IN THE COURT OF APPEALS OF IOWA

No. 2-432 / 11-1313
Filed July 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANIS SULJEVIC,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Anis Suljevic appeals from sentences imposed after guilty pleas, claiming his sentences should have merged. **AFFIRMED IN PART AND REVERSED IN PART.**

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

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

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

DANILSON, J.

Anis Suljevic appeals from sentences imposed after guilty pleas. Suljevic pled guilty on four counts. He challenges only his sentences for robbery in the second degree and assault while participating in a felony, claiming they should have merged. Because we find the charges should have merged, we reverse in part and affirm in part.

I. Background Facts and Proceedings.

On July 27, 2010, Suljevic and his passenger pulled up next to another vehicle in the Crossroads Mall parking lot in Waterloo, Iowa. Suljevic called out to the driver of the other vehicle and asked if he had change for a twenty dollar bill. The man exited his vehicle and approached Suljevic to make change. Suljevic's passenger then pointed a handgun at the man and demanded his money.

When the man hesitated, Suljevic said, "He thinks we're playing around." Suljevic's passenger cocked the gun and again demanded the man's money. The man continued to refuse, claiming the incident was being captured on the mall's security cameras, and that he had taken a picture of Suljevic's license plate. Suljevic mumbled something like, "You're tough," and drove away. The handgun used in the robbery was later found in Suljevic's bedroom.

On August 5, 2010, the State charged Suljevic with robbery in the first degree, in violation of Iowa Code section 711.2 (2009). Suljevic initially rejected the State's plea offer and proceeded to jury trial on a charge of robbery in the first degree. On the third day of trial, after substantial damaging testimony, the State allowed Suljevic to change his mind and accept the plea agreement.

In lieu of facing a first degree robbery charge, Suljevic agreed to plead guilty to robbery in the second degree,[1] assault while participating in a felony,[2] trafficking in stolen weapons,[3] and carrying a concealed weapon.[4] The agreement further provided that all parties would recommend the sentences be imposed consecutively. Suljevic entered an Alford plea on the specific intent element of robbery in the second degree, but admitted guilt to all the remaining elements on all four charges. Both attorneys and the court agreed it was a fair offer and a wise decision on Suljevic's part.[5] At the sentencing hearing, Suljevic and his counsel offered no objection to conviction on all counts.

When entering his plea to second degree robbery, Suljevic did not contest that on July 27, 2010, he aided and abetted another who had the specific intent to commit a theft, and he admitted that he aided and abetted another who committed an assault or threatened the victim with the purpose of putting him in fear of immediate serious injury. During the colloquy, the district court judge stated:

> As to the assault while participating in a felony, you have already made the admissions as to element number one and essentially element number two because you've admitted to the elements of the crime of robbery, but in order to clarify that, do you agree that at the time [the victim] was assaulted that you, or the person you aided and abetted, were participating in the crime of robbery?

To which Suljevic replied, "Yeah."

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[1] In violation of Iowa Code section 711.3.
[2] In violation of Iowa Code section 708.3.
[3] In violation of Iowa Code section 724.16A.
[4] In violation of Iowa Code section 724.4(1).
[5] Though conviction on robbery in the first degree was believed to be forthcoming, Suljevic was not the principal actor, and he was only seventeen years old when he committed the crimes.

The court went on to outline the factual basis for assault while participating in a felony:

> Mr. Dalrymple has already pointed out a number of, and illustrated from the evidence that has been presented and the minutes of testimony, corroborating factors which make it easy for me to be able to find your active participation, your aid—under the aiding and abetting theories and your knowledge of the gun, for example. A couple of things that are very striking which confirm your intent and your knowledge and your active participation are the comments that you made at the time the robbery was being committed[6] . . . the fact that you did nothing . . . to stop it, you didn't do anything to leave, there was no argument in the vehicle about what was going on, and then your final comment to [the victim] as you left.[7] Also [pictures of] the very weapon that was used [are] on your cell phone. Photos were taken of that weapon prior to the robbery in question. Those factors along with all the other evidence make it easy for me to find a factual basis for your pleas.

Suljevic's counsel agreed, "I think the offer is fair. . . Obviously, there was a lot of risk had we gone forward today, and I think it's a fair outcome."

On appeal, Suljevic challenges only the sentences entered on his convictions for robbery in the second degree in violation of section 711.3, and assault while participating in the felony of robbery in violation of section 708.3. He contends he has been punished twice for the same offense, in violation of the Double Jeopardy Clause of the United States Constitution and Iowa's merger statute. *See* U.S. Const. amend. V; Iowa Code § 701.9.

II. Error Preservation and Standard of Review.

"As a rule, a defendant must preserve error by making an objection at the earliest opportunity after the grounds for the objection become apparent." *State*

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[6] The victim testified that after he refused to relinquish his money, Suljevic said, "He thinks we're playing." After that statement, Suljevic's accomplice cocked the gun.

[7] The victim further testified one of the perpetrators said, "You're tough," as they were leaving. The victim believed it was the driver, Suljevic.

v. Halliburton, 539 N.W.2d 339, 343 (Iowa 1995). This rule applies to constitutional issues. *Id.*

Suljevic could have raised these issues in district court. He knew the terms of the plea bargain provided that both parties would jointly recommend an indeterminate sentence of ten years with a mandatory minimum of seven years on the robbery charge, an indeterminate sentence of five years on the assault while participating in a felony charge, and further recommend all sentences be imposed consecutively. He did not object at sentencing. In fact, his attorney stated he thought "the offer [wa]s fair" and that the defendant avoided "a lot of risk had [h]e gone forward" and ultimately "it's a fair outcome." Because Suljevic did not object to his conviction and sentencing on both counts in the district court, we will not consider his claim of double jeopardy for the first time on appeal. *Id.*

However, illegal sentences may be challenged and corrected at any time. *State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009). They are not subject to the usual requirements of error preservation and waiver. *Halliburton*, 539 N.W.2d at 343. Therefore, Suljevic may raise the claim that his sentences violate section 701.9 for the first time on appeal. *Id.*

Our review of an alleged violation of section 701.9 is for correction of errors at law. *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000).

III. Discussion.

A. Merger

The Iowa merger doctrine is expressed in Iowa Code section 701.9 and Iowa Rule of Criminal Procedure 2.6(2). *See State v. Anderson*, 565 N.W.2d 340, 343 (Iowa 1997). Section 701.9 codifies the double jeopardy protection

against cumulative punishment. *Halliburton*, 539 N.W.2d at 344. Section 701.9 provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

A sentence that does not comply with section 701.9 is illegal and void. *Halliburton*, 539 N.W.2d at 343. Similarly, Iowa Rule of Criminal Procedure 2.6(2) provides: "Upon prosecution for a public offense, the defendant may be convicted of either the public offense charged or an included offense, but not both."

"In deciding whether a lesser crime is included in a greater one, the test is whether, if the elements of the greater offense are established in the manner in which the State sought to establish them, the elements of the lesser offense have also been established." *State v. Mapp*, 585 N.W.2d 746, 748-49 (Iowa 1998).

> If the greater offense cannot be committed without also committing the lesser offense, the lesser is included in the greater. We call this the "impossibility" test. The so-called "elements" test for included offenses is applied only as an aid in using the impossibility test and is fully subsumed in it.

State v. Hickman, 623 N.W.2d 847, 850 (Iowa 2001) (citations omitted).

If the State charges an offense in the alternative, the test for included offenses is applied to each alternative. *Id.* at 851. If the test is met under either of the alternatives charged, merger is generally required. *Id.* at 851-52. However, even if the test indicates that the lesser charge is an included offense,

"it may still be separately punished if legislative intent for multiple punishments is otherwise indicated." *State v. Bullock*, 638 N.W.2d 728, 732 (Iowa 2002).

To determine whether merger is required under section 701.9, we look to legislative intent. *Id.* at 731. "Legislative intent to impose multiple punishment, when more than one offense is charged from a single incident, may be discerned from the plain text of the pertinent statutes." *State v. Daniels*, 588 N.W.2d 682, 684 (Iowa 1998) (quoting *Halliburton,* 539 N.W.2d at 344). Legislative intent is further demonstrated by whether the charges meet the legal elements test for lesser-included offenses. *Bullock*, 638 N.W.2d at 731.

> As charged, the elements of robbery in the second degree as follows:
>
> 1. On or about the 27th day of July, 2010, the defendant and the other he aided and abetted had the specific intent to commit a theft.
> 2. In carrying out their intention, with or without the stolen property, the defendant or the person he aided and abetted:
> a. Committed an assault on [the victim], or
> b. Threatened [the victim] with or purposely put [the victim] in fear of immediate serious injury.

Count two, assault while participating in a felony was charged as follows:

> 1. On or about the 27th day of July 2010, the defendant or the person he aided and abetted committed an assault (an act which was intended to place [the victim] in fear of an immediate physical contact which would have been painful, injurious, insulting or offensive).
> 2. At the time of the assault, the defendant and the person he aided and abetted were participating in the crime of robbery.

Our supreme court has considered the elements required to establish guilt for both robbery in the second-degree and assault while participating in a felony, when the felony is second-degree robbery.

> "[P]articipating in" the offense of second-degree robbery, if coupled with a completed assault, establishes all, rather than some, of the

> elements of the robbery offense. The essential elements of the robbery offense are (1) intent to commit a theft, and (2) an assault in carrying out the intent to commit a theft. When the basis for charging "participating in a felony" under section 708.1 relates to participation in second-degree robbery, the statutory definition of "participating in a public offense" would require proof of the same elements of intent that are necessary to establish the robbery offense. Iowa Code § 702.13 (1993) (requires act "done . . . for the purpose of committing that [object felony] offense").

State v. Wilson, 523 N.W.2d 440, 441 (Iowa 1994) (finding submission of a lesser included charge of assault while participating in a second-degree robbery unnecessary when proof of the commission of the included offense would have required the State to establish all of the elements of robbery in the second degree, the offense charged).

While *Wilson* considered the charges in a different context, the same analysis applies to demonstrate that merger is required, absent legislative intent for multiple or cumulative punishments. We find no evidence from the language of the statutes to demonstrate such legislative intent. To the contrary, the fact that the crimes meet the legal elements test for lesser-included offenses indicates that the legislature intended them to be subject to merger, under section 701.9. Thus, the assault while participating in a felony charge should have merged with the second-degree robbery charge.

B. REMEDY

Suljevic seeks to vacate the conviction and sentence for assault while participating in a felony without disrupting the remainder of his sentences. The State contends that the underlying guilty pleas should be invalidated to preserve the benefit of the bargain.

In *State v. Woody*, 613 N.W.2d 215, 218 (Iowa 2000), an illegal sentence enhancement based on habitual offender status was vacated without disrupting the underlying valid plea on a second-degree robbery charge. The court noted, "[t]he State should bear the consequences of a decision that was based on the State's wrong assumption" that a habitual offender enhancement was valid. *Woody*, 613 N.W.2d at 215. Here, where there is ample evidence to support a factual basis for the pleas, the State should bear the consequences of the inaccurate assessment that merger would not apply. *Cf. State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996) (remanding with permission to reinstate the charge dismissed in contemplation of a valid plea when plea was determined invalid for lack of factual basis in the record). Thus, the valid pleas shall remain undisturbed.

If an illegal sentence is severable from a valid portion of the sentence, "we may vacate the invalid part without disturbing the rest of the sentence. We are not, however, required to do so and may remand for resentencing. Further, if it is not possible to sever the illegal portion of a sentence, we should remand for resentencing." *State v. Keutla*, 798 N.W.2d 731, 735 (Iowa 2011).

The plea agreement was struck three days into trial. The plea agreement encompassed the imposition of consecutive sentences on all charges and the district court followed the agreement. Unlike *Keutla*, where one sentence or disposition was potentially dependent on the other, and the court may have imposed a different sentence where one of the components was vacated, here the court imposed the maximum sentence on each charge and ran the sentences consecutively. Under these facts, remanding for resentencing on the remaining

charges would serve no useful purpose as there is no reason to suspect that the court would not follow the balance of the plea agreement. Thus, we sever and vacate the illegal sentence only.

IV. Conclusion.

Suljevic's convictions on second-degree robbery and assault while participating in a felony merged under section 701.9 and we sever and vacate the illegal sentence for the lesser offense only. Thus, we reverse the conviction for the lesser offense, assault while participating in a felony, and affirm the convictions of second-degree robbery, trafficking in stolen weapons, and carrying a concealed weapon.

AFFIRMED IN PART AND REVERSED IN PART.