

**IN THE COURT OF APPEALS OF IOWA**

No. 3-832 / 12-2096  
Filed October 2, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JAMES PAUL SMITH,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Davis County, Myron L. Gookin,  
Judge.

Defendant appeals the judgments and sentences entered by the district  
court following his guilty pleas. **AFFIRMED IN PART, SENTENCE VACATED IN  
PART, AND REMANDED WITH DIRECTIONS.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,  
Assistant Appellate Defender, for appellant.

James Smith, Fort Dodge, pro se.

Thomas J. Miller, Attorney General, Katie A.H. Fiala, Assistant Attorney  
General, and Rick L. Lynch, County Attorney, for appellee.

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

**DANILSON, J.**

James Paul Smith appeals from the judgments and sentences entered by the district court in six separate proceedings following his guilty pleas on October 3, 2012.<sup>1</sup> On appeal, he maintains the court imposed an illegal sentence by levying improper surcharges against him and by sentencing him to serve both jail and prison sentences. He also maintains that he received ineffective assistance from counsel. Specifically, he argues counsel failed to advise him his sentences could run consecutively, rather than concurrently, and this failure rendered his plea unknowing and involuntary. We agree Smith should not have been sentenced to the county jail and the surcharge was only appropriate on his theft conviction. We preserve his claim of ineffective assistance of counsel. Accordingly, we affirm in part, reverse in part, and remand with directions.

**I. Background Facts and Proceedings.**

On March 21, 2012, in case number AGIN098883 the State filed a trial information charging Smith with theft in the third degree. On the same day, the State filed a trial information in case number AGIN098889 charging him with three counts of harassment in the first degree, assault on a peace officer, two counts of interference with official acts, and public intoxication, second offense. Smith pled not guilty to all charges and waived his rights to speedy trial.

---

<sup>1</sup> Smith pled guilty to driving while license barred, in violation of Iowa Code section 321.561 (2011), two counts of harassment in the first degree, in violation of section 708.7(2), harassment in the second degree, in violation of section 708.7(3), eluding law enforcement, in violation of section 321.279(2), theft in the third degree, in violation of sections 714.2(1) and 714.2(3), and assault causing bodily injury, in violation of section 708.2.

Ultimately, Smith pled guilty to the theft charge and two counts of harassment in the first degree.

On June 27, 2012, the State filed a trial information in case number AGIN098909 charging Smith with operating a motor vehicle while barred and theft in the fourth degree. Smith again pled not guilty to the charges and waived his right to a speedy trial. Smith later entered a plea of guilty to the driving while barred offense.

On July 11, 2012, the State filed a trial information in case number AGIN098914 charging Smith with harassment in the first degree. Smith pled not guilty and waived his right to a speedy trial. Subsequently, Smith pled guilty to an amended charge of harassment in the second degree.

On August 22, 2012, the State filed a trial information in case number SRIN098927 charging Smith with assault causing bodily injury. He pled not guilty and waived his right to a speedy trial. Smith entered a plea of guilty to the charge on a later date.

Notwithstanding all his pending charges, Smith apparently was able to post bond or secure his release—only to again face new charges. On October 3, 2012, the State filed a trial information in case number AGIN098941 charging Smith with eluding or attempting to elude a law enforcement vehicle and operating a motor vehicle while barred. On the same date, Smith pled guilty to the eluding charge.

Smith agreed to plead guilty to some of the charged offenses, as identified, pursuant to a plea agreement that dismissed all remaining charges. He then filed six written petitions to plead guilty, while withdrawing his not guilty

pleas. Smith also waived his right to file a motion in arrest of judgment, waived a delay before sentencing, waived his presence, and waived a formal record. The court accepted each of Smith's pleas. He was sentenced to three separate terms not to exceed two years for theft in the third degree and for both counts of harassment in the first degree. The judge ordered the sentences to be served consecutively. All other terms imposed on the remaining charges to which he pled were set to run concurrently. Smith now appeals his sentence.

## **II. Standard of Review.**

We review challenges to the legality of a sentence for errors at law. *State v. Davis*, 544 N.W.2d 453, 455 (Iowa 1996).

A defendant may raise an ineffective assistance claim on direct appeal if he has reasonable grounds to believe the record is adequate for us to address the claim on direct appeal. *State v. Straw*, 709 N.W. 2d 128, 133 (Iowa 2006). If we determine the record is adequate, we may decide the claim. *Id.* We review claims for ineffective assistance of counsel de novo. *Id.* We use this standard because such claims have their basis in the Sixth Amendment to the United States Constitution. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012).

## **III. Discussion.**

### **A. Law Enforcement Initiative Surcharge.**

Iowa Code section 911.3 directs the court to assess a law enforcement initiative surcharge of \$125 if a defendant is adjudged guilty of offenses under specific chapters and sections of the Iowa Code.<sup>2</sup> The court assessed the

---

<sup>2</sup> The section states, in pertinent part:

surcharge on each of Smith's six cases. The State concedes, and we agree, the court should have only imposed the surcharge on the theft charge. While section 911.3 does instruct the court to impose the charge for each applicable offense, only Smith's charge for theft in the third degree, in violation of sections 714.2(1) and 714.2(3), is covered by the statute. See Iowa Code § 911.3

Because the district court committed error by assessing the \$125 surcharge on the other charges, we reverse and remand with directions to the district court to enter an order vacating all surcharges except on the theft conviction in case number AGIN098883.<sup>3</sup>

**B. Jail and Prison Sentence.**

The district court sentenced Smith to an indeterminate prison term, not to exceed six years. Two of the court's sentencing orders specify that Smith is to serve his sentence in the Davis County jail. Smith maintains the district court erred, noting that section 901.7 requires him to serve his sentence in a place designated by the director of the Iowa Department of Corrections. See Iowa Code § 901.8 ("[I]f consecutive sentences are specified in the order of commitment, the several terms shall be construed as one continuous term of imprisonment."); see *also* Iowa Code § 901.7 ("If imposing a sentence of confinement for more than one year, the court shall commit the defendant to the

---

1. In addition to any other surcharge, the court or clerk of the district court shall assess a law enforcement initiative surcharge of one hundred twenty-five dollars if an adjudication of guilt or a deferred judgment has been entered for a criminal violation under any of the following:

a. Chapter 124, 155A, 453B, 713, 714, 715A, or 716.

b. Section 719.7, 719.8, 725.1, 725.2, or 725.3

<sup>3</sup> Specifically, we direct the district court to vacate the portion of the sentencing orders imposing the surcharge in case numbers AGIN098889, AGIN098909, AGIN098914, SRIN098927, and AGIN098941.

custody of the director of the Iowa Department of Corrections.”); *State v Kapell*, 510 NW.2d 878, 880 (Iowa 1994) (“Section 903.4 clearly requires that any person sentenced to confinement for a period of more than one year shall be committed to the custody of the Department of Correction.”). The State concedes the error and we agree.

Accordingly, we reverse and remand with directions for the district court to enter an order vacating the portion of the sentencing orders<sup>4</sup> naming Davis County jail as the place for Smith’s confinement. We direct the court to order the defendant to be committed to the custody of the director of the department of corrections.

**C. Ineffective Assistance.**

Smith maintains he received ineffective assistance of counsel at trial. In support of his contention, he argues specifically that counsel failed to advise him his sentences could run consecutively, rather than concurrently, and this failure rendered his plea unknowing and involuntary. He asserts that but for counsel’s breach of duty, he would not have pled guilty and instead would have elected to stand trial.

The record on this appeal is inadequate to address Smith’s claims. Smith should have been informed his sentences could run consecutively, but it is unclear whether he received such information before submitting his pleas. See *State v. White*, 587 N.W.2d 240, 242–43 (Iowa 1998) (“[T]he accused must be fully aware of the direct consequences of a guilty plea. Sentences to be served consecutively are a direct consequence of a guilty plea.”). Smith claims counsel

---

<sup>4</sup> Case numbers AGIN098914 and SRIN098927.

did not so advise him and the State does not point to any evidence in the record that such information was available to the defendant. The State does note that each of the six signed petitions to plead guilty lists the maximum possible penalty for those specific offenses, however, none of the petitions advise Smith that his sentences may run consecutively.

The issue of whether trial counsel was ineffective is preserved for possible postconviction relief proceedings. See *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006) (where record was unclear whether defense counsel discussed the possibility of consecutive sentences with the defendant and whether defendant would have chosen to go to trial if properly informed, proper remedy was to preserve the issue for postconviction relief proceedings).

**D. Conclusion.**

Because we reserve Smith's claims for full development of the facts in possible postconviction proceedings, we affirm his convictions. Because we conclude the district court wrongly imposed an enforcement initiative surcharge pursuant to Iowa Code section 911.3 on five of Smith's cases, we reverse in part and remand with directions for the district court to enter an order to vacate the surcharges in all cases except number AGIN098883. Further, we direct the district court to enter an order in case numbers AGIN098914 and SRIN098927 to vacate the portion of the sentencing order that requires Smith to serve the sentences in the Davis County jail. We direct the court order Smith to be committed to the custody of the director of the department of corrections.<sup>5</sup>

---

<sup>5</sup> This case is another of many appeals involving errors in sentencing orders. We acknowledge the difficulty facing trial judges where a plea agreement encompasses

**AFFIRMED IN PART, SENTENCE VACATED IN PART, AND  
REMANDED WITH DIRECTIONS.**

---

multiple cases with multiple counts, particularly in high volume courts that may be understaffed. Some sentencing errors can be corrected by the trial court upon a proper motion or application and we would encourage counsel to bring such errors to the trial court's attention when and where practicable.