FILED
DEC 27 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 27, 1983

vs.)

DENNIS LEE DOERFLINGER,) 3-376
69608

Defendant-Appellant.)

Appeal from Linn District Court - L. Vern Robinson, Judge.

Defendant appeals his conviction for burglary in the second degree in violation of Iowa Code sections 713.1 and 713.3 (1981), and the habitual offender sentence imposed under Iowa Code sections 902.8 and 902.9(2) (1981). CONVICTION AFFIRMED, SENTENCE VACATED AND REMANDED FOR NEW SENTENCING.

Charles Harrington, Appellate Defender and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Defendant appeals his conviction for burglary in the second degree in violation of Iowa Code sections 713.1 and 713.3 (1981), and the habitual offender sentence imposed under Iowa Code sections 902.8 and 902.9(2) (1981). We affirm the conviction, vacate the sentence, and remand for new sentencing.

Defendant was charged by information with second-degree burglary. The information also alleged that defendant was a habitual offender "having been previously convicted of two felonies in Linn county on Augusut 31, 1972 . . . ." Counsel was appointed, and the case was tried to a jury. The jury subsequently found defendant guilty of burglary as charged. Defendant then admitted in court that he had twice before been convicted of a felony, both convictions being entered on August 31, 1972. The trial court subsequently sentenced defendant as a habitual offender to an indeterminate fifteen-year term of imprisonment, with a three-year minimum sentence.

The record shows that defendant and the State engaged in plea bargaining negotiations prior to trial. At the close of the State's case, defendant offered to enter a guilty plea pursuant to a plea bargain. The plea bargain provided that in exchange for defendant's guilty plea to second-degree burglary and to one of three counts of third-degree theft charged in a separate information, the State would dismiss the two remaining theft counts and the habitual offender allegation and recommend that the theft and burglary sentences run concurrently. However, when defendant refused to admit the intent element of burglary, the trial court refused to accept the guilty plea and resumed the trial.

On appeal defendant asserts that: (1) the habitual offender statute was not applicable to him because his two prior felonies occurred on the same date; (2) his trial counsel was ineffective for failing to challenge the applicability of the habitual offender statute; and (3) counsel's failure to challenge the applicability of the habitual offender statute prior to trial unfavorably affected defendant's plea

bargaining position and prejudiced his subsequent burglary conviction. Defendant requests that his burglary conviction be reversed or, alternatively, that his habitual offender sentence be vacated and the case be remanded for resentencing.

The State concedes that the habitual offender statute is inapplicable to defendant and that defendant received ineffective assistance of trial counsel. The State asserts, however, that defendant has failed to prove that the habitual offender allegation affected plea bargaining negotiations or the subsequent burglary conviction, and that the appropriate remedy therefore is affirmance of the burglary conviction and a remand for resentencing.

Since the defendant has raised issues involving the violation of basic constitutional safeguards, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

In State v. Hollins, 310 N.W.2d 216, 217-18 (Iowa 1981), this court held that the habitual offender statute, Iowa Code section 902.8, was inapplicable where the two prior convictions on which the habitual offender allegation was based occurred on the same date. Accordingly, the parties do not dispute that defendant should not have been sentenced as a habitual offender and that defendant's trial counsel was ineffective for failing to challenge the applicability of the habitual offender statute.

The only disputed issue on appeal is whether counsel's ineffectiveness regarding the habitual offender allegation significantly affected plea bargaining negotiations and prejudiced defendant's subsequent burglary conviction.

Defendant contends that had the habitual offender allegation not been on the trial information, he would have been in a position to command additional, meaningful concessions from the State in the plea negotiations. This argument is very speculative in nature. The record shows that the State had a very strong case against the defendant for burglary and it is unlikely that any further concessions would have been made.

The only prejudice to defendant in this case was being sentenced as a habitual offender. Therefore, we vacate the sentence imposed below and remand for new sentencing.

CONVICTION AFFIRMED, SENTENCE VACATED, AND REMANDED FOR NEW SENTENCING.