IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-1532
BLACK HAWK COUNTY NO. AGCR227848

STATE OF IOWA,
Plaintiff / Appellee

vs.

RODNEY DEJUAN BERRY,
Defendant / Appellant

APPEAL FROM BLACK HAWK COUNTY DISTRICT COURT

THE HONORABLE WILLIAM PATRICK WEGMAN, JUDGE

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE AND FILING

I, Jessica Maffitt, hereby certify that on the 30th day of December, 2019, I served the attached Appellant's Final Brief and Request for Oral Argument on the Court and each other party by electronic service or through mailing one copy thereof to the following party:

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101(3), this case would be appropriate for consideration by the Iowa Court of Appeals as it involves applying existing legal principles.

STATEMENT OF THE CASE

This is an appeal from the August 23, 2019 Judgment and Sentence entered by the Honorable Judge William Patrick Wegman. On August 20, 2019, Defendant /Appellant Rodney Dejuan Berry entered a plea of guilty to the sole count of the Information: Possession of a Controlled Substance, to wit: Marijuana, 3rd or Subsequent Offense. (Non-Con. App. at 7) (Judgment and Sentence at 1). Berry was sentenced to not more than 5 years in prison, all suspended; two to five years on probation; placement at the Waterloo Residential Facility; a suspended $750 fine and surcharge; restitution; and submission of a DNA sample. (Non-Con. App. at 7-9) *Id* at 1-3. Judgment and sentence was entered on August 23, 2019. *Id*. This appeal follows.

STATEMENT OF THE FACTS

On October 31, 2018, Berry was stopped by law enforcement and his vehicle was searched. (Con. App. at 11) (Minutes of Testimony at 7). During the course of the search, an officer found a small amount of marijuana concealed within a piece of paper in the center console. (Con. App. at 12-13) *Id* at 8-10.

On December 10, 2018, Berry was charged with Possession of a Controlled Substance, to wit: Marijuana, 3rd or Subsequent Offense, in violation of Iowa Code § 124.401(5). (Non-Con. App. at 5) (Trial Information). The trial information listed two prior convictions for possession of a controlled substance: "Possession of a Controlled Substance, to-wit: Marijuana (Third Offense) in case number (FE)SRCR289251 on November 9, 2016; and in the Iowa District Court for Black Hawk County on the offense of Possession of a Controlled Substance, to-wit: Marijuana (Third Offense) in case number AGCR220354". (Non-Con. App. at 5) (Trial Information).

Likewise, the Minutes of Testimony listed witnesses who would testify to Berry's prior convictions in SRCR289251 and AGCR220354 for possession of a controlled substance, Marijuana. (Con. App. at 6-7) (Minutes

of Testimony at 2-3). Attached to the Minutes of Testimony was a Sentencing Order in SRCR289251, showing that Berry was convicted on November 9, 2016 of Possession Of a Controlled Substance, 3rd Offense, to wit: Marijuana. (Con. App. at 15, 19) (Minutes of Testimony at 11, 15). Also attached was a Sentencing Order in AGCR220354, showing that Berry was convicted on November 5, 2017 of Possession of a Controlled Substance, 3rd Offense, to wit: Marijuana. (Con. App. at 31, 34) (Minutes of Testimony at 27, 30). The State did not attach any other sentencing orders to the Minutes of Testimony, or even allege any specific cases in which Berry may have been convicted of possessing a controlled substance other than marijuana. (Con. App. at 5-42) (Minutes of Testimony).

On August 20, 2019, Berry entered a plea of guilty to Possession of a Controlled Substance, to wit: Marijuana, 3rd or Subsequent Offense. (Non-Con. App. at 7) (Judgment and Sentence at 1). At the plea hearing, the Court informed Berry that in order for him to be found guilty of Possession of a Controlled Substance, 3rd Offense, the State would have to prove "you knowingly and intentionally had marijuana in your possession, that you knew the substance was marijuana and that you have been at least twice previously convicted of possession of a controlled substance." (Plea Tr. at 9-

10). The Court further asked Berry if he agreed with the essential allegations contained in the Minutes of Testimony and agreed the Court could use the attached reports to determine there was a factual basis for his plea. (Plea Tr. at 10-11). Berry agreed. (Plea Tr. at 11). Berry then informed the Court he "possessed marijuana", he "knew it was marijuana", he had "two prior convictions for possession of a controlled substance", and he was represented in both cases involving his prior convictions. (Plea Tr. at 11-12). Berry did not specify the case numbers of his prior convictions or what substance he was convicted of possessing. (Plea Tr. at 12). The Court did not inquire further regarding these prior convictions. (Plea Tr. at 12). Defense counsel and counsel for the State agreed that a sufficient factual basis was made. (Plea Tr. at 13).

Berry was sentenced to not more than 5 years in prison, all suspended; two to five years on probation; placement at the Waterloo Residential Facility; a suspended $750 fine and surcharge; restitution; and submission of a DNA sample. (Non-Con. App. at 7-9) (Judgment and Sentence at 1-3). Judgment and sentence was entered on August 23, 2019. *Id*.

Berry timely filed a notice of appeal on September 13, 2019.

ARGUMENT

I. BERRY IS SUBJECT TO AN ILLEGAL SENTENCE BECAUSE THE BASIS FOR THE SENTENCING ENHANCEMENT WAS TWO PRIOR CONVICTIONS FOR POSSESSION OF MARIJUANA, WHICH SUPPORT A CONVICTION OF AN AGGRAVTED MISDEMEANOR, NOT A FELONY

a. Error Preservation

This issue was not properly preserved at the district court level. However, that does not prohibit appellate review. In this case, because "the claim is that the sentence itself is inherently illegal, whether based on constitution or statute, we believe the claim may be brought at any time." *State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009). "An illegal sentence is void, which permits an appellate court to correct it on appeal without the necessity for the defendant to preserve error by making a proper objection in the district court" *State v. Parker*, 747 N.W.2d 196, 212 (Iowa 2008) (citing *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000)). Accordingly, "the ordinary rules of issue preservation do not apply" and "a constitutional challenge to an illegal sentence, even one brought *after* the initial brief has

been filed" can be considered by the Iowa appellate courts. *State v. Lyle*, 854 N.W.2d 378, 382 (Iowa 2014), *as amended* (Sept. 30, 2014).

Alternatively, if the court finds this issue has not been sufficiently developed for appellate review, the court should "remand this case to the district court to allow [both parties] to fully develop and argue [Appellant's] claims". *State v. Hoeck*, 843 N.W.2d 67, 72 (Iowa 2014).

b. Scope and Standard of Appellate Review

Review of challenges to the illegality of a sentence is for errors at law. *See e.g. Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001); *State v. Carstens*, 594 N.W.2d 436, 437 (Iowa 1999); *State v. Sisk*, 577 N.W.2d 414, 416 (Iowa 1998).

"[A] defendant is permitted to challenge an illegal sentence at any time." *State v. Parker*, 747 N.W.2d 196, 212 (Iowa 2008) (citing *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000)). "An illegal sentence is void, which permits an appellate court to correct it on appeal without the necessity for the defendant to preserve error by making a proper objection in the district court" *Id*.

Constitutional claims to the legality of a sentence are reviewed de novo. *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009).

c. Argument

Berry is challenging the legality of his sentence for the charge of Possession of a Controlled Substance, Marijuana, 3rd or Subsequent Offense on the basis that the prior convictions alleged by the State and considered by the Court were both for possession of marijuana, and the substance he was convicted of possessing was marijuana.

Under Iowa Code § 124.401(5), "[i]t is unlawful for any person knowingly or intentionally to possess a controlled substance". A sentencing enhancement exists for defendants who have previously been convicted of possession of a controlled substance. Iowa Code § 124.401(5). A third or subsequent conviction for possession of a controlled substance is generally a Class D Felony. "However, the second paragraph of subsection (5) specifically addresses the sentences imposed for marijuana offenses. *State v. Iowa Dist. Court ex rel. Black Hawk Cty*., 812 N.W.2d 1, 3 (Iowa 2012), *as corrected* (Mar. 14, 2012). Accordingly, "[i]f the controlled substance is marijuana and the person has been previously convicted two or more times

of a violation of this subsection in which the controlled substance was marijuana, the person is guilty of an aggravated misdemeanor." Iowa Code § 124.401(5).

As in Berry's case, where a person is convicted of possession of marijuana, and admits to at least two prior convictions for possession of marijuana, a sentencing enhancement to an aggravated misdemeanor is authorized. Iowa Code § 124.401(5). However, in this case, the trial court imposed a higher sentencing enhancement to a Class D Felony, which is not authorized under Iowa Code § 124.401(5). Accordingly, Berry's sentence is unlawful.

i. There Is Insufficient Evidence in the Record to Prove Berry Was Previously Convicted of Possession of a Controlled Substance Other than Marijuana

There is sufficient evidence in the record to prove that Berry was previously convicted of possession of a controlled substance, marijuana, on two separate occasions. However, there is no evidence in the record that Berry was convicted of possession of any controlled substance other than

marijuana. Defense counsel and counsel for the State agreed that a sufficient factual basis was made. (Plea Tr. at 13).

The State has the burden of alleging the prior convictions necessary to substantiate a sentencing enhancement. *State v. Smith*, 129 Iowa 709, 106 N.W. 187, 189 (1906) (recognizing that "the fact of former convictions shall be set forth in the indictment."). It is well established that "the fact of the prior convictions is to be taken as part of the offense instantly charged, at least to the extent of aggravating it and authorizing an increased punishment." *Id* at 188. The State bears this burden because "[e]very fact essential to the infliction of legal punishment upon a human being must be proven beyond a reasonable doubt." *Id* at 189.

Moreover, in accepting admissions to predicate convictions for the purpose of a sentencing enhancement, "the court must also make sure a factual basis exists to support the admission to the prior convictions." *State v. Harrington*, 893 N.W.2d 36, 45–46 (Iowa 2017), *as amended* (June 14, 2017). Here the court did not ask Berry to provide a factual basis regarding any prior convictions for possession of controlled substances other than marijuana.

Berry did agree the court could consider the reports attached to the minutes of testimony to determine there was a factual basis for his plea. (Plea Tr. at 10-11). However, the reports attached to the minutes of testimony only included sentencing orders in SRCR289251 and AGCR220354, both for Possession Of a Controlled Substance, 3rd Offense, to wit: Marijuana. (Con. App. at 15, 19, 31, 34) (Minutes of Testimony at 11, 15, 27, 30). There were no records of conviction for any convictions for possession of controlled substances other than marijuana. (Con. App. at 5-42) (Minutes of Testimony).

Under Iowa law, "If the state fails to meet its burden of proof, the prior convictions cannot be used to support the habitual offender status." *Harrington*, 893 N.W.2d at 48. Likewise, an adequate factual basis must exist to support a sentencing enhancement under a subsequent offender statute. *State v. Coleman*, 907 N.W.2d 124, 147 (Iowa 2018).

In this case, the State did not meet its burden of providing any evidence of Berry having been convicted of any charge of possession of controlled substances other than marijuana. Accordingly, the sentencing enhancement to a Class D Felony in this case based on such convictions cannot be sustained. This case must be remanded and Berry must be

sentenced in compliance with the record: to no greater penalty than that authorized for an aggravated misdemeanor under Iowa Code § 903.1(2).

ii. There Is Insufficient Evidence in the Record to Prove Berry Was Represented by Counsel in a Case Involving Conviction of Possession of a Controlled Substance Other than Marijuana

There is also sufficient evidence in the record to prove that Berry was represented by counsel in two prior possession of marijuana cases. However, there is no evidence in the record that Berry was represented by counsel in any cases involving controlled substances other than marijuana.

It is well established that "[t]he State must also establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel." *State v. Kukowski*, 704 N.W.2d 687, 691 (Iowa 2005) (citations omitted).

Iowa and federal courts have long recognized the importance of only permitting convictions in cases where the defendant was represented by counsel to be used for sentencing enhancements to other crimes: "To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another

offense is to erode the principle of that case." *Kukowski*, 704 N.W.2d at 691; *Burgett v. Texas*, 389 U.S. 109, 114–15 (1967) (citation omitted). Accordingly, "[t]he admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial". *Burgett*, 389 U.S. at 115.

The Iowa Constitution prohibits the use of an uncounseled prior conviction from being used to enhance a subsequent offense. *State v. Young*, 863 N.W.2d 249, 256 (Iowa 2015). According to the Iowa Supreme Court, "[i]f the failure to provide appointed counsel to a poor person in a misdemeanor case violates the right to counsel in article I, section 10 [of the Iowa Constitution], it would be fundamentally unfair under the due process clause of article I, section 9 [of the Iowa Constitution] to use that conviction to enhance a later crime." *Id*.

According to the United States Supreme Court, one reason for requiring counsel is "the lack of reliability of convictions obtained without the assistance of counsel." *Young*, 863 N.W.2d at 261 (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). Moreover, the right to counsel under the 6th Amendment is necessary to "assure fair trials before impartial tribunals [but this] noble ideal cannot be realized if the poor man charged with crime has

to face his accusers without a lawyer to assist him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Likewise, under Iowa Constitution article I, section 10 and article I, section 9, "[i]f ensuring fairness and reliability of criminal justice outcomes are the constitutional forces underlying the right to counsel, an uncounseled misdemeanor conviction cannot support incarceration directly or in subsequent cases." *Young*, 863 N.W.2d at 280.

In this case, the State did not meet its burden of providing any evidence of Berry having been represented by counsel in any case where he was convicted of possession of any controlled substance other than marijuana. Accordingly, the sentencing enhancement to a Class D Felony in this case based on such convictions cannot be sustained. This case must be remanded and Berry must be sentenced in compliance with the record: to no greater penalty than that authorized for an aggravated misdemeanor conviction under Iowa Code § 903.1(2).

iii. Berry's Sentence Is Illegal Because it Exceeds the Maximum Sentence for an Aggravated Misdemeanor

In this case, both of the prior convictions alleged by the State in the Trial Information and Minutes of Testimony are for possession of marijuana.

(Non-Con. App. at 5-6, Con. App. at 15, 19, 31, 34) (Trial Information, Minutes of Testimony at 2-3, 11, 15, 27, 30). Berry made a factual basis to the Court during the plea hearing that he was twice previously convicted of possession of a controlled substance, but he did not specify the case numbers of his prior convictions or what substance he was convicted of possessing. (Plea Tr. at 12). The Court did not inquire further regarding these prior convictions. (Plea Tr. at 12). Defense counsel and counsel for the State agreed that a sufficient factual basis was made. (Plea Tr. at 13).

The two prior convictions specified by the State are for possession of marijuana, as is the present offense. Accordingly, Berry should have been sentenced pursuant to the second paragraph in § 124.401(5) regarding enhancements, which addresses enhancements to charges for possession of marijuana based on prior convictions for possession of marijuana. *State v. Iowa Dist. Court ex rel. Black Hawk Cty*., 812 N.W.2d 1, 3 (Iowa 2012), *as corrected* (Mar. 14, 2012); Iowa Code § 124.401(5). Under that paragraph, "[i]f the controlled substance is marijuana and the person has been previously convicted two or more times of a violation of this subsection in which the controlled substance was marijuana, the person is guilty of an aggravated misdemeanor." Iowa Code § 124.401(5).

The maximum penalty for an aggravated misdemeanor is "imprisonment not to exceed two years." Iowa Code § 903.1(2). Additionally, a defendant can be sentenced to pay a fine of "at least six hundred twenty-five dollars but not to exceed six thousand two hundred fifty dollars". *Id*.

In this case, Berry was sentenced to not more than 5 years in prison, all suspended; two to five years on probation; placement at the Waterloo Residential Facility; a suspended $750 fine and surcharge; and submission of a DNA sample. (Non-Con. App. at 7-9) (Judgment and Sentence at 1-3). This sentence is lawful for a person convicted of a Class D Felony. Iowa Code § 902.9(e). However, this sentence is unlawful as applied to a person convicted of an aggravated misdemeanor. Iowa Code § 903.1(2).

By imposing a more stringent sentence, the trial court imposed an illegal sentence upon Berry. Accordingly, the sentence in this case must be vacated and this case must be remanded for resentencing consistent with Iowa law. *See e.g. State v. Freeman*, 705 N.W.2d 286, 291-92 (Iowa 2005); *State v. Smith*, 106 N.W. 187, 190 (1906).

CONCLUSION

The Court should vacate the sentence imposed by the trial court for Berry's conviction of Possession of a Controlled Substance, Marijuana, 3rd or Subsequent Offense. The Court should vacate the sentence in this case and remand this case for resentencing consistent with Iowa Code § 903.1(2). *See e.g. Freeman*, 705 N.W.2d at 291-92; *Smith*, 106 N.W. at 190.

ATTORNEY'S REQUEST FOR ORAL ARGUMENT

The Appellant requests the opportunity to present oral argument in this appeal.

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost incurred by Benzoni Law Office, P.L.C., for printing the attached Appellant's Brief was $5.00.

ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(l) or (2) because it contains 2, 977 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(l).

2. This brief complies with the typeface requirements of Iowa. R. App. P. 6.903(l)(e) and the type-style requirements of Iowa R. App. P. 6.903(l)(f) because it has been prepared in a proportionally spaced typeface using WordPerfect X3 in Times New Roman 14 point font.

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