IN THE COURT OF APPEALS OF IOWA

No. 1999-362 (9-615) / 98-1899
Filed January 12, 2000

FILED
JAN 1 2 2000
CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

BRADLEY LEE WINTERS,
Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey, Judge.

Defendant appeals the sentence imposed after his guilty plea to possession of a controlled substance with intent to deliver (repeat offender) and tax stamp violation.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Paul L. Martin, County Attorney, and Steven D. Tynan, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

The defendant-appellant, Bradley Winters, appeals the conviction and sentence imposed after his guilty plea to possession of a controlled substance with intent to deliver (repeat offender) in violation of Iowa Code section 124.401(1)(b) (1995) and tax stamp violation pursuant to section 453B.12. On appeal he claims the court erred in considering as a basis for enhancement his recent drug conviction, then on appeal, and enhancement of his sentence as a repeat drug offender under section 124.411 violated double jeopardy. We affirm.

Factual and procedural setting. The State charged Winters with possession of a controlled substance (methamphetamine) with intent to deliver (class B felony) and drug stamp violation (class D felony). Under a rule 9 plea agreement, he pled guilty to possession with intent to deliver reduced to a class C felony (repeat offender) and the tax stamp violation. The plea agreement included a provision any sentences imposed would run concurrently with his existing sentence for child endangerment. The court expressly informed Winters he could receive up to thirty years on the enhanced class C felony possession charge and up to fifteen years on the class D felony tax-stamp charge, which could be imposed consecutively. Winters did not file a motion in arrest of judgment after the plea proceeding.

The presentence investigation revealed Winters has a long criminal history including a 1991 conviction for possession with intent to deliver marijuana and a 1998 conviction for possession with intent to deliver methamphetamine which was

on appeal. (*State v. Winters*, no. 98-646, affirmed by this court on May 26, 1999 (no. 9-250), further review denied Sept. 13, 1999). After reviewing the presentence investigation, hearing testimony of witnesses, and hearing the statements of counsel and the defendant, the sentencing court imposed a fifteen year sentence on the class C felony possession charge and a five year sentence on the class D felony tax-stamp charge, to be served consecutively.

Appellate claims. Winters claims the trial court impermissibly used his 1998 conviction, which was still on appeal, against him in determining his enhanced sentence. He also claims the enhancement provision of Iowa Code section 124.411 violates double jeopardy. The State responds the record is clear the court based the enhanced sentence on the 1991 conviction, not the 1998 conviction. It also argues Winters did not preserve error on the double jeopardy issue because he did not file a motion to dismiss as required by Iowa Rule of Criminal Procedure 10(2), nor a motion in arrest of judgment as required by Iowa Rule of Criminal Procedure 23(3).

Scope of review. Our scope of review is for errors at law. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994); Iowa R. App. P. 4. A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as trial court consideration of impermissible factors. *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983). Although the preference is to raise an alleged sentencing error directly to the sentencing court,

such a claim may also be raised on direct appeal. *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1988).

Consideration of prior conviction. During the sentencing hearing, the parties discussed the presentence investigation listing of juvenile and adult criminal matters. The court specifically excluded from its consideration all of the juvenile criminal matters and those adult matters for which no disposition has been made. The court's remarks in the record make it clear the court was aware of the 1991 conviction and that the State offered that conviction as the basis for enhancement under Iowa Code section 124.411. The evidence in the record does not support Winters' claim the court considered the 1998 conviction.[1] We conclude the district court did not consider any impermissible factors and affirm the sentence imposed by the court.

Winters did not preserve for our review his constitutional claim the enhancement statute violates double jeopardy. This issue was not presented to the trial court and we will not address issues raised for the first time on appeal. *Iowa Elec. Light and Power Co. v. General Elec. Co.*, 352 N.W.2d 231, 236 (Iowa 1984); *see Regal Insurance Co. v. Summit Guaranty Corp.*, 324 N.W.2d 697, 706 (Iowa 1982); *Peel v. Burk*, 197 N.W.2d 617, 619 (Iowa 1972). Even if the claim had been preserved, Winters acknowledges Iowa and federal courts have rejected such

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[1] Even if the court had based the enhanced sentence on the 1998 conviction, we would not find that to be an impermissible sentencing consideration. *See State v. Summers*, 219 N.W.2d 26, 26 (Iowa 1974) (holding a court may consider any information about an accused derived from events prior or subsequent to the crime for which sentence is to be pronounced); *see also* 39 Am. Jur. 2d *Habitual Criminals* § 20, at 450 (1999).

challenges to other enhancement provisions. The weight of authority would not support his claim.

AFFIRMED.