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 REPLY BRIEF

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CERTIFICATE OF SERVICE AND FILING

I, Jessica Maffitt, hereby certify that on the 22nd day of December, 2019, I served the attached Appellant's Reply Brief on the Court and each other party by electronic service or through mailing one copy thereof to the following party:

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ARGUMENT

I. BERRY'S CASE IS NOT PRECLUDED BY RECENT LEGISLATION

The Iowa Legislature recently amended Iowa Code §814.6(1), which grants a criminal defendant a right to appeal, except in certain cases, including "(3) A conviction where the defendant has pled guilty" except "in a case where the defendant establishes good cause." *See* 2019 Iowa Acts ch. 140, §§ 28, 31 (to be codified at Iowa Code § 814.6(1)(a)(3) (2020)). Accordingly, Berry must establish good cause to support his right to appeal from his conviction following his guilty plea.

The State claims appellate review is precluded in this case because Berry needs to establish good cause. *See* Appellee's Brief at 9-10, 15. However, Berry has established good cause through his briefing in this case. Berry specifically asserted legal errors and violations of his statutory and constitutional rights, which constitute good cause to file an appeal following his plea of guilty. *See generally* Appellant's Brief.

Furthermore, Berry is challenging imposition of an illegal sentence. Imposition of an illegal sentence is a violation of Berry's rights under the Iowa and federal Constitutions. Iowa Constitution Article 1 § 17; U.S.

Constitution, 8th Amendment. Accordingly, correction of Berry's illegal sentence necessarily constitutes good cause to file an appeal in his case.

Moreover, the State has provided no guidance to criminal defendants for demonstrating good cause when seeking to appeal a conviction following a guilty plea. There is no procedure set forth in the new legislation for establishing good cause. Iowa Acts ch. 140. Nor has there been any procedure set forth by the appellate courts of Iowa or the district courts of Iowa explaining to criminal defendants what procedures they must use to establish good cause to appeal a conviction following a guilty plea.

Berry complied with the new law to the best of his ability by setting forth the good cause for appealing his conviction following his guilty plea in his brief before this court. If some other procedure is required, due process requires Berry be given notice of the correct procedure and the opportunity to be heard on the issue of good cause. Iowa Constitution Article 1 § 9; U.S. Constitution, 14th Amendment.

According to the Iowa Supreme Court, "all statutes that govern the conduct of people, regardless of their compelling purpose, must comply with the fundamental concepts of fairness implicit in the constitutional right to 'due process of law.' " *State v. Newton*, 929 N.W.2d 250, 255 (Iowa 2019)

(citing U.S. Const. amend. XIV, § 1; Iowa Const. art. I, § 9). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted).

Accordingly, the laws must give fair notice of the necessary procedures a person must follow in order to preserve their right to appeal. If such notice is not given, a criminal defendant is deprived of their right to appeal without the notice of the potential deprivation or opportunity to preserve error that are required by the due process clauses of the Iowa and federal constitutions.

II. BERRY DID NOT WAIVE HIS RIGHT TO APPELLATE REVIEW BY FAILING TO PRESERVE ERROR

The State argues Berry failed to preserve error on this issue by failing to file a motion in arrest of judgment. *See* Appellee's Brief at 10. However, failure to file a motion in arrest of judgment does not prohibit appellate review in cases challenging an illegal sentence. "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). 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). The cases cited by the State in support of its contention that Berry "waived error by giving up the opportunity to file a motion in arrest of judgment" do not relate to illegal sentence claims. *See* Appellee's Brief at 10.

Moreover, Iowa law does prohibit "challenges to a plea of guilty based on alleged defects in the plea proceedings" if the issue is not "raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal." Iowa R. Crim. P. 2.8. However, Berry is not challenging a defect in the plea proceedings. He is asserting that his sentence was improper because he was sentenced as though he were convicted of a felony when he was in fact found guilty and

convicted of possession of marijuana, 3rd or subsequent offense, an aggravated misdemeanor.

III. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO PROVE BERRY WAS PREVIOUSLY CONVICTED OF POSSESSION OF A CONTROLLED SUBSTANCE OTHER THAN MARIJUANA

The State argues the record demonstrates that Berry has two prior convictions for possession of controlled substances other than marijuana. *See* Appellee's Brief at 12, 14-15. However, the State acknowledges Berry's convictions in both cases listed in the trial information and minutes of testimony were for possession of marijuana. *Id* at 14. Furthermore, the State acknowledges Berry's conviction in Black Hawk County case number AGCR220354 was based on two prior convictions for possession of marijuana. *Id*.

The State's argument appears to be that Berry must have been convicted of possession of a controlled substance other than marijuana because he was convicted of possession of marijuana in SRCR289251 and other cases were listed in trial information for SRCR289251. *See* Appellee's Brief at 14 (citing (App at 20) (Minutes of Testimony at 16)). However, any effort to bootstrap prior convictions into the record through the case numbers

listed in the minutes of testimony must fail because the record does not state what Berry was convicted of in any of these cases: possessing marijuana or another controlled substance. 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." *State v. Harrington*, 893 N.W.2d 36, 48 (Iowa 2017), *as amended* (June 14, 2017). 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).

Moreover, the record does not demonstrate whether Berry was represented by counsel in these other case numbers. Without such a showing, 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). Accordingly, 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.

The State also seems to be arguing that the record establishes Berry was previously convicted of possession of a controlled substance other than

marijuana because six other cases were dismissed when Berry was sentenced in SRCR289251. *See* Appellee's Brief at 14-15. However, the enhancement for prior possession offenses, whether prior offenses are for possession of marijuana or of another controlled substance, only applies to convictions, not to dismissed counts, so this argument lacks merit. Iowa Code § 124.401(5).

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).

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. State v. Freeman*, 705 N.W.2d 286, 291-92 (Iowa 2005); *State v. Smith*, 129 Iowa 709, 106 N.W. 187, 190 (1906).

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 $3.00.

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 1,451 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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