

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1532

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RODNEY DEJUAN BERRY,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE PATRICK WEGMAN, JUDGE

APPELLEE'S BRIEF

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FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW 5

ROUTING STATEMENT..... 7

STATEMENT OF THE CASE..... 7

ARGUMENT..... 9

I. Review of the Defendant’s Guilty Plea Challenge is Precluded by Recent Legislation. Further, the Defendant Has Waived Error and Cannot Establish Good Cause Warranting Review..... 9

CONCLUSION..... 15

REQUEST FOR NONORAL SUBMISSION..... 15

CERTIFICATE OF COMPLIANCE 17

TABLE OF AUTHORITIES

State Cases

<i>State v. Carter</i> , No.17-1258, 2018 WL 2246871 (Iowa Ct. App. May 16, 2018).....	10
<i>State v. Coleman</i> , 907 N.W.2d 124 (Iowa 2018)	12
<i>State v. Cortez</i> , 617 N.W.2d 1 (Iowa 2000)	13
<i>State v. Finney</i> , 834 N.W.2d 46 (Iowa 2013)	11
<i>State v. Garcia</i> , No.17-1181, 2018 WL 2084905 (Iowa Ct. App. May 2, 2018)	10
<i>State v. Hallock</i> , 765 N.W.2d 598 (Iowa Ct. App. 2009)	10, 11
<i>State v. Harrington</i> , 893 N.W.2d 36	12
<i>State v. Holman</i> , No.18-1507, 2019 WL 1294801 (Iowa Ct. App. March 20, 2019).....	11
<i>State v. Iowa Dist. Ct. ex rel. Story County</i> , 812 N.W.2d 1 (2012).....	10
<i>State v. Johnson</i> , No.17-1871, 2018 WL 6120245 (Iowa Ct. App. Nov. 21, 2018)	12
<i>State v. Karr</i> , No.17-1111, 2018 WL 2727784 (Iowa Ct. App. June 6, 2018)	10
<i>State v. Loye</i> , 670 N.W.2d 141 (Iowa 2003).....	11
<i>State v. Macke</i> , 933 N.W.2d 226 (Iowa 2019).....	9
<i>State v. Rodriguez</i> , 804 N.W.2d 844 (Iowa 2011)	10
<i>State v. Schminkey</i> , 597 N.W.2d 785 (Iowa 1999)	11
<i>State v. Smith</i> , 924 N.W.2d 846 (Iowa 2019)	12
<i>State v. Smith</i> , No.18-0329, 2019 WL 156642 (Iowa Ct. App. Jan. 9, 2019)	11

State v. Stewart, No.99-1778, 2000 WL 1675909
(Iowa Ct. App. Nov. 8, 2000).....13

State Statutes/Rules

2019 Iowa Acts ch. 140, § 289, 10
2019 Iowa Acts ch. 140, § 31 9
Iowa Code § 3.7(1) 9
Iowa Code § 124.401(5) 12, 13
Iowa Code § 814.6(1)(a)(3) 9, 15
Iowa R. App. P. 6.903(2)(i)16
Iowa R. App. P. 6.908(2)16
Iowa R. Crim. P. 2.8(2)(b) 11
Iowa R. Crim. P. 2.24(3)(a)10

**STATEMENT OF THE ISSUE PRESENTED FOR
REVIEW**

I. Review of the Defendant’s Guilty Plea Challenge is Precluded by Recent Legislation. Alternatively, Whether the Defendant Has Waived Error and Failed to Articulate Good Cause Warranting Review.

Authorities

- State v. Carter*, No.17-1258, 2018 WL 2246871
(Iowa Ct. App. May 16, 2018)
- State v. Coleman*, 907 N.W.2d 124 (Iowa 2018)
- State v. Cortez*, 617 N.W.2d 1 (Iowa 2000)
- State v. Finney*, 834 N.W.2d 46 (Iowa 2013)
- State v. Garcia*, No.17-1181, 2018 WL 2084905
(Iowa Ct. App. May 2, 2018)
- State v. Hallock*, 765 N.W.2d 598 (Iowa Ct. App. 2009)
- State v. Harrington*, 893 N.W.2d 36
- State v. Holman*, No.18-1507, 2019 WL 1294801
(Iowa Ct. App. March 20, 2019)
- State v. Iowa Dist. Ct. ex rel. Story County*, 812 N.W.2d 1
(2012)
- State v. Johnson*, No.17-1871, 2018 WL 6120245
(Iowa Ct. App. Nov. 21, 2018)
- State v. Karr*, No.17-1111, 2018 WL 2727784
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- State v. Loye*, 670 N.W.2d 141 (Iowa 2003)
- State v. Macke*, 933 N.W.2d 226 (Iowa 2019)
- State v. Rodriguez*, 804 N.W.2d 844 (Iowa 2011)
- State v. Schminkey*, 597 N.W.2d 785 (Iowa 1999)
- State v. Smith*, 924 N.W.2d 846 (Iowa 2019)
- State v. Smith*, No.18-0329, 2019 WL 156642
(Iowa Ct. App. Jan. 9, 2019)
- State v. Stewart*, No.99-1778, 2000 WL 1675909
(Iowa Ct. App. Nov. 8, 2000)
- 2019 Iowa Acts ch. 140, § 28
- 2019 Iowa Acts ch. 140, § 31
- Iowa Code § 3.7(1)
- Iowa Code § 124.401(5)

Iowa Code § 814.6(1)(a)(3)
Iowa R. App. P. 6.903(2)(i)
Iowa R. App. P. 6.908(2)
Iowa R. Crim. P. 2.8(2)(b)
Iowa R. Crim. P. 2.24(3)(a)

ROUTING STATEMENT

Because this case can be decided based on existing legal principles transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Rodney Dejuan Berry, appeals from the district court's entry of judgment and sentence on his guilty plea to the possession of marijuana as a third or subsequent offender, a class D felony. *See* Iowa Code § 124.401(5). On appeal the defendant challenges the factual basis supporting the repeat drug offender felony enhancement.

Course of Proceedings

On December 10, 2018, the State charged Berry with possession of marijuana as a third or subsequent offender based on prior drug convictions in Polk and Black Hawk counties. Trial Information ((FE)AGCR227848); App. 5-6. Berry appeared before the court on August 20, 2019, and entered a guilty plea to the possession charge. *See generally* Guilty Plea, Sentencing, Probation Revocation Tr. [hereinafter "Plea/Sent. Tr."]. Following a full plea colloquy, the court accepted Berry's plea as knowing, voluntary, and supported by a

factual basis. Plea/Sent. Tr.p.9, line 18-p.10, line 25, p.11, lines 1-24, p.13, line 23-p.14, line 6. Berry waived trial on the enhancement issue, and requested immediate sentencing on his guilty plea and a pending probation revocation case. Plea/Sent. Tr.p.11, line 25-p.13, line 22, p.14, line 7-p.16, lines 1-2,8-11.

The court thereafter ordered Berry to serve up to five years but suspended the prison term and fines, and placed him on formal probation for two to five years requiring him to live in the Waterloo Residential Correctional Facility for a period of time. Plea/Sent. Tr.p.28, line 22-p.30, line 16; Order Judgment and Sentence (8/23/19); App. 7-11. As to the probation case, the court ordered Berry to consecutively serve the remaining period in the residential facility. Tr.p.30, lines 17-20, p.32, line 19-p.33, line 9; Order; App. 9. Berry filed a timely notice of appeal. Notice (9/13/19); App. 12.

Facts

The minutes of testimony reflect that a small amount of marijuana wrapped in paper was found in the vehicle Berry had been driving following a traffic stop in Waterloo after 11 p.m. on October 31, 2018. Minutes (officer's narrative); Conf.App. 11. At his plea hearing, Berry admitted to the knowing possession of marijuana on

the date at issue and that he had twice been convicted of controlled substance offenses. Plea/Sent. Tr.p.11, line 10-p.12, line 10. Berry did not contest the probation violation based on the current offense.

Additional relevant facts will be discussed as part of the State's argument.

ARGUMENT

I. Review of the Defendant's Guilty Plea Challenge is Precluded by Recent Legislation. Further, the Defendant Has Waived Error and Cannot Establish Good Cause Warranting Review.

Jurisdiction, Authority, and Waiver

On July 1, 2019, recent legislation affecting the Court's jurisdiction/authority to consider or rule on guilty plea appeals became effective.¹ See 2019 Iowa Acts ch. 140, §§ 28, 31 (to be codified at Iowa Code § 814.6(1)(a)(3) (2020)); Iowa Code § 3.7(1) (establishing an effective date when none is listed). Section 28 of 2019 Iowa Acts chapter 140 amended Iowa Code section 814.6 to eliminate a defendant's right to appeal from a guilty plea unless the defendant is convicted of a Class A felony, not at issue here, or when the defendant establishes good cause. See 2019 Iowa Acts ch. 140, §

¹ See also *State v. Macke*, 933 N.W.2d 226, 239-40 (Iowa 2019) (finding legislation not retroactive).

28. This statutory change precludes Berry's appeal absent a showing of good cause.

Further, Berry waived error by giving up the opportunity to file a motion in arrest of judgment as required by Iowa Rules of Criminal Procedure 2.8(2)(d) and 2.24(3)(a) to challenge the factual basis supporting his guilty plea. Plea/Sent. Tr.p.14, line 7-p.16, line 2. He also waived trial on the enhancement issue following the court's advisories on both matters. Tr.p.12, line 11-p.13, line 3, p.14, line 7-p.16, line 2. Such waivers ordinarily bar direct challenges to the adequacy of a guilty plea proceeding on appeal. Iowa R. Crim. P. 2.24(3)(a); *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011); *State v. Hallock*, 765 N.W.2d 598, 601-02 (Iowa Ct. App. 2009).

Notably, Berry is not arguing that his plea counsel was ineffective in failing to file a motion in arrest of judgment to challenge the offense level. *See, e.g., State v. Karr*, No.17-1111, 2018 WL 2727784, at *4 (Iowa Ct. App. June 6, 2018); *State v. Carter*, No.17-1258, 2018 WL 2246871, at *2 (Iowa Ct. App. May 16, 2018); *State v. Garcia*, No.17-1181, 2018 WL 2084905, at *1 (Iowa Ct. App. May 2, 2018). Berry's factual basis challenge is not, as he asserts, an "illegal sentence" claim. Appellant's Brief pp.13-14,21-23; *State v. Iowa Dist.*

Ct. ex rel. Story County, 812 N.W.2d 1, 3 (2012) (illegal sentence is one that exceeds the court’s jurisdiction or constitutes an improper application of the law).

For the above reasons, the Court should decline to consider the merits of Berry’s factual basis challenge to application of the felony sentencing enhancement.

Standards for Review

Iowa Rule of Criminal Procedure 2.8(2)(b) codifies the due process standards applicable to guilty pleas. *State v. Loye*, 670 N.W.2d 141, 151 (Iowa 2003). As part of the guilty plea colloquy, the court must find a factual basis to support the guilty plea and determine whether the plea agreement is entered intelligently and voluntarily. Iowa R. Crim. P. 2.8(2)(b); *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999); *Hallock*, 765 N.W.2d at 603. The record as a whole must disclose facts sufficient to establish each element of the crime. *State v. Finney*, 834 N.W.2d 46, 59-60 (Iowa 2013); *State v. Holman*, No.18-1507, 2019 WL 1294801, at *1 (Iowa Ct. App. March 20, 2019); *State v. Smith*, No.18-0329, 2019 WL 156642, at *1-*2 (Iowa Ct. App. Jan. 9, 2019).

The factual basis requirement applies equally to evidence supporting habitual offender and other sentencing enhancements based on one or more prior convictions. *State v. Smith*, 924 N.W.2d 846, 852-53 (Iowa 2019); *State v. Coleman*, 907 N.W.2d 124, 147-48 (Iowa 2018); *State v. Harrington*, 893 N.W.2d 36, 46-47 (Iowa 2017). In addition, the trial court must conduct a guilty plea type colloquy with defendants facing repeat offender sentencing enhancements to ensure his or her waiver or stipulation is knowing and voluntary. *Harrington*, 893 N.W.2d at 45-47; *State v. Johnson*, No.17-1871, 2018 WL 6120245, at *2-*3 (Iowa Ct. App. Nov. 21, 2018).

Merits

Defendant Berry argues that his conviction for possession of marijuana should have been sentenced as an aggravated misdemeanor, rather than a D felony, because the prior convictions relied on by the State to support the enhancement were not proven to be for controlled substances other than marijuana. See Iowa Code § 124.401(5) (second paragraph). The State disagrees the record on the prior convictions is insufficient to support the felony enhancement. The Court should either decline to consider Berry's appeal under

section 814.6(1)(a)(3), or find waiver and/or no good cause for appellate review.

The second paragraph of section 124.401(5) grants leniency to persons charged only with marijuana related drug offenses. *Id.*; *State v. Cortez*, 617 N.W.2d 1, 3 (Iowa 2000); *State v. Stewart*, No.99-1778, 2000 WL 1675909, at *2 (Iowa Ct. App. Nov. 8, 2000). Prior convictions for controlled substances other than marijuana, however, can be used to enhance a subsequent marijuana offense. Iowa Code § 124.401(5).

During the plea colloquy Berry admitted to possessing marijuana at the time of the traffic stop. Plea/Sent. Tr.p.10, line 16-p.11, line 24. He also admitted to two prior controlled substance convictions with the assistance of counsel. Tr.p.11, line 25-p.12, line 10. Berry waived the offer of a trial on the question of prior convictions. Tr.p.12, line 11-p.13, line 11. In addition, Berry was on probation from a 2016 Polk County conviction at the time of the 2018 offense, and also on probation when he committed a possession offense in Black Hawk County in 2017. Tr.p.16, line 8-p.17, line 24, p.26, lines 2-10.

The trial information filed in this case ((FE)AGCR227848) listed two prior controlled substance convictions relied on for the repeat offender enhancement: possession of marijuana (third offense) in Polk County ((FE)SRCR289251) on November 9, 2016, and possession of marijuana (third offense) in Black Hawk (AGCR220354) on November 5, 2017. Trial Information; App. 5-6. The Black Hawk case was charged and sentenced as an aggravated misdemeanor for possession of marijuana based on prior marijuana related convictions from 2012 and 2016. *See* Minutes (Trial Information (AGCR220354)); Minutes (Order Judgment and Sentence) (same); Conf.App. 31-42.

However, the State points out the trial information in the Polk County case charged Berry with possession of marijuana enhanced to a D felony based on six prior controlled substance convictions that included three felony case numbers. Minutes (Trial Information (FE)SRCR289251)) (listing priors); Conf.App. 20-22. Notably, Berry pled guilty to the enhanced offense level and was sentenced accordingly receiving the benefit of the State's dismissal of six other pending cases. Minutes (Order (Plea/Sentencing Order—Felony Drug)); Conf.App. 15-19. It therefore follows the record establishes

that Berry necessarily has more than two prior non-marijuana controlled substance convictions supporting the felony sentencing enhancement. In addition, the State points out that had Berry raised his factual basis claim under the rubric of ineffective assistance and prevailed, the remedy would be a remand to allow the State an opportunity to establish the missing factual basis, which the State could clearly do. Further proceedings would not benefit Berry.

Therefore, the Court should dismiss defendant Berry's appeal either on procedural grounds or because he has failed to state good cause warranting appellate review.

CONCLUSION

For all of the reasons stated above, the State respectfully requests that this Court affirm the conviction and sentence imposed on defendant-appellant Rodney Berry.

REQUEST FOR NONORAL SUBMISSION

Appellant has requested oral argument. The State, however, believes that oral argument would not be of material assistance when appellate review is precluded by recent legislation, and further, that the issue involves a routine factual basis claim involving the repeat drug offender enhancement. Iowa Code § 814.6(1)(a)(3); Iowa R.

App. P. 6.903(2)(i), 6.908(2). Should the Court order oral argument, the State would request to also be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **1,686** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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