IN THE COURT OF APPEALS OF IOWA

No. 1-572 / 10-1490
Filed August 10, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROGER BERNELL ENNENGA,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

The defendant appeals from the order denying his motion to correct an illegal sentence. **APPEAL DISMISSED.**

William S. Morris, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and John Sarcone, County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

TABOR, J.

In 1999 the Polk County district court sentenced Roger Ennenga to a prison term not to exceed ten years for his participation in a drug conspiracy. In 2010 Ennenga filed a motion to correct an illegal sentence that attacked the factual basis for his guilty plea. The district court denied Ennenga's motion, concluding the alleged grounds went beyond the correction of an illegal sentence under Iowa Rule of Criminal Procedure 2.24(5)(*a*). Because Ennenga's sentence expired before he filed his motion, our decision would have no practical legal effect upon the controversy. We dismiss this appeal as moot.

I. Background Facts and Proceedings

Des Moines police officers arrested Roger Ennenga on August 10, 1999, for drug offenses and running from authorities. On September 29, 1999, he entered guilty pleas to two counts: conspiracy to possess a controlled substance with intent to deliver in violation of Iowa Code section 124.401(c) (1999) and eluding in violation of section 321.279. On December 21, 1999, the district court sentenced Ennenga to a term not to exceed ten years on the conspiracy count and a term not to exceed two years on the eluding count; the court ordered the sentences to run concurrently.

Our court affirmed Ennenga's convictions on direct appeal, rejecting his claim that his attorney was ineffective for allowing him to enter a guilty plea without a factual basis. *State v. Ennenga*, No. 00-0102 (Iowa Ct. App. Jan. 24, 2001).

Ennenga filed a pro se "Motion for Correction of an Illegal Sentence" on July 29, 2010. He asserted that the prosecution "failed to allege material evidence necessary to constitute charge in question." As a remedy, he asked for an order "vacating his sentence as void" and for a hearing to be scheduled to determine "a legal sentence consistent with Iowa law."

On August 4, 2010, the district court denied Ennenga's request, stating:

> Upon review of the motion and the court file, the Court finds and concludes the matters raised in Defendant's motion are not grounds for correction of a sentence under Iowa Rule of Criminal Procedure 2.24(5). The Defendant's motion raises substantive challenges to the Defendant's conviction which had to be raised in his appeal.

Enenga appeals the denial of his motion.

II. Scope and Standards of Review

We review rulings on motions to correct an illegal sentence for errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001).

We have discretion to consider an appeal on its merits despite the fact that the issue raised is moot where the case presents matters of public importance and the problem is likely to recur. *Christensen v. Iowa Dt. Ct.*, 578 N.W.2d 675, 679 (Iowa 1998).

III. Correction of an Allegedly Illegal Sentence and Mootness

To decide Ennenga's claim, we must consider the interplay between Iowa Rule of Criminal Procedure 2.24(5)(*a*) governing the correction of illegal sentences and the mootness doctrine. Specifically, the defendant's argument regarding why the district court erred in denying his motion to correct an illegal

sentence doubles as his explanation for why we should decided his appeal despite the fact that he has served his sentence.[1]

Ennenga anchors his illegal sentence claim on the following language from *State v. Bruegger,* 773 N.W.2d 862, 871 (Iowa 2009):

> [A] challenge to an illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed, including claims that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional.

Ennenga then expands on the premise in *Bruegger*, contending that the district court erred in accepting his plea to the drug conspiracy charge without a factual basis[2] and, thereby, his resulting sentence was illegal and void.

The State disputes Ennenga's broad interpretation of *Bruegger*, quoting additional language from that opinion:

> As the United States Supreme Court made clear, under the federal rule [which is comparable to Iowa rule 2.24(5)(*a*)] the purpose of allowing review of an illegal sentence is "to permit correction at any time of an illegal *sentence,* not to re-examine errors occurring at the trial or other proceedings prior to the imposition of the sentence."

Id. at 871-872 (quoting *Hill v. United States,* 368 U.S. 424, 430, 82 S. Ct. 468, 472, 7 L. Ed. 2d 417, 422 (1962)).

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[1] Ennenga would have discharged his indeterminate ten-year sentence, at the latest, on December 21, 2009. In his reply brief, Ennenga responds to the State's mootness claim by "assuming" that he has served his sentence. We also make that assumption for purposes of this appeal. *See Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 539 n.1 (Iowa 1997) (explaining appellate court is bound to consider any change since judgment was entered and determine under the presently existing circumstances if the case should be treated as moot).

[2] While the substance of Ennenga's objection to his plea appears to have been decided adversely to him in his direct appeal, we do not reach that issue because of the dismissal on mootness grounds.

But before taking on Ennenga's expansive reading of *Bruegger,* the State contends the appeal should be dismissed as moot, arguing as follows:

> Oddly, . . . the defendant is not challenging the sentence in this case, he is challenging his conviction, although alleging the conviction itself to be an illegal sentence. However, the statute of limitations in [Iowa Code] section 822.3 has long since passed and the defendant's challenge to his conviction is barred. To the extent he challenges his sentence, it is moot. The defendant's claim is not something that would evade review, does not present an issue of law that is important to the bench and bar, and was resolved contrary to the defendant's position in *State v. Allen*, 633 N.W.2d 752 (Iowa 2001).

An action is moot if it no longer presents a justiciable controversy because the issues involved have become academic or nonexistent. *State v. Wilson*, 234 N.W.2d 140, 141 (Iowa 1975) (dismissing as moot an appeal challenging only the propriety of work release revocation where the defendant had already been released from county jail after serving his sentence). Iowa's appellate courts "will generally dismiss an appeal 'when judgment, if rendered, will have no practical legal effect upon the existing controversy.'" *Christensen*, 578 N.W.2d at 679 (citations omitted). We will invoke an exception to this general rule "where matters of public importance are presented and the problem is likely to recur." *Id*. In deciding whether to accept a moot case, we also consider whether the challenged action "is such that often the matter will be moot before it can reach an appellate court." *Id*.

Ennenga urges us to decide his appeal even assuming that he has discharged his entire prison term:

> [B]ecause Crim. Rule 2.24(5)(*a*) provides a motion to correct an illegal sentence may be raised at any time, any time includes the

> need for an authoritative adjudication on an illegal sentence even after the sentence has been served.

He distinguishes his situation from *State v. Wilson* by asserting that Wilson's challenge was to "the propriety of his sentence, not the conviction itself. Ennenga's appeal involves the conviction itself. Ennenga is asking that the conviction be set aside."

We reject Ennenga's reasoning. If he is challenging his underlying conviction as improper, he cannot do so by means of a motion to correct an illegal sentence. *See State v. Chadwick*, 586 N.W.2d 391, 393 (Iowa Ct. App. 1998) (holding right to counsel could not be brought by motion to correct illegal sentence). Contrary to Ennenga's argument, our supreme court has not expanded the scope of rule 2.24(5)(*a*) to cover challenges to the factual basis for a guilty plea. *See Bruegger*, 773 N.W.2d at 872. *Bruegger* held that a cruel-and-unusual-punishment challenge amounted to a claim that a sentence was illegal because it involved a claim that the sentencing court lacked the power to impose a particular sentence. *Id.* at 871; *see Veal v. State,* 779 N.W.2d 63, 64 (Iowa 2010).

Ennenga is not alleging that the district court lacked the power to impose the *particular* sentence he received for his drug conspiracy conviction. Rather he is alleging the court lacked power to impose *any* sentence because the guilty plea lacked a factual basis. On appeal, Ennenga is "asking that his conviction be set aside." The remedy for a successful motion to correct an illegal sentence is vacation of the sentencing order, not reversal of the underlying conviction. *See Bruegger*, 773 N.W.2d at 871, 886. In fact, vacation of his sentence was the only

remedy Ennenga requested in his pro se motion in the district court. A motion to correct an illegal sentence does not offer Ennenga the relief he seeks on appeal.

If Ennenga is challenging his sentence as being illegal—which he must do to bring the claim under rule 2.24(5)(*a*)—the fact that his prison term has expired renders the case moot. *See Rarey v. State*, 616 N.W.2d 531, 532 (Iowa 2000) (finding challenge to prison disciplinary action was rendered moot by absolute discharge of prison sentence); *Wilson*, 234 N.W.2d at 141; *see also Lane v. Williams*, 455 U.S. 624, 631, 102 S. Ct. 1322, 1327, 71 L. Ed. 2d 508, 515 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot."). Nothing in Ennenga's motion to correct an illegal sentence points to an issue of public importance that would likely evade appellate review if not decided in this instance. *See Rarey*, 616 N.W.2d at 532. Accordingly, we see no reason to exercise our discretion to consider a moot claim.

APPEAL DISMISSED.