IN THE COURT OF APPEALS OF IOWA

No. 8-663 / 07-1830
Filed October 15, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FREDERICK D. EWING,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy Tabor, Judge.

Frederick D. Ewing appeals the sentence imposed upon his conviction for possession of marijuana. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Michael Walton, County Attorney, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

MILLER, J.

Frederick D. Ewing appeals the sentence imposed upon his conviction of possession of a controlled substance, marijuana. He claims the district court imposed an illegal sentence. We vacate the sentence and remand the case for resentencing on that conviction.

The State charged Ewing, by trial information, with assault on a police officer resulting in bodily injury, in violation of Iowa Code section 708.3A(3) (2005), and possession of a controlled substance, marijuana, in violation of section 124.401(5). It subsequently filed an amended and substituted trial information containing the same two charges, but adding a charge of attempt to disarm a police officer of a dangerous weapon, in violation of section 708.13. A jury found Ewing not guilty of the attempt to disarm charge, and guilty of the other two charges. The district court sentenced Ewing, in relevant part, to a term of incarceration of no more than two years on the assault conviction and a concurrent term of incarceration of one year on the possession of marijuana conviction. Ewing appeals, challenging only the latter sentence.

Ewing claims the sentence imposed on his conviction for possession of marijuana constitutes an illegal sentence.

> An illegal sentence is one that is not permitted by statute. It is void and not subject to the usual concepts of waiver, whether from a failure to seek review or other omissions of error preservation. Because an illegal sentence is void, it can be corrected at any time.

State v. Gordon, 732 N.W.2d 41, 43 (Iowa 2007) (quotations and citations omitted).

We review a sentence imposed by the district court for corrections of errors at law. Iowa R. App. P. 6.4; *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). We also review issues of statutory interpretation and application for errors at law. *State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000).

In response to Ewing's claim of an illegal sentence, the State asserts that Ewing did not receive an illegal sentence and has not preserved error. If Ewing's sentence is illegal, he need not have preserved error in order to raise the claim on appeal. *Gordon*, 732 N.W.2d at 43. For the reasons that follow we conclude the sentence is illegal, and thus need not further discuss the question of error preservation.

A person who knowingly or intentionally possesses marijuana is subject to punishment, in relevant part, by "imprisonment . . . for not more than six months." Iowa Code § 124.401(5) (second unnumbered paragraph). If the person has been previously convicted (once) of possession of marijuana, the punishment, in relevant part, is imprisonment not to exceed one year. *See id.* (providing for punishment as provided in section 903.1(1)(b)); and *see* Iowa Code § 903.1(1)(b) (providing, in relevant part, for imprisonment not to exceed one year). However, when a defendant faces a charge that imposes an enlarged penalty for prior convictions, our law imposes a two-stage trial. *State v. Kukowski*, 704 N.W.2d 687, 691 (Iowa 2005); *see also* Iowa R. Crim. P. 2.6(5) (requiring allegations of prior convictions to be in the indictment); Iowa R. Crim. P. 2.19(9) (requiring, after conviction of the current offense, trial on the issue of prior conviction(s) if defendant denies prior conviction(s)). Relatedly, if the defendant affirms the

existence of the prior conviction(s), and that he or she was represented by counsel or waived counsel, the court nevertheless has a duty to conduct a further inquiry, similar to the colloquy required before accepting a plea of guilty to a criminal charge, to ensure that the defendant's affirmation of or stipulation to the prior conviction(s) is voluntary and intelligent. *Kukowski*, 704 N.W.2d at 692. This requires that the affirmation or stipulation be made with "an adequate grasp of the [sentencing] implications of his or her stipulation." *Id.* (citing and quoting *State v. McBride,* 625 N.W.2d 372, 374-75 (Iowa Ct. App. 2001)).

The State notes that the presentence investigation report that was prepared for and considered at sentencing states Ewing was previously convicted of delivery of a controlled substance[1] and was also previously convicted of possession of a controlled substance. It notes that at sentencing Ewing agreed the report was accurate. It argues that he "was therefore not eligible for the six month prison term set out in Iowa Code section 124.401(5) for a 'first offense.'" Implicit in the State's argument is a conclusion that Ewing's implicit acknowledgement, at sentencing, of two prior controlled substance convictions satisfies the requirements for imposition of enlarged punishment based on prior convictions. We disagree.

In deciding whether to defer judgment or sentence or suspend any sentence of imprisonment, the district court was required to consider Ewing's prior record of convictions. Iowa Code § 907.5. The existence of those

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[1] The report actually says he was charged with "delivery controlled substance," but "plead possession with intent."

convictions was thus an appropriate factor for the court to consider *in determining an appropriate sentence*. However, we have above noted and described the procedures our law imposes when the State seeks an enlarged penalty based on prior convictions. In this case neither the original trial information nor the amended and substituted trial information alleged a prior conviction or convictions. Ewing was not asked to affirm or deny that he had been previously convicted or, if so, that he had been represented by counsel or had waived counsel. No inquiry, similar to the colloquy required for a guilty plea, was conducted to ensure that any purported affirmation or stipulation was made with any grasp of the sentencing implications. We conclude that under these circumstances the sentence imposed on Ewing's conviction for possession of marijuana could not be enlarged based on prior convictions, and the sentence imposed was therefore not permitted by statute and was thus illegal. Accordingly, we vacate the sentence imposed on Ewing's conviction for possession of marijuana and remand the case for resentencing on that conviction.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.