

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

)

257

Plaintiff-Appellee,

)

Filed November 20, 1984

vs.

)

4-370

84-09

JERRY WAYNE KLESS,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Lee County, D. B. Hendrickson,
Judge.

Defendant appeals an amended judgment entry that increased the length of his sentence for being an habitual offender. On appeal defendant asserts: (1) that Iowa law does not authorize the court to impose an increased sentence; (2) that the increase of sentence imposed on the defendant violates the due process and double jeopardy provisions of the United States and Iowa Constitutions; and (3) constitutional safeguards that apply to guilty plea proceedings should also apply to prior convictions admission proceedings and the trial court erred in overruling defendant's motion in arrest of judgment challenging defects in the proceeding. AFFIRMED.

Gary R. Noneman, Assistant County Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, Snell, and Sackett, JJ.

OXBERGER, C.J.

The defendant, Jerry Kleiss, was charged by information with second-degree burglary in violation of Iowa Code § 713.3 (1983). At trial, the court asked defendant's counsel whether the defendant intended to admit to the allegations of prior felony convictions or whether he intended to demand a jury determination of his habitual offender status, in the event the defendant was found guilty of the second-degree burglary charge. The defendant replied that he intended to admit to the prior convictions. This inquiry took place out of the presence of the jury.

After the return of the guilty verdict, the court asked Kleiss whether he admitted to each allegation of a prior conviction. The court stated that the determination of the prior convictions would concern the penalty imposed on the defendant. However, the court did not fully explain what affect the prior convictions would have on the defendant's sentence. The defendant admitted to the prior convictions and sentences.

The defendant was sentenced to a term not to exceed ten years. The court gave its sentence despite the fact that defendant was described as a habitual offender. Under the habitual offender statute, defendant should have been sentenced to no more than fifteen, rather than ten years. Iowa Code § 902.9 (1983). The defendant appealed the original judgment and sentence claiming insufficient evidence to support a jury verdict and ineffective assistance of counsel at trial. The Iowa Court of Appeals affirmed the conviction and original sentence. No. 68286 State v. Kleiss (opinion filed August 30, 1983).

The State filed an application for correction of sentence seeking to increase the sentence imposed on the defendant. This application was made more than sixteen months after the original judgment entry was filed. The court found defendant had been given an illegal sentence and ordered resentencing. Kleiss made a motion in arrest of judgment challenging both the court's ruling and the

propriety of the prior convictions admission proceedings that were conducted at the original trial. The court granted leave to file the motion and overruled it. At resentencing the defendant's sentence was increased from a term not to exceed ten years to a term not to exceed fifteen years.

Defendant claims there was error in changing his original sentence one and one-half years after the original judgment when the State did not apply for discretionary review or appeal and where he had begun to serve the original sentence. Specifically, he says the rule the State used to obtain review of the sentence was meant to be used by a defendant and not the prosecution, that the increase of his sentence violates federal and state due process and double jeopardy clauses, and that his constitutional rights were not properly protected at the hearing where he admitted the prior convictions. We affirm.

The State filed an application to correct Kleiss's sentence pursuant to Iowa Rule of Criminal Procedure 23(5), which states:

- a. Time when correction of sentence may be made.
The court may correct an illegal sentence at any time.
- b. Credit for time served. The defendant shall receive full credit for time spent in custody under the sentence prior to correction or reduction.

Kleiss claims the historical limitations of state power in criminal matters and the purpose of the rule shows the State is not allowed to use this motion. He claims there is no precedent to allow such an action and that the use of the rule is limited to a defendant's action.

Kleiss also cites a number of Supreme Court cases to the effect that a person may not be punished twice for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). He says controlling law is found in one case which states imposition of more than one sentence following a single conviction is an unconstitutional violation of the double jeopardy clause. Ex parte Lange, 18 Wall 163, 21 L. Ed. 872 (1874).

Even if the United States Constitution does not show the actions are improper, the Iowa Constitution, Kleiss says, prohibits an increase in his sentence. He refers this court to Smith v. District Court of Mahaska County, 132 Iowa 603, 607, 109 N.W. 1085, 1087 (1906) where the court held the defendant could not be resentenced six years after he finished serving the original sentence imposed.

These issues presented by the defendant were also presented to the Iowa court in State v. Ohnmact, 342 N.W.2d 838 (Iowa 1983), and rejected by the supreme court. The defendant had been given a suspended sentence for a crime requiring a minimum prison term by statute. Id. at 840. The court held it was improper to deny the Attorney General's motion to correct and increase the sentence. Id. at 845. Stating that the sentencing judge was not allowed to impose a sentence in violation of a statute, the court held the sentence void. Id. at 842. Such void sentences are not subject to the usual concepts of waiver, and the Attorney General properly proceeded to challenge the sentence using Iowa Rule of Criminal Procedure 23(5)(a). Id. at 843. The court rejected estoppel and due process violation claims made by the defendant. Id. It relied on federal circuit court statements indicating a void sentence may be corrected even if that correction requires an increase in the sentence. Id. at 844, citing Safrit v. Garrison, 623 F.2d 330, 332 (4th Cir. 1980). In a case denied review by the United States Supreme Court, the tenth circuit found the rule that a sentence may not be increased once it is being served does not apply when the sentence is void under statutory law. Garcia v. United States, 492 F.2d 395, 397 (10th Cir.), cert. denied, 419 U.S. 897, 95 S. Ct. 178, 42 L. Ed. 2d 142 (1974). Our court had earlier rejected such due process claims, noting, "Because it was invalid, the sentence upon which he relies was outside the power or discretion of the sentencing court. . . . Surely it should not lie within the authority of bargaining counsel and a

willing judge to thus reshape the parameters of allowable punishment. If Howell were to prevail upon either of these contentions (estoppel or due process) we would be left the anomalous situation in which parties could make their own law whenever a judge could be persuaded to allow it." State v. Howell, 290 N.W.2d 355, 358 (Iowa 1980).

The defendant's double jeopardy claim has also been rejected by the Supreme Court for similar reasons. The highest court has held that the correction of an invalid sentence by increasing punishment does not constitute double jeopardy since the more severe sentence substitutes for the originally imposed sentence. Boza v. United States, 330 U.S. 160, 165-66, 67 S. Ct. 645, 648-49, 91 L. Ed. 818, 821-22 (1974).

Contrary to defendant's contention, the Iowa Constitution does not provide any additional protection to him. In fact the Iowa Constitution is narrower than the federal constitution, stating, "No person shall after acquittal, be tried for the same offence." [sic] Iowa Const. Art. I, § 12.

The cases cited by Kleiss are distinguishable from the present case. Despite the public policy arguments of Smith v. District Court, 132 Iowa 603, 109 N.W. 1085 (1906), the court later found that where the first sentence imposed was void the court had the power to resentence. State v. Taylor, 137 N.W.2d 688 (Iowa 1965). Smith involved a situation where the defendant had already finished serving his jail term, and the action to correct the sentence was taken six years after he completed the sentence. Smith, 132 Iowa at 603, 109 N.W. at 1085. In the Lange case the court imposed both imprisonment and a fine when the statute authorized one or the other. Ex parte Lange, 18 Wall at 164, 21 L. Ed. at 875. The court was not allowed to later impose the prison sentence when the fine was paid. Id.

Kleiss also claims improper procedures were used when he admitted to the prior sentences, resulting in the habitual offender finding. He asserts the same procedures should be used in a habitual offender proceeding as are required when a guilty plea is accepted, outlined by the court at State v. Sisco, 169 N.W.2d 542, 548-51 (Iowa 1969).

We initially note that although the question was raised at the trial court level whether error was preserved on this issue, the State accepts that error was preserved and instead attacks the question on its merits. We believe the detailed procedures set out at Sisco do not apply to the proceedings accepting defendant's admission of the prior convictions. It is not necessary a formal plea be accepted to being a habitual offender. State v. Tillman, 228 N.W.2d 38, 42 (Iowa 1975). The habitual offender statute does not define an additional crime, but instead relates to the punishment for the crime. State v. Popes, 290 N.W.2d 926, 927 (Iowa 1980); State v. Hannah, 277 N.W.2d 605, 608 (Iowa 1979); State v. Biggles, 235 N.W.2d 112, (Iowa 1975). The court has rejected the argument that the defendant must be interrogated concerning admission of prior convictions, and Sisco does not apply. State v. Goodwin, 212 N.W.2d 399, 402 (Iowa 1973).

For these reasons, we affirm the trial court.

AFFIRMED.