IN THE COURT OF APPEALS OF IOWA

No. 3-1085 / 12-1318
Filed December 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RAVIN MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick (plea) and John D. Telleen (sentencing), Judges.

Ravin Miller appeals the sentence and fine imposed following his guilty plea to possession with intent to deliver marijuana as a habitual offender. **CONVICTION AFFIRMED; SENTENCE VACATED IN PART AND REMANDED.**

Jack E. Dusthimer of Dusthimer Law, Davenport, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly G. Cunningham, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

DOYLE, P.J.

In 2012, Ravin Miller pled guilty to class "D" felony possession with intent to deliver marijuana, a schedule I controlled substance, as a habitual offender, in violation of Iowa Code sections 124.104(1)(d) and 902.9(5) (2011). At a later sentencing proceeding, the district court imposed an indeterminate term of incarceration not to exceed fifteen years, with a mandatory minimum of three years pursuant to Iowa Code section 902.8. Additionally, without any objection by Miller's counsel, the court imposed a fine of $2500.

Miller appeals the imposition of that fine as illegal, noting the fine is not expressly authorized by statute. *See* Iowa Code § 902.8 (setting forth the minimum sentence for a habitual offender without any reference to an imposition of a fine); *but see id.* § 902.9(5) (providing that a "class 'D' felon, *not an habitual offender*, shall be . . . sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars." (emphasis added)). The State concedes "the applicable statutes do not authorize a fine as part of the sentence for a habitual offender convicted of possession with intent to deliver a schedule I controlled substance (marijuana)," and we agree. Consequently, we must find the court's imposition of the fine as part of Miller's sentence was not allowed by law and therefore illegal. *See State v. Draper*, 457 N.W.2d 600, 605 (Iowa 1990) ("A sentence that is not authorized by statute is an illegal sentence.").

In summarizing his arguments, Miller states:

> At the least, MILLER's sentence regarding the fine should be set aside as being an illegal [sic]. As a result of the confusion arising out of the fine/no fine—MILLER *may also argue* he should be

> allowed to set aside his plea and have his Possession with Intent to Deliver conviction be set aside as there was not a meaningful understanding of his rights and options.

(Emphasis added.) He goes on to assert an ineffective-assistance-of-counsel claim because his trial attorney did not object to the imposition of the fine, and he prays the court "reverse the Possession with Intent to Deliver Conviction and remand the case for trial on the merits. In the alternative any fine imposed should be vacated."

"Generally, in criminal cases, where an improper or illegal sentence is severable from the valid portion of the sentence, we may vacate the invalid part without disturbing the rest of the sentence." *State v. Keutla*, 798 N.W.2d 731, 735 (Iowa 2011). In this instance, we conclude the district court's language with regard to the fine is easily severable from the remainder of his sentence. Furthermore, we find this remedy adequate because removing the fine returns the sentence to the sentence for which Miller bargained in his plea agreement.[1] Consequently, we vacate that portion of Miller's sentence relating to the $2500 fine, and we remand the case to the district court for resentencing consistent with this opinion. We affirm his conviction and sentence in all other respects.

CONVICTION AFFIRMED; SENTENCE VACATED IN PART AND REMANDED.

[1] To establish a claim of ineffective assistance of counsel, a defendant must show by a preponderance of the evidence "(1) counsel failed to perform an essential duty; and (2) prejudice resulted." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). In the context of a guilty plea, a defendant must show that there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial, but for counsel's errors. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Here, Miller's counsel was not ineffective in declining to file a motion in arrest of judgment to challenge the voluntariness of the guilty plea because Miller cannot establish the requisite prejudice once the fine is vacated from his sentence.