IN THE COURT OF APPEALS OF IOWA

No. 2-664 / 11-1428
Filed August 22, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICKY FLOYD ALLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Defendant appeals his conviction of possession of a controlled substance—marijuana—enhanced as a third or subsequent violation and as an habitual offender. **AFFIRMED.**

Tod J. Deck of Deck Law, L.L.P., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant County Attorney, Patrick Jennings, County Attorney, and Amy E. Klocke, Assistant County Attorney, for appellee.

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

MULLINS, J.

The defendant, Ricky Allen, appeals his conviction of possession of a controlled substance—marijuana—enhanced as a third or subsequent violation and as an habitual offender, in violation of Iowa Code sections 124.401(5) and 902.8 (2009). Allen asserts the application of the sentencing enhancements to his conviction was illegal because the court did not engage in a more thorough colloquy before accepting his admission to four prior convictions. He also contends the district court erred in denying his motion for a new trial based on newly discovered evidence and the weight of the evidence. As we find no error by the district court, we affirm.

I. BACKGROUND AND PROCEEDINGS.

Allen and his friend, Erik Seaton, went into the Firehouse Bar in Sioux City on the night of October 23, 2010. As neither had money, one of them offered to give the waitress, Shannon Law, marijuana in exchange for a pitcher of beer. Law refused and reported the offer to her manager and the owner of the bar. Allen and Seaton left the bar followed closely behind by the bar's bouncers, Chad Braun and Dan Cummings, and the bar's owner, Paul Andersen. Heated words were exchanged between Allen and Andersen. Andersen called the police while Braun and Cummings followed the two men into the alley.

Braun testified at trial that he saw Allen fling his hand "like he was skipping a rock" and heard a metallic object bounce off a vehicle. Braun then saw Allen reach into his pocket, drop a bag on the ground and kick it under a nearby vehicle. At the same time a bystander, Bradley Gregg, charged Allen, and a fight

ensued. Braun located the bag under the vehicle and pointed it out to the police when they arrived shortly thereafter.

Cummings also testified he saw Allen reach in his front pants pocket and make a kicking motion with his leg. He then heard something that sounded like a "tink, tink, tink" sound, "like something small, metal bouncing." Cummings then intervened in the altercation between Gregg and Allen, restraining Allen until the police arrived.

Allen offered the testimony of Seaton at trial, who stated he offered Law the marijuana in exchange for the beer. He also stated that he, not Allen, possessed the bag of marijuana that night and threw it under the vehicle.

Allen also called Law to testify at trial. She confirmed that she waited on two men at the bar and the one on the right offered her marijuana in exchange for a pitcher of beer. She was able to identify Seaton, who was in the back of the court room during her testimony, as one of the two men. She testified she did not identify to her manager or Andersen which one of the men offered her the marijuana. She also could not remember telling the prosecution that it was Allen that offered her the marijuana.

Andersen testified to the 911 call he made that night. He denied seeing either Allen or Seaton drop anything, though he did acknowledge that his voice can be heard on the 911 recording saying he saw one of them drop something.

Allen moved for a judgment of acquittal during the trial, but the motion was denied by the court. After the jury returned a guilty verdict on the possession charge, the court conducted a colloquy with Allen regarding his prior convictions.

The court articulated the charge and the conviction date of each of the four offenses the State alleged made up Allen's prior convictions, which justified the sentencing enhancements. The court then asked Allen, "Do you agree that there are at least two prior convictions, any one of those two would count to establish the prior—two prior possession offenses?" Allen responded, "Yes." The court again recited the two felony convictions and asked Allen, "Do you admit and agree that those two matters are prior felony convictions such that that would be a third felony conviction?" Allen responded, "Yes." As a result of Allen's admissions, the jury was discharged.

Prior to sentencing Allen moved for a new trial on two grounds: newly discovered evidence and the weight of the evidence. The court considered both grounds and denied the motion. Allen was sentenced to a term of incarceration of fifteen years with a mandatory minimum of three years under Iowa Code sections 902.8 and 902.9(3). He was assessed the applicable surcharges, court costs, and attorney fees. He appeals his conviction.

II. SCOPE OF REVIEW.

Allen's claim that his sentence is illegal is reviewed for correction of errors at law. *See Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). We review Allen's claim the district court erred in denying is motion for a new trial for abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003).

III. SENTENCING ENHANCEMENT COLLOQUY.

Allen claims on appeal that his sentence is illegal because the district court did not provide him with the same advisory during the colloquy on the sentencing enhancement as is required for a guilty plea under Iowa Rule of Criminal Procedure 2.8(2)(b). Specifically he asserts he was not informed of (1) the nature of the applicable enhancements, (2) the maximum and minimum penalties involved, (3) his trial rights, and (4) his right to counsel.[1] Allen concedes that admitting to the application of sentencing enhancements is not the same as a guilty plea; nonetheless, he asserts strict compliance to the guilty plea advisory is appropriate in a case such as his where his serious misdemeanor offense was elevated to a felony with a fifteen-year sentence and a mandatory minimum of three years.

The State claims Allen did not preserve error on his challenge to the advisory as he is raising this issue for the first time on appeal. The State asserts Allen's claim is not a challenge to an illegal sentence, and thus, cannot be raised at any time. We agree.[2]

It is true under Iowa Rule of Criminal Procedure 2.24(5)(a) a "court may correct an illegal sentence at any time." But a challenge to an illegal sentence is one that asserts the sentence is not authorized by statute or beyond the power of

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[1] *See State v. Kukowski,* 704 N.W.2d 687, 691–94 (Iowa 2005) (providing when accepting an admission to support the imposition of a sentencing enhancement penalty, the court has a duty to conduct a further inquiry with the defendant similar to the colloquy required under rule 2.8(2) to ensure the affirmation is voluntary and intelligent).

[2] The State also asserts Allen did not suffer prejudice as a result of the court's failure to conduct a more detailed colloquy in connection with accepting his admission to prior drug and felony convictions. However, because we find the issue has not been preserved for our review, we do not reach the merits of the claim.

the court to impose. *Tindell*, 629 N.W.2d at 359. The rule is not meant to permit a re-examination of errors that occurred during trial or other proceedings prior to the imposition of the sentence. *State v. Bruegger*, 773 N.W.2d 862, 871–72 (Iowa 2009). The challenge must focus on whether the sentence was "'in excess of that prescribed by the relevant statutes, multiple terms were . . . imposed for the same offense, . . . [or] the terms of the sentence itself [were] legally or constitutionally invalid in any other respect.'" *Id*. at 872 (alteration in original) (emphasis omitted) (quoting the Supreme Court's analysis in *Hill v. United States*, 368 U.S. 424, 430 (1962), which examined the pre-1966 federal rule on which our rule of criminal procedure was based). To expand the scope of rule 2.24(5)(a) to encompass redress of procedural defects "would open up a virtual Pandora's box of complaints with no statutorily prescribed procedures for their disposition nor any time limits for their implementation." *Tindell*, 629 N.W.2d at 359.

Allen's claim on appeal does not contend the sentence imposed violated a statute or was outside the court's power to impose. Instead he asserts the court failed to provide him with the procedural advisories meant to ensure a guilty plea is made voluntarily and intelligently prior to accepting his admission to his prior criminal convictions. *See* Iowa R. Crim. P. 2.8(2)(b). Allen did not challenge the lack of advisory when the court accepted his admission to the prior offenses, and he did not raise the issue in his motion for a new trial or at the sentencing hearing. As a result the alleged procedural defect was never presented to or

decided by the district court. *See State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997). Accordingly, we find this issue was not preserved for our review.

IV. MOTION FOR A NEW TRIAL.

Allen also asserts the district court erred in denying his motion for a new trial based on newly discovered evidence and the weight of the evidence.

A. Newly Discovered Evidence. For a defendant to succeed on a motion for a new trial based on newly discovered evidence, he must prove "the evidence (1) was discovered *after* the verdict, (2) could not have been discovered earlier in the exercise of due diligence, (3) is material to the issues in the case and not merely cumulative, and (4) probably would have changed the result of the trial." *State v. Jefferson*, 545 N.W.2d 248, 249 (Iowa 1996).

In this case, we find the district court did not abuse its discretion in denying Allen's motion for a new trial. Following her testimony during the trial, Law walked out of the courtroom and informed the public defender's investigator that it was Seaton, not Allen, who offered her marijuana in exchange for a pitcher of beer on the night in question. Allen contends this evidence could not have been discovered earlier, was material to who had possession of the marijuana, and would have changed the result of the trial. We disagree.

First, this information was communicated to the investigator for the public defender's office prior to the close of evidence during the trial. Thus, it was not discovered *after* the verdict as Allen contends. Next, a review of the trial transcript reveals Law was never asked while she was on the stand if it was Allen or Seaton who offered the marijuana. She testified it was the man sitting on the

right side of the table who made the offer. In addition, Law was only able identify Seaton during trial. Neither defense counsel nor the prosecution asked her whether it was Allen or Seaton who made the offer; therefore, we find this evidence could have been elicited at trial if either party had asked the question. Finally, we find the information was not likely to change the outcome of the trial. The fighting issue was whether it was Allen or Seaton who possessed a bag of marijuana and kicked it under a car outside of the bar. Law was not present when this event occurred, and the information she provided to the public defender's investigator was cumulative to Seaton's testimony at trial. Seaton stated he was the one to offer marijuana and was the one who took it out of his pocket and threw it under the cars. Therefore, we find it was not an abuse of discretion for the district court to deny the motion for a new trial on this ground.

B. Contrary to the Weight of the Evidence. Allen also asserts the verdict is contrary to the weight of the evidence. He claims there were several conflicts in the evidence and the evidence as a whole does not support the guilty verdict. He argues that Braun testified Allen threw a metallic sounding object, whereas Cummings testified Allen kicked something that made a metallic sound. Since marijuana is not metallic, Allen asserts the object thrown or kicked could not have been marijuana. He points to Seaton's testimony taking responsibility for the marijuana[3] and Andersen's testimony that he did not see Allen drop anything.

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[3] Allen states that Seaton "was charged and convicted of the crime of possession of marijuana with intent to deliver marijuana arising out of the events of the night in question in this matter." He identifies a case number and seeks for us to take judicial

Our review of the district court's denial of Allen's motion for a new trial based on the weight of the evidence is limited to "a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *See Reeves*, 670 N.W.2d at 203. Thus, we will not weigh the evidence on appeal as Allen seeks for us to do, but simply review the district court's exercise of discretion in denying Allen's motion. The district court's exercise of discretion is measured against the following standard:

> The discretion of the trial court should be exercised in all cases in the interest of justice, and, where it appears to the judge that the verdict is against the weight of the evidence, it is his imperative duty to set it aside. "We do not mean . . . that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and, when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that, whether from mistake, or prejudice, or other cause, the jury . . . erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury."

Id. (citations omitted). Here, the district court stated it had carefully considered the motion, reviewed its trial notes, and found the motion for a new trial was without merit. The question of credibility of each of the witnesses in this case was uniquely suited for the jury, and we do not find that this case is one of the extraordinary cases where the district court should have lessened the jury's role.

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notice of the contents of that case file. Neither this case file or nor its contents are contained in our record on appeal, and we decline Allen's invitation to take judicial notice of this information.

State v. Maxwell, 743 N.W.2d 185, 193 (Iowa 2008). We find the trial court did not abuse its discretion in denying the motion for a new trial.

AFFIRMED.