IN THE COURT OF APPEALS OF IOWA

No. 2-1024 / 12-0050
Filed January 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KYLEA ALGERON CARTWRIGHT,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith and Mark D. Cleve, Judges.

Kylea Cartwright appeals his sentence for conspiracy to commit a non-forcible felony as an habitual offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Teresa Baustian, Assistant Attorney General, Michael J. Walton, County Attorney, and Joseph Grubisich and Amy Devine, Assistant County Attorneys, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Kylea Cartwright appeals his sentence for conspiracy to commit a non-forcible felony as an habitual offender. He contends the district court imposed an illegal sentence by suspending a mandatory minimum fine when the applicable code sections did not provide for the imposition of a fine. Because the judgment entry suspended "any mandatory minimum fine," the court imposed no greater sentence than that authorized by statute. Accordingly, we affirm his sentence.

I. Background Facts and Proceedings

On September 7, 2011, the State filed two trial informations against Cartwright. The two-count trial information in case FECR340378 charged Cartwright with conspiracy to commit a non-forcible felony, a class "D" felony, in violation of Iowa Code section 706.3 (2011), and third-degree theft, an aggravated misdemeanor, in violation of sections 703.1, 714.1(1), and 714.2(3). Because Cartwright already had felony convictions in Illinois and Iowa, the information also charged him as an habitual offender under section 902.8. A two-count trial information in case FECR340660 charged Cartwright with possession with intent to deliver, in violation of sections 124.401(1)(c)(3) and 124.206(2)(d), and interference with official acts, in violation of section 719.1(1). The second information also charged him as an habitual offender.

On November 28, 2011, after an aborted jury trial, Cartwright entered an agreement in which he would plead guilty to the conspiracy charge as an habitual offender in exchange for the State's dismissal of the additional third-degree theft charge. Two days later, in case FECR340660, Cartwright agreed to plead guilty

to both counts for the State's recommendation that the incarceration for each offense would run concurrently.

The district court combined both cases for a sentencing hearing. On December 30, 2011, the district court sentenced Cartwright on case FECR340378:

> Beginning with FECR340378, there the offense is Conspiracy to Commit a Non-forcible Felony in violation of Iowa Code Sections 706.3 and 902.8. Mr. Cartwright, pursuant to your plea of guilty to that charge and as provided by Sections 902.8 and 902.9 of the Iowa Criminal Code it is the judgment and sentence of the Court that you be and are hereby committed to the custody of the Director of the Iowa Department of Corrections for an indeterminate period of not to exceed 15 years. You will receive credit on your sentence for time spent in the Scott County Jail in connection with this case. Under Iowa Code section 902.8 of that indeterminate sentence the defendant shall be required to serve a minimum of three years.

The court's calendar entry contained largely the same language, except for the closing sentence: "Any mandatory minimum fine is suspended."

In FECR34660 the court sentenced Cartwright to an indeterminate term of imprisonment not to exceed ten years for possession with the intent to deliver a controlled substance and a period not to exceed two years for interference with official acts. The court suspended any mandatory minimum fine on both acts and ordered the sentences imposed in both cases to run concurrently.

II. Scope and Standard of Review

We review the legality of a sentence for correction of legal error. *State v. Maxwell*, 743 N.W.2d 785, 190 (Iowa 2008). Because an illegal sentence is void, we can correct it at any time. Iowa R. Crim. P. 2.24(5)(a); *State v. Gordon*, 732 N.W.2d 41, 43 (Iowa 2007).

III. Analysis

Conspiracy to commit a non-forcible felony is a class "D" felony. Iowa Code § 706.3. If a person convicted as a class "D" felon is not sentenced as an habitual offender, he is subject to a fine ranging from $750 to $7500. *Id.* § 902.9(5). Because section 902.9 does not provide a fine for habitual offenders, a court's authority to impose a fine must come from elsewhere in the code. *See id.* § 902.9(3). Section 706.3 classifies conspiracies and does not provide any form of punishment. *See id.* § 706.3.

Cartwright contends the calendar entry's language that "[a]ny mandatory minimum fine is suspended" constituted an illegal sentence because the court held no authority to impose a fine under the circumstances of the case. The State responds that because the court suspended "any" mandatory minimum fine, the habitual offender sentence conformed with the law even though the underlying offense did not carry a fine.

An illegal sentence is one that is not authorized by statute. *State v. Wade*, 757 N.W.2d 618, 628 (Iowa 2008). "The sentence is illegal because it is beyond the power of the court to impose." *State v. Ross*, 729 N.W.2d 806, 809 (Iowa 2007) (internal quotation marks omitted).

Our court has vacated a fine imposed upon an habitual offender where the underlying criminal statute did not contain a separate penalty provision. *See State v. Halterman*, 630 N.W.2d 611, 613–14 (Iowa Ct. App. 2001). But in *Halterman* the district court actually imposed a $500 mulct against a defendant

sentenced for a class "C" felony as an habitual offender. *See id.* The sentence in that case was not provided by law. *Id*.

Rather than fining Cartwright or imposing a fine and suspending it, here the calendar entry directed that "[a]ny mandatory minimum fine" be suspended. As an adjective, the word "any" is commonly used in conditional or hypothetical sentences. *See generally Garner's Modern American Usage* 52 (3rd ed. 2009). Accordingly, we read the phrase "any mandatory minimum fine" as the equivalent of "a mandatory minimum fine, if any." Because no fine was authorized by statute, no fine was suspended.

Cartwright urges us to remand the case because the record is unclear whether the court believed it could impose a fine. When a clerical error causes a judgment entry to incorrectly diverge from the oral rendition, the district court has the inherent power to correct the entry to reflect its actual pronouncement. *State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995). Here the calendar entry's reference to "any" fine imposed did not differ from the sentence handed down at the December 30 hearing. A remand is not necessary.

Finally, even if the calendar entry did impose an illegal sentence, we do not believe a remand is required. Iowa Code section 814.20 authorizes us—after examination of the entire record—to reduce the punishment on appeal. *See State v. Davis*, 328 N.W.2d 301, 308 (Iowa 1982). Under this authority, to the extent that the district court imposed a fine, we nullify that portion of Cartwright's sentence.

AFFIRMED.