IN THE COURT OF APPEALS OF IOWA

No. 1-901 / 11-0463
Filed December 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SCOTT LYNN BLOW,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John M. Wright, Judge.

Scott Blow appeals from the judgment and sentence entered following his guilty plea for a tax stamp violation as a habitual offender. **AFFIRMED IN PART, SENTENCE VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Tyron Rogers, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

On October 14, 2010, the State charged Scott Blow with manufacturing marijuana as a habitual offender and possession of marijuana with intent to deliver as a habitual offender. After Blow reached a plea agreement with the State, the State filed an amended trial information charging Blow with a failure to affix a drug tax stamp as a habitual offender.

On December 2, 2010, Blow pleaded guilty to the charge of failure to affix a drug tax stamp in violation of Iowa Code section 453B.12 (2009) as a habitual offender. The district court accepted Blow's plea and set sentencing for a later date. On December 17, 2010, Blow filed a timely motion in arrest of judgment asserting a factual basis for his plea had not been established. In his brief in support of his motion in arrest of judgment, Blow alleged the weight of the marijuana documented in the laboratory report supporting the factual basis for the charge had included non-taxable stem and stalks. Because the laboratory measurement included stalk of the marijuana plant, Blow alleged there was no factual basis in the record to support his plea. The State did not admit or resist the alleged error in the weight measurement.

On January 5, 2011, the district court issued a ruling denying Blow's motion in arrest of judgment. The court found the laboratory report attached to the minutes of testimony and referenced at the time of the guilty plea by both parties adequately supported the State's allegation that Blow possessed more than 42.5 grams of marijuana, the necessary statutory threshold.

Following the district court's denial of his motion in arrest of judgment, Blow filed a motion requesting an evidentiary hearing this motion. The district court ultimately granted Blow's request and held an evidentiary hearing on February 4, 2011. The criminalist who prepared the laboratory report weighing the marijuana testified at this hearing. He stated that when he weighed the marijuana, he did not segregate the stalk from the plant material. He testified that while he could not estimate the exact weight of the plant material with the stalk excluded, there was no question that the taxable plant material would weigh more than 42.5 grams.

After this evidentiary hearing, the district court again denied Blow's motion in arrest of judgment. The court found the only testimony presented at the hearing supported a finding that there was a factual basis at the time of the guilty plea hearing.

Blow appeals, asserting the district court abused its discretion in denying his motion in arrest of judgment. Blow also asserts the district court erred in imposing an unauthorized fine and criminal penalty as part of his sentence.

II. Motion in Arrest of Judgment

Blow asserts the district court abused its discretion in denying his motion in arrest of judgment when there was not a factual basis to support his plea. The district court may not accept a guilty plea without first determining the plea has a factual basis. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). We review the denial of a motion in arrest of judgment following a guilty plea for an abuse of discretion and will not reverse unless the district court's decision was

"based on reasons clearly unreasonable or untenable." *State v. Meyers*, 653 N.W.2d 574, 581 (Iowa 2002).

Iowa Code section 453B.12 provides that "a dealer . . . possessing taxable substances without affixing the appropriate stamps . . . is guilty of a class 'D' felony." Marijuana qualifies as a taxable substance. Iowa Code § 453B.1(10). Section 453B.1(3)(b) gives several definitions of "dealer," including any person who possesses 42.5 grams or more of processed marijuana or a substance consisting of or containing marijuana. "[T]he gram weight computed under the statute cannot include the weight of marijuana stalks." *State v. Martens*, 569 N.W.2d 482, 488 (Iowa 1997).

Blow asserts the factual basis for the weight of the marijuana was provided exclusively by the laboratory report that listed two items with a combined net weight of 49.2 grams. At the evidentiary hearing on Blow's motion in arrest of judgment, the criminalist testified the weights on the laboratory report improperly included non-taxable stalk. Because the laboratory report relied upon by the court in determining the factual basis for Blow's guilty plea was prepared in error, Blow asserts "the factual basis failed" and his motion in arrest of judgment should have been granted.

We disagree. "In deciding whether a factual basis exists, we consider the entire record before the district court at the guilty plea hearing . . . ." *Schminkey*, 597 N.W.2d at 788. The laboratory report attached to the minutes of testimony listed the weight of the marijuana at 49.2 grams total. The minutes further provided that an investigator would testify that he conducted a preliminary weighing of the marijuana with packaging, and it weighed 51.27 grams. At the

guilty plea hearing, both the prosecutor and Blow's attorney stated a factual basis had been presented to support Blow's plea. Further, Blow's attorney stated it was Blow's position that he was in violation of the statute "because of his possession of 49.2 grams of marijuana." We conclude a factual basis for Blow's guilty plea was established at the time of the guilty plea hearing.

Further, if we consider the record as supplemented by the evidence taken at the hearing on the motion in arrest of judgment, we still conclude Blow's guilty plea was supported by an adequate factual basis. The expert at the evidentiary hearing testified that without the nontaxable material, the substance unquestionably weighed more than 42.5 grams. Blow failed to prove his claim that the factual basis was lacking. Accordingly, we find the district court did not err in accepting Blow's guilty plea and in denying Blow's motion in arrest of judgment.

III. Fine and Criminal Penalty

At sentencing, the district court ordered Blow to pay a $1000 fine "plus the 35 percent applicable surcharges." On appeal, Blow asserts, and the State concedes, the district court was without authority to impose either the fine or the surcharge. We agree.

Blow pleaded guilty to a tax stamp violation as a habitual offender in violation of Iowa Code section 453B.12. Section 453B.12 provides that, in addition to being subject to a civil tax penalty, a dealer who violates the chapter is guilty of a class "D" felony. Iowa Code section 902.9 governs criminal sentences for felons. Subsection 3 of that section provides only that habitual offenders "shall be confined for no more than fifteen years." Iowa Code

§ 902.9(3). This subsection does not provide for a monetary fine. *Id.* Subsection 5 provides that a class "D" felon, not a habitual offender, shall, among other things, be required to pay a fine. *Id.* § 902.9(5). Subsection 5 further provides for the imposition of a surcharge required by section 911.1. *Id.* However, subsection 5, by its plain language does not apply to Blow because he is a habitual offender. Nowhere does section 902.9 authorize a fine for a habitual offender. Section 911.1 provides for a criminal penalty surcharge as a percentage of the fine imposed. Because section 902.9 does not provide for the imposition of a fine, no surcharge can be imposed. We find the district court was not authorized to impose the $1000 fine or the thirty-five percent surcharge, and we vacate that portion of Blow's sentence.

AFFIRMED IN PART, SENTENCE VACATED IN PART.