roy Kinsolving, will be referred to as “Defendant”. The Plaintiff and Appellee, State of South Dakota, will be referred to as “State.” References to documents will be as follows:

Preliminary HearingPH
Change of Plea HearingCPH
Pre-Sentence Report.....PSR
Settled RecordSR
Sentencing Hearing SH

All documents will be followed by their appropriate page number(s).

JURISDICTIONAL STATEMENT

Defendant appealed from a Judgment of Conviction entered on November 19, 2024, by the Honorable Kent A. Shelton, Circuit Court Judge, for the Third Judicial Circuit, in Beadle County, South Dakota. (SR 90). The Judgment of Conviction is a final order and is appealable as a matter of right pursuant to SDCL 23A-32-2. The Notice of Appeal was filed on December 10, 2024.

LEGAL ISSUES

1. The Court’s sentence constitutes cruel and unusual punishment.

Relevant Authority:

State v. Blair, 2006 S.D. 75

State v. Bonner, 1998 S.D. 30

STATEMENT OF THE CASE

The Defendant pled guilty to Counts I, II, and III of an Information charging Unauthorized Possession of Controlled Substance, Class 5 Felonies, and Count V, keeping place for use or sale of controlled substance, a Class 5 Felony. A Preliminary Hearing was held in the Third Judicial Circuit Court in Hand County before the Honorable Kent A. Shelton on April 16, 2024, and the Defendant was bound over for trial. The Defendant pled guilty to the above-referenced counts of the Information on August 20, 2024. The Defendant was sentenced on November 12, 2024: Count I, five years in the South Dakota State Penitentiary, Counts II, III, and V, five years in the South Dakota State Penitentiary, all to run concurrent with Count I.

STATEMENT OF FACTS

The Defendant was arrested on February 21, 2024, following the arrest of another individual on charges of Possession of a Controlled Substance. During the transport of that individual to the Beadle County jail by the Hand County Sheriff, the individual disclosed that he had smoked methamphetamine at the Defendant's residence earlier that day. Upon returning to Hand County the Sheriff applied for and was granted a search warrant to search the Defendant's residence. The search warrant was executed and a variety of controlled substances and drug paraphernalia were located and seized. A Preliminary Hearing was held on April 16, 2024, at which time the Defendant was bound over for trial. The Defendant entered guilty pleas as described above on August 20, 2024, and was sentenced on November 12, 2024.

ARGUMENT

I. The Court's sentence constitutes cruel and unusual punishment.

The Eighth Amendment to the United States Constitution and Article VI, § 23 of the South Dakota Constitution prohibit cruel and unusual punishments. Although sentences within the statutory maximum are reviewed under the abuse of discretion standard, an Eighth Amendment challenge subjects review of the sentence to the *Bonner* standards of proportionality. *State v. Bonner*, 1998 SD 30. This Court has held that a sentence must be proportionate to the offense committed and the offender, and that the harshest sentences are reserved for the “most serious combinations of the offense and the background of the offender.” *State v. Blair*, 2006 SD 75 ¶ 26 (internal citations omitted). In order to properly assess the proportionality of sentence, the sentencing court must “acquire a thorough acquaintance with the character and history of the person before it. *Id.* (citing *Bonner*).

The factors a sentencing court must consider are: 1) the Defendant’s moral character; 2) mentality; 3) habits; 4) social environment; 5) tendencies; 6) age; 7) aversion or inclination to commit crimes; 8) life; 9) family; 10) occupation and 11) previous criminal record. *Id.* at ¶27. In addition, the Defendant’s rehabilitation prospects and the impact of the crime(s) on any victims must be considered. *Id.* The sentencing court failed to consider the majority of these factors when imposing sentence.

While noting that this is a presumptive probation case pursuant to SDCL 22-6-11, the court found the following aggravating factors: 1) multiple probation violations and previous convictions; 2) new felony charges while on supervised probation; 3) low likelihood of complying with terms of probation; 4) new felony charges upon recent completion of probation and 5) a substantial threat to the community. SH 6, lines 19-25, SH 7, lines 1-12. The court then imposed sentence. SH 7, lines 13-25, SH 8, lines 1-7.

As stated above and the record reflects, the court only considered the Defendant's previous criminal record and current charges and failed to consider the remaining *Bonner* factors. The record reflects that the court failed to consider the information contained in the pre-sentence report prepared pursuant to SDCL 23A-27-5 and 6. The information included in the pre-sentence report included information related to the *Bonner* factors the court did not consider. That information included the Defendant's family history, employment history, substance abuse and treatment history as well as the ongoing efforts and resources the Defendant was currently undergoing to deal with his substance abuse issues. It also included the LSI Graph which rated the Defendant at 19, which is the lowest level of a medium classification for requirement of services. PSR 30. Finally, the pre-sentence report contained 8 letters of support from friends and employers, and one from the Defendant (that was duplicated). PSR 33-44. These letters acknowledged the Defendant's substance abuse issues and all of the authors appeared to be aware of the Defendant's criminal charges. However, the letters reflected a change in the Defendant's behavior, his commitment to recovery and the efforts he was making to be successful and his value to the community.

These letters of support collectively address the *Bonner* factors that the court did not take into consideration when imposing sentence. The letters support the Defendant's general moral character, the changes the authors have observed, how he has become more outgoing and personable, his busy and hard-working nature and his willingness to help others. In addition, they discuss his aging mother who recently moved to an assisted living facility in Wyoming and his desire to provide the care for her that he can.

The record and the pre-sentence report indicate that the sentence was grossly disproportionate given the *Bonner* factors. Although the sentences on Counts II, III, and V were concurrent to the sentence on Count I, and although the court enumerated its aggravating factors in imposing the sentences, the court failed to articulate a thorough understanding of the Defendant in light of the *Bonner* factors.

The court in *Blair* considered remorse, rehabilitation prospects, danger to the community and effects of the crime on the victims as appropriate factors for the sentencing court to take into consideration. *State v. Blair*, 2006 SD 75 ¶ 46-64. Although the court affirmed the sentence, it conducted a careful and seemingly complete analysis of all the necessary factors, something the sentencing court here failed to do.

In his statements to court services in the pre-sentence report, PSR 7, in his letter to the court that was included, PSR 43, and at the sentencing hearing, SH 7, lines 9-10, the Defendant acknowledged his criminal conduct and expressed remorse for it, expressing a desire to continue to turn his life around and away from drug use. The record does not reflect consideration of this factor.

The pre-sentence report outlined the Defendant's recovery efforts, including a 29-day inpatient program from which he was successfully discharged, PSR 7, as well as ongoing out-patient treatment. The pre-sentence report also detailed his successful discharge from supervised probation. PSR 5. While the court considered this factor when it stated "you do well while you're being supervised", it discounted this success due to violations after being released from probation. SH 7, lines 4-10. This suggests that a longer and perhaps closer period of supervision would be appropriate.

The court made a conclusory statement that the Defendant poses a “substantial threat to the community”. SH 7, lines 11-12. While the Defendant does not aver that drug use is a victimless crime, he was neither charged with nor convicted of distribution of controlled substances. The letters of support contained in the pre-sentence report indicate that despite his drug activity the Defendant was a well-liked and productive member of the Miller community. The court made no finding on this factor other than its conclusion that he posed a substantial threat to the community. This finding has no basis in the record.

CONCLUSION

The Court failed to consider all of the required factors in order to balance the criminal conduct of the Defendant with his character. This renders the sentence imposed an abuse of discretion and grossly disproportionate. Therefore, the case should be remanded to the Court to reconsider sentencing.

Dated this 14th day of April, 2025.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENTS

Defendant, by and through counsel, requests the opportunity to present oral arguments to the Court in support of this appeal.

/s/ Jeffrey M. Banks

Jeffrey M. Banks

APPENDIX

1. Judgment of Conviction and Sentencing entered on November 19, 2024.

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
) ss.	
COUNTY OF HAND)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,)	
Plaintiff,)	CRI 24-07
)	
vs.)	JUDGMENT OF CONVICTION
)	AND SENTENCE
JAMES RAY KINSOLVING,)	
Defendant.)	

An Information was filed on April 16, 2024, with this Court charging the Defendant with the crimes of **COUNT I: UNAUTHORIZED POSSESSION OF CONTROLLED SUBSTANCE, A CLASS 5 FELONY, VIOLATION OF SDCL 22-42-5;** **COUNT II: UNAUTHORIZED POSSESSION OF A CONTROLLED SUBSTANCE, A CLASS 5 FELONY, VIOLATION OF SDCL 22-42-5;** **COUNT III: UNAUTHORIZED POSSESSION OF CONTROLLED SUBSTANCE, A CLASS 5 FELONY, VIOLATION OF SDCL 22-42-5;** **COUNT IV: UNAUTHORIZED INGESTION OF CONTROLLED SUBSTANCE, A CLASS 5 FELONY, VIOLATION OF SDCL 22-42-5.1;** **COUNT V: KEEPING PLACE FOR USE OR SALE OF CONTROLLED SUBSTANCE, A CLASS 5 FELONY, VIOLATION OF SDCL 22-42-10;** and **COUNT VI: POSSESSION OF MARIJUANA TWO OUNCES OR LESS, A CLASS 1 MISDEMEANOR, VIOLATION OF SDCL 22-42-6,** committed on or about February 21, 2024. The Defendant was arraigned on said Information on the 14th day of May, 2024, the Defendant, the Defendant's attorney, Jeffrey M. Banks, and Elton R. Anson, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of

all constitutional and statutory rights pertaining to the charges against the Defendant. On August 20, 2024, the Defendant, the Defendant's attorney, Jeffrey M. Banks, and Elton R. Anson, Hand County State's Attorney, appeared at the defendant's change of plea hearing. The Defendant pled guilty to COUNT I: UNAUTHORIZED POSSESSION OF CONTROLLED SUBSTANCE, VIOLATION OF SDCL 22-42-5; COUNT II: UNAUTHORIZED POSSESSION OF A CONTROLLED SUBSTANCE, VIOLATION OF SDCL 22-42-5; COUNT III: UNAUTHORIZED POSSESSION OF CONTROLLED SUBSTANCE, VIOLATION OF SDCL 22-42-5; and COUNT V: KEEPING PLACE FOR USE OR SALE OF CONTROLLED SUBSTANCE, VIOLATION OF SDCL 22-42-10, in the Information and a presentence investigation was ordered.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of UNAUTHORIZED POSSESSION OF CONTROLLED SUBSTANCE, in violation of SDCL 22-42-5; UNAUTHORIZED POSSESSION OF CONTROLLED SUBSTANCE, in violation of SDCL 22-42-5; UNAUTHORIZED POSSESSION OF CONTROLLED SUBSTANCE, in violation of SDCL 22-42-5; and KEEPING PLACE FOR USE OR SALE OF CONTROLLED SUBSTANCE, in violation of SDCL 22-42-10.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that said plea was voluntary, knowing, and intelligent, that the Defendant was represented by competent counsel; and that a factual basis existed for the plea.

SENTENCE

On November 12, 2024, the Defendant appeared at the sentencing hearing with counsel, Jeffrey M. Banks, the State was represented by Elton R. Anson, Hand County State's Attorney. The Court asked the Defendant whether any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

Aggravating circumstances exist to depart from the presumptive probation of SDCL 22-6-11:

1. Multiple probation violations;
2. Multiple felony convictions;
3. Eight lifetime felonies, and Seven in the last year;
4. New felonies while on probation;
5. Likelihood of supervision is poor; and
6. Substantial threat to community.

COUNT I:

IT IS HEREBY ORDERED that Defendant, James Roy Kinsolving, shall be imprisoned in the South Dakota State Penitentiary for a term of FIVE (5) years, with credit of SEVEN (7) days previously served.

IT IS FURTHER ORDERED that the Defendant shall pay court costs.

IT IS FURTHER ORDERED that the Defendant shall reimburse Hand County for court appointed attorney fees.

IT IS FURTHER ORDERED that the Defendant shall pay prosecution fees in the amount of \$299.00 for testing fees.

IT IS FURTHER ORDERED that the bond posted by the 3rd party, currently held in this matter, shall be released to said 3rd party.

IT IS FURTHER ORDERED that the Defendant is remanded to the custody of the Hand County Sheriff for transport and commitment to the South Dakota State Penitentiary.

COUNT II:

IT IS HEREBY ORDERED that Defendant, James Roy Kinsolving, shall be imprisoned in the South Dakota State Penitentiary for a term of FIVE (5) years, to run concurrent with COUNT II.

IT IS FURTHER ORDERED that the Defendant shall pay court costs.

COUNT III:

IT IS HEREBY ORDERED that Defendant, James Roy Kinsolving, shall be imprisoned in the South Dakota State Penitentiary for a term of FIVE (5) years, to run concurrent COUNT I, and COUNT II.

IT IS FURTHER ORDERED that the Defendant shall pay court costs.

COUNT V:

IT IS HEREBY ORDERED that Defendant, James Roy Kinsolving, shall be imprisoned in the South Dakota State Penitentiary for a term of FIVE (5) years, to run concurrent COUNT I, COUNT II, and COUNT III.

IT IS FURTHER ORDERED that the Defendant shall pay court costs.

YOU HAVE 30 DAYS TO APPEAL THIS COURT'S SENTENCE ONCE YOU RECEIVE NOTICE OF THE SAME.

BY THE COURT:
11/19/2024 1:08:50 PM

Attest:
Bertsch, Marla
Clerk/Deputy



A handwritten signature in black ink, appearing to read "K.A. Shelton", is written over a horizontal line.

Hon. Kent A. Shelton
Circuit Court Judge

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff/Appellee,
v.

JAMES ROY KINSOLVING,
Defendant/Appellant

)
)
)
) **CERTIFICATE OF COMPLIANCE**
)
)
) # 30928
)
)

The undersigned hereby certifies that the foregoing brief complies with the type volume limitations found in SDCL 15-26A-66(b). It contains 1731 words and 11,117 characters.

Dated this 14th day of April, 2025.

/s/ Jeffrey M. Banks

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IN THE SUPREME COURT
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Plaintiff/Appellee,
v.

JAMES ROY KINSOLVING,
Defendant/Appellant

CERTIFICATE OF SERVICE

30928

The undersigned hereby certifies that, on the 14th day of April, 2025, a true and correct copy of Appellant's Brief was served through the eFileSD System upon the following, to-wit:

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Dated this 14th day of April, 2025.

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Attorney for Defendant/Appellant

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30928

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JAMES ROY KINSOLVING,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
HAND COUNTY, SOUTH DAKOTA

THE HONORABLE KENT SHELTON
Circuit Court Judge

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Notice of Appeal filed December 10, 2024

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30928

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JAMES ROY KINSOLVING,

Defendant and Appellant.

PRELIMINARY STATEMENT

Kinsolving appeals arguing the circuit court failed to consider all the *Bonner* factors when determining his sentence; therefore, his sentence constitutes cruel and unusual punishment and an abuse of discretion. References to the Settled Record, 29CRI24-7, are denoted “SR.” References to the Appellant’s Brief are denoted “AB.” The proper page number(s) follows the references.

JURISDICTIONAL STATEMENT

This is an appeal of a Judgment and Sentence entered by the Honorable Kent Shelton, Circuit Court Judge, Third Judicial Circuit, Hand County, South Dakota. SR:90-94. Kinsolving timely filed a Notice of Appeal on December 10, 2024. SR:148; SDCL 23A-32-15. This Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT PROPERLY SENTENCED KINSOLVING?

The circuit court did not rule on this issue.

- *State v. Chipps*, 2016 S.D. 8, 874 N.W.2d 475
- *State v. Rice*, 2016 S.D. 18, 877 N.W.2d 75
- *State v. Klinetobe*, 2021 S.D. 24, 958 N.W.2d 734

STATEMENT OF THE CASE

Kinsolving pled guilty to four class 5 felonies: three counts of unauthorized possession of a controlled substance and one count of keeping place for use or sale of controlled substance. SR:91. Pursuant to a plea agreement, the State dismissed two counts: unauthorized possession of a controlled substance and possession of marijuana two ounces or less. SR:90-91, 101. The State also dismissed the Habitual Offender enhancement. SR:101.

At sentencing, the State asked for Kinsolving to be incarcerated due to his extensive criminal history. SR:158-59. Kinsolving requested if any jail time be imposed Kinsolving “be allowed work release, and that he be allowed to check into the jail so that he can have his own vehicle to get back and forth for work.” SR:161. The circuit court found several aggravating circumstances and stated Kinsolving was “a substantial threat to the community based upon [his] history.” SR:161-62. The circuit court sentenced Kinsolving to five years in the South Dakota State Penitentiary on each count to run concurrently. SR:162-63.

STATEMENT OF THE FACTS

On February 21, 2024, the Sheriff of Hand County made an arrest on a traffic stop for a methamphetamine (“meth”) possession charge.

SR:70. In questioning that individual, he admitted to smoking meth with Kinsolving at his residence that morning. SR:70. The Sheriff knew Kinsolving had “a long history of drug use” and was arrested, as a result of a search at his residence, on February 25, 2019, for possession of a controlled substances (meth and Xanax), possession of marijuana, and possession of drug paraphernalia. SR:116.

Based off the information learned that day and Kinsolving’s prior history, the Sheriff applied for a search warrant for Kinsolving’s residence. The search warrant was granted and executed. SR:70. During the search, officers found over 5 grams of meth, 41 grams of Psilocybin, 7 grams of marijuana, and THC oil, wax, and/or gummies. SR:71-74, 111.

ARGUMENT

I.

THE CIRCUIT COURT PROPERLY SENTENCED KINSOLVING.

Kinsolving appeals arguing the circuit court did not properly consider the *Bonner* factors when fashioning his sentence; therefore, his sentence constitutes cruel and unusual punishment and an abuse of discretion. AB:6 (citing *State v. Bonner*, 1998 S.D. 30, 577 N.W.2d 575).

A. Eighth Amendment Analysis

This Court “surveyed United States Supreme Court decisions on the Eighth Amendment and explained the proper analysis of cruel-and-unusual-punishment cases.” *State v. Rice*, 2016 S.D. 18, ¶ 13, 877 N.W.2d 75, 80 (citing *State v. Chipps*, 2016 S.D. 8, 874 N.W.2d 475).

This Court held:

The question whether a noncapital sentence violates the Eighth Amendment requires us to determine de novo whether the sentence imposed is grossly disproportionate to its corresponding offense. To do so, we first compare the gravity of the offense—i.e., ‘the offense’s relative position on the spectrum of all criminality’—to the harshness of the penalty—i.e., ‘the penalty’s relative position on the spectrum of all permitted punishments.’ ‘If the penalty imposed appears to be grossly disproportionate to the gravity of the offense, then we will compare the sentence to those “imposed on other criminals in the same jurisdiction” as well as those “imposed for commission of the same crime in other jurisdictions.’ ” The challenged sentence is cruel and unusual only if these comparisons ‘validate [the] initial judgment that [the] sentence is grossly disproportionate to [the] crime.’

Id. (internal citations omitted). When a defendant receives multiple sentences, this Court “evaluate[s] the individual sentence for each count, [as] opposed to scrutinizing the aggregate sentence.” *State v. Shelton*, 2021 S.D. 22, ¶ 38, 958 N.W.2d 721, 733-34 (quoting *State v. Uhing*, 2016 S.D. 93, ¶ 18, 888 N.W.2d 550, 556).

The analysis begins by examining the gravity of Kinsolving’s offense. Kinsolving pled guilty to three counts of unauthorized possession of a controlled substance for possessing approximately 5.5 grams of meth, approximately 41.1 grams of Psilocybin, and THC oil, wax, and/or gummies. SR:91. Kinsolving also pled guilty to keeping place for use or sale of controlled substance. SR:91. Kinsolving “does not aver that drug use is a victimless crime[.]” AB:6. Although Kinsolving pled guilty to non-violent offenses, he committed a serious offenses that impose great harm on the community.

Next, the harshness of Kinsolving’s sentence is examined. The circuit court sentenced Kinsolving to five years’ incarceration for each count. SR:92-93. The spectrum of all permitted punishments in South Dakota includes the possibility of death and mandatory life imprisonment. *See* SDCL 22-6-1. Kinsolving’s sentence is at the lower end of the spectrum for permitted punishments. Kinsolving’s sentence when compared to the gravity of the offense, is not grossly disproportionate, thus ending the review of his constitutional claim.

Kinsolving argues his sentence was cruel and unusual because the circuit court failed to consider the *Bonner* factors. AB:3 (*citing State v. Bonner*, 1998 S.D. 30, 577 N.W.2d 575). This Court held *Bonner*'s "Eighth Amendment analysis will no longer be followed by this Court." *Rice*, 2016 S.D. 18, ¶ 16, 877 N.W.2d at 81. This Court held its "analysis per *Rice* and *Chipps* does not take an individualized approach to sentencing. [This Court] look[s] only to whether the penalty imposed is grossly disproportionate to the gravity of the offense." *State v. Bausch*, 2017 S.D. 1, ¶ 39, 889 N.W.2d 404, 415. As previously stated, Kinsolving's punishment, five years' incarceration on each count, when compared to the gravity of his offenses, is not grossly disproportionate.

B. Abuse of Discretion Analysis

In addition to his Eighth Amendment challenge, Kinsolving also contends the circuit court's sentence was an abuse of discretion. AB:6. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83 (internal citation omitted). Additionally, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *State v. Toavs*, 2017 S.D. 93, ¶ 14, 906 N.W.2d 354, 358 (quoting *State v. Blair*, 2006 S.D. 75, ¶ 20, 721 N.W.2d 55, 61). It comes as a consequence of these circumstances that a sentence within the statutory

maximum generally will not be disturbed on appeal. *Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83 (internal citation omitted).

In determining an appropriate sentence, “[c]ourts should consider the traditional sentencing factors of retribution, deterrence—both individual and general—rehabilitation, and incapacitation.” *State v. Caffee*, 2023 S.D. 51, ¶ 27, 996 N.W.2d 351, 360 (quoting *State v. Klinetobe*, 2021 S.D. 24, ¶ 28, 958 N.W.2d 734, 741). Courts should weigh these factors “on a case-by-case basis” and may determine “which theory is accorded priority” in a particular case. *Caffee*, 2023 S.D. 51, ¶ 27, 996 N.W.2d at 360 (internal citation omitted).

The circuit court did not abuse its discretion in sentencing Kinsolving. To assist in fashioning an appropriate sentence, the circuit court ordered court services to conduct a Presentence Investigation (PSI). SR:24. The PSI contained, among other things, information regarding Kinsolving’s extensive criminal history, family history, education, employment history, and social circumstances. SR:100-143. In determining Kinsolving’s sentence, the circuit court stated:

Well, this is a presumptive probation case. But I’m finding the following aggravating circumstances: He’s had multiple probation violations [and] multiple felony convictions prior. This will be a lifetime eight felony convictions now. Seven felonies in the last five years. You received new felonies while you were on felony supervision this last time.

It’s my opinion, likelihood of complying with probation is not good because it seems like every time you do well while you’re being supervised, but then you turn right around, and you get new charges shortly after you were off. You were off

probation for seven months, and you were right back in the same behavior. And who knows when that started? If it started the day before you got the new charges or shortly after you were off probation.

I find that you're a substantial threat to the community based upon your history.

. . .

This time you go to the penitentiary. You can't keep doing the same thing over and over again. You're just a threat to the community, and we can't have that anymore.

SR:161-63. Such commentary illustrates that the circuit court considered the traditional sentencing factors of retribution, deterrence, incapacitation, and rehabilitation in making its decision.

Kinsolving pled guilty to four class 5 felonies; each count carries a maximum sentence of five years imprisonment and a \$10,000 fine.

SR:91; SDCL 22-42-5; SDCL 22-42-10; SDCL 22-6-1. The circuit court sentenced Kinsolving to five years imprisonment on each count, to run concurrently with each other. SR:92-93. Kinsolving's sentence was within the statutory maximum; therefore, his sentence should not be disturbed on appeal. *See Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83.

Kinsolving contends the circuit court abused its decision in sentencing because it failed to balance Kinsolving's criminal conduct with his character, specifically information related to Kinsolving's letters of support. AB:4, 6. However, "the mere presence of mitigating evidence does not entitle a defendant to a diminished sentence, but rather forms a part of the larger sentencing record, all of which the sentencing court

must consider.” *Klinetobe*, 2021 S.D. 24, ¶ 41, 958 N.W.2d at 744.

Contrary to Kinsolving’s statement, the circuit court considered the sentencing factors when making its decision.

There were many aggravating factors present in Kinsolving’s case that support the circuit court’s decision to impose a prison sentence.

See SR:100-30. Kinsolving has several prior felony convictions for possession of a controlled substance. SR:103-05. Kinsolving participated in both outpatient and inpatient treatment. SR:106.

Kinsolving obtained new felony charges while out on felony supervision. SR:161-62. Kinsolving’s Level of Service Inventory (“LSI-R”) returned a score of 19, which is the low end of the medium assessment level.

SR:107, 129. The LSI-R identified that Kinsolving’s areas of risks are criminal history, financial, alcohol/drug, and emotional/personal.

SR:107. The circuit court opined that Kinsolving’s likelihood of complying with probation was not good because he reoffended shortly after getting off supervision. SR:162. The circuit court held that Kinsolving is a “substantial threat to the community based upon [his] history.” SR:162. The circuit court then imposed on Kinsolving the sentence of five years on each count to run currently. SR:162-63.

The circuit court’s sentence was not beyond the range of permissible choices and in the court’s view were necessary to protect the public. The circuit court did not abuse its discretion in fashioning Kinsolving’s sentence.

CONCLUSION

The State requests this Court affirm Kinsolving's Judgment of Conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 1,808 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 9th day of May 2025.

/s/ Renee Stellagher

Renee Stellagher
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 9th, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. James Roy Kinsolving* was served by electronic mail on Jeffery M. Banks at bluelaw.law@midconetwork.com.

/s/ Renee Stellagher

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