IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. TIMOTHY ALVIN NEWTON, Defendant–Appellant.	)	S.CT. NO. 16–1525

APPEAL FROM THE IOWA DISTRICT COURT
FOR RINGGOLD COUNTY
THE HONORABLE DUSTRIA A. RELPH, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

MARK C. SMITH
State Appellate Defender

MARY K. CONROY
Assistant Appellate Defender
mconroy@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT–APPELLANT

FINAL

CERTIFICATE OF SERVICE

On the 5th day of October, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant–Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Timothy Alvin Newton, 3030 Co. Hwy. J55, Lamoni, IA 50140.

APPELLATE DEFENDER'S OFFICE

MARY K. CONROY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mconroy@spd.state.ia.us
appellatedefender@spd.state.ia.us

MKC/d/10/17

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE SUBMISSION OF THE PER SE ALTERNATIVE OF OPERATING WHILE INTOXICATED, PURSUANT TO IOWA CODE SECTION 321J.2(1)(c), WHICH ALLOWED THE JURY TO FIND NEWTON GUILTY IF ANY AMOUNT OF CONTROLLED SUBSTANCE WAS PRESENT IN HIS URINE VIOLATED HIS DUE PROCESS RIGHTS?

This issue is not addressed in the reply brief.

II. WAS THE DEFENDANT'S STIPULATION TO THE PRIOR OFFENSE INVALID BECAUSE IT WAS UNKNOWING AND INVOLUNTARY?

Authorities

State v. Loye, 670 N.W.2d 141, 150 (Iowa 2003)

State v. Harrington, 893 N.W.2d 36, 43 (Iowa 2017)

State v. Kukowski, 704 N.W.2d 687, 692 (Iowa 2005)

Schiriro v. Summerlin, 542 U.S. 348, 351 (2004)

Griffith v. Kentucky, 479 U.S. 314, 328 (1987)

Stovall v. Denno, 388 U.S. 293, 301 (1967)

III. IS THE DEFENDANT ENTITLED TO A NEW SENTENCING HEARING BECAUSE THE SENTENCING COURT CONSIDERED UNPROVEN OFFENSES WHEN DETERMINING THE SENTENCE?

Authorities

State v. Barker, 476 N.W.2d 624, 629 (Iowa Ct. App. 1991)

State v. Zinnel, 695 N.W.2d 42, 2004 WL 2296711, at *2 (Iowa Ct. App. 2004) (unpublished decision)

State v. Warren, 819 N.W.2d 427, 2012 WL 1864771, at *1–2 (Iowa Ct. App. 2012) (unpublished table decision)

State v. Erlinger, 860 N.W.2d 343, 2014 WL 6977460, at *2 (Iowa Ct. App. 2014) (unpublished table decision)

State v. Shanahan, 844 N.W.2d 223, 2016 WL 1703342, at *1–3 (Iowa Ct. App. 2016)

State v. Fuqua, 723 N.W.2d 451, 2006 WL 2265458 (Iowa Ct. App. 2006) (unpublished table decision)

State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990)

State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014)

State v. Black, 324 N.W.2d 313, 316 (Iowa 1982)

State v. Young, 292 N.W.2d 432, 434–35 (Iowa 1980)

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Formaro, 630 N.W.2d 720, 725 (Iowa 2002)

STATEMENT OF THE CASE

COMES NOW the Defendant–Appellant Timothy Alvin Newton, pursuant to Iowa Rule of Appellate Procedure 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about September 14, 2017. While the Defendant–Appellant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. THE SUBMISSION OF THE PER SE ALTERNATIVE OF OPERATING WHILE INTOXICATED, PURSUANT TO IOWA CODE SECTION 321J.2(1)(c), WHICH ALLOWED THE JURY TO FIND NEWTON GUILTY IF ANY AMOUNT OF CONTROLLED SUBSTANCE WAS PRESENT IN HIS URINE, VIOLATED HIS DUE PROCESS RIGHTS.

This issue is not addressed in the reply brief.

II. THE DEFENDANT'S STIPULATION TO THE PRIOR OFFENSE INVALID BECAUSE IT WAS UNKNOWING AND INVOLUNTARY.

The State argues this Court cannot consider Newton's claims directly because Newton did not file a motion in arrest of judgment that challenged the defects in his stipulation

proceeding. (State's Br. pp. 34–35). Rather, the State argues the Court must analyze the failure to challenge the stipulation under an ineffective-assistance-of-counsel rubric. (State's Br. pp 35–37).

The State's position ignores the importance and the reasons for the requirements of Rule 2.8(2)(d). As the State concedes, the district court failed to advise Newton that failure to file a motion in arrest of judgment would preclude him from challenging defects in his stipulation on appeal. (State's Br. p. 35). Therefore, because the court failed to advise him of the preclusive effect the failure to file the motion has, the record establishes Newton was not aware that he needed to raise the defect that occurred in the stipulation proceeding in a motion in arrest of judgment in order to challenge those defects directly on appeal. See State v. Loye, 670 N.W.2d 141, 150 (Iowa 2003) (stating the court's advisement was insufficient where "the court's comments in no way conveyed the fact that the defendant's failure to file a motion attacking the adequacy of her plea would forfeit her right to challenge the plea on appeal.").

The State's position that Newton somehow waived his right to directly challenge the defects in his stipulation *without ever being advised that he must challenge any defect in it* in a motion in arrest of judgment *or forfeit his right* to challenge them on appeal is directly opposed to the rationale behind the advisory and the spirit of Rule 2.8. It is unfair and illogical to prohibit Newton from directly challenging the defects in the stipulation proceeding on appeal now simply because he did not file a motion in arrest of judgment considering that the district court never informed him of the preclusive effect of the failure to file a motion in arrest of judgment raising those defects. The State's position would punish a criminal defendant for not following a procedure of which he was never aware or advised.

Furthermore, the State's argument ignores the language in State v. Harrington. In Harrington, the Iowa Supreme Court stated:

> We have applied the error preservation rule to a variety of motions in the past. Having determined that claims of deficiencies in a habitual offender proceeding are properly raised by filing a motion in arrest of judgment, there is no reason not to also

> apply the error preservation requirement. The purposes of the error preservation rule would be served, just as they are by imposing the requirement to preserve error for deficiencies in a guilty plea proceeding. The error preservation requirement would lead to an orderly and prompt process to dispose of claims of procedural error, just as for guilty-plea claims. Accordingly, we hold that offenders in a habitual offender proceeding must preserve error in any deficiencies in the proceeding by filing a motion in arrest of judgment.
>
> Notwithstanding, *we only apply this rule of law prospectively. We therefore excuse Harrington's failure to preserve error by filing a motion in arrest of judgment.*

State v. Harrington, 893 N.W.2d 36, 43 (Iowa 2017) (emphasis added). Thus, it is clear that the Iowa Supreme Court's rule requiring defects in stipulation proceedings to be raised in a motion in arrest of judgment in trial court to preserve error on appeal only applies for defendants who had stipulation proceedings after the Harrington decision. Newton, who filed his appeal and raised the same challenge as the defendant in Harrington on appeal, is also excused from the requirement of preserving error. See id. Notably, the Iowa Supreme Court did not analyze Harrington's claim under an

ineffective-assistance-of-counsel framework. Rather, it considered the claim that his stipulation proceedings were unknowing and involuntary directly. See id. The same standard of review should apply to Newton, who filed his notice of appeal prior to the Court's decision in Harrington.

In addition, as the majority in Harrington noted, Iowa law has *always* required that the district court ensure a defendant's admission of prior offenses is voluntary and intelligent. Id. at 45 (citations omitted). In doing so, the Court has frequently stated the district court has a duty to conduct inquiry into the defendant's admission, similar to the guilty plea colloquy required by Iowa Rule of Criminal Procedure 2.8(2). Id. (citing State v. Kukowski, 704 N.W.2d 687, 692 (Iowa 2005)). Thus, it appears the majority in Harrington did not fashion any new rules regarding stipulation to prior offenses; it merely took the opportunity to clearly set forth guidelines for district courts to follow in order to comply with the requirements of the Rules and to ensure a criminal defendant's stipulation to a prior offense is voluntary and intelligent. See id. at 45–48. Thus, the

requirements clearly set forth by the Court in Harrington apply to the stipulation in Newton's case.

However, even if the Court in Harrington announced a "new rule," it would apply to Newton, who raised the same issue as the defendant in Harrington in his pending direct appeal. "When a decision of this Court results in a 'new rule,' that *rule applies to all criminal cases still pending on direct review.*" See Schiriro v. Summerlin, 542 U.S. 348, 351 (2004) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)) (emphasis added). See also Stovall v. Denno, 388 U.S. 293, 301 (1967) ("Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in trial *or appellate process who have raised the same issue.*" (emphasis added)), abrogated by Griffith, 479 U.S. 314 (1987). As Newton's case was already pending on appeal prior to the Harrington decision, Newton is entitled to similar review and relief. See id.

Therefore, for the reasons above, this Court can consider Newton's arguments regarding of his stipulation directly,

without the framework of an ineffective-assistance-of-counsel claim.

III. THE DEFENDANT IS ENTITLED TO A NEW SENTENCING HEARING BECAUSE THE SENTENCING COURT CONSIDERED UNPROVEN OFFENSES WHEN DETERMINING THE SENTENCE.

The State agrees the sentencing court considered Newton's pending charges at the time of sentencing. (State's Br. p. 41). However, the State argues that because Newton did not object to the inclusion of his pending offenses in the presentence investigation report (PSI), the sentencing court properly considered these new charges in its sentencing decision. (State's Br. pp. 41–42). Newton respectfully disagrees.

Contrary to the State's assertion, the Court of Appeals has routinely vacated the defendant's sentence and remanded for a new sentencing hearing when the sentencing court relied on an unproven offense, even when the unproven charge was included in the criminal history section of the PSI. See, e.g., State v. Barker, 476 N.W.2d 624, 629 (Iowa Ct. App. 1991) ("The presentence investigation report shows twenty-four items under

the heading of prior record. However, several of these were charges which were dismissed. These the court may not consider. . . . [T]he sentencing court . . . considered matters which it legally should not have considered, such as the defendant's record of arrests without convictions."); State v. Zinnel, 695 N.W.2d 42, 2004 WL 2296711, at *2 (Iowa Ct. App. 2004) (unpublished decision) (finding the court relied on unproven offenses when it referenced them in sentencing, despite the inclusion of the offenses and details regarding them in the presentence investigation report); State v. Warren, 819 N.W.2d 427, 2012 WL 1864771, at *1–2 (Iowa Ct. App. 2012) (unpublished table decision) (finding the court impermissibly considered a charge listed in the arrest history of the PSI for which there was not a conviction); State v. Erlinger, 860 N.W.2d 343, 2014 WL 6977460, at *2 (Iowa Ct. App. 2014) (unpublished table decision) (reversing for a new sentencing hearing after the court's statements suggested it relied on "instances where [the defendant] was charged but not convicted" that were contained in the PSI); State v. Shanahan,

844 N.W.2d 223, 2016 WL 1703342, at *1–3 (Iowa Ct. App. 2016) (reversing for new sentencing hearing when court considered dismissed charges despite information related to those charges was included in the unchallenged presentence investigation report).

In addition, Newton's case is indistinguishable from State v. Fuqua. See State v. Fuqua, 723 N.W.2d 451, 2006 WL 2265458 (Iowa Ct. App. 2006) (unpublished table decision). In State v. Fuqua, the presentence investigation report indicated that the defendant had been arrested and charged with an additional offense. Id. at *1 ("This additional offense was listed in the pre-sentence investigation report that was relied on by the court in sentencing."). In Fuqua, the listing of the arrest in the PSI was not objected to, and the sentencing court specifically referred to the new criminal arrest when pronouncing the defendant's sentence. Id. In an unpublished decision, the Court of Appeals found the sentencing court "impermissibly considered an unprosecuted charge that was neither admitted to by Fuqua nor otherwise

sufficiently proven in the record." Id. at *2. The Court vacated the sentence and remanded for a resentencing. Id.

It is not the sentencing court's mere *knowledge* of a dismissed or unproven offense that rises to the level of an improper sentencing factor, but the court's *reliance* on such an offense. See State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990). Newton did not have to object to the arrest history and the inclusion of his pending charges in the presentence investigation, nor did he have to object to any dismissed offenses or those lacking convictions, because he does not challenge the sentencing court's knowledge of those offenses on appeal, but rather its reliance on them in determining his sentence. As the Court of Appeals has implicitly recognized in its prior decisions, the mere inclusion of a pending or dismissed offense in the PSI is not the equivalent of an admission by the defendant that the offense actually occurred. The Court of Appeals has not found the bare inclusion of such offenses in the PSI as improper; rather, it has found the sentencing court's reliance on those unproven offenses impermissible.

Newton did not contest the fact that he had indeed been arrested in another county; however, that is a different question of whether he actually committed a new crime. It is also noteworthy that the sentencing court's comments reflect that she may have considered him guilty of these new offenses, despite having no information regarding their dispositions. She stated: "After you were arrested for this and facing convictions and possibly prison, *you reoffended* in Clarke County--or allegedly did. You picked up new charges in Clarke County." (Sentencing Tr. p.28 L.1–14) (emphasis added). It is also clear that a sentencing court is not allowed to attempt to disclaim its reference to an impermissible sentencing factor. State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014).

The inclusion of information regarding dismissed or pending charges in the presentence investigation may not in itself be objectionable. While certainly the better practice may be for the PSI writer to omit any criminal history that did not result in a conviction, this does not appear to be the practice of the Department of Correctional Services. A careful, zealous

defense attorney may very well object to this information being contained in the PSI in order to ensure the sentencing judge does not improperly consider it. Nevertheless, it is well established under Iowa law that a sentencing judge is not allowed to consider and rely on an unproven offense in determining a defendant's sentence; it also not required that a defense attorney object to the sentencing court's consideration of an improper sentencing factor in order to preserve error on appeal. See State v. Black, 324 N.W.2d 313, 316 (Iowa 1982); State v. Young, 292 N.W.2d 432, 434–35 (Iowa 1980); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). Moreover, the Court of Appeals has rejected the idea that a defendant must to object to the mere listing of an unproven offense in the PSI to prevent the sentencing judge from considering it when determining the defendant's sentence. See, e.g., Barker, 476 N.W.2d at 629; Zinnel, 2004 WL 2296711, at *2; Fuqua, 2006 WL 2265458, at *1–2; Warren, 2012 WL 1864771, at *1–2; Erlinger, 2014 WL 6977460, at *2; Shanahan, 2016 WL 1703342, at *1–3.

Rather, the sentencing court may only consider an unproven offense if the defendant admits it or the State presents facts that establish the defendant committed the offense. See State v. Formaro, 630 N.W.2d 720, 725 (Iowa 2002). There is nothing in the record indicating Newton admitted the pending offenses, nor did the State present any evidence that supported the conclusion that he committed them. As such, the sentencing court improperly relied on them when fashioning Newton's sentence, and Newton is entitled to a new sentencing hearing. See id.

CONCLUSION

Defendant–Appellant Timothy Alvin Newton respectfully requests the Court vacate his convictions and remand to district court for a new trial. Alternatively, Defendant–Appellant Timothy Alvin Newton requests the Court vacate his sentencing enhancement and remand for further proceedings in district court, and he asks the Court to vacate his sentence and remand for resentencing.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $ 2.28, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

MARY K. CONROY
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 2333 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: 10/04/2017

MARY K. CONROY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mconroy@spd.state.ia.us
appellatedefender@spd.state.ia.us