IN THE COURT OF APPEALS OF IOWA

No. 1-173 / 00-0737
Filed June 13, 2001

FILED
JUN 13 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALE MATTHEW RENKEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, William L. Thomas and Thomas L. Koehler, Judges.

Defendant appeals from the judgment and sentence entered following his guilty pleas to possession of marijuana (third offense—penalty enhanced), and possession of crack cocaine (second offense—penalty enhanced). *See* Iowa Code § 124.401(5) (1999). **GUILTY PLEA AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Denver D. Dillard, County Attorney, and Harold Denton, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

000470

MAHAN, P.J.

Defendant appeals from the judgment and sentence entered following his guilty pleas to possession of marijuana (third offense—penalty enhanced), and possession of crack cocaine (second offense—penalty enhanced). *See* Iowa Code § 124.401(5) (1999). Defendant contends no factual basis exists to support his plea to the enhancement of the marijuana charge and claims his trial counsel was ineffective in allowing him to plead guilty to that charge. We affirm defendant's guilty plea, vacate the sentence for the possession of marijuana charge, and remand for resentencing.

Backgrounds Facts and Proceedings. On January 18, 2000, the State filed a trial information charging Renken with possession of crack cocaine (penalty enhanced), in violation of Iowa Code section 124.401(5). The trial information indicated Renken had been convicted of possession of a controlled substance on five previous occasions.

In a separate trial information, filed February 2, 2000, the State charged Renken with the following: possession of marijuana (penalty enhanced), in violation of Iowa Code section 124.401(5) (Count I); possession of methamphetamine (penalty enhanced), in violation of Iowa Code section 124.401(5) (Count II); and driving while under suspension, in violation of Iowa Code section 321.218 (Count III). The trial information indicated Renken had been convicted of possession of a controlled substance on two previous occasions.

Renken entered into a plea agreement with the State whereby he agreed to plead guilty to possession of crack cocaine—second offense and possession of marijuana—third offense. The State agreed to dismiss the possession of methamphetamine and driving while under suspension charges. During the guilty plea hearing, Renken admitted he possessed crack cocaine on December 24, 1999, and marijuana on January 24, 2000. He also admitted convictions of possession of a controlled substance on two or more prior occasions. The court accepted Renken's guilty plea. Subsequently, the court sentenced Renken to five years imprisonment for the possession of marijuana charge, and a two years imprisonment for the possession of crack cocaine charge. Renken appeals.

Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*,

515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa Ct. App. 1996). A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Renken argues his counsel was ineffective in allowing him to plead guilty to the possession of marijuana charge without requiring the court to find a factual basis existed for the enhancement. Specifically, Renken contends the court did not verify, as required for enhancement purposes, his two prior convictions did not involve marijuana.

Iowa Code section 124.401(5) provides, in pertinent part, as follows:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a serious misdemeanor for a first offense. A person who commits a violation of this subsection and who has previously been convicted of violating this subsection is guilty of an aggravated misdemeanor. *A person who commits a violation of this subsection and has previously been convicted two or more times of violating this subsection is guilty of a class "D" felony.*
>
> *If the controlled substance is marijuana*, the punishment shall be by imprisonment in the county jail for not more than six months or by a fine of not more than one thousand dollars, or by both such fine and imprisonment for a first offense. If the controlled substance is marijuana and the person has been previously convicted of a violation of this subsection in which the controlled substance was marijuana, the punishment shall be as provided in

> section 903.1, subsection 1, paragraph "b". *If the controlled substance is marijuana and the person has been previously convicted two or more times of a violation of this subsection in which the controlled substance was marijuana, the person is guilty of an aggravated misdemeanor.*

Iowa Code § 124.401(5) (1999) (emphasis added).

The statute grants leniency only to those charged exclusively with marijuana related offenses. *State v. Cortez*, 617 N.W.2d 1, 3 (Iowa 2000). "Once a defendant is convicted of a single offense involving other illegal substances . . . all crimes committed prior or subsequent thereto could be used to enhance the offender's sentence under the stricter, felony track." *Id.*

The court shall not accept a plea of guilty without first determining the plea has a factual basis. Iowa R. Crim. P. 8(2)(b); *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996). However, "a trial information which charges a prior violation for enhancement of punishment of the charged offense does not make the prior violation an element of the crime charged in the trial information." *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999). Rather, a prior violation "only impacts the penalty in the event guilt is found." *Id.* Therefore, the fact Renken may have been subject to an enhanced penalty at sentencing pursuant to section 124.401(5) did not affect the factual basis of his guilty plea to possession of marijuana. Renken's counsel was not ineffective for allowing him to plead guilty, because a factual basis for the charge existed. We do not end our analysis here, however.

Sentence Imposed. A sentence not authorized by statute is an illegal sentence. *State v. Draper*, 457 N.W.2d 600, 605 (Iowa 1990). An illegal

sentence is void and we will vacate it. *State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998). Because an illegal sentence is void, it can be corrected at any time. *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000). "We cannot permit a void sentence to stand even when a party does not raise the issue." *Wilson v. Fenton*, 312 N.W.2d 524, 529 (Iowa 1981).

The record makes no mention of the controlled substances involved in Renken's prior possession convictions. If *all* Renken's previous possession convictions involved marijuana, he would be subject to a more lenient sentence (aggravated misdemeanor) under the provisions of 124.401(5). If any of Renken's previous possession convictions involved a substance other than marijuana, he would be subject to a Class "D" felony conviction. *See Cortez*, 617 N.W.2d at 3. The sentencing court failed to develop the record to determine whether the marijuana reduction applied in Renken's case.

The State, in its petition for rehearing filed May 4, 2001, argues because Renken pled guilty to possession of marijuana *and* possession of crack cocaine, the district court did not have discretion to impose the more lenient marijuana sentence under the provisions of 124.401(5). We granted the State's petition for rehearing, and gave leave for Renken to file an answer. In his answer, Renken argues the State cannot rely upon the crack cocaine charge to enhance his punishment for possession of marijuana for the first time in its petition for rehearing. We agree. Throughout the course of its prosecution, the State relied upon two prior possession convictions for enhancement purposes. Assuming the district court could use the crack cocaine possession charge to enhance the

marijuana possession sentence—a decision we do not reach—the State's reliance on the charge comes too late.

Therefore, we vacate the sentence for the possession of marijuana charge and remand to the district court for resentencing after further development of the record concerning the nature of the controlled substances involved in the prior possession convictions.

GUILTY PLEA AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.