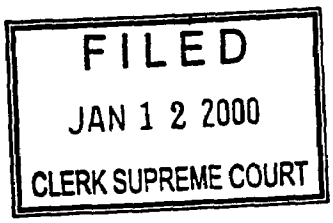
IN THE COURT OF APPEALS OF IOWA

No. 1999-385 (9-638) / 98-2154
Filed January 12, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

LOUIS R. OLIVER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Defendant appeals from the judgment and sentence entered upon his guilty pleas to second-degree robbery as an habitual offender, first-degree burglary, and first-degree theft. **AFFIRMED.**

Aaron M. Hubbard of Critelli & Critelli, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

STREIT, J.

Louis Oliver alleges prosecutorial misconduct and the improper imposition of a mandatory minimum sentence on his habitual offender conviction. Because Oliver failed to preserve error on two distinct procedural grounds as to the alleged prosecutorial misconduct, we cannot preserve his claim for postconviction relief. Additionally, we need not reach his claim of impropriety regarding the imposition of mandatory minimums as it is not properly before this court on direct appeal.

I. Background Facts & Proceedings.

The State charged the defendant, Louis Oliver, with first-degree robbery, assault with intent to commit sexual abuse, first-degree burglary, and first-degree theft. The State and Oliver allegedly reached a tentative plea agreement that was later retracted by the State for reasons not within the record. The case proceeded to trial, with the district court consolidating the robbery and theft cases for one trial date and the burglary and assault cases for a later trial date. In the midst of the first trial, Oliver reached a second plea agreement with the State and entered *Alford* pleas to first-degree theft, first-degree burglary, assault with intent to commit sexual abuse, and second-degree robbery. *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Oliver then waived his right to file a motion in arrest of judgment and proceeded directly to sentencing. The court sentenced Oliver to concurrent terms of twenty-five years on the burglary, ten years on the theft, five years on the assault, and fifteen years on the robbery

as an habitual offender. In its sentencing order, the court expressed reservations whether the mandatory minimum prescribed in Iowa Code section 902.12 (1997) could be applied to the habitual offender statute, but noted such a decision was reserved for the department of corrections.

Oliver now appeals, seeking to preserve the alleged prosecutorial misconduct and the application of Iowa Code section 902.12 to the habitual offender statute for postconviction relief.

II. Error Preservation as to the Alleged Prosecutorial Misconduct.

In order to properly preserve an issue for appeal, the alleged error must first be raised at trial. *State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994). "This principle acknowledges we are a court of review and provides the needed symmetry in our judicial process by requiring the trial judge to be alerted to the claim of error at trial and given an opportunity to correct it without an appeal." *State v. Escobedo*, 573 N.W.2d 276, 276-77 (Iowa App. 1997); *see State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995). We cannot review the trial court's decisions or actions when it was not afforded an opportunity to rectify alleged error. *Escobedo*, 573 N.W.2d at 277; *see State v. Wages*, 483 N.W.2d 325, 326 (Iowa 1992). Nearly all error may be waived, including alleged prosecutor misconduct, when it is not attacked by timely objection or motion. *State v. Smith*, 228 N.W.2d 111, 112 (Iowa 1975).

Oliver's claim of error is barred on two distinct procedural grounds. He not only failed to alert the district court of the alleged prosecutorial misconduct,

but he also pled guilty to the charges, thus waiving any alleged error. *See State v. White*, 545 N.W.2d 552, 554 (Iowa 1996) (ruling a guilty plea waives all defenses except in the situation where the indictment charges no offense). Finally, Oliver's eleventh-hour attempt to recast the issue as one implicating ineffective assistance of counsel cannot save his claim as "an issue cannot properly be asserted for the first time in a reply brief." *State v. Walker*, 574 N.W.2d 280, 288 (Iowa 1998) (citing Iowa R. App. P. 14(f)(3)). Therefore, we cannot preserve his claim of prosecutorial misconduct for postconviction relief.

III. Error Preservation as to Applicability of Section 910.12.

Iowa Code section 822.2 provides:

> Any person who has been convicted of, or sentenced for, a public offense and who claims that :
> . . .
> 3. The sentence exceeds the maximum length authorized by law;
> . . .
> 5. The person's sentence has expired . . . or the person is otherwise unlawfully held in custody or other restraint;
> . . .
> may institute . . . a [postconviction relief] proceeding . . . .

Therefore, we need not preserve or address this claim on direct appeal, as an application for postconviction relief, filed at an appropriate time, is the appropriate procedural vehicle to address such a claim. The convictions are affirmed.

AFFIRMED.