**IN THE COURT OF APPEALS OF IOWA**

No. 8-501 / 98-0037

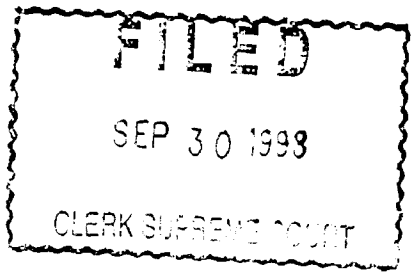
**STATE OF IOWA,**

Plaintiff-Appellee,

**vs.**

**JAMES LEE BIXBY,**

Defendant-Appellant.




---

Appeal from the Iowa District Court for Buchanan County, Thomas J. Bower, Judge.

Defendant appeals his sentences as entered by the district court following his guilty plea to charges of second-degree theft, assault on a peace officer, and possession of marijuana. **AFFIRMED.**

James T. Peters, Independence, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Allan W. Vanderhart, County Attorney, and Andrea Dryer, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

**MAHAN, J.**

James Bixby appeals the trial court's sentencing order. Bixby contends the trial court erred by basing its sentence on improper factors. We affirm.

Pursuant to a plea agreement, Bixby entered a plea of guilty to charges of second-degree theft, assault on a peace officer using a dangerous weapon, and possession of a controlled substance. In exchange, the State agreed to dismiss charges of operating while under suspension and driving while under financial responsibility suspension. The State recommended Bixby receive up to five years for the theft charge, up to five years for the assault charge, and six months for the possession charge. The State also recommended the charges be served concurrently. The State made no recommendation regarding whether these sentences should run concurrent with or consecutive to a sentence previously entered in Linn County. The plea agreement was not binding on the trial court.

The trial court sentenced Bixby to terms not to exceed five years for the theft and assault charges, and six months for the possession charge. The five-year terms were to run consecutive to one another and to the previous Linn County charge. The six month sentence was to run concurrent with all the charges. When it sentenced Bixby, the trial court stated:

> The Court finds that it was not bound by the terms of the plea agreement, that the plea agreement is unsatisfactory in the Court's mind. The things that occurred on August 20, 1997, in stealing a car and *intentionally killing Trooper Henderson* are certainly serious. That coupled with the fact that your record is atrocious, your criminal history goes back to 1989 and you are a very young person at the age of twenty-six at this time.

> The Court finds that the sentence imposed being consecutive sentences is appropriate for the protection of the community as well as to punish you for your continued criminal acts. To run these concurrent would allow you to catch a couple free ones because you have already been sentenced to prison in Linn County.

(Emphasis added.)

Bixby's entire appeal is based solely upon the fact the trial court allegedly stated one of the reasons for imposing a more severe sentence than contemplated by the plea agreement was Bixby's actions in "intentionally killing Trooper Henderson."

As a rule, a defendant must preserve error by making an objection at the earliest opportunity after the grounds for the objection become apparent. *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995). Illegal sentences are not subject to the usual requirements of error preservation and waiver. *Id.* An illegal sentence is one not authorized by statute; it is void. *Id.*

It is clear on a reading of the entire record in this case the use of the word "killing" was either an unintentional misstatement by the trial court or a mistake by the court reporter.[1] There is nothing in the record to suggest the trial court was under the mistaken impression that Trooper Henderson had been killed. The same judge was involved at the plea taking proceedings which occurred approximately one month before the sentencing proceedings. In addition, the sentence involved five-year terms. No one brought the matter to the trial court's attention after the alleged statement was made. Indeed, after the trial court informed Bixby of his rights following sentencing,

---

[1] Appellate counsel did not represent Bixby at the sentencing.

it asked Bixby's counsel and the State if there was anything further. Both attorneys said they had nothing further. On appeal, there is no allegation the sentence entered by the trial court is illegal or void. Therefore, we find Bixby has failed to preserve error on this issue.

Even assuming error had been preserved, we find the trial court's sentence was based upon proper factors. The trial court stated the sentence was based upon the seriousness of the offenses, the past record of Bixby, Bixby's age, and the protection of the community.

For these reasons we affirm the sentence as entered by the trial court.

**AFFIRMED.**