

APPELLANT'S BRIEF

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

No. 30636

Plaintiff/Appellee,

v.

ROY LEE BROWN,

Defendant/Appellant,

APPEAL FROM THE CIRCUIT COURT
OF THE
SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

HONORABLE RACHEL RASMUSSEN
Circuit Court Judge

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Notice of Appeal Filed February 28, 2024

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30636

STATE OF SOUTH DAKOTA,
Plaintiff/Appellee,

vs.

ROY LEE BROWN,
Defendant/Appellant.

PRELIMINARY STATEMENT

Defendant and Appellant, Roy Lee Brown, will be referred to throughout this brief as “Brown” or “Appellant”. The Appellee, State of South Dakota, will be referred to as “State” or “Appellee”. The transcript of the Change of Plea Hearing will be referred to as “C.P.” The transcript of the Sentencing on October 10, 2023, will be referred to as “S.T.”.

JURISDICTIONAL STATEMENT

An Indictment was filed with the Lincoln County Clerk of Courts on March 1, 2023, charging Brown with the following, Count I: Possession of Controlled Drug or Substance in Motor Vehicle, a Class 5 Felony, in violation of SDCL 22-42-5 and 32-12-52.3. A Part II Information alleging the Defendant to be a habitual offender as defined by SDCL 22-7-7 was also filed.

On March 20, 2023, Brown was arraigned on the Indictment and Part II Information and thereafter entered a Not Guilty plea.

On August 22, 2023, Brown appeared before the trial court and entered a Guilty plea to Count I: Possession of a Controlled Drug or Substance in Motor Vehicle, a Class 5

Felony, in violation of SDCL 22-42-5 and 32-12-52.3. Brown also admitted to the Part II Information. Brown thereafter exercised his right to a delay in sentencing.

Sentencing was originally set for October 3, 2023, however the Court had concerns with Brown's sobriety on said date, so it was continued to October 10, 2023. Brown was sentenced to ten (10) years in the South Dakota State Penitentiary with five (5) years suspended and credit for eight (8) days served. Brown was also ordered to pay court costs and attorney fees to Lincoln County on a payment plan on parole. Further, his license was revoked for ninety (90) days. An Amended Judgment and Sentence was filed on February 23, 2024. Notice of Appeal was filed on February 28, 2024. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

1. The trial court erred by imposing a prison sentence on a Class 5 Felony without stating aggravating circumstances at the time of sentencing or incorporating them in the Judgment of Conviction.

SDCL 22-6-11

State v. Flowers, 2016 SD 63

State v. Rowley, 2013 SD 6

PROCEDURAL STATEMENT

An Indictment was filed with the Lincoln County Clerk of Courts on March 1, 2023, charging Brown with the following, Count I: Possession of Controlled Drug or Substance in Motor Vehicle, a Class 5 Felony, in violation of SDCL 22-42-5 and 32-12-52.3. A Part II Information alleging the Defendant to be a habitual offender as defined by SDCL 22-7-7 was also filed.

On March 20, 2023, Brown was arraigned on the Indictment and Part II Information and thereafter entered a Not Guilty plea.

On August 22, 2023, Brown appeared before the trial court and entered a Guilty plea to Count 1: Possession of a Controlled Drug or Substance in Motor Vehicle, a Class 5

Felony, in violation of SDCL 22-42-5 and 32-12-52.3. Brown also admitted to the Part II Information. Brown thereafter exercised his right to a delay in sentencing.

Sentencing was originally set for October 3, 2023, however the Court had concerns with Brown's sobriety on said date, so it was continued to October 10, 2023. Brown was sentenced to ten (10) years in the South Dakota State Penitentiary with five (5) years suspended and credit for eight (8) days served. Brown was also ordered to pay court costs and attorney fees to Lincoln County on a payment plan on parole. Further, his license was revoked for ninety (90) days. An Amended Judgment and Sentence was filed on February 23, 2024. Notice of Appeal was filed on February 28, 2024. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF FACTS

On or about February 16, 2023, Sioux Falls Police responded to 5100 South Louise Avenue in reference to a wellbeing call. *Transcript of Plea Hearing of August 22, 2023, pg. 8, lines 9-12.* The reporting party indicated a male was sitting in a car and advised that he was Brown. *Id. at lines 13-15.* Brown indicated the car was not working and was having ignition problems. *Id. at lines 17-19.* Brown exited the vehicle, it was searched, and a backpack was located. *Id. at lines 21-24.* Inside the backpack was a syringe and a baggy containing methamphetamine was found on Brown's person. *Id. at pgs. 8-9, lines 24-8.* Brown entered a Guilty plea to Count 1: Possession of a Controlled Drug or Substance in Motor Vehicle on August 22, 2023. Brown also admitted to the Part II Information. The Possession of a Controlled Substance Charge was a Class 5 Felony and with the Part II Information admission the same was raised to the penalty of a Class 4 Felony.

On October 10, Judge Rasmussen sentenced Brown to ten (10) years in the South Dakota State Penitentiary with five (5) years suspended and credit for eight (8) days

served. Brown was also ordered to pay court costs and restitution for court appointed attorney's fees to Lincoln County. Further, his license was suspended for ninety (90) days.

LEGAL ANALYSIS

1. The trial court erred by imposing a prison sentence on a Class 5 Felony without stating aggravating circumstances at the time of sentencing or incorporating them in the Judgment of Conviction.

Whether a circuit court misinterpreted or misapplied SDCL 22-6-11 involves a question of statutory interpretation, which this Court reviews de novo, with no deference given to the circuit court's legal conclusions. *State v. Underwood, 2015 SD 17.*

Criminal defendants who are convicted of a Class 5 or Class 6 felony that is not specifically excluded from the provisions of SDCL 22-6-11 must be sentenced in accord with the statute.

South Dakota courts are required to sentence defendants convicted of certain Class 5 and 6 felonies (including possession of a controlled substance) to probation unless "the court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation." SDCL 22-6-11.

("[T]he habitual offender statutes operate to increase the defendant's sentence, but do not substantively change the class of the principal felony." (emphasis added)). Although *Rowley* interpreted SDCL 22-7-8.1, a separate enhancement statute, the dispositive language in SDCL 22-7-7 is the same. SDCL 22-7-7, like SDCL 22-7-8.1, only provides that "the sentence for the principal felony shall be enhanced." And interpreting the statute to enhance the classification of the underlying felony "would require us to ignore the words 'the sentence for,' which we will not do." *State v. Rowley, 2013 SD 6, ¶ 8.*

"Regardless of the nomenclature we chose, . . . the habitual offender statutes operate to increase the defendant's sentence, but do not substantively change the class of the

principal felony." *Id.* at ¶ 10; see also *State v. Guthmiller*, 2003 SD 83, ¶ 31. ("The habitual offender statute SDCL 22-7-7 enhances the sentence to the next more severe felony class." (emphasis added)); *State v. Salway*, 487 NW2d 621, 622 (SD 1992). ("[B]eing a habitual criminal enhances the punishment for the principal crime to a higher class of felony." (emphasis added)). Here, Feucht's principal offense was a Class 5 felony. Therefore, the presumptive probation requirements of SDCL 22-6-11 apply.

The case at hand is almost identical to *State v. Flowers*, 2016 SD 63. In *Flowers*, the defendant was indicted for possession of a controlled substance in violation of SDCL 22-42-5 (a Class 5 felony). *Id.* at ¶ 3. A Part II Information was also filed alleging that Flowers had two previous convictions for possession of a controlled substance. *Id.* Flowers entered a guilty plea to possession of a controlled substance and admitted to the Part II Information. *Id.* At sentencing the trial court did not mention probation, a departure from presumptive probation or aggravating circumstances warranting a departure from probation. *Id.* at ¶ 4. The final written judgment did not list aggravating factors either. *Id.*

This Court held "[b]ecause SDCL 22-6-11 applied, the circuit court could depart from probation only 'if the court [found] aggravating circumstances exist[ed] that pose[d] a significant risk to the public and require[d] a departure from presumptive probation.'" *Id.* at ¶ 8. Additionally, the court was required to state the aggravating circumstances "on the record at the time of sentencing" and in the final written judgment. SDCL 22-6-11. Brown argues that he is entitled to resentencing because the circuit court failed to follow these requirements.

It is clear from reading the Amended Judgment of Conviction signed by the trial court on February 23, 2024, that no aggravating circumstances were included in the Judgment of Conviction as required. Further, in looking at the Sentencing Transcript the trial court

never found aggravating circumstances on the record. The trial court, with respect to aggravating factors stated: “Even if you weren’t on parole supervision, based on history, I still likely would find -- and I do find – for the purposes of sentence here today that aggravating circumstances exist that warrant a change from presumptive probation based upon the history and the potential danger to the community, that your use continues to precipitate in the sense of use within the community and continued use within the community.” *Sentencing Transcript of October 10, 2023, pg. 10, lines 15-22.*

Much like *Kurtz*, the circuit court focused on Brown’s prior record, however, the court did not, as required by SDCL 22-6-11, focus on the relationship of those circumstances to public safety. *State v. Kurtz, 2024 SD 13, ¶ 15.* As this Court noted in *Kurtz*, “while it is true that prior felonies and prior probation violations can constitute aggravating circumstances that pose such a risk, it is not a foregone conclusion that all defendants with lengthy prior criminal histories or a history of noncompliance categorically pose a significant risk to the public.” *Id.* The trial court never mentioned at the time of sentencing how the aggravating factors it mentioned correlated to Brown being a significant risk to the public nor did the trial court mention that Brown was a significant risk to the public. As such, this case should be remanded to the trial court for resentencing.¹

The remedy here, like in *Flowers*, is to remand the case back to the trial court for a resentencing. The trial court indicated that it knew it was a presumptive probation at the time of entry of the plea, however the trial court failed to state any aggravating factors on the record warranting departure and further there were no aggravating circumstances in

¹ Counsel is aware that this Court noted in *Feucht* that counsel is now required to object at the time of sentencing to preserve the record for appeal when a trial court does not comply with SDCL 22-6-11. Counsel would note that this sentencing occurred prior to this Court releasing the opinion in *Feucht*.

the written judgment. Like in *Flowers*, the errors go beyond clerical and the proper remedy is to remand the matter for resentencing. *Id. at* ¶ 11.

CONCLUSION

In the case at hand, the trial court failed to enumerate any findings on the record to deviate from the statutory presumptive probation, therefore Brown requests this Honorable Court vacate the Amended Judgment of Conviction entered on February 23, 2024, and remand this matter for resentencing.

Dated this 23rd day of September, 2024.

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Appellant, through counsel, hereby respectfully requests oral argument in the above-entitled matter.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served one (1) copy of Appellant's Brief upon the persons herein next designated all on the date below by email to said addresses, to wit:

Jacob Dempsey
atgservice@state.sd.us

Amanda Eden
aeden@lincolncountysd.org

which email address is the last email address of the addressee known to the subscriber.

Dated this 23rd day of September, 2024.

/s/Manuel J. de Castro, Jr.
Manuel J. de Castro, Jr.

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STATE OF SOUTH DAKOTA)
)
COUNTY OF LINCOLN) : SS

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

State of South Dakota,

CRI. 23-156

Plaintiff,

v.

Amended
Judgment and Sentence

Roy L. Brown,

Defendant.

An Indictment was filed with the Court on the 1st day of March, 2023, charging the Defendant with Count 1: Possession of Controlled Drug or Substance in Motor Vehicle, SDCL 22-42-5, 32-12-52.3, a class 5 Felony. A Part II Information for Habitual Criminal was also filed pursuant to SDCL 22-7-8.1.

The Defendant appeared for arraignment on the 20th day of March, 2023 with attorney Matt Theophilus, and the State was represented by prosecuting attorney Alison D. Nelson. A plea of not guilty was entered and the matter was scheduled for further hearing.

On the 22nd day of August, 2023, the Defendant returned before the Court with Matt Theophilus, and the State was represented by prosecuting attorney Amanda D. Eden.

The Defendant entered an oral plea of GUILTY to the charge that on or about the 16th day of February, 2023, in the County of Lincoln, State of South Dakota, Roy L. Brown did commit the public offense of:

Ct. 1: Possession of Controlled Drug or Substance in Motor Vehicle, SDCL 22-42-5, 32-12-52.3.

The Defendant also entered an admission to the Part II Information for Habitual Criminal, SDCL 22-7-8.1. The Defendant exercised his right to delay sentencing.

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

It is therefore the JUDGMENT of this Court that the Defendant is guilty of Ct. 1: Possession of Controlled Drug or Substance in Motor Vehicle, SDCL 22-42-5, 32-12-52.3; and

the Defendant is a habitual criminal in that he has been convicted of a felony on three or more prior occasions, pursuant to SDCL 22-7-8.1.

SENTENCE

On the 10th day of October, 2023, the Defendant returned to court with attorney Matt Theophilus, and the State was represented by prosecuting attorney Amanda D. Eden and then Defendant was sentenced. The Court asked the Defendant if any cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court pronounced the following sentence.

IT IS ORDERED AND ADJUDGED by this Court that the Defendant, Roy L. Brown, shall be imprisoned in the South Dakota State Penitentiary for a period of 10 years, with 5 years of the sentence suspended upon the following conditions:

- (1) The Defendant shall comply with the terms of parole.
- (2) The Defendant shall pay \$116.50 in court costs and reimburse Lincoln County \$1,064.60 in attorney fees. Said monies shall be repaid on a payment schedule established by parole services. Attorney fees shall be set to civil lien.
- (3) The Defendant shall receive credit for 8 days previously served.
- (4) The Defendant is remanded immediately to the Lincoln County Sheriff to begin his sentence.
- (5) The Defendant's driving privileges shall be revoked for a period of 90 days.

IT IS FURTHER ORDERED, that the terms and conditions of this matter shall run consecutive to 49CRI23-2487.

BY THE COURT:

2/23/2024 2:20:10 PM

Attest:
Wiberg, Paula
Clerk/Deputy



A handwritten signature in black ink, appearing to read 'Rachel Rasmussen'.

Rachel R. Rasmussen – Circuit Court Judge

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30636

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

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ROY LEE BROWN,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE RACHEL R. RASMUSSEN
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed on February 28, 2024

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30636

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ROY LEE BROWN,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Roy Lee Brown, is called “Brown.” Plaintiff and Appellee, the State of South Dakota, is called “State.” References to documents and Video Exhibits are as follows:

Lincoln County Criminal File No. 23-156 SR
Brown’s Brief..... BB
August 22, 2023 Plea Hearing PH
October 3, 2023 Sentencing Hearing SH1
October 10, 2023 Sentencing Hearing SH2

All document designations are followed by the appropriate page numbers.

JURISDICTIONAL STATEMENT

The Honorable Rachel R. Rasmussen, Lincoln County Circuit Court Judge, filed an Amended Judgment and Sentence on February 23, 2024. SR:124. Brown filed a Notice of Appeal on February 28, 2024. SR:115. This Court has jurisdiction to hear the appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT FOUND AGGRAVATING CIRCUMSTANCES THAT POSED A SIGNIFICANT RISK TO THE PUBLIC AND STATED THEM IN THE DISPOSITIONAL ORDER?

The circuit court found aggravating circumstances to depart from presumptive probation.

SDCL 22-6-11

State v. Beckwith, 2015 S.D. 76, 871 N.W.2d 57

State v. Kurtz, 2024 S.D. 13, 4 N.W.3d 1

State v. Thayer, 2006 S.D. 40, 713 N.W.2d 608

State v. Underwood, 2017 S.D. 3, 890 N.W.2d 240

STATEMENT OF THE CASE

A grand jury indicted Brown for Possession of a Controlled Substance in Motor Vehicle, violating SDCL 22-42-5 and SDCL 32-12-52.3, in March 2023. SR:6. The State filed a Part II Information for Habitual Criminal in March 2023 alleging Brown had prior convictions for:

- Possession of a Controlled Substance in April 2021;

- Possession of a Controlled Substance in March 2020;
- Possession of a Controlled Substance in July 2017;
- Second Degree Burglary in June 2013;
- Attempted Third Degree Burglary in September 2012;
- Possession of Counterfeit Obligations or Securities in August 2012;
- Possession of a Controlled Substance in December 2011; and
- Possession with Intent to Distribute Marijuana in December 2011.

SR:7-8. Brown pled guilty in August 2023. PH:5. After initially sentencing Brown in October 2023, the circuit court entered an Amended Judgment and Sentence sentencing Brown to ten years in prison with five years suspended in February 2024. SR:124-25.

STATEMENT OF THE FACTS

In February 2023, Officer Jason Purkapile arrived at a fast food¹ parking lot in Sioux Falls at about midnight after he received a well-being call for a suspicious vehicle. SR:99; PH:8. The vehicle had been sitting near the drive-thru for about seven hours. SR:99. Another officer arrived on the scene, and the two officers approached the vehicle and discovered Brown sitting in the driver's seat. *Id.* Brown claimed to have

¹ Officer Purkapile's report says Taco Bell, but a Google search of the address provided at the Plea Hearing shows the restaurant was a Taco John's. SR:99; PH:8.

run out of gas and that he had ignition problems. SR:99; PH:8. He exhibited nervous, jittery behavior and spoke rapidly. SR:99; PH:8. Brown stepped out of the vehicle, even though law enforcement did not ask him to, and as he did so a syringe cap fell off him and landed on the ground. SR:99; PH:8. After seeing this, Officer Purkapile asked Brown if he had any drugs, to which Brown responded “why?” SR:99. Officer Purkapile advised that he had seen the syringe fall, and Brown asserted that was not illegal. *Id.*

When Officer Purkapile asked Brown if he was on parole, Brown said he was. *Id.* Brown consented to a search of his person, but he kept moving around and turning during the search. *Id.* The officers therefore detained him by placing him in handcuffs. *Id.* Officer Purkapile located a sandwich bag in Brown’s front right pocket that contained a white, powdery substance that field-tested positive for methamphetamine. *Id.* The officers arrested Brown for possession of a controlled substance and drug paraphernalia. *Id.* Law enforcement confirmed Brown’s parole status, and advised him that they would be searching his vehicle. *Id.*; PH:8. The search of Brown’s vehicle revealed a small, green bag in the center console that contained three used syringes with no caps. SR:99. In the back seat, they found a black backpack that contained both a white paper bag with eleven syringes and a crumpled plastic bag with a residual white substance that field-tested positive for methamphetamine. *Id.*; PH:8-9.

Brown pled guilty to Possession of a Controlled Substance and admitted to the Part II Information in August 2023. PH:5. A sentencing hearing occurred in October 2023. SH1:1. The circuit court explained at the beginning of this hearing that it was familiar with Brown's PSI. SH1:2. The circuit court also reviewed a progress report from Glory House and a discharge summary. *Id.* The circuit court heard argument from Brown's counsel, who said that Brown's addiction and history of relapse were the root of both his current charge and his criminal history. *Id.* at 5-10. Counsel discussed Brown having generalized anxiety disorder, and how a long winter where Brown spent a lot of time alone contributed to his most recent relapse. *Id.* at 7.

Before the circuit court allowed Brown to speak on his own or pronounced his sentence, it announced that it had concerns that, due to his sweating and excessive jitteriness displayed in the courtroom, Brown was on drugs during the hearing. *Id.* at 11. The circuit court said it did not want Brown to say anything, and it called a recess to get him to provide a urine sample for testing, but none was ever produced. *Id.* Law enforcement took Brown into custody for driving to the hearing under the influence. *Id.* at 13. Brown claimed his behavior was caused by anxiety, and that he never produced a urine sample because he went to the bathroom before the hearing. *Id.* at 14. The circuit court noted that the DWI arrest was a bond violation and issued an Order of Commitment. *Id.* at 15.

A second sentencing hearing occurred a week later. SH2:1. The circuit court said that it had its notes from the prior hearing. *Id.* at 2-3. Defense counsel added that Brown had been charged with a DWI Second Offense.² *Id.* at 3. Counsel again emphasized Brown's addiction struggles, and that he turned to drugs to cope with despair. *Id.* at 4-6. Brown also made a statement where he re-emphasized his battle with addiction and highlighted a sense of isolation that developed during the previous winter and acted as a catalyst for his relapse. *Id.* at 6-8.

The circuit court began issuing Brown's sentence by acknowledging how sad and frustrating his situation was. *Id.* at 9. It noted that he had been on criminal supervision since 2011, and despite continued use of resources to achieve and maintain sobriety he could not. *Id.* The circuit court emphasized that his most recent recovery report from Glory House only gave him a fair prognosis, and the court had concerns he was not retaining his recovery knowledge. *Id.* The circuit court pointed out that Brown had been on a continuous cycle of relapse for a long time and that something new needed to be tried, but at the same time prison could not be a place to achieve full rehabilitation. *Id.* at 10. But the circuit court also acknowledged that a period of forced sobriety could be achieved by a prison sentence. *Id.* It noted Brown's

² Lincoln County Criminal File No. 23-130 shows that Brown was charged with both Ingestion of Methamphetamine and Driving While Intoxicated in connection with his behavior at the first sentencing hearing. He ultimately pled guilty to a DWI Second Offense.

repeated failures on probation and parole, including during his current offense, which showed that supervision was an insufficient deterrent. *Id.*

The circuit court found aggravating circumstances. *Id.* It pointed to Brown's history of crime and relapse, as well as his failures on supervision. *Id.* The circuit specifically found that his continued use of methamphetamine was a danger to the community. *Id.* It acknowledged his ability to maintain employment and participate in recovery programs, but pointed out that he still used methamphetamine. *Id.* at 10-11. The court concluded by highlighting that Brown came to his first sentencing hearing under the influence. *Id.* It sentenced him to ten years in prison with five years suspended. *Id.* at 11-12. In the circuit court's Amended Judgment and Sentence, it found that Brown was a habitual criminal convicted of a felony on three or more prior occasions. SR:124.

ARGUMENT

THE CIRCUIT COURT FOUND AGGRAVATING CIRCUMSTANCES THAT POSED A SIGNIFICANT RISK TO THE PUBLIC AND STATED THEM IN THE DISPOSITIONAL ORDER.

A. Standard of Review

The sole issue Brown argues is that the circuit court failed to state aggravating circumstances at sentencing or list them in the dispositional order despite departing from presumptive probation for a Class 5 felony under SDCL 22-6-11. BB:4-6. "Whether the circuit court misinterpreted or misapplied SDCL 22-6-11 involves a question

of statutory interpretation, which [this Court] review[s] de novo, with no deference given to the circuit court's legal conclusions.” *State v. Kurtz*, 2024 S.D. 13, ¶ 12, 4 N.W.3d 1, 4 (citing *State v. Underwood*, 2017 S.D. 3, ¶ 5, 890 N.W.2d 240, 241; *State v. Whitfield*, 2015 S.D. 17, ¶ 11, 862 N.W.2d 133, 137).

B. Analysis

SDCL 22-6-11 provides, in pertinent part:

“The sentencing court may impose a sentence other than probation or a fully suspended state incarceration sentence if the court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under this section. If a departure is made, the judge must state the aggravating circumstances on the record at the time of sentencing and in the dispositional order. . . .”

“What constitutes aggravating circumstances posing ‘a significant risk to the public’ is not defined by statute.” *Kurtz*, 2024 S.D. 13, ¶ 14, 4 N.W.3d at 5 (quoting SDCL 22-6-11). “Likewise, this Court has not provided a definition of this phrase, perhaps because it is not one that can be precisely defined.” *Id.* “[This Court’s] precedent, however, offers some guidance as to what [it] has or has not deemed to be aggravating circumstances constituting a significant risk to the public.” *Id.* “For example, [it] determined that a ‘failure to pay fines, costs, restitution, or attorney fees hardly amounts to a “significant risk to the public[.]”” *Id.* (quoting

Underwood, 2017 S.D. 3, ¶ 7, 890 N.W.2d at 242) (alteration in original).

But “[this Court] also rejected the notion that ‘SDCL 22-6-11 contemplates only circumstances demonstrating a risk of violence or career criminality.’” *Id.* (quoting *Underwood*, 2017 S.D. 3, ¶ 8, 890 N.W.2d at 242). “On the other hand, [this Court] determined that prior criminal history and probation or parole violations may constitute aggravating circumstances posing a significant risk to the public.” *Id.* (citing *State v. Beckwith*, 2015 S.D. 76, ¶ 11, 871 N.W.2d 57, 60 (“[t]he likelihood of not complying with the conditions of probation is an appropriate aggravating circumstance to consider as it may signal a significant risk to the public”)).

The circuit court stated at Brown’s second sentencing hearing:

“Even if you weren’t on parole supervision, based on history, I still likely would find—and I do find—for the purposes of a sentence here today that aggravating circumstances exist that warrant a change from presumptive probation based upon that history and the potential danger to the community, that your use continues to precipitate in the sense of use within the community and continued use within the community.”

SH2:10. The circuit court listed Brown’s continuing drug use and history, which referenced his criminal history and history of parole and probation violations, as aggravating circumstances that posed significant risks to the public and warranted a departure from presumptive probation. *Id.* There is simply no basis in the record for

Brown’s contention that “the trial court never found aggravating circumstances on the record.” BB:5-6.

The aggravating circumstances listed by the circuit court conformed to this Court’s precedent. *Kurtz*, 2024 S.D. 13, ¶ 14, 4 N.W.3d at 5. Brown’s ingestion of methamphetamine was a parole violation — an aggravating circumstance specifically contemplated in *Kurtz*. *Id.* Here, the circuit court spoke extensively about how Brown’s illegal drug use on parole showed that he would not comply with probation, and it also discussed the failure of probation sentences in the past. SH2:10-11. This Court has held “[t]he likelihood of not complying with the conditions of probation is an appropriate aggravating circumstance to consider as it may signal a significant risk to the public.” *Beckwith*, 2015 S.D. 76, ¶ 11, 871 N.W.2d at 60.

“The sentencing court’s required finding under SDCL 22-6-11 must focus on the relationship of those circumstances to public safety.” *Kurtz*, 2024 S.D. 13, ¶ 15, 4 N.W.3d at 5. “Therefore, while it is true that prior felonies and prior probation violations can constitute aggravating circumstances that pose such a risk, it is not a foregone conclusion that all defendants with lengthy prior criminal histories or a history of noncompliance categorically pose a significant risk to the public.” *Id.* The circuit court explained that Brown’s methamphetamine use endangered the public because it

perpetuated use of the drug within the community, and it also referenced the fact that Brown drove to the first hearing high on methamphetamine.³ SH2:10-11. By contrast, this Court ruled in *Kurtz* that a specific finding that a defendant does not pose a significant risk to the public meant SDCL 22-6-11 was not satisfied. 2024 S.D. 13, ¶ 15, 4 N.W.3d at 5. The circuit court here unambiguously listed aggravating circumstances at sentencing and specified how they posed a significant risk to the public. SH2:10-11.

The circuit court needed to state the aggravating circumstances “on the record at the time of sentencing’ and ‘in the final written judgment.” *State v. Flowers*, 2016 S.D. 63, ¶ 8, 885 N.W.2d 783, 785 (quoting SDCL 22-6-11). In the Amended Judgment and Sentence, the circuit court wrote, “the Defendant is a habitual criminal in that he has been convicted of a felony on three or more prior occasions, pursuant to SDCL 22-7-8.1.” SR:124-25. “Prior criminal history and probation or parole violations may constitute aggravating circumstances posing a significant risk to the public.” *Kurtz*, 2024 S.D. 13, ¶ 14, 4 N.W.3d at 5 (citing *Beckwith*, 2015 S.D. 76, ¶ 11, 871 N.W.2d at 60). The circuit court’s language in the Amended Judgment and Sentence regarding Brown’s criminal history

³ Brown’s driving to his sentencing while high on methamphetamine should also be looked at in the context of his underlying charge, which involved him being found with methamphetamine and used syringes in his vehicle. SR:99.

echoed its finding at sentencing that “based on history, I still likely would find—and I do find—for the purposes of a sentence here today that aggravating circumstances exist that warrant a change from presumptive probation based upon that history and the potential danger to the community.” SR:124-25; SH2:10. That said, the final written disposition did not refer to Brown’s risk to the public, as the court stated in its oral pronouncement.

This Court has addressed instances where the sentencing court’s oral pronouncement differs from the final dispositional order. “When a court's written sentence differs from its oral sentence, [this Court] review[s] it under the premise that the oral sentence controls.” *State v. Thayer*, 2006 S.D. 40, ¶ 7, 713 N.W.2d 608, 611. When a sentencing court “states the aggravating circumstances on the record but fails to restate them in the final dispositional order,” this Court said, “[t]hat type of clerical error does not require a new trial or resentencing.” *Id.* In those cases, the appropriate remedy is to “remand to the sentencing court to amend the dispositional order to include the aggravating circumstances considered on the record at the time of the sentencing hearing.” *Flowers*, 2016 S.D. 63, ¶ 10, 885 N.W.2d at 786 (quoting *Beckwith*, 2015 S.D. 76, ¶ 16, 871 N.W.2d at 61; *Whitfield*, 2015 S.D. 17, ¶ 20, 862 N.W.2d at 140).

CONCLUSION

Based on the above arguments and authorities, the State requests that Brown's convictions and sentences be affirmed and, if necessary, the matter be remanded only to amend the dispositional order to include the aggravating circumstances enumerated on the record at the time of sentencing.

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 2,559 words.

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

Dated this 7th day of November 2024.

/s/ Jacob R. Dempsey
Jacob R. Dempsey
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 7, 2024, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Roy Lee Brown*, Appeal No. 30636, was served via electronically through Odyssey File and Serve on Manuel de Castro at mdecastro1@yahoo.com.

/s/ Jacob R. Dempsey
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December 26, 2024

South Dakota Supreme Court
ATTN: Clerk
500 E. Capitol Avenue
Pierre, SD 57501

RE: State of South Dakota v. Roy L. Brown; Appeal #30636

Dear Clerk:

This letter comes on behalf of Appellant, Roy L. Brown, as the Appellant Reply Brief is presently due today, December 26, 2024, however, Counsel believes a reply brief would be redundant and would like this matter heard and decided on the previously submitted Appellant Brief.

If there are any questions, please do not hesitate to contact my office.
Thank you.

Best Regards,



Manuel J. de Castro, Jr.

MJC/ch